

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

THOMAS GALLAGHER,	)	
	)	
Complainant,	)	
	)	
vs.	)	CASE NO. 21-0864-EL-CSS
	)	
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY,	)	
	)	
Respondent.	)	

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S  
POST-HEARING REPLY BRIEF**

## **I. INTRODUCTION**

Complainant Thomas Gallagher (“Complainant”) filed his initial post-hearing brief (“Complainant’s Brief”) on August 19, 2022 captioned the “Direct Testimony of Thomas P. Gallagher Jr. on Behalf of Thomas P. Gallagher Jr.”<sup>1</sup> His so-called “Direct Testimony” is both too late and does not add any facts to the record. Accordingly, the Commission should disregard any factual allegations in the filing. As a post-hearing brief, Complainant’s filing failed to demonstrate that he met his burden of demonstrating that Respondent The Cleveland Electric Illuminating Company (“CEI”) did not properly calculate his energy consumption. Instead, he seeks to flip the burden of proof to have CEI demonstrate that it properly recorded his usage.

Because Complainant failed to satisfy his burden of proof, the Commission should dismiss his Complaint with prejudice and/or render judgment in CEI’s favor.

## **II. COMPLAINANT CANNOT SUBMIT DIRECT TESTIMONY AFTER THE CLOSE OF THE HEARING**

Complainant submitted his self-captioned “Direct Testimony of Thomas P. Gallagher Jr. on Behalf of Thomas P. Gallagher Jr.” on August 19, 2022<sup>2</sup>—ten days after the close of the hearing. Once an evidentiary hearing has closed, it may only be reopened for the presentation of additional evidence upon a showing of good cause as to why such evidence could not have been presented at the hearing.<sup>3</sup> No such showing has been made here and the Commission should disregard any additional testimony contained within Complainant’s Brief. However, Complainant’s Brief does not add any additional facts to the record. Instead, he poses questions that Complainant could have, but did not, ask of CEI’s expert witness at the hearing.

---

<sup>1</sup> *In the Matter of Thomas P. Gallagher vs The Cleveland Electric Illuminating Co.*, PUCO No. 21-864-EL-CSS, Post-Hearing Brief of Thomas P. Gallagher, Jr. (Aug. 19, 2022) (“Complainant’s Brief”).

<sup>2</sup> Complainant’s Brief. The Commission properly captioned the filing as the Post-Hearing Brief of Thomas P. Gallagher, Jr.

<sup>3</sup> Ohio Adm. Code 4901-1-34(A).

### **III. COMPLAINANT FAILED TO SATISFY HIS BURDEN TO PROVE THAT CEI DID NOT PROPERLY CALCULATE HIS ENERGY CONSUMPTION**

As in all complaint proceedings, Complainant bears the burden of proving his case.<sup>4</sup> This means that it is Complainant's burden to prove that his meter did not record his consumption accurately prior to April 14, 2021. Contrary to the implication in Complainant's Brief, it is not CEI's burden to disprove Complainant's allegations. In high billing complaint proceedings, as here, the results of a meter test "is strong" evidence, although rebuttable.<sup>5</sup> In cases where the Complainant seeks to rebut the weight of a meter test by showing "conservation measures or other usage inconsistent with the amount which is billed," the Company may confirm the results of the meter test by presenting a plausible explanation of how the contested usage may have occurred.<sup>6</sup> CEI "need not 'prove' its 'plausible explanation,'" and "[t]he burden of proof remains on the customer" to demonstrate that his bill was unreasonably high.<sup>7</sup> Indeed, CEI merely needs to posit a plausible hypothesis of what caused the alleged differences in energy consumption.<sup>8</sup>

Here, Complainant asserts that CEI did not present "proof" of the accuracy of the meter.<sup>9</sup> This ignores the testimony of CEI's expert witness, Princess Davis, who testified that his meter tested at 99.96% accurate.<sup>10</sup> Her testimony is sufficient proof of the accuracy of the meter and is based on her review of company records.<sup>11</sup> It is Complainant's burden to prove that the meter was not accurate.<sup>12</sup> He adduced no evidence or testimony at the hearing to call CEI's meter test into

---

<sup>4</sup> *Grossman v. Pub. Util. Comm'n*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966).

<sup>5</sup> *In the matter of Jenny Kenderes v. The Cleveland Electric Illuminating Co.*, PUCO No. 18-922-EL-CSS, Opinion & Order ¶ 29 (May 6, 2020).

<sup>6</sup> *Id.*

<sup>7</sup> *In the Matter of the Complaint of Arthur M. Shuster v. Columbia Gas of Ohio, Inc.*, 1988 Ohio PUC LEXIS 587, PUCO Case No. 87-2080-GA-CAA, Opinion & Order at \*20-21 (Jun. 14, 1988).

<sup>8</sup> *See In the Matter of the Complaint of John Taylor et al. v. Columbus and Southern Electric Company*, 1985 Ohio PUC LEXIS 228, PUCO Case No. 84-762-EL-CSS, at \*11-12 (July 2, 1985).

<sup>9</sup> Complainant's Brief at 2.

<sup>10</sup> Pre-Filed Testimony of Princess Davis ("Davis Testimony"), Company Ex. 1, 6:7, Ex. A.

<sup>11</sup> Davis Testimony, Company Ex. 1, 3:15-23.

<sup>12</sup> *See Grossman*, 5 Ohio St.2d at 190; *In the Matter of the Complaint of Arthur M. Shuster v. Columbia Gas of Ohio, Inc.*, 1988 Ohio PUC LEXIS 587, PUCO Case No. 87-2080-GA-CAA, Opinion & Order at \*20-21 (Jun. 14, 1988).

doubt.<sup>13</sup> Because there is no evidence or testimony challenging the results of CEI’s meter test, the test results are an unrebutted verity.

Second, Complainant’s brief failed to demonstrate that his actual usage was inconsistent with the usage recorded by CEI’s meter.<sup>14</sup> Instead, he merely posits the conclusory statement that “[t]here has been a significant decrease in reported current usage.”<sup>15</sup> As noted in CEI’s Initial Post-Hearing Brief, this is not accurate. The mere comparison of his monthly usage to the same month in a prior year is not appropriate and cannot sustain his burden of proof.<sup>16</sup> For instance, his comparison fails to account for the numerous variables that could account for differences in usage, such as differences in appliance use or additional time at his residence due to the COVID pandemic.<sup>17</sup> Because he did not control for these variables, he cannot prove that the only difference between his recorded usage between different years was his meter—a required conclusion to satisfy his burden of proof—his analysis is both irrelevant and unreliable.<sup>18</sup> In contrast, CEI’s Meter Lab uses a known amount of voltage and amperage to test meters and therefore can determine the accuracy of the meter.<sup>19</sup>

Although CEI does not dispute that his usage in May 2021 was approximately 40% of what his usage in May 2020 was,<sup>20</sup> this “decrease” is not supported by the evidence after May 2021. The normal variations in usage likely stemmed from changes in his use of appliances or from

---

<sup>13</sup> See, e.g., Tr. 41:3-14.

<sup>14</sup> See generally Complainant’s Brief.

<sup>15</sup> Complainant’s Brief at 2.

<sup>16</sup> See The Cleveland Electric Illuminating Company’s Initial Post-Hearing Brief (“CEI’s Post-Hearing Brief”) at 6-8 (Sept. 30, 2022).

<sup>17</sup> *Id.*

<sup>18</sup> Additionally, Complainant is not qualified to testify as an expert witness in this matter because he did not prefile any testimony as required under Commission Rules. See Ohio Adm. Code 4901-1-29(A); Entry, ¶ 8 (June 14, 2022). His “analysis” is inadmissible.

<sup>19</sup> Davis Testimony, Company Ex. 1, 6:11-23.

<sup>20</sup> CEI’s Post-Hearing Brief at 8.

increased time at home at the start of the COVID-19 Pandemic.<sup>21</sup> Complainant's comparison did not account for any of these variables, and therefore is inadequate to demonstrate that CEI's meter did not properly record his energy consumption.<sup>22</sup>

Rather than prove that his consumption decreased, a comparison of his usage demonstrates that his usage has been consistent before and after CEI exchanged his meter.<sup>23</sup> As stated in CEI's Initial Post-Hearing Brief, his usage post-April 2021 (from December 2021 through March 2022), was within 96.17% of his pre-pandemic usage from December 2019 through March 2020, and within 88.77% of his pandemic usage from December 2020 to March 2021.<sup>24</sup> Moreover, the record shows that in at least one instance, his usage increased from the prior year.<sup>25</sup> Accordingly, the evidence in the record does not support Complainant's contention that there was a "significant decrease in [his] current usage."<sup>26</sup>

Complainant adduced no evidence or testimony to demonstrate that his usage was not what was recorded by his meter.<sup>27</sup> He therefore failed to satisfy his burden to demonstrate that CEI's meter improperly recorded his energy usage, and the Commission need not proceed further to assess whether CEI set forth a plausible explanation for why his usage was "high." As noted above, there is no competent evidence that he had unreasonably high bills as his bills were consistent across the nearly three-years of consumption history in the record.<sup>28</sup> Nevertheless, CEI has set

---

<sup>21</sup> See Executive Order 2020-01D (March 9, 2020); Davis Testimony, Company Ex. 1, 8:21-10:5.

<sup>22</sup> *Albaugh v. City of Columbus, Div. of Police*, 10th Dist. Franklin No. 02AP-687, 2003-Ohio-1328, ¶¶ 13, 22 ("Without proper analysis, these statistics are meaningless."); *State v. Waddy*, 10th Dist. Franklin, No. 96APA07-863, 1997 WL 318032, at \*7-8 (Ohio Ct. App. June 10, 1997) (noting that the lack of a control group is a "fatal flaw[]").

<sup>23</sup> Davis Testimony, Company Ex. 1, at 8:3-9.

<sup>24</sup> CEI's Post-Hearing Brief at 9-10.

<sup>25</sup> CEI's Post-Hearing Brief at 8-9.

<sup>26</sup> Complainant's Brief at 2. Contrary to this statement, the most recent usage evidence in record, from March 2022, indicates an *increase* in his usage from March 2021. Davis Testimony, Company Ex. 1, Exs. C.1 & C.2; CEI's Post-Hearing Brief at 8-9 (noting a 4.5% increase from March 2021 to March 2022).

<sup>27</sup> Tr. 33:1-4.

<sup>28</sup> Davis Testimony, Company Ex. 1, 8:3-9:17; CEI's Post-Hearing Brief at 8-10.

forth a plausible explanation—his usage is consistent across years and follows normal patterns of increasing during the winter and decreasing during the summer, consistent with his use of an electric heat pump.<sup>29</sup> There are numerous variables that determine how much energy is consumed each month—including differences in temperature, household appliance usage, and by leaving the lights on more frequently<sup>30</sup>—that plausibly explain the normal fluctuations of usage across months. CEI need not prove that its plausible explanation was the cause of Complainant’s “high bill.”<sup>31</sup> Accordingly, Complainant failed to meet his burden of proof and the Commission must dismiss his Complaint.

#### **IV. CONCLUSION**

Complainant failed to satisfy his burden of proof to demonstrate that CEI did not properly record his energy consumption. The evidence in the record only supports the conclusion that CEI’s meter tested at 99.96% accurate. Complainant failed to demonstrate that his usage was inconsistent with the usage recorded by CEI’s meter, and his sole “proof” that there was a decrease in his usage after his meter was exchanged is not supported by the evidence and does not conform to proper statistical analysis. Moreover, CEI has set forth a plausible hypothesis for the variations in Complainant’s energy consumption. Accordingly, the Commission should dismiss Complainant’s Complaint with prejudice or find in favor of CEI.

---

<sup>29</sup> Davis Testimony, Company Ex. 1, 8:3-6.

<sup>30</sup> Davis Testimony, Company Ex. 1, 8:18-9:17.

<sup>31</sup> *In the Matter of the Complaint of Arthur M. Shuster v. Columbia Gas of Ohio, Inc.*, 1988 Ohio PUC LEXIS 587, PUCO Case No. 87-2080-GA-CAA, Opinion & Order at \*20-21 (Jun. 14, 1988); *In the Matter of the Complaint of John Taylor et al. v. Columbus and Southern Electric Company*, 1985 Ohio PUC LEXIS 228, PUCO Case No. 84-762-EL-CSS, at \*11-12 (July 2, 1985).

Respectfully submitted,

/s/ Christopher A. Rogers

Christopher A. Rogers (100781)  
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](mailto:crogers@beneschlaw.com)  
*Counsel for The Cleveland Electric Illuminating  
Company*

**CERTIFICATE OF SERVICE**

On October 14, 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 14th day of October 2022 to the Complainant at the following address:

Thomas P. Gallagher  
8484 Stearns Road  
Olmsted Falls, OH 44138

/s/ Christopher A. Rogers

*Attorney for The Cleveland Electric  
Illuminating Company*

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**10/14/2022 12:03:05 PM**

**in**

**Case No(s). 21-0864-EL-CSS**

Summary: Brief The Cleveland Electric Illuminating Company's Post-Hearing Reply  
Brief electronically filed by Mr. Christopher Rogers on behalf of The Cleveland  
Electric Illuminating Company