

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

MICHAEL S. ROOTE,	)	
	)	
Complainant,	)	CASE NO. 21-0011-EL-CSS
	)	
vs.	)	
	)	
THE CLEVELAND ELECTRIC	)	
ILLUMINATING COMPANY,	)	
	)	
Respondent.	)	

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY’S  
MEMORANDUM CONTRA COMPLAINANT’S APPLICATION FOR REHEARING**

**I. INTRODUCTION**

On April 19, 2023, the Public Utilities Commission of Ohio (“Commission”) issued an Opinion and Order correctly finding that Complainant failed to satisfy his burden of proof that Respondent The Cleveland Electric Illuminating Company (“CEI”) provided unreasonable service or violated its tariffs, statutory obligations, or Commission regulations, practices, or orders<sup>1</sup> (“Order”).

Complainant filed an Application for Rehearing of the Order on May 17, 2023 (“Application”). In his Application, Complainant asserts four errors:

1. The Commission erred when it considered whether CEI acted reasonably by considering “the conditions and circumstances which were known or reasonably should have been known at the time of the decision was made” by CEI.
2. The Commission erred in finding, based on consideration of the circumstances at the time, that CEI’s service was reasonable because, according to Complainant, CEI’s service was unsafe and therefore unreasonable.

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<sup>1</sup> Order, ¶ 102.

3. The Commission erred in finding that CEI did not violate Ohio Adm. Code 4901:10-06.
4. The Commission erred in finding that CEI did not violate Ohio Adm. Code 4901:10-09(B)(3).<sup>2</sup>

However, Complainant's Application merely parrots the arguments that he made in both his Initial Post-Hearing Brief and his Post-Hearing Reply brief, which have already been fully considered and decided by the Commission. Because Complainant failed to demonstrate that any part of the Commission's decision was unreasonable or unlawful, his Application for Rehearing should be denied.

## **II. ARGUMENT**

### **A. Standard of Review**

Pursuant to Section 4903.10, Revised Code and Section 4901-1-35, Ohio Administrative Code, an applicant on an Application for Rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be *unreasonable or unlawful*."<sup>3</sup> To prevail, a Complainant cannot merely present the same arguments that were already presented to and addressed by the Commission.<sup>4</sup>

Because the Application raises no new arguments for the Commission's consideration, Complainant's Application for Rehearing should be denied.<sup>5</sup>

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<sup>2</sup> Application, at p. 3.

<sup>3</sup> R.C. 4903.10 (emphasis added); *see also* Ohio Adm. Code 4901-1-35(A).

<sup>4</sup> *In the matter of the Application of Duke Energy Ohio, Inc.*, PUCO Case No. 14-457-EL-RDR, Fourth Entry on Rehearing, ¶ 22 (April 10, 2019).

<sup>5</sup> *In the Matter of the Complaint of Sarunas Abraitis v. The E. Ohio Gas Co.*, PUCO No. 10-650-GA-CSS, 2011 WL 10945261, Entry on Rehearing, ¶ 6 (Feb. 9, 2011).

**B. Complainant's Preface Should Be Disregarded**

Complainant begins his Application with a three-page Preface containing extraneous and rhetorical statements and questions that are not germane to an application for rehearing. Rather than address the standard for rehearing, Complainant questions the legitimacy of the formal complaint process and expresses his general disagreement with the outcome of the case. Accordingly, the Commission should disregard Complainant's Preface.

**C. Complainant Failed to Demonstrate that the Commission's Opinion and Order Was Unreasonable or Unlawful**

In his Application, Complainant asserts four errors in the Order:

1. The Commission erred when it considered whether CEI acted reasonably by considering "the conditions and circumstances which were known or reasonably should have been known at the time of the decision was made" by CEI.
2. The Commission erred in finding, based on consideration of the circumstances at the time, that CEI's service was reasonable because, according to Complainant, CEI's service was unsafe and therefore unreasonable.
3. The Commission erred in finding that CEI did not violate Ohio Adm. Code 4901:10-06.
4. The Commission erred in finding that CEI did not violate Ohio Adm. Code 4901:10-09(B)(3).<sup>6</sup>

Complainant's Application fails for several reasons. *First*, in his first two interrelated assignments of error, he fails to establish that the Commission's application of *Cincinnati Gas & Electric* (and the Commission's consideration of the circumstances) was unreasonable or unlawful. *Next*, Complainant fails to demonstrate that the Commission's finding that CEI did not

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<sup>6</sup> Application, at pg. 3.

violate National Electrical Safety Code (“NESC”) § 214(a)(5) was unreasonable or unlawful. *Finally*, Complainant failed to demonstrate that the Commission’s finding that CEI substantially complied with Ohio Adm. Code 490:1-10-09(B)(3) was unreasonable or unlawful.

**1. Complainant Failed to Demonstrate that the Commission’s Application of *Cincinnati Gas & Electric* Was Unreasonable or Unlawful**

Complainant’s first two assignments of error<sup>7</sup> are related and are premised upon his disagreement with the Commission’s application of *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 1999-Ohio-81, 86 Ohio St. 3d 53, 53, 711 N.E.2d 670, 675, to determine whether CEI acted reasonably in light of the circumstances. Complainant’s arguments are misplaced and untimely.

*First*, the Commission has discretion to rely on applicable legal authority.<sup>8</sup> *Cincinnati Gas & Electric* is authority from the Ohio Supreme Court regarding the application of a reasonableness analysis. Complainant cites no authority contradicting the application of *Cincinnati Gas & Electric* in this case, nor does he cite any authority establishing that the Commission’s consideration and application of *Cincinnati Gas & Electric* was unreasonable or unlawful. Complainant attempts to distinguish *Cincinnati Gas & Electric* because it involved the reasonableness of cost overruns on a project, while he maintains that his Complaint concerned whether a condition was safe or unsafe.<sup>9</sup> But nothing requires that the underlying facts be identical to the present matter for such authority to have precedential value.

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<sup>7</sup> “ASSIGNMENT OF ERROR 1... *Cincinnati* is not an appropriate case to include in reviewing the case at hand.” Application, ¶ 8. “ASSIGNMENT OF ERROR 2 ... To reach its erroneous finding, the Commission has to rely on *Cincinnati*...” Application, ¶ 13.

<sup>8</sup> *See, e.g., Toledo Coalition for Safe Energy v. Pub. Util. Comm’n of Ohio*, 69 Ohio St.2d 559, 563, 433 N.E.2d 212, 215 (1982).

<sup>9</sup> Application, ¶ 8.

*Second*, Complainant contends that consideration of “mitigating factors” (*i.e.*, circumstances) was in error.<sup>10</sup> However, Complainant ignores the foundational statute for the Commission’s jurisdiction in complaint proceedings, R.C. 4905.26, which requires the Commission to consider whether CEI provided reasonable service. The definition of “reasonable” is “[f]air, proper, or moderate under the circumstances.”<sup>11</sup> Analysis of a complaint proceeding under R.C. 4905.26 necessarily requires the Commission to consider the circumstances, and the Commission properly did so in determining that CEI did not act unreasonably.<sup>12</sup>

*Third*, Complainant presents no authority for his (erroneous) proposition that “[i]t 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.”<sup>13</sup> This statement has no basis in either fact or law. The law is replete with examples of instances where consideration of circumstances is not only appropriate, but necessary.<sup>14</sup>

*Finally*, when CEI asserted the application of *Cincinnati Gas & Electric* in post-hearing briefing, Complainant failed to object.<sup>15</sup> Instead he implicitly acknowledged the validity of *Cincinnati Gas & Electric* and “accept[ed] the challenge and welcome[ed] the opportunity to

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<sup>10</sup> *Id.*

<sup>11</sup> *Reasonable*, BLACK’S LAW DICTIONARY (11<sup>th</sup> Ed. 2019) (defining reasonable as “Fair, proper, or moderate under the circumstances”).

<sup>12</sup> Order, ¶ 65.

<sup>13</sup> Application, ¶ 9.

<sup>14</sup> For example, the reasonable person standard in tort liability requires “ordinary care” which is the “the degree of care which persons of ordinary care and prudence are accustomed to observe under the same or similar circumstances.” *Neu v. Est. of Nussbaum*, 2015-Ohio-159, ¶ 19, 27 N.E.3d 906, 912 (“Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to observe *under the same or similar circumstances...*” (emphasis added)). Similarly, self-defense would not be a viable defense without considering the totality of the circumstances. *State v. Davidson-Dixon*, 2021-Ohio-1485, ¶ 27, 170 N.E.3d 557, 564 (8th Dist.) (“[T]he totality of the circumstances surrounding the confrontation should be considered, *i.e.*, whether the confronting spouse threatens or uses force prior to engaging in the initial confrontation.”); *see also State v. Talbott*, 2d Dist. Montgomery No. 14690, 1995 WL 353883, at \*2 (June 9, 1995) (“An officer’s reasonable suspicion that someone is involved in criminal activity must be based on the totality of the surrounding circumstances.”).

<sup>15</sup> CEI’s Initial Post-hearing Brief, at 9 (Feb. 16, 2022); Complainant’s Post-Hearing Reply Brief, at 10 (March 9, 2022).

show that while applying the very standards CEI has cited, Roote has indeed proved CEI's Service was Unreasonable [sic]."<sup>16</sup>

Although Complainant now asserts a disagreement with the Commission's application of *Cincinnati Gas & Electric*, this does not demonstrate that the Commission's reliance on *Cincinnati Gas & Electric* was unreasonable or unlawful, as required to succeed on an application for rehearing. Therefore, Complainant's first two assignments of error should be denied.

**2. Complainant Failed to Demonstrate that the Commission's Determination that CEI Did Not Violate NESC § 214.14(A)(5) Was Unreasonable or Unlawful**

Complainant's third assignment of error again fails to demonstrate that the Commission's Order was unreasonable or unlawful. As identified in the Order, Complainant failed to carry his burden to demonstrate that CEI failed to act promptly, as he failed to adduce any evidence or expert testimony on whether CEI's actions were prompt under the NESC.<sup>17</sup>

In his Application, Complainant merely restates his position that CEI's actions were not prompt and that the Commission erred in relying on *Cincinnati Gas & Electric*.<sup>18</sup> His argument is again based on his disagreement with the Commission's finding that CEI acted promptly *under the circumstances*.<sup>19</sup> His disagreement, however, does not demonstrate that the Commission's determination that CEI did not violate NESC § 214(A)(5) was unreasonable or unlawful.

As recognized by the Commission and not challenged by the Complainant, Complainant failed to adduce any expert testimony on whether CEI's actions were prompt, as that term is used

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<sup>16</sup> Complainant's Post-Hearing Reply Brief, at 10 (March 9, 2022).

<sup>17</sup> Order, ¶¶ 92–93.

<sup>18</sup> Application, ¶¶ 14–16. Additionally, Complainant, without citation, references that the disconnect for his secondary line was no more than 100 feet from where the primary wire was repaired. Application ¶ 15. Complainant failed to provide a citation to this alleged fact in the record, and CEI could find none. As this fact was not included in the hearing, the Commission should disregard it now.

<sup>19</sup> Application, ¶¶ 14–15.

in the NESC.<sup>20</sup> In reasserting his conclusory statement that CEI's actions were not "prompt,"<sup>21</sup> and that the Commission therefore erred in considering the circumstances, Complainant ignores that the definition of "promptly" requires consideration of the circumstances.<sup>22</sup>

Accordingly, the Commission's consideration of the circumstances to determine whether CEI acted "promptly" is reasonable. Complainant's third assignment of error fails because he has not shown that the Commission's decision was or is unreasonable or unlawful.

**3. Complainant Failed to Demonstrate that the Commission's Determination that CEI Did Not Violate Ohio Adm Code 490:1-10-09(B)(3) Was Unreasonable or Unlawful**

Complainant's final assignment of error is that the Commission erred in finding that CEI substantially complied with the requirements of Section 4901:1-10-09(B)(3), Ohio Administrative Code.<sup>23</sup> However, Complainant fails to demonstrate that the Commission's decision is unreasonable or unlawful. Complainant fails to assert any argument or evidence that was not considered by the Commission. Although he appears to quote a portion of CEI's initial call prompt,<sup>24</sup> he does not cite its source, and this evidence was in the record, and thus considered by the Commission in its Order.<sup>25</sup>

Moreover, Complainant failed to adduce evidence at the hearing that he was unable to contact a representative when needed. In his initial brief, he relied upon one call that he claimed

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<sup>20</sup> Order, ¶¶ 91-92.

<sup>21</sup> Complainant implies that CEI only restored power to the 420 customers along Rockhaven Road. Application, ¶ 15. This is incorrect. CEI was restoring power to approximately 170,000 customers who lost power because of the storm. Ingram Testimony, Company Ex. 1, 2:12-13; Kozak Testimony, Company Ex. 2, 2:6.

<sup>22</sup> *In re Murray*, 350 B.R. 408, 411-12 (S.D. Ohio 2006) ("promptly...depends largely on the facts in each case, for what is 'prompt' in one situation may not be considered such under other circumstances or conditions.") (quoting *Promptly*, BLACK'S LAW DICTIONARY 1214 (6th Ed. 1990)); see also *Ward v. Nat'l Bank of Paulding*, 5 Ohio Misc. 140, 145, 212 N.E.2d 191 (C.P. 1965) (to disaffirm an agent's acts, the principal must act "promptly," which means "within a reasonable time under the circumstances"); *Westfield Ins. Co. v. Russo*, 2005-Ohio-5942, ¶ 13, 164 Ohio App. 3d 533, 843 N.E.2d 205 (9th Dist.) ("A provision in an insurance policy requiring 'prompt' notice to the insurer requires notice within a reasonable time in light of all the surrounding facts and circumstances.").

<sup>23</sup> Application, ¶ 17.

<sup>24</sup> Application, ¶ 18.

<sup>25</sup> See Tr. 103:10-15. This call was transferred to a customer service representative. Tr. 106:23-24.

he made “on December 1, 2020 at 3:48 pm in the afternoon...” as the sole evidence that he was unable to reach a customer service representative.<sup>26</sup> However, as CEI explained in its post-hearing reply brief, Complainant actually made this call at 3:48 am.<sup>27</sup> Importantly, the record shows that Complainant was able to speak to a representative when needed.<sup>28</sup> There is no evidence that he requested to speak to a representative at 3:48 am, and representatives would not have been available at that time of day.

Complainant failed to carry his burden to demonstrate that the Commission’s determination that CEI substantially complied with Ohio Adm. Code 4901:1-10-09(B)(3) was unreasonable or unlawful.

### III. CONCLUSION

For the reasons set forth herein, The Cleveland Electric Illuminating Company respectfully requests that the Commission deny Complainant’s Application for Rehearing.

Respectfully submitted,

/s/ Christopher A. Rogers

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<sup>26</sup> Complainant’s Initial Post-Hearing Brief, at 16 (Feb. 14, 2022).

<sup>27</sup> CEI’s Post-Hearing Reply Brief, at 4 n.11 (March 9, 2022).

<sup>28</sup> *See, e.g.*, Tr. 106:23-24, 123:15-16, 141:8-10.



### **CERTIFICATE OF SERVICE**

On May 30, 2023, 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 via regular and electronic mail on this 30<sup>th</sup> day of May 2023 to the Complainant at the following addresses:

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*Attorney for The Cleveland Electric  
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Summary: Memorandum Contra Complainant's Application for Rehearing  
electronically filed by Mr. Christopher Rogers on behalf of The Cleveland Electric  
Illuminating Company.