

ORIGINAL

IN THE
SUPREME COURT OF OHIO

C. Richard Smith)	Case No. 11-1828
)	
Appellant,)	
)	On Appeal from the Public Utilities
v.)	Commission of Ohio in Case No. 10-340-
)	EL-CSS
Ohio Edison Company)	
)	
Appellee.)	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

Appellant, C. Richard Smith (Mr. Smith), asks this Court to reweigh certain factual findings by the Public Utilities Commission of Ohio¹ (Commission). Mr. Smith appeals the Commission's decision, which properly determined that Mr. Smith did not establish electric service at 1930 Mahoning Avenue and which found that disconnection of service for safety reasons due to meter tampering was proper. As the fact finder, the Commission held a hearing, took conflicting evidence, weighed that evidence, and

¹ Although Mr. Smith named Ohio Edison as the Appellee in the caption of his Notice of Appeal, the Commission is the proper Appellee. Ohio Rev. Code Ann. § 4903.13 (West 2011), App. at 7. Under this Court's precedent, this is a non-jurisdictional defect. *Consolidated Rail Corp. v. Pub. Util. Comm'n*, 40 Ohio St. 3d 252, 254, 533 N.E.2d 317, 319 (1988).

reached a decision. Still, the Commission granted Mr. Smith's complaint against the Ohio Edison Company (Ohio Edison or Company) for inadequate service. The Commission found that adequate service was not provided by Ohio Edison when it failed to properly investigate a consumer complaint by Mr. Smith. The complaint began January 30, 2009, when Ohio Edison failed to respond and resolve a dispute over tampering charges with Mr. Smith. Although Mr. Smith received a favorable result on this complaint, he still challenges certain Commission findings.

Mr. Smith also failed to present evidence of alleged alteration of telephone recordings in a timely fashion. The Commission properly denied this tardy attempt to introduce evidence on rehearing that was available and could and should have been presented during the hearing itself. Mr. Smith had the opportunity to present the evidence and he failed to do so.

STATEMENT OF THE FACTS AND CASE

Mr. Smith took possession of property at 1930 Mahoning Avenue N.W., in Warren, Ohio in early September 2008, found that the electrical service was still on, and called Ohio Edison. *In the Matter of the Complaint of C. Richard Smith vs. Ohio Edison Company*, Case No. 10-340-EL-CSS (Opinion and Order at 2) (July 6, 2011) (hereinafter "*Complaint Case*"), Appellant's App. at 12.² During that call, Mr. Smith told Ohio

² References to Appellee's appendix attached to this brief are denoted "App. at ____"; references to Appellee's supplement are denoted "Supp. at ____." Although Appellant failed to number his appendix, references to Appellant's appendix are referred to sequentially and denoted "Appellant's App. at ____."

Edison he purchased the vacant property, gave Ohio Edison his billing address, and stated that vagrants had been living in the house. Tr. at 11-12, Supp. at 2-3. Ohio Edison advised Mr. Smith that: (1) the power should not be on, (2) the billing system showed the power being off for 3 years, (3) there was a tampering issue, (4) the premises required inspection before service could be reconnected, and (5) a service order to have electrical service disconnected by Ohio Edison would be requested. *Id.* at 12-18, Supp. at 3-9. After Mr. Smith's telephone call, however, the power remained on. *Complaint Case* (Opinion and Order at 2) (July 6, 2011), Appellant's App. at 12.

Mr. Smith subsequently had the premises inspected, made the necessary repairs, and the electrical inspector sent an inspection release form to Ohio Edison for reconnection. *Id.* In early November 2008, Mr. Smith again contacted Ohio Edison and asked that the billing address for the electrical service at 1930 Mahoning Avenue be changed to the address of his home residence, 7051 Kinsman-Nickerson Road in Kinsman, Ohio, where he was already an Ohio Edison customer. *Id.* at 20, Appellant's App. at 30. During that call, while the Ohio Edison agent repeatedly told him to remain on the line, Mr. Smith chose instead to hang up and terminate the call before necessary information could be provided to him. *Id.* As a result, Ohio Edison never received or accepted a formal application for service. Tr. at 169, 171, Supp. at 18.

In late January 2009, Mr. Smith found that Ohio Edison had removed the meter from the premises. *Complaint Case* (Opinion and Order at 2) (July 6, 2011), Appellant's App. at 12. He then contacted Ohio Edison, on January 30, 2009, and was advised that electrical service had been terminated because of evidence of tampering. *Id.* During that

call, Mr. Smith requested to speak with a supervisor, but no supervisor ever contacted him. *Id.* On February 11, 2009, Mr. Smith again contacted Ohio Edison and was again told that tampering was suspected and that he would be required to pay penalties and fraud charges. *Id.* at 2-3, Appellant's App. at 12-13. Mr. Smith then sent his concerns to Ohio Edison via facsimile transmission on February 12, 2009; however, Ohio Edison did not contact him regarding his concerns. *Id.* at 3, 20, Appellant's App. at 13 and 30.

On June 1, 2009, Mr. Smith's attorney sent a letter to Ohio Edison, along with a copy of Mr. Smith's February 12, 2009 fax. *Id.* at 20, Appellant's App. at 30. The letter stated Mr. Smith had not received a response to his inquiry and requested that Ohio Edison send a reply. *Id.* Also enclosed with the letter was a summary of events concerning the electric service at 1930 Mahoning Avenue. *Id.* Ohio Edison did not contact either Mr. Smith or his attorney in response to the letter Mr. Smith's attorney had sent. *Id.* Mr. Smith's several unsuccessful attempts above to resolve the tampering charges with Ohio Edison since January 30, 2009 resulted in the Commission finding that Ohio Edison failed to respond to, and resolve, Mr. Smith's complaints in a timely manner. *Id.* at 24, Appellant's App. at 34.

On March 17, 2010, Mr. Smith filed a complaint at the Commission alleging that Ohio Edison damaged his property by removing the meter and requesting power be restored to his property and that he be awarded damages. *Id.* at 1; Appellant's App. at 11. Ohio Edison denied the allegations stating that service had been disconnected since 2005 and remained disconnected when Mr. Smith took possession of the property in September

2008. Upon inspection, Ohio Edison personnel discovered evidence of tampering and removed the meter for safety reasons. *Id.* at 2, Appellant's App. at 12.

On August 9, 2010, Mr. Smith filed a more detailed amended complaint alleging that he was injured and damaged because Ohio Edison's conduct violated the Ohio Administrative Code relating to disconnection of residential electrical service and properly recording and documenting contacts between Ohio Edison and the public. Ohio Edison generally denied the allegations and advised Mr. Smith that tampering charges would be assessed. *Id.*

An evidentiary hearing then was held on February 23, 2011. The Commission took conflicting evidence, weighed that evidence, and held that Mr. Smith failed to establish electric service at 1930 Mahoning Avenue and disconnection was handled properly, but adequate service was not provided since January 30, 2009 when Ohio Edison failed to investigate the consumer complaint as required by O.A.C. 4901:1-10-21. Both Mr. Smith and Ohio Edison filed applications for rehearing which were denied. This appeal ensued.

ARGUMENT

Proposition of Law No. I:

The Commission found, as factual matters, that Mr. Smith failed to properly apply for new service, tampering with the meter existed, and Ohio Edison was not required to give prior notice of disconnection. The Ohio Supreme Court will not reverse or modify the Commission decision where Commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Constellation NewEnergy, Inc., v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 540, 820 N.E.2d 885, 894 (2004)

As the complainant below, Mr. Smith bore the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record, which Mr. Smith has failed to do. *Constellation NewEnergy, Inc., v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 540, 820 N.E.2d 885, 894 (2004). To support this burden, Mr. Smith must show that the evidence of record does not support the Commission's factual determinations. *Id.* This is not a *de novo* review, because no question of law is being reviewed here, and the Court does not second-guess the Commission's factual determinations. The Court upholds the Commission's determinations of fact where, as here, the record contains sufficient probative evidence to show that the Commission's decision was not against the manifest weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Id.*; see also, *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 571, 820 N.E. 2d 921, ¶ 29 (2004).

This is a heavy burden. The Court will not weigh the evidence nor will it choose between debatable alternatives. *Consumers' Counsel v. Pub. Util. Comm'n*, 127 Ohio St. 3d 524, 526-527, 941 N.E.2d 757, 761 (2010). R.C. 4903.13 provides that a Commission order "shall be reversed, vacated, or modified by the Supreme Court on appeal, if upon consideration of the record, such Court is of the opinion that such order was unlawful or unreasonable." Ohio Rev. Code Ann. § 4903.13 (West 2012), App. at 7. In matters involving the Commission's special expertise and the exercise of discretion, the Court generally defers to the judgment of the Commission. *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004). It should do so here.

This case challenges only factual determinations arising from a complaint regarding electric service, a matter particularly within the Commission's expertise. Mr. Smith asks the Court to reweigh the evidence and substitute its judgment for that exercised by the Commission. That, of course, is not the function of this Court on appeal. See *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 871 N.E.2d 1176, ¶ 39 (2007). This Court should affirm the order issued below.

A. The Commission's Order should be affirmed because Mr. Smith failed to establish that the Commission's decision was unlawful or unreasonable.

The Commission's decision below was both reasonable and lawful. The Court will presume that orders are reasonable; it falls to the appellant (Mr. Smith) to upset that presumption. *In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 271, 274,

951 N.E.2d 751, 754 (2011) citing *Columbus v. Pub. Util. Comm'n*, 170 Ohio St. 105, 163 N.E.2d 167, syllabus ¶ 2 (1959). R.C. 4905.26 requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law or that any practice affecting or relating to any service furnished is unjust or unreasonable. Ohio Rev. Code Ann. § 4905.26 (West 2012), App. at 8. In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm'n*, 5 Ohio St. 2d 189, 214 N.E.2d 666 (1966).

1. The Commission properly found that Mr. Smith did not make an application for new service in the fall of 2008.

Mr. Smith argues that the Commission erred in finding he failed to make an application for new service as a result of his telephone calls on either September 10, 2008 or November 5, 2008. Smith Merit Brief at 13. He is wrong. The Commission, after weighing the evidence of record, properly found in its Order that “[i]n his September 10, 2008, and November 5, 2008 telephone calls to Ohio Edison, Mr. Smith was not successful in establishing electric service in his name at 1930 Mahoning Avenue.” *Complaint Case* (Opinion and Order at 23) (July 6, 2011), Appellant’s App. at 33. In reaching that conclusion, the Commission stated that:

[Mr. Smith] simply did not continue his telephone conversations with Ohio Edison's representatives long enough to provide the specific information the company needed to establish new service.

Id. at 18, Appellant’s App. at 28. The Commission also noted that:

[i]n order to furnish service at appropriate voltages, Ohio Edison requires prospective customers to provide, as part of an application for service, information regarding the characteristics of the requested new service, including the voltage, amps, and phase of the service, the type and size of the hot water source, the type of heating and cooling sources, and descriptions of major electrical appliances.

Id. at 18 (footnote 1), Appellant's App. at 28; Ohio Edison Ex. A (Vidal Direct) at 8, Supp. at 23; Ohio Edison Ex. D, Supp. at 25; Tr. at 159, Supp. at 17. This is important information and there is no dispute that Mr. Smith failed to provide any of this information to Ohio Edison repeatedly. Tr. at 137, Supp. at 16. Knowing the load characteristics helps Ohio Edison evaluate whether transformers and other electrical facilities in place are adequate for the proposed service. Ohio Edison Ex. A (Vidal Direct) at 8, Supp. at 23. This is especially important where (as here) authorized service has been disconnected for an extended period of time. *Id.*; Tr. at 159, Supp. at 17.

Furthermore, Mr. Smith's request for new service was atypical and complicated because evidence supported tampering with utility equipment on the premises. Tampering is a criminal theft offense under R.C. 4933.18 and R.C. 2913.01, a safety issue, and ultimately the cost for illegally stealing electricity is borne by other ratepayers. Under O.A.C. 4901:1-10-20(B)(1)(a), an electric company may disconnect a tampered meter, without prior notice, for safety reasons. Ohio Admin. Code § 4901:1-10-20(B)(1)(a) (West 2012); App. at 15. Both Ohio Edison and Mr. Smith agree that there was tampering in connection with the meter at 1930 Mahoning Avenue and that the meter base was damaged creating an unsafe condition. *Complaint Case* (Opinion and Order at 19) (July 6, 2011), Appellant's App. at 29. Mr. Smith could not be a customer of Ohio Edison

until the tampering issue was properly resolved. As described more fully below, the Commission found tampering at the meter created an unsafe condition and that Ohio Edison correctly took action to disconnect the tampered meter for safety reasons. *Id.* at 19, Appellant's App. at 29.

Mr. Smith also argues that O.A.C. 4901:1-10-12(B)(5) required Ohio Edison to provide him an explanation of what each applicant must do to receive service from that electric utility. Smith Merit Brief at 15. He mistakenly relies on O.A.C. 4901:1-10-12(B)(5) for the proposition:

Each electric utility shall provide to *new customers, upon application for service*, and existing customers upon request, a written summary of their rights and obligations under this chapter... The summary shall include, but not be limited to... [a]n explanation of what each applicant must do to receive service from that electric utility.

Ohio Admin. Code § 4901:1-10-12(B)(5) (West 2012) (emphasis added), App. at 11.

O.A.C. 4901:1-10-12(B)(5) expressly requires that the rights and obligations summary be provided to *new customers* contemporaneously with having completed an application for service. *Id.* As the evidence showed, Mr. Smith never made an application for service in the fall of 2008 and thus did not become an Ohio Edison customer at the property. *Complaint Case* (Opinion and Order at 23) (July 6, 2011), Appellant's App. at 33. Commission rules and Ohio Edison's tariff define the process by which service is established. A prospective customer requests service by submitting an application and the utility approves the service by accepting the application. Applicant is defined in O.A.C. 4901:1-18-01(A) as:

any person who *requests or makes an application* for any of the following residential services: electric, gas, or natural gas.

Ohio Admin. Code § 4901:1-18-01(A) (West 2012) (emphasis added); App. at 20. Ohio Edison's tariff states that:

before such service is supplied by the Company, an accepted application from the customer or other form of contract between the Company and the customer will be required.

Ohio Edison Ex. A (Vidal Direct) at 5, Supp. at 22. Ohio Edison's acceptance then brings the parties within the tariff, which constitutes the service contract. Mr. Smith failed to submit an application and Ohio Edison never approved service for this reason. No application was accepted by Ohio Edison because Mr. Smith did not complete the application process. As a result, Mr. Smith failed to become a customer of Ohio Edison. Since Mr. Smith was not a customer in the fall of 2008, he was not entitled to a rights and obligations summary. As such, the Commission correctly found that Mr. Smith had not yet completed the required process to initiate new service at that address. *Complaint Case* (Opinion and Order at 18) (July 6, 2011), Appellant's App. at 28.

Specifically the evidence shows that on November 5, 2010 an Ohio Edison agent offered to walk Mr. Smith through the process of placing an order for residential service. Tr. at 24-25, Supp. at 10-11. During that call, while the Ohio Edison agent repeatedly told him to remain on the line, Mr. Smith chose instead to hang up and terminate the call before necessary information could be provided to him. *Id.* Accordingly, the Commission correctly found that Mr. Smith's own actions failed to establish new service. *Complaint Case* (Opinion and Order at 18) (July 6, 2011), Appellant's App. at 28.

Considering the lack of information and the evidence of tampering, Mr. Smith did not meet its burden of proof and the Commission, as the finder of fact that weighs evidence, properly found that Mr. Smith did not make an application for new service in the fall of 2008. A party challenging an order of the Commission has a heavy burden, since the Court has consistently deferred to the Commission's judgment in matters that require it to apply its special expertise and discretion to make factual determinations. *Consumers' Counsel v. Pub. Util. Comm'n*, 117 Ohio St. 3d 301, 304, 883 N.E.2d 1035, 1039 (2008). Mr. Smith asks this Court to assume the Commission's role of weighing the evidence. This is improper and the Commission should be affirmed.

2. The Commission properly found that tampering with the meter at the property had occurred.

Mr. Smith argues that "the Commission erred in finding that both parties agreed that there was tampering in connection with the meter...as the[re] was no intent by C. Richard Smith to impede the correct registration of the meter." Smith Notice of Appeal at 1, Appellant's App. at 1; Smith Brief at 17-18. This argument is mistaken. For good reason, the Commission properly concluded that "[b]oth parties agreed that there was tampering in connection with the meter...and that the meter base was damaged, creating an unsafe condition." *Complaint Case* (Opinion and Order at 19) (July 6, 2011), Appellant's App. at 29. The identification of the person who tampered with the meter was not an issue that was raised by the parties in the complaint proceeding nor was it addressed by the Commission.

Below, Mr. Smith improperly attempted to shift the burden of proof to Ohio Edison. He stated that: “[t]he Commission greatly lowered the burden required to be met by Ohio Edison in determining that the parties agreed that tampering had occurred.” *Complaint Case* (Application for Rehearing at 9) (August 4, 2011), Appellant’s App. at 52. Mr. Smith confused the nature of the burden in complaint cases before the Commission. Mr. Smith, the complainant, bore the burden of proof. *See Ohio Bell Tel. Co. v. Pub. Util. Comm’n*, 49 Ohio St. 3d 123, 126 (1990); *Grossman v. Pub. Util. Comm’n*, 5 Ohio St 2d 189, 190, 214 N.E.2d 666 (1966). Mr. Smith had the burden with respect to every issue in this proceeding, including whether tampering occurred.

Mr. Smith also claimed that he never agreed tampering occurred at the property. *Complaint Case* (Application for Rehearing at 8-9) (August 4, 2011), Appellant’s App. at 51-52. His testimony at the hearing reveals otherwise:

Q: Mr. Smith, you believe that the meter had been tampered with before you moved into 1930 Mahoning Avenue, correct?

A: Yes.

Q: And you believe that because, in part, because the meter seal had been broken; isn't that right?

A: Yes.

Q: And you believe that when a meter seal is broken or cut, that that means the meter has been tampered with, correct?

A: Yes.

Tr. at 128-130, Supp. at 12-14.

Nonetheless, Mr. Smith denied that tampering occurred at the property. He relied on O.A.C. 4901:1-10-01(Z), which states:

Tampering means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so far as to reduce the amount of utility service that is registered on or reported by the meter. Tampering includes the unauthorized reconnection of a utility meter, conduit, or attachment that has been disconnected by the utility.

Ohio Admin. Code § 4901:1-10-01(Z) (West 2012), App. at 9. Mr. Smith claimed he never intended to “impede the correct registration of the meter.” *Complaint Case* (Application for Rehearing at 1) (August 4, 2011), Appellant’s App. at 44. He pointed out that the meter was properly recording usage by the time he took possession of the property. *Id.* at 9, Appellant’s App. at 52. He also asserted that a broken meter seal does not necessarily indicate that tampering occurred. *Id.* at 10-11, Appellant’s App. at 53-54. According to Mr. Smith, those factors amount to a lack of tampering. *Id.* But that assertion ignores the plain language of Rule 4901:1-10-01(Z), which indicates that tampering “includes the unauthorized reconnection of a utility meter conduit, or attachment that has been disconnected by the utility.” Ohio Admin. Code § 4901:1-10-01(Z) (West 2012), App. at 11. The meter was working when Mr. Smith took possession of the property even though it had been disconnected by Ohio Edison over three years earlier. *Complaint Case* (Opinion and Order at 2) (July 6, 2011), Appellant’s App. at 12. As demonstrated above, Mr. Smith “was not successful in establishing electric service in his name” at the property. *Id.* at 23, Appellant’s App. at 33. As a result, an “unauthorized reconnection”

occurred, and under O.A.C. 4901:1-10-01(Z), that “unauthorized reconnection” constitutes “tampering.” Accordingly, rehearing with respect to tampering was unnecessary and the Commission acted properly in denying it.

3. The Commission correctly found that Ohio Edison was not required to give prior notice of disconnection to Mr. Smith.

Finding that Mr. Smith was not a customer listed in Ohio Edison’s records for 1930 Mahoning Avenue, the Commission also found that “Ohio Edison took the correct action in disconnecting the tampered meter for safety reasons.” *Complaint Case* (Opinion and Order at 18, 23) (July 6, 2011), Appellant’s App. at 28, 33. Under O.A.C. 4901:1-10-20(B):

An electric utility may disconnect service for safety reasons without prior notice to a customer in either of the following circumstances: (1) The electric service meter, metering equipment, or associated property was damaged, interfered or tampered with, displaced or bypassed. (2) A person not authorized by the electric utility has reconnected service.

Ohio Admin. Code § 4901:1-10-20(B) (West 2012); App. at 15.

Mr. Smith asserts that the meter at the property was not disconnected for safety reasons. Smith Merit Brief at 17-18. He argues that Ohio Edison did not immediately disconnect the meter when it began to record usage. The argument is wrong; safety was the primary concern. Further, he argues that because disconnection occurred in winter months, disconnection for “safety reasons” should have some limitations. Smith Merit Brief at 18. Again, as described above, tampering is a criminal offense and a fire safety

issue. Where evidence of tampering exists, an electric company may disconnect a tampered meter, without prior notice, for safety reasons. Mr. Smith admitted at hearing that a broken meter base is dangerous. Tr. at 136, Supp. at 15. Further, there can be little doubt that someone had tampered with the meter because the seal was cut. At that point, Ohio Edison was justified in disconnecting the electrical service for safety reasons by removing the meter pursuant to O.A.C. 4901:1-10-20(B). Finally, even if someone had not tampered with the meter, once Ohio Edison's employee discovered the broken meter base, Ohio Edison was justified, if not obligated, in disconnecting the electrical service at the pole for safety reasons pursuant to O.A.C. 4901:1-10-20(B).

Mr. Smith's arguments fail to support his claim that the electrical service at the property was not disconnected for safety reasons. Because safety was an issue, the Commission properly found that Ohio Edison was not required to provide notice of disconnection.

Proposition of Law No. II:

The Commission has broad discretion in the conduct of its hearings. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (2000). The Commission properly denied evidence on rehearing that Mr. Smith had available but failed to present at hearing.

Mr. Smith claims that the Commission erred in denying rehearing when the application presented evidence that "audio recordings of the telephone conversations played at the hearing may have been altered." Smith Merit Brief at 18. This argument is

misguided. The Commission properly rejected Mr. Smith's request for rehearing with respect to the telephone call recordings for several reasons.

First, Mr. Smith did not present any evidentiary support in the hearing record that the audio recordings were altered. Rehearing is properly denied in cases where the party that made the application cannot provide any record support. *See* Ohio Rev. Code Ann. § 4903.10 (West 2012); App at 6. A party may apply for rehearing only with “respect to any matters determined in the proceeding.” *Id.* Mr. Smith was not entitled to rehearing on new allegations regarding the authenticity of the telephone-call recordings. Despite a full and fair opportunity at hearing to pursue that claim through expert testimony or other evidence, he failed to do so. In fact, Mr. Smith stipulated at hearing that the “tape recorded telephone conversations between C. Richard Smith and Ohio Edison personnel...are authentic recordings of those conversations made at the time of the telephone conversations in the ordinary course of business by respondent Ohio Edison Company.” *Complaint Case* (Opinion and Order at 5) (July 6, 2011), Appellant’s App. at 15. Mr. Smith offered no reason why evidence regarding the authenticity of the telephone call recordings could not have been offered at hearing. Mr. Smith noted that his counsel received the audio recordings six days before the hearing. *Complaint Case* (Order on Rehearing at 4-5) (August 31, 2011), Appellant’s App. at 7-8. Mr. Smith’s counsel also did not seek a continuance to further examine the recording. Mr. Smith's counsel received the audio recordings from Ohio Edison and had ample opportunity, acting with reasonable diligence, to have challenged the recordings at hearing. *Id.* With no record support, the telephone call recording could not have been examined on rehearing.

Second, rehearing is improper to investigate a late-raised claim. Lacking any record support for his claim regarding the telephone call recordings, Mr. Smith asserted that the Commission “under its own investigative authority” should analyze the recordings and allow Mr. Smith to present evidence regarding their authenticity. Smith Merit Brief at 19; *Complaint Case* (Application for Rehearing at 1) (August 4, 2011), Appellant’s App. at 44. Again, Mr. Smith failed to explain why the issue of the alleged alteration of the audio recordings could not have been brought up at the hearing. *Complaint Case* (Order on Rehearing at 5) (August 31, 2011), Appellant’s App. at 8. Rehearing is not proper for the purposes of instituting investigations. Instead, rehearing is permitted with “respect to any matters determined in the proceeding.” Ohio Rev. Code Ann. § 4903.10 (West 2012), App. at 6. The Commission acted properly and lawfully in refusing to take any additional evidence on the issue through rehearing.

R.C. 4901.13 provides that the “[C]ommission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all.” Ohio Rev. Code Ann. § 4901.13 (West 2012), App. at 6. The Commission has broad discretion in the conduct of its hearings. *Weiss v. Pub. Util. Comm’n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (2000) citing *Duff v. Pub. Util. Comm’n*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 273 (1978). The Commission has the discretion to decide how “it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.” *Toledo Coalition for Safe Energy v. Pub. Util. Comm’n*, 69 Ohio St. 2d 559, 560, 23 O.O.3d 474, 475, 433 N.E.2d 212, 214 (1982). For

these reasons, the Commission properly rejected Mr. Smith's request for rehearing with respect to the authenticity of the telephone call recordings.

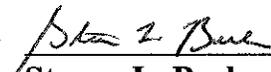
CONCLUSION

The Commission properly performed its fact finding role, making factual determinations based on an evaluation of the record evidence. The Commission's decision is supported fully by the record and should be affirmed.

Respectfully submitted,

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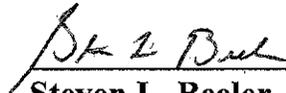


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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid upon the following parties of record, this 16th day of March, 2012.



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APPENDIX

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§ 2913.01. Theft and fraud general definitions

As used in this chapter, unless the context requires that a term be given a different meaning:

(A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

(B) "Defraud" means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.

(C) "Deprive" means to do any of the following:

(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

(2) Dispose of property so as to make it unlikely that the owner will recover it;

(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

(D) "Owner" means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful.

(E) "Services" include labor, personal services, professional services, rental services, public utility services including wireless service as defined in division (F)(1) of section 4931.40 of the Revised Code, common carrier services, and food, drink, transportation, entertainment, and cable television services and, for purposes of section 2913.04 of the Revised Code, include cable services as defined in that section.

(F) "Writing" means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.

(G) "Forge" means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct.

(H) "Utter" means to issue, publish, transfer, use, put or send into circulation, deliver, or display.

(I) "Coin machine" means any mechanical or electronic device designed to do both of the following:

(1) Receive a coin, bill, or token made for that purpose;

(2) In return for the insertion or deposit of a coin, bill, or token, automatically dispense property, provide a service, or grant a license.

(J) "Slug" means an object that, by virtue of its size, shape, composition, or other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill, or token made for that purpose.

(K) "Theft offense" means any of the following:

(1) A violation of section 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2911.32, 2913.02, 2913.03, 2913.04, 2913.041, 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33, 2913.34, 2913.40, 2913.42, 2913.43, 2913.44, 2913.45, 2913.47, 2913.48, former section 2913.47 or 2913.48, or section 2913.51, 2915.05, or 2921.41 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state, or of the United States, substantially equivalent to any section listed in division (K)(1) of this section or a violation of section 2913.41, 2913.81, or 2915.06 of the Revised Code as it existed prior to July 1, 1996;

(3) An offense under an existing or former municipal ordinance or law of this or any other state, or of the United States, involving robbery, burglary, breaking and entering, theft, embezzlement, wrongful conversion, forgery, counterfeiting, deceit, or fraud;

(4) A conspiracy or attempt to commit, or complicity in committing, any offense under division (K)(1), (2), or (3) of this section.

(L) "Computer services" includes, but is not limited to, the use of a computer system, computer network, computer program, data that is prepared for computer use, or data that is contained within a computer system or computer network.

(M) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

(N) "Computer system" means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.

(O) "Computer network" means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.

(P) "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data.

(Q) "Computer software" means computer programs, procedures, and other documentation associated with the operation of a computer system.

(R) "Data" means a representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner and that are intended for use in a computer, computer system, or computer network. For purposes of section 2913.47 of the Revised Code, "data" has the additional meaning set forth in division (A) of that section.

(S) "Cable television service" means any services provided by or through the facilities of any cable television system or other similar closed circuit coaxial cable communications system, or any microwave or similar transmission service used in connection with any cable television system or other similar closed circuit coaxial cable communications system.

(T) "Gain access" means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network, or any cable service or cable system both as defined in section 2913.04 of the Revised Code.

(U) "Credit card" includes, but is not limited to, a card, code, device, or other means of access to a customer's account for the purpose of obtaining money, property, labor, or services on credit, or for initiating an electronic fund transfer at a point-of-sale terminal, an automated teller machine, or a cash dispensing machine. It also includes a county procurement card issued under section 301.29 of the Revised Code.

(V) "Electronic fund transfer" has the same meaning as in 92 Stat. 3728, 15 U.S.C.A. 1693a, as amended.

(W) "Rented property" means personal property in which the right of possession and use of the property is for a short and possibly indeterminate term in return for consideration; the rentee generally controls the duration of possession of the property, within any applicable minimum or maximum term; and the amount of consideration generally is determined by the duration of possession of the property.

(X) "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method.

(Y) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

(Z) "Telecommunications service" means the providing, allowing, facilitating, or generating of any form of telecommunication through the use of a telecommunications device over a telecommunications system.

(AA) "Counterfeit telecommunications device" means a telecommunications device that, alone or with another telecommunications device, has been altered, constructed, manufactured, or programmed to acquire, intercept, receive, or otherwise facilitate the use of a telecommunications service or information service without the authority or consent of the provider of the telecommunications service or information service. "Counterfeit telecommunications device" includes, but is not limited to, a clone telephone, clone microchip, tumbler telephone, or tumbler microchip; a wireless scanning device capable of acquiring, intercepting, receiving, or otherwise facilitating the use of telecommunications service or information service without immediate detection; or a device, equipment, hardware, or software designed for, or capable of, altering or changing the electronic serial number in a wireless telephone.

(BB)(1) "Information service" means, subject to division (BB)(2) of this section, the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including, but not limited to, electronic publishing.

(2) "Information service" does not include any use of a capability of a type described in division (BB)(1) of this section for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(CC) "Elderly person" means a person who is sixty-five years of age or older.

(DD) "Disabled adult" means a person who is eighteen years of age or older and has some impairment of body or mind that makes the person unable to work at any substantially remunerative employment that the person otherwise would be able to perform and that will, with reasonable probability, continue for a period of at least twelve months without any present indication of recovery from the impairment, or who is eighteen years of age or older and has been certified as permanently and totally disabled by an agency of this state or the United States that has the function of so classifying persons.

(EE) "Firearm" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(FF) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(GG) "Dangerous drug" has the same meaning as in section 4729.01 of the Revised Code.

(HH) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(II)(1) "Computer hacking" means any of the following:

(a) Gaining access or attempting to gain access to all or part of a computer, computer system, or a computer network without express or implied authorization with the intent to defraud or with intent to commit a crime;

(b) Misusing computer or network services including, but not limited to, mail transfer programs, file transfer programs, proxy servers, and web servers by performing functions not authorized by the owner of the computer, computer system, or computer network or other person authorized to give consent. As used in this division, "misuse of computer and network services" includes, but is not limited to, the unauthorized use of any of the following:

(i) Mail transfer programs to send mail to persons other than the authorized users of that computer or computer network;

(ii) File transfer program proxy services or proxy servers to access other computers, computer systems, or computer networks;

(iii) Web servers to redirect users to other web pages or web servers.

(c)(i) Subject to division (II)(1)(c)(ii) of this section, using a group of computer programs commonly known as "port scanners" or "probes" to intentionally access any computer, computer system, or computer network without the permission of the owner of the computer, computer system, or computer network or other person authorized to give consent. The group of computer programs referred to in this division includes, but is not limited to, those computer programs that use a computer network to access a computer, computer system, or another computer network to determine any of the following: the presence or types of computers or computer systems on a network; the computer network's facilities and capabilities; the availability of computer or network services; the presence or versions of computer software including, but not limited to, operating systems, computer services, or computer contaminants; the presence of a known computer software deficiency that can be used to gain unauthorized access to a computer, computer system, or computer network; or any other information about a computer, computer system, or computer network not necessary for the normal and lawful operation of the computer initiating the access.

(ii) The group of computer programs referred to in division (II)(1)(c)(i) of this section does not include standard computer software used for the normal operation, administration, management, and test of a computer, computer system, or computer network including, but not limited to, domain name services, mail transfer services, and other operating system services, computer programs commonly called "ping," "tcpdump," and "traceroute" and other network monitoring and management computer software, and computer programs commonly known as "nslookup" and "whois" and other systems administration computer software.

(d) The intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the owner of the computer, computer system, or computer network or other person authorized to give consent.

(2) "Computer hacking" does not include the introduction of a computer contaminant, as defined in section 2909.01 of the Revised Code, into a computer, computer system, computer program, or computer network.

(JJ) "Police dog or horse" has the same meaning as in section 2921.321 of the Revised Code.

(KK) "Anhydrous ammonia" is a compound formed by the combination of two gaseous elements, nitrogen and hydrogen, in the manner described in this division. Anhydrous ammonia is one part nitrogen to three parts hydrogen (NH₃). Anhydrous ammonia by weight is fourteen parts nitrogen to three parts hydrogen, which is approximately eighty-two per cent nitrogen to eighteen per cent hydrogen.

(LL) "Assistance dog" has the same meaning as in section 955.011 of the Revised Code.

(MM) "Federally licensed firearms dealer" has the same meaning as in section 5502.63 of the Revised Code.

§ 4901.13. Publication of rules governing proceedings

The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public.

§ 4903.10. Application for rehearing

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

§ 4903.13. Reversal of final order - notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4905.26. Complaints as to service

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

§ 4933.18. Tampering with utility equipment

(A) In a prosecution for a theft offense, as defined in section 2913.01 of the Revised Code, that involves alleged tampering with a gas, electric, steam, or water meter, conduit, or attachment of a utility that has been disconnected by the utility, proof that a meter, conduit, or attachment of a utility has been tampered with is prima-facie evidence that the person who is obligated to pay for the service rendered through the meter, conduit, or attachment and is in possession or control of the meter, conduit, or attachment at the time the tampering occurred has caused the tampering with intent to commit a theft offense.

In a prosecution for a theft offense, as defined in section 2913.01 of the Revised Code, that involves the alleged reconnection of a gas, electric, steam, or water meter, conduit, or attachment of a utility that has been disconnected by the utility, proof that a meter, conduit, or attachment disconnected by a utility has been reconnected without the consent of the utility is prima-facie evidence that the person in possession or control of the meter, conduit, or attachment at the time of the reconnection has reconnected the meter, conduit, or attachment with intent to commit a theft offense.

(B) As used in this section:

(1) "Utility" means any electric light company, gas company, natural gas company, pipe-line company, water-works company, or heating or cooling company, as defined by division (A)(3), (4), (5), (6), (7), or (8) of section 4905.03 of the Revised Code, its lessees, trustees, or receivers, or any similar utility owned or operated by a political subdivision.

(2) "Tamper" means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so as to reduce the amount of utility service that is registered on the meter.

4901:1-10-01 Definitions.

As used in this chapter:

(A) "Applicant" means a person who requests or makes application for service.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Competitive retail electric service provider" means a provider of competitive retail electric service, subject to certification under section 4928.08 of the Revised Code.

(D) "Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period for services from both an electric utility and a competitive retail electric service provider.

(E) "Consumer" means any person who receives service from an electric utility or a competitive retail electric service provider.

(F) "Critical customer" means any customer or consumer on a medical or life-support system who has provided appropriate documentation to the electric utility that an interruption of service would be immediately life-threatening.

(G) "Customer" means any person who has an agreement, by contract and/or tariff with an electric utility or by contract with a competitive retail electric service provider, to receive service.

(H) "Customer premises" means the residence(s), building(s), or office(s) of a customer.

(I) "Director of the service monitoring and enforcement department" means the director of the service monitoring and enforcement department of the commission or the director's designee.

(J) "Electric distribution utility" shall have the meaning set forth in division (A)(6) of section 4928.01 of the Revised Code.

(K) "Electric light company" shall have the meaning set forth in division (A)(4) of section 4905.03 of the Revised Code.

(L) "Electric services company" shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.

(M) "Electric utility" as used in this chapter shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(N) "Electric utility call center" means an office or department or any third party contractor of an electric utility designated to receive customer calls.

(O) "Fraudulent act" means an intentional misrepresentation or concealment by the customer or consumer of a material fact that the electric utility relies on to its detriment. Fraudulent act does not include tampering.

(P) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.

(Q) "Major event" encompasses any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 4.5 of standard 1366-2003 adopted by the institute of electric and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages. For purposes of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

(R) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(S) "Outage coordinator" means the commission's emergency-outage coordinator.

(T) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(U) "Postmark" means a mark, including a date, stamped or imprinted on a piece of mail which services to record the date of its mailing, which in no event shall be earlier than the date on which the item is actually deposited in the mail. For electronic mail, postmark means the date the electronic mail was transmitted.

(V) "Renewable energy credit" means the fully aggregated attributes associated with one megawatt hour of electricity generated by a renewable energy resource as defined in division (A)(35) of section 4928.01 of the Revised Code.

(W) "Slamming" means the transfer of or requesting the transfer of a customer's competitive electric service to another provider without obtaining the customer's consent.

(X) "Staff" means the commission staff or its authorized representative.

(Y) "Sustained outage" means the interruption of service to a customer for more than five minutes.

(Z) "Tampering" means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so far as to reduce the amount of utility service that is registered on or reported by the meter. Tampering includes the unauthorized reconnection of a utility meter, conduit, or attachment that has been disconnected by the utility.

(AA) "Transmission outage" means an outage involving facilities that would be included in rate setting by the federal energy regulation commission.

(BB) "Universal service fund" means a fund established pursuant to section 4928.51 of the Revised Code, for the purpose of providing funding for low-income customer assistance programs, including the percentage of income payment plan program, customer education, and associated administrative costs.

(CC) "Voltage excursions" are those voltage conditions that occur outside of the voltage limits as defined in the electric utility's tariffs and are beyond the control of the electric utility.

4901:1-10-12 Provision of customer rights and obligations.

Each electric utility shall provide to new customers, upon application for service, and existing customers upon request, a written summary of their rights and obligations under this chapter. This written summary shall also be prominently posted on the electric utility's website. The summary shall be in clear and understandable language. Each electric utility shall submit the summary or amendments thereto to the chief of the reliability and service analysis division for review at least sixty calendar days prior to mailing the summary to its customers. For purposes of this rule "new customer" means a customer who opens a new account and has not received such a customer rights summary within the preceding year. The summary shall include, but not be limited to, the following:

(A) The electric utility and commission procedures for complaints, which shall include:

(1) How complaints are made to the electric utility, including a local or toll free number, an address and a website, if applicable.

(2) A statement that:

"If your complaint is not resolved after you have called (your electric utility), or for general utility information, residential and business customers may contact the Public Utilities Commission of Ohio for assistance at 1-800-686-7826 (toll free) or for TTY at 1-800-686-1570 (toll free) from 8:00 a.m. to 5:00 p.m. weekdays, or at www.PUCO.ohio.gov."

“Residential customers may also contact the Ohio Consumers’ Counsel for assistance with complaints and utility issues at 1-877-742-5622 (toll free) from 8:00 a.m. to 5:00 p.m. weekdays, or at www.pickocc.org.”

(B) Customer rights and responsibilities, which shall include:

(1) A list of customer rights and obligations relating to installation of service, payment of bills, disconnection and reconnection of service, and meter testing.

(2) Information detailing the customer’s responsibility to notify the electric utility of material changes in the customer’s equipment or usage within the time reasonably necessary to permit the electric utility to provide necessary facilities and acquire additional power supply, if needed. The summary shall provide examples of such changes in customer equipment and usage.

(3) A description of the following customer rights:

(a) The circumstances under which the electric utility may demand and/or hold security deposits.

(b) The circumstances under which customers may obtain deferred payment plans and low-income assistance plans, and information concerning those plans.

(4) The toll-free telephone number(s) for the “one-call” or “call-before-you-dig” protection service(s) to locate underground utility facilities.

(5) An explanation of what each applicant must do to receive service from that electric utility.

(6) Information explaining when a customer will be charged for the cost of modifying service, installing a meter, and/or providing facilities necessary to serve that customer.

(C) A statement notifying customers that, when electric utility employee(s) or agent(s) seek access to the customer’s and/or landlord’s premises, the customer or landlord may request the employee/agent to show photo identification and to state the reason for the visit.

(D) A statement concerning the availability of rate information, which shall include:

(1) A statement that the electric utility’s rates and tariffs are available for review at the electric utility’s office, on the electric utility’s website, and on the commission’s website.

(2) A statement that, upon inquiry by a customer regarding rates or energy efficiency, the electric utility will disclose to the customer the existence and availability of the electric utility’s alternative rates or any energy efficiency programs.

(E) A statement that customers may review a copy of the electric service and safety standards on the commission’s website or obtain a copy from the commission upon request.

(F) Information on privacy rights, which shall include:

(1) A statement that the electric utility is prohibited from disclosing a customer's account number without the customer's written consent or electronic authorization or without a court or commission order, except for the following purposes:

(a) The electric utility's collections and/or credit reporting.

(b) Participation in the home energy assistance program, the emergency home energy assistance program, and programs funded by the universal service fund, such as the percentage of income payment plan programs.

(c) Governmental aggregation.

(2) A statement that the electric utility is prohibited from disclosing a customer's social security number without the customer's written consent or without a court order, except for the following purposes:

(a) The electric utility's consumer credit evaluation.

(b) The electric utility's or competitive retail electric service (CRES) provider's collections and/or credit reporting.

(c) Participation in the home energy assistance program, the emergency home energy assistance program, and programs funded by the universal service fund, such as the percentage of income payment plan programs.

(3) A statement that customers have the right to request up to twenty-four months of their usage history, payment history, and detailed consumption data, if available, and time differentiated price data, if applicable, from the electric utility without charge.

(4) A statement that customers have the right to prohibit the electric utility from including their names on mass customer lists made available to CRES providers.

(5) A statement that staff is not prohibited from accessing records or business activities that would allow it to effectively monitor customer calls to the electric utility's call center.

(G) A statement that customers have the right to obtain, from their electric utility, a list of available CRES providers, that are actively seeking residential customers in its service territory and their phone numbers.

(H) A statement that customers returning to the electric utility's standard offer service due to default, abandonment, slamming, or certification rescission of a CRES provider will not be liable for any costs associated with the switch.

(I) Information concerning notice of a change in the customer's supplier of electric service.

(1) A statement that, if a change in a residential or small commercial customer's electric services company is initiated, the electric utility is required to send the customer a notice confirming the change.

(2) A statement that the customer has a right to cancel any change in its supplier of electric service within seven calendar days after the notice has been sent by calling the electric utility at the telephone number on the notice.

(J) Information explaining the procedures customers must follow if they believe their generation and/or transmission service has been switched without their consent. This explanation shall include, at a minimum, the following information:

(1) If a customer participates in the percentage of income payment plan or in a governmental aggregation, the customer's supplier of generation and/or transmission services appearing on the customer's bill may be a company other than the electric utility.

(2) If the customer's electric bill reflects a supplier of electric service not chosen by the customer, the customer should call the commission to initiate a slamming investigation.

(3) If the staff determines that the customer's service was changed without proper authorization:

(a) The customer will be switched back to the customer's previous supplier of electric service without charge to the customer.

(b) The customer's account will be credited for any switching fees resulting from the customer being switched without proper authorization.

(c) The customer will be credited or reimbursed for any charges in excess of what the customer would have paid absent the unauthorized change in electric service provider.

(K) Information concerning actual meter readings.

(1) A statement that the electric utility is required to obtain an actual meter reading when the customer initiates or terminates electric service with the electric utility, if the meter has not been read within the preceding sixty days.

(2) A statement that, if the meter has not been read within the preceding thirty-three to fifty-nine days, the electric utility is required to inform the customer, when the customer contacts the electric utility to initiate or terminate service, of the option to have an actual meter read, at no charge.

(3) A statement that the customer may request two actual meter reads per calendar year, at no charge, if the customer's usage has been estimated for more than two of the consecutively preceding billing cycles or if the customer has reasonable grounds to believe that the meter is malfunctioning.

4901:1-10-20 Fraudulent act, tampering, and theft of service.

(A) Each electric utility shall establish and maintain an anti-theft and anti-tampering plan and shall submit its plan and subsequent amendments to the director of the service monitoring and enforcement department.

(B) Disconnection of service for tampering or unauthorized reconnection.

(1) An electric utility may disconnect service for safety reasons without prior notice to a customer in either of the following circumstances:

(a) The electric service meter, metering equipment, or associated property was damaged, interfered or tampered with, displaced, or bypassed.

(b) A person not authorized by the electric utility has reconnected service.

(2) Each which electric utility that has disconnected service under this paragraph shall tag or seal the customer's meter and hand deliver a written notice to the customer or consumer at the service location. If no adult customer or consumer is present, each electric utility shall attach written notice to a conspicuous place on the premises. When an electric utility reasonably believes that tagging or sealing the meter, hand delivering a notice, or posting a notice may jeopardize employee safety, it shall promptly mail the notice, return receipt requested, to the customer or occupant. The notice shall clearly display each of the following items:

(a) An explanation that service was disconnected because one of the following circumstances was found:

(i) The meter, metering equipment and/or electric utility property was tampered with.

(ii) A person not authorized by the electric utility reconnected the customer's service.

(b) The electric utility's telephone number of the electric utility's office.

(c) A statement that the customer may contest the disconnection by contacting an electric utility representative at the telephone number provided.

(d) A statement that, if the customer does not contest the disconnection, the electric utility is not required to restore service until the customer has provided satisfactory assurances that such tampering or unauthorized reconnection has ceased and has paid or made satisfactory arrangements to pay the electric utility an amount that the electric utility calculates for unmetered service, any defaulted amount, any damage to the electric utility's equipment or meter, any security deposit (consistent with rule 4901:1-10-14 of the Administrative Code), and any tariffed reconnection and investigation charges.

(e) A statement that the staff is available to render assistance, and the commission's current address, toll-free and TTY numbers of the commission's call center, and the commission's website.

(3) If the customer meets with the electric utility to contest the disconnection, the electric utility shall timely mail or deliver its decision to the customer.

(C) Disconnection of service for fraudulent act.

An electric utility may disconnect service, after following the steps set forth in this paragraph, when a customer uses any fraudulent act, as defined by paragraph (O) of rule 4901:1-10-01 of the Administrative Code, to obtain or maintain service

(1) Before it may disconnect service for a fraudulent act, each electric utility shall hand deliver written notice to the customer or consumer at the service location. If no adult customer or consumer is present, the electric utility shall attach written notice to a conspicuous place on the premises. When an electric utility reasonably believes that hand delivering or posting notice may jeopardize employee safety, it shall promptly mail the notice, return receipt requested, to the customer or occupant.

(2) The notice shall clearly display each of the following items:

(a) A description of the alleged fraudulent act.

(b) The address and telephone number of the electric utility's office.

(c) A statement that the customer may contest the electric utility's findings by requesting a meeting with an electric utility representative.

(d) A statement that the electric utility may disconnect service if either of the following occurs:

(i) The customer does not contact the electric utility representative to contest the findings of the fraudulent act, within three business days after receiving this notice.

(ii) The customer does not provide a satisfactory explanation at that meeting.

(e) A statement that, if service is disconnected, the electric utility is not required to reconnect service until the customer pays or makes satisfactory arrangements to pay the electric utility the bill for service that was fraudulently obtained or maintained, any security deposit (consistent with rule 4901:1-10-14 of the Administrative Code), and any tariffed reconnection and investigation charges.

(f) A statement that the staff is available to render assistance, and the commission's current address, toll-free and TTY numbers of the commission's call center, and the commission's website.

(3) An electric utility may terminate service for a fraudulent act in the following circumstances:

(a) No sooner than three business days after delivery of the written notice required by this paragraph, if the customer does not contact the electric utility at the telephone number provided.

(b) No sooner than two business days after the customer received the electric utility's written adverse decision subsequent to the discussion between the customer and the electric utility representative, in the event that the customer initiated the discussion.

(D) Each electric utility shall maintain records that clearly set forth the basis for its decision to terminate service for a fraudulent act, tampering, unauthorized reconnection, or theft of service, and the steps taken under this rule.

4901:1-10-21 Customer complaints and complaint-handling procedures.

(A) As used in this rule, customer/consumer complaint means a customer/consumer contact when such contact necessitates follow-up by or with the electric utility to resolve a point of contention.

(B) Each electric utility shall make good faith efforts to settle unresolved disputes, which efforts may include meeting with the customer/consumer at a reasonable time and place.

(C) Except as ordered by the commission or directed by the staff in disconnection or emergency cases, each electric utility shall investigate customer/consumer complaints and provide a status report within three business days of the date of receipt of the complaint to:

(1) The customer/consumer, when investigating a complaint made directly to the electric utility.

(2) The customer/consumer and staff, when investigating a complaint referred to the electric utility by the commission or staff.

(D) If an investigation is not completed within ten business days, the electric utility shall provide status reports, either orally or in writing, to update the customer/consumer, or to update the customer/consumer and staff, where appropriate, every five business days until the investigation is complete, unless agreed to otherwise.

(E) The electric utility shall inform the customer/consumer, or the customer/consumer and staff, where appropriate, of the results of the investigation, orally or in writing, no later than five business days after completion of the investigation. The customer/consumer or staff may request the final report to be in writing.

(F) If the customer/consumer disputes the electric utility's report(s), the electric utility shall inform the customer/consumer that the staff is available to mediate complaints. The company

shall provide the customer/consumer with the commission's current address, toll-free and TTY numbers of the commission's call center, and the commission's website.

(G) If a customer contacts an electric utility concerning competitive retail electric service (CRES) issues, the electric utility shall take the following actions:

- (1) Review the issue with the customer to determine whether it also involves the electric utility.
- (2) Coordinate the resolution of any joint issues with the CRES provider.
- (3) Refer the customer to the appropriate CRES provider only in those instances where the issue lacks any electric utility involvement.

(H) Slamming complaints.

(1) A slamming complaint is a customer's allegation that the customer's supplier of electric service has been switched without the customer's authorization.

(2) If a customer contacts an electric utility with a slamming complaint after the end of the seven-day rescission period for the customer's enrollment with the alleged slamming CRES provider, the electric utility shall take the following actions:

(a) Provide the customer with the enrollment information contained in its records.

(b) Refer the customer to the commission and provide the customer with the commission's current address, toll-free and TTY numbers of the commission's call center, and the commission's website.

(c) Cooperate with the staff in any subsequent investigations of the slamming complaint, including assisting the staff in determining the amount of any restitution owed to the customer pursuant to paragraph (C)(5) of rule 4901:21-08 of the Administrative Code if the customer was switched without authorization from the electric utility's standard offer service.

(3) If a customer initiates a slamming complaint with the staff within thirty calendar days after being issued a bill from the alleged slammer, the customer shall not be required to pay the current charges assessed by the alleged slammer until the staff determines that the change in the customer's electric service provider was authorized.

(4) If the staff determines that a customer's service was switched without the customer's authorization, the staff shall notify the electric utility of such determination. After such notification, and if the electric utility is not at fault, the electric utility may then seek reimbursement from the CRES provider that improperly initiated the switch for any incremental costs incurred by the electric utility to correct the unauthorized switch including any switching fees. The electric utility shall provide the CRES provider an itemized list of any such incremental costs.

(5) If correcting an unauthorized switch involves returning the customer to its previous CRES provider, the electric utility shall make the corrective switch at the next regularly scheduled meter reading date following receipt of the enrollment request from the previous CRES provider. Such corrective switch shall be made in accordance with the electric utility's normal practices and procedures for switching customers, except that the electric utility shall not charge, or shall credit to the customer, any switching fees and the electric utility is not required to issue the customer the notice required by paragraph (F)(1) of rule 4901:1-10-29 of the Administrative Code.

(6) If correcting an unauthorized switch involves returning the customer to the electric utility's standard offer service, the electric utility shall make the corrective switch at the next regularly scheduled meter reading date in accordance with the electric utility's normal practices and procedures for switching customers, except that the electric utility shall not charge or shall credit to the customer any switching fees and the electric utility is not required to issue the customer the notice required by paragraph (F)(1) of rule 4901:1-10-29 of the Administrative Code.

(7) If, as part of correcting an unauthorized switch, a customer who was taking standard offer service from the electric utility at the time of the unauthorized switch is returned to standard offer service, the customer shall not be subject to any minimum stay or other commission-approved alternative for returning customers, unless the customer would have been subject to such a requirement had the unauthorized switch not occurred.

(8) If the electric utility switches the customer served by a CRES provider to the electric utility's standard offer service without authorization by the customer, without authorization by the appropriate CRES provider or pursuant to a commission order, the electric utility shall take the following actions:

(a) Not charge, or shall credit the customer, any switching fees and shall return the customer to the previous CRES provider, making the corrective switch at the next regularly scheduled meter reading date following receipt of the enrollment request from the previous CRES provider.

(b) By the next billing cycle, take all three of the following actions:

(i) Credit or refund to the customer any fees previously charged for switching the customer to the electric utility.

(ii) Either of the two following actions:

(ii)(a) If reported to staff within thirty calendar days after being issued a bill from the alleged slammer, absolve the customer of any liability for any charges assessed to the customer, excluding the distribution charges and refund to the customer any charges collected from the customer.

(ii)(b) If reported to the staff more than thirty calendar days after being issued a bill by the alleged slammer, credit the customer any fees the electric utility charged in excess of the amount the customer would have paid its previous CRES provider for the same usage.

(iii) If the customer can not be returned to the original contract terms with its previous CRES provider, the slamming electric utility shall credit or refund to the customer, the value of the customer's contract with the previous CRES provider for the remaining term of the contract immediately prior to the slam.

(c) Reimburse the CRES provider for any incremental costs incurred by the CRES provider to correct the unauthorized switch within thirty calendar days of receiving an itemized invoice of the incurred incremental costs.

4901:1-18-01 Definitions.

For purposes of this chapter, the following definitions shall apply:

(A) "Applicant" means any person who requests or makes application with a utility company for any of the following residential services: electric, gas, or natural gas.

(B) "Arrearages" means for each percentage of income payment plan (PIPP) customer such customer's current bill balance, plus the customer's accrued arrearage at the time the customer enrolls in the PIPP program, but does not include past due monthly PIPP payments.

(C) "Bona fide dispute" means a complaint registered with the commission's call center or a formal complaint filed with the commission's docketing division.

(D) "Collection charge" means a tariffed charge assessed to a residential customer by a utility company when payment or proof of payment is given to a utility company employee or agent sent to disconnect the service and who is authorized to accept payment in lieu of disconnection.

(E) "Commission" means the public utilities commission of Ohio.

(F) "Consumer" means any person who is an ultimate user of electric, gas, or natural gas utility service.

(G) "Customer" means any person who enters into an agreement, whether by contract or under a tariff, to purchase: electric, gas, or natural gas utility service.

(H) "Customer premise" means the service address where the customer receives the residential electric, gas, or natural gas utility service.

(I) "Default" means the failure to make the required payment on an extended payment plan by the due date.

(J) "Extended payment plan" means an agreement between the customer and the company that requires the customer to make payments over a set period of time to the company on unpaid amounts owed to the company.

(K) "Former percentage of income payment plan customer" (former PIPP customer) means a customer that remains within the gas or natural gas utility company's service territory who elects to terminate participation in the percentage of income payment plan program or is no longer eligible to participate in the percentage of income payment plan as a result of an increase in the household income or change in the household size and is not in a graduate percentage of income payment plan.

(L) "Fraudulent act" means an intentional misrepresentation or concealment by the customer or consumer of a material fact that the electric, gas, or natural gas utility company relies on to its detriment. "Fraudulent act" does not include tampering.

(M) "Graduate percentage of income payment plan customer" (graduate PIPP customer) means a customer who was previously enrolled in a percentage of income payment plan and who meets the requirements, as set forth in rule 4901:1-18-16 of the Administrative Code, to participate in the transitional phase of the income-based payment plan for low-income, residential customers served by regulated electric, gas, and natural gas utility companies.

(N) "Household income" has the meaning attributed to it by the Ohio department of development, office of community services, in the administration of the home energy assistance program.

(O) "Percentage of income payment plan" (PIPP) means the income-based payment plan for low-income, residential customers served by regulated electric, gas, and natural gas utility companies.

(P) "PIPP anniversary date" means the calendar date by which the PIPP customer must document his or her household income and household size to continue participation in the PIPP program or participate in the graduate PIPP program. The anniversary date shall be every twelve months from when the customer was enrolled in PIPP.

(Q) "PIPP customer" means the customer currently enrolled in PIPP.

(R) "PIPP reverification date" means the actual date on which the PIPP customer documented his or her household income and household size to continue participation in the PIPP program or graduate PIPP program. This date is used to calculate when any missed PIPP payments are due for continued PIPP program participation.

(S) "Tampering" means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so as to reduce the amount of utility service that is registered on the meter. Tampering includes the unauthorized reconnection of an electric, gas, or natural gas meter, or a conduit or attachment that has been disconnected by the utility company.

(T) "Utility company" means all persons, firms, or corporations engaged in the business of providing electric, gas, or natural gas service to consumers as defined in division (A)(11) of

section 4928.01, division (A)(4) of section 4905.03, and division (G) of section 4929.01 of the Revised Code, respectively.

(U) "Winter heating season" means the time period from November first through April fifteenth.