

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Michael S. Roote )

V ) Case No. 21-0011-EL-CSS

Cleveland Electric Illuminating Co. )

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APPLICATION FOR REHEARING

BY

Michael S. Roote Complainant

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May 17, 2023

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The PUCO finding and order<sup>1</sup> unlawfully fails to protect Ohio Electric Utility Customers safety by unnecessarily exposing them to risk of fire with its potential for loss of life.

The PUCO erred in deciding that the need to restore power to customers exceeds the requirement to protect their safety.

Likewise the Commission erred in not recognizing the danger created by not recognizing their own rule requiring Utilities to make it easy for customers to speak to a representative in order to relay important details about the condition of power lines and their own service entry connections.

If the PUCO does not reconsider its finding and order, it will be only a matter of time before circumstances similar to those of Roote arise again and result in tragedy including loss of life.

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<sup>1</sup> Finding and Order (April 19, 2023)

Accordingly, under R.C. 4903.10, Complainant applies for rehearing of the April 19, 2023 Finding and Order, which was unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred in including in its consideration whether CEI acted reasonably “...in light of the conditions and circumstances which were known or reasonably should have been known at the time of the decision was made” by CEI. *Cincinnati Gas and Elec. Co. v. Pub. Util. Commsn. Of Ohio*, 86 Ohio St. 3d at 53. (Herein “*Cincinnati*”). *Cincinnati* is not applicable in this case. The Complaint is about safety. The Supreme Court in *Cincinnati* was not ruling on a case involving safety. It is never legal to do something unsafe due to circumstances.

ASSIGNMENT OF ERROR NO. 2 The PUCO erred in finding that CEI’s service was reasonable. CEI’s service was unsafe and therefore unreasonable.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred in finding CEI did not violate Administrative Rule 4901:10-06 “C2 – 2017 NESC” the requirement that CEI comply with the NESC safety rules included by reference. Specifically §214.A.5 of the NESC requiring utilities to promptly isolate or repair reported damaged distribution lines.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred in finding CEI did not violate 4901:10-09(B)(3) the requirement that the CEI answering system advise callers in their initial message that they have the option of speaking with a live Attendant.

The PUCO should grant rehearing and abrogate or modify its April 19, 2023 Finding and Order to fulfill its mission of protecting Utility customers and the public in general from the dangers of not adhering to these basic safety requirements.

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MEMORANDUM IN SUPPORT

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**Preface to Assignment of errors.**

{¶1} Before getting into the details of the errors it is necessary to try and understand, given the preponderance of contrary evidence in the record, how the Commission could have erred in their conclusions resulting in the errors in their rulings. What explanation is there for the Commission ignoring the evidence that CEI restoring power to Rockhaven Road without taking Roote's property out of service was unreasonable because it was unsafe? Does the Commission not recognize that unsafe equals unreasonable? How do they ignore the damage shown in the photos of CEI's Service Drop going to Roote's residence ? How do they ignore it was unsafe? How did they conclude it may be safe in spite of the experts agreeing it was unsafe needing inspection before power was reapplied? Shouldn't we fear for the Commissioner's safety if they do not have the common sense to recognize that if the Service Entry going to their Meter Box is pulled off the side of the house while the wires are still connected that that means they better make sure the power remains off? How could they not understand that the damage evident in the photographs of Roote's Service Entry rendered the Service Entry unsafe? How can the Commission not recognize what any layman, let alone expert, could clearly see?<sup>2</sup> How do they ignore that the recordings of Roote's phone call of December 1, 2020 proved conclusively that the damage had been reported to CEI? How did the Commission ignore that CEI recorded the damage as

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<sup>2</sup> The Commission is unable to decide whether Hazard Crew members ever investigated the reported downed Service Drop or damaged Service Entry ¶80. How can that be when it is easily deduced from the photographs of the damage, that had Hazard Crew ever seen the damage, they were required to have isolated it to make it safe. They did not isolate it, therefore they never saw it.

well? And that the reports of the damage were included in the work order sent to the Hazard Crew advising them to look for the damage?

{¶2} How does the Commission ignore the obstacles Roote had to face and overcome when trying to reach a Representative when calling the CEI LIGHTS OUT 800 line? How do they ignore that PUCO's rule clearly states the answering system's initial message must advise callers that one option is to speak to an attendant? How do they ignore that recording after recording admitted as evidence and played into the transcript clearly shows the initial message does not offer that option to the caller? How do you ignore that Roote testified that he had to lie to the Automated Answering system in order to eventually speak to a live attendant? And finally, how does the Commission ignore a call where every attempt by Roote, including asking for a Representative resulted in failure and his being ultimately disconnected? How does the Commission conclude that that's OK because they assume, without evidence, that Roote had nothing more of importance to say?

{¶3} Given Roote's forthrightness in his testimony, his reading into the record of every line of his original complaint supported with evidence and knowing he was under oath, how does the Commission conclude that he perjured himself? How can you explain he took this risk without knowing exactly what evidence CEI might produce to impeach his testimony? (Of course, CEI failed to produce any) How does the Commission conclude Roote lied about there being no evidence of anyone from CEI being on his property prior to the restoration of power on December 3, 2020? How does the Commission conclude Roote lied about Tyler Henry coming up his driveway on the 8th, that he lied about his neutral wire being pulled out, and that he lied about who pulled his meter and who reinstalled it? The Commission concluded Roote must have lied not because CEI introduced evidence refuting what Roote says, but because CEI could produce no testimony or records confirming what he said. In other words, if CEI didn't testify to it or possess records of it occurring, then it didn't happen. What

kind of reasoning is that? It isn't, it's poppycock! And how does the Commission not file contempt charges against Mr. Roote when they are on the record concluding he lied, and lied "adamantly"?

{¶4} So how can all this be explained? The Commissioner's are too accomplished to be accused of being stupid and while no one is an expert on everything, this is fundamental electricity safety that we were all taught as school children, so it is improbable that this is a result of ignorance. By the process of elimination, the only plausible explanation is that the Commission has extreme prejudice toward complainants like Roote and therefore defer to the host of lawyers representing CEI.

{¶5} Still, the Hearing is like a Court isn't it? Aren't those conducting the hearing, the "judges", the Attorney-Examiners trained to be impartial? Isn't the whole idea of basing this on the rules of evidence and other court rules designed to prevent any bias and insure impartiality? Roote believed that until he realized that in-spite of all the Commission's posturing, posing, parading and pretending that it is a court, that in fact, it is NOT a court. The people and the process are not part of the Judicial Branch of Government where Courts reside and Parties are afforded all these protections. It is part of the Executive Branch of Government where the trappings of court proceedings are canceled by the fact that, in the end, it is a political process, subject to all the vagaries thereof.

{¶6} Need proof? Name another Court in any jurisdiction in the country where the Judge, or Jury doesn't issue the ruling? Name any real court where the Chairman of a committee, who serves at the pleasure of the Governor, votes on the decision?

{¶7} So bias, is the predicate for all these errors. A bias so broad, that the Commissioners set aside the opinions of the Attorney-Examiner who conducted the Hearing and invented out of whole cloth, their own ruling.

## ASSIGNMENT OF ERROR 1.

{¶8} Cincinnati<sup>3</sup> is not an appropriate case to include in reviewing the case at hand. In Cincinnati, the PUCO did not accuse the Utility of any unlawful act, safety violations or of any violation of its Rules, Regulations or Tariff. The issue in Cincinnati was the Commission's view that poor management and business decisions resulted in cost overruns of a given project and that therefore Cincinnati was not entitled to recovering those costs with rate increases for its customers. The Supreme Court overruled stating that errors in judgment must take into account the circumstances that were known at the time, not years later in hindsight. But in Roote the question before the Commission was safe or unsafe. There are no mitigating factors that could result in concluding restoring power was safe and mitigating factors should not be considered in making a ruling.

{¶9} It is long established law that circumstances are not a consideration when determining the assignment of responsibility in a civil case or guilt in a criminal case. In fact instructions to the juries include specific language saying those mitigating factors should not be considered in deciding the case. Only after a decision is reached are judges or juries to consider mitigating circumstances when determining sentencing of the defendant or the amount of an award for damages.<sup>4</sup> Even in the rare cases of a judge setting aside a jury verdict, he does not issue that ruling until after the jury has reached a decision regarding guilt or liability.

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3 Of note, in paragraph 78, it goes on to say "once the repairs were made to primary lines reported in CEI Ex 1.B, ...". Ex 1.B refers to "wires down to structure". That is a reference to the service drop, not the primary wires. The primary wires are included in the order to the repair crew in CEI Ex 1.C in which the description "line down Pole to pole" is clearly a reference to Primary wires. In this instance, the commission has confused CEI Ex 1.B with CEI Ex 1.C.

4 In ¶81 the Commission concludes Roote's claims of unsafe service that continued on December 4 through December 8 were not unsafe because of a litany of mitigating circumstances. As argued here those mitigating circumstances should not be considered before deciding on whether the actions were unsafe or safe. In fact the lack of response of CEI once the unsafe condition was confirmed to them by Roote on December 4 continuing through the 8<sup>th</sup> are instead aggravating factors that should be considered when assessing the amount to fine CEI once the rehearing is complete.

{¶10} Finally at the end of ¶65 which is about unreasonable service, the Commission errs in bringing in the Attorney-Examiner's June 24, 2021 entry limiting "the hearing to whether CEI complied with its tariff, the Commission's rules, regulations, and order." It is an error because unreasonable service is a separate issue as compared to a violation of rules. The Commission clearly agrees with this. They issued separate rulings on reasonableness under the heading "Unreasonable Service Allegation" in ¶80 and ¶81 , and then on Code Violations in ¶92 under the heading "Alleged Code Violations". In ¶65, the Commission errors in conflating the two issues.

{¶11} The Commission must reconsider their rulings without deference to Cincinnati.

## **ASSIGNMENT OF ERROR 2.**

{¶12} It is explained in ¶80 and ¶81, of the Commission's ruling, that CEI's actions were reasonable based on the unique circumstances of Roote's case. Therefore the ruling depends solely on Cincinnati. ¶80 is particularly instructive in demonstrating why circumstances should never be considered in ruling on assigning responsibility for actions in violation of law. In Roote's reply brief 3.2., P 10-15 Roote lays out the timeline and all the evidence *secured from CEI*, that CEI was aware as of December 1, 2020 of CEI's damaged Service Drop and Roote's damaged Service Entry. Experts Roote and Ingram agreed restoring power under those circumstances would be unsafe without inspection. But on December 3, 2020 CEI restored power anyway. Because CEI knew of the condition before they restored power, they violated the law. The Hearing provided the Commission zero evidence to dispute these facts. Based on those facts which are the only thing that should be taken into consideration, the finding has to be CEI's actions were unsafe and therefore unreasonable.

{¶13} To reach its erroneous finding, the Commission has to rely on Cincinnati and is reduced to making the ridiculous judgment that restoring power to 420 residents along the Rockhaven route was of greater concern than protecting Roote's persons and property. Ruling ¶80



### ASSIGNMENT OF ERROR 3

{¶14} In ¶92 the Commission errs in finding for CEI regarding the violation of §214.A.5. Here the Commission ruling hangs again on Cincinnati, but again this is about the NESC whose purpose is to enumerate the safety rules a Utility must follow. Safety violations are not subject to Cincinnati as previously put forth.

{¶15} Then the Commission adds to the explanation that CEI didn't violate the rule because given the circumstances, they did meet the meaning of acting "promptly" as used in the rule. This reasoning is frankly baffling. It ignores the fact that CEI didn't need to do anything, "promptly" or otherwise, to keep Roote's property and persons safe. The power was already off as a result of the downed primary along the Rockhaven Route. As long as it remained that way, the Roote property was safe. And here it must be noted that there is no dispute that the restoration of power to the 420 residents along the Rockhaven Route was accomplished by repairing the primary wire *in front of Roote's property*. The means of disconnecting and isolating Roote's property was no more than one hundred feet away from where the primary wire was repaired! Had the Hazard Crew acted responsibly and not violated §214.A.5 and notified the Repair Crew to isolate Roote's property before restoring power, the Repair Crew being already in the proximity, would have needed at most mere minutes to isolate Roote's house by pulling the fuse and disconnect as Tyler Henry did on December 8, 2020.

{¶16} Here again, reviewing the ruling without consideration of Cincinnati and the grasping at straws represented by the "promptly" argument, the Commission is encouraged to reverse its finding.

### ASSIGNMENT OF ERROR 4

{¶17} Ohio Adm.Code 4901:1-10-09(B)(3), *requires* the following:

"When an electric utility utilizes a menu-driven, automated, interactive answering system (referred to as the system), the initial recorded message presented by the system to the caller shall only identify the general options available to the caller, *including the option of being transferred to a live attendant*.

At any time during the call, the caller shall be transferred to a live attendant if the caller fails to interact with the system for a period of ten seconds following any prompt.” Emphasis added.

{¶18} Here, taken from the transcript, is the actual text of the initial recorded message presented to the caller. “Welcome to the Illuminating Company, a FirstEnergy company. (Spanish). Your call may be monitored or recorded for quality. In a few words tell me how I can help you today. You can say anything from outage to what's my account balance. So how can I help you?”

{¶19} The rule includes the word **Shall**, which is defined in Black's Law Dictionary 2nd Ed this way. “As used in statutes and similar instruments, this word is generally imperative or mandatory; but it may be construed as merely permissive or directory, (as equivalent to “may,”) to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.

{¶20} Since **Shall** is used in a PUCO administrative rule which is a “similar instrument” created to support a statute (O.R.C. 4905.22, 4905.04, 4928.06, 4928.11) the use of **Shall** therefore must be interpreted to mean imperative or mandatory. Because the rule does convey a right or benefit (access to a representative) to the customer calling (public) the use here of **Shall** does **not** meet the exception to the imperative interpretation rule. Therefore it is imperative or mandatory that the Utility comply with the rule as written.

{¶21) Of note, this rule exists under the umbrella of 4901:1-10-09 which is entitled “Minimum Customer Service Levels” reinforcing that anything less than what is spelled out in the requirement fails to comply. There is no possibility of “substantially complying” with a “Minimum” requirement

with anything less than what is mandated in the rule. To decide otherwise, as the Commission has done here, is to make a mockery of the Commission's own rule.

## **Conclusion**

{¶22} Given what Roote believes about the Commission's bias, why does he persist at tilting at windmills pursuing this? Given the bias, the expectation is the Commission will use the 30 day rule to allow this request to expire without comment. I am making this request anyway because I believe the rehearing request exists because it provides an opportunity for the Commission to correct their errors. And if possible, everyone should be given that chance. After all, the goal is to get the ruling right. And I am pursuing this because I promised myself at the outset, I would see it through to the end. And this will not be the end. I believe the The Ohio Supreme Court will give this a fair and impartial review, In the end, Roote, on behalf of the residents of Ohio will prevail. This will prevent another tragedy or worse as happened in Allstate and could have happened to Roote, William N. Miller or Keith A. Burrows (Case No, 21-0630-EL-CSS), and certainly others.

Respectfully submitted,

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

**5/17/2023 4:26:19 PM**

**in**

**Case No(s). 21-0011-EL-CSS**

Summary: Application Application for Rehearing of Commission Ruling and Order  
of 4/19/2023 electronically filed by Mr. Michael S. Roote on behalf of Roote,  
Michael S Mr..