

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

ROBERT A. NEIDERT,)	
)	
Complainant,)	
)	
vs.)	CASE NO. 22-0450-EL-CSS
)	
OHIO EDISON COMPANY,)	
)	
Respondent.)	
)	

MOTION TO DISMISS OF OHIO EDISON COMPANY

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

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Robert Neidert’s (“Complainant”) Complaint against Ohio Edison Company (“Ohio Edison”) must be dismissed because he has failed to set forth reasonable grounds for his Complaint as required by Section 4905.26 of the Ohio Revised Code.

I. Background

Ohio Edison Company (“Ohio Edison” or the “Company”) obtained Commission approval to install smart meters.¹ O.A.C. 4901:1-10-05 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, Ohio Edison obtained Commission approval to charge an opt-out fee to those customers who do not wish to

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 Nos. 16-481-EL-UNC, 17-2436-EL-UNC, et al., Opinion and Order, (July 17, 2019).

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, Ohio Edison filed Tariff Update pages with the Commission, which included the approved Rider AMO language. Rider AMO can be found in P.U.C.O. No. 11 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 must pay a recurring monthly fee of \$28.29.⁴ Similarly, if the Complainant desires to have the smart meter removed (as opposed to having the communications disabled), Complainant must pay a one-time removal fee of \$41.72.⁵ Complainant does not dispute that the Commission has approved Rider AMO and the associated opt-out fee. Nevertheless, the Complaint attacks Ohio Edison’s Commission-approved tariff and, by logical extension, O.A.C. 4901:1-10-05, because Complainant does not like the Commission’s approval of Rider AMO and its incorporated opt-out fee. Commission precedent is clear that a customer’s dislike of a Commission-approved tariff charge does not support a showing that a utility provided inadequate service or acted in an unjust or unreasonable way.⁶ Therefore, the Complaint must be dismissed, with prejudice.

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 & Order at 3-4 (July 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 *See* P.U.C.O. No. 11, Sheet 128, 1st Revised Page 1 of 1 (“Rider AMO”).

⁵ *Id.*

⁶ *In the Matter of the Complaint of Ned Bushong v. Ohio Power Company D/B/A AEP Ohio*, Case No. 18-1828-EL-CSS (“Bushong”), Opinion and Order ¶ 26 (Oct. 7, 2020) (“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.”)

II. Background

The Commission should dismiss the Complaint with prejudice because Complainant fails to set forth reasonable grounds as required by Section 4905.26 of the Ohio Revised Code. Instead, and as explained below, the Complaint:

- attacks a Commission-approved, facially just and reasonable tariff;
- seeks a remedy that is already defined by the tariff he attacks;
- seeks a remedy that would require Ohio Edison to violate Commission Rules; and
- is an inefficient collateral attack on an established, lawful, Commission-approved rider and the Commission's rulemaking process.

For each of these reasons, the Complaint should be dismissed, with prejudice.

A. Ohio Edison's requirement that a customer pay a Commission-approved tariff charge does not support a finding that Ohio Edison's conduct is in any way inadequate, unjust, or unreasonable.

Ohio law is clear: Ohio Edison 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.⁷

When the Commission approves a utility's tariff, it tacitly agrees that the provisions of the tariff are neither unjust nor unreasonable on their face.⁸ In *City of Reynoldsburg*, the Commission made clear that where the language of a utility's tariff covers a dispute and the tariff is not unjust, unreasonable, or unlawful, the utility acts appropriately when it provides service pursuant to the provisions of that tariff.⁹ In upholding the Commission's decision in that case, the Ohio Supreme Court stated,

⁷ *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 40-41, 979 N.E.2d 1229 (2012); *see also Bushong*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order ¶ 26 (Oct. 07, 2020).

⁸ *In the Matter of the City of Reynoldsburg v. Columbus Southern Power Company*, Case No. 08-846-EL-CSS, Opinion & Order at 14 (Apr. 5, 2011).

⁹ *Id.* at 14-15, 29-30.

[t]he conduct rule created by the tariff statutes is clear: 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.¹⁰

Here, the Commission has reviewed and approved Rider AMO, including the monthly optout fee applicable to all opt-out customers.¹¹ Upon approval of those provisions, the Commission confirmed that the opt-out provisions in Rider AMO are neither unjust nor unreasonable. Complainant cannot overcome this conclusion of law.

Rather than asserting a violation of law, it is clear from the Complaint that Complainant is simply unwilling to pay the opt-out charge in Rider AMO. But the Commission cannot grant Complainant this relief. O.A.C. 4901:1-10-05(J) and Ohio Edison's tariff require Complainant to pay Ohio Edison's opt-out charge if he declines the use of a smart meter. Ohio Edison's refusal to exempt Complainant from this tariffed charge applicable to all opt-out customers does not support a finding that Ohio Edison's actions were inadequate, unjust, or unreasonable.¹² Indeed, if Ohio Edison were to exempt Complainant from this charge, it would be discriminatory treatment, in violation of R.C. 4905.35.

Because Rider AMO is, as a matter of law, neither unjust nor unreasonable, and because failure to apply Rider AMO uniformly to similarly situated customers would amount to discriminatory treatment, the Complaint fails to state reasonable grounds and must be dismissed, with prejudice

¹⁰ *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 40-41, 979 N.E.2d 1229 (2012).

¹¹ *See generally* Rider AMO Case, PUCO Case No. 20-0385-EL-ATA, Finding & Order ¶¶ 7, 10 (July 29, 2020).

¹² *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 40-41, 979 N.E.2d 1229 (2012); *see Bushong*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order ¶ 26 (Oct. 07, 2020).

B. The remedy that Complainant seeks – being permitted to read his own meter in lieu of Complainant paying the mandatory opt-out fee – would violate the Commission’s Rules regarding reading customer meters.

Complainant’s suggestion that he be able to read his own meter in lieu of paying the monthly opt-out fee required by Rider AMO is improper. In addition to violating the terms of Ohio Edison’s Commission-approved tariff, such a remedy would also violate the Commission’s Rules regarding meter readings. O.A.C. 4901:1-10-05(I) requires an electric utility to obtain actual readings of every in-service customer meter at least quarterly each calendar year. Further, this Rule states that “the electric utility shall make reasonable attempts to obtain accurate, actual readings of the energy and demand, if applicable, delivered for the billing period[.]”¹³

Allowing Complainant to read his own meter would require Ohio Edison to violate O.A.C. 4901:1-10-05(I) for two reasons. First, Ohio Edison would not be making a “reasonable attempt” to read Complainant’s meter every month. Second, Ohio Edison would not be taking an actual reading of Complainant’s meter at least quarterly. In other words, the remedy Complainant seeks would violate Commission Rules.

The opt-out charge in Rider AMO is Complainant’s only option if he wishes to avoid having a smart meter used at his residence. His dislike of the Rider AMO opt-out fee cannot be used to force Ohio Edison to violate Commission Rules and Ohio Edison’s tariff. The Complaint therefore must be dismissed, with prejudice.

C. The Complaint is an improper collateral attack on Ohio Edison’s Commission-approved tariff.

The Complaint also amounts to 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

¹³ O.A.C. 4901:1-10-05(I)(1).

and thoroughly considered the provisions of the tariff and the Complainant alleges nothing new or different for the Commission's consideration."¹⁴

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. As previously discussed, Ohio Edison's Rider AMO application was docketed at the Commission and made available for review by all interested parties.¹⁵ The Commission approved Rider AMO, 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."¹⁶ The Complaint should be dismissed, with prejudice, as an improper collateral attack on Rider AMO, in the interest of judicial economy and efficiency.

D. The Complaint is also an improper collateral attack on the Commission's Five-Year Rule Review process.

As explained in the Commission's Finding and Order approving Rider AMO, O.A.C. 4901:1-10-05 "requires EDUs to provide customers with the option to remove an installed advanced meter and replace it with a traditional meter, and the option to decline installation of an advanced meter and retain a traditional meter, including a cost-based, tariffed opt-out service."¹⁷ In fact, the Commission approved Rider AMO, in pertinent part, because Ohio Edison's "application is consistent with Ohio Adm.Code 4901:1-10-5[.]"¹⁸ In other words, Rider AMO was established pursuant to, and approved by the Commission because it is consistent with, a Commission Rule in the Ohio Administrative Code.

¹⁴ See *In the Matter of the Complaint of Mark R. Weiss v. The Cleveland Electric Illuminating Company*, PUCO Case No. 97-876-EL-CSS at 5 (Nov. 6, 1997) (citing cases).

¹⁵ *Rider AMO Case*, Case No. 20-0385-EL-ATA, Finding and Order ¶¶ 7-8 (July 29, 2020).

¹⁶ *Id.* ¶ 10.

¹⁷ *Id.* ¶ 3.

¹⁸ *Id.* ¶ 11.

The Commission's Rules are promulgated and reviewed according to a regulatory procedure that is designed to ensure due process for stakeholders. R.C. 111.15(B) requires all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. The most recent "Five Year Rule Review" of the Rules that contained O.A.C. Chapter 4901:1-10 commenced on October 3, 2017, when the Commission held a workshop to elicit feedback on these Rules.¹⁹ The Commission then issued an Entry requesting comments and reply comments on Staff's proposed revisions to these Rules.²⁰ Over a dozen stakeholders submitted comments and reply comments, sought rehearing of the Commission's Finding and Order adopting certain changes to these Rules, and sought further rehearing on the Commission's Entry on Rehearing.²¹ The Commission finalized its revisions of the Rules on October 6, 2021, effective November 1, 2021.²²

The Commission has recently and thoroughly considered the Rules in O.A.C. 4901:1-10, including the requirements of O.A.C. 4901:1-10-05 with which Complainant takes issue. While Ohio Edison understands that Complainant disagrees with the Rider AMO opt-out charge and wishes to take his own meter readings each month, the opt-out charge in Rider AMO complies with O.A.C. 4901:1-10-05(J), and O.A.C. 4901:1-10-05(I) requires the utility, not the customer, to obtain customer meter readings. Complainant's concerns regarding these rules should have been raised in Case No. 17-1842-EL-ORD, not in this Complaint proceeding. The Complaint should be dismissed as an improper collateral attack on the Commission's recent review of O.A.C.

¹⁹ See generally *In the Matter of the Commission's Review of Chapter 4901:1-10 of the Ohio Administrative Code*, Case No. 17-1842-EL-ORD, Entry (Sept. 1, 2017).

²⁰ *Id.*, Entry (July 17, 2019).

²¹ See generally *id.*, Case No. 17-1842-EL-ORD, Docket.

²² *Id.*, Entry (Oct. 6, 2021).

Chapter 4901:1-10 in Commission Case No. 17-1842-EL-ORD, in the interest of judicial economy and efficiency.

III. Conclusion

For the foregoing reasons, Ohio Edison respectfully requests an Order dismissing the Complaint with prejudice and granting Ohio Edison all other necessary and proper relief.

Respectfully submitted,

/s/ Christopher A. Rogers

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CERTIFICATE OF SERVICE

On June 9, 2022, 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 9th day of June 2022 to the Complainant at the following address:

Robert Neidert
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Stow, OH 44224

/s/ Christopher A. Rogers

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). 22-0450-EL-CSS

Summary: Motion MOTION TO DISMISS OF OHIO EDISON COMPANY
electronically filed by Mr. Christopher Rogers on behalf of Ohio Edison Company