

IN THE SUPREME COURT OF OHIO

C. RICHARD SMITH	:	CASE NO.: 11-1828
	:	
APPELLANT,	:	On Appeal from the Ohio Public
VS.	:	Utilities Commission
	:	Case No.: 10-340-EL-CSS
OHIO EDISON COMPANY,	:	
	:	
APPELLEE,	:	

REPLY BRIEF OF APPELLANT C. RICHARD SMITH

Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax

Attorney for Appellant
C. Richard Smith

RICHARD MICHAEL DEWINE (0009181)
OHIO ATTORNEY GENERAL
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
(614) 466-4397
(614) 466-8764 fax

Attorney for Appellee
The Public Utilities Commission

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Jones Day
Allison Haedt (0082243)
325 John H. McConnell Boulevard
Suite 600
P.O. 165017
Columbus, Ohio 43216-5017
Attorney for Intervening Appellee
Ohio Edison Company

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Proposition of Law No. 1

The Public Utilities commission erred in determining that Appellant did not become a customer of Ohio Edison, who was entitled to the protections of notice pursuant to O.A.C. 4901:1-18-06 prior to disconnection of residential services.

Proposition of Law No. 2

The Public Utilities commission erred in determining that Ohio Edison properly disconnected electric services pursuant to O.A.C. 4901:1-10-20.

Both the Appellee Public Utilities Commission and the Intervenor-Appellee Ohio Edison attempt to rely upon the lack of a formal written application submitted by C. Richard Smith. Ohio Edison has a long multiple question application that it argues must be answered. Ohio Edison asserts that, without the completed application by C. Richard Smith and a formal acceptance of the application by Ohio Edison, C. Richard Smith is not entitled to any protection. O.A.C. 4901:1-10-1(A) defines applicant; "Applicant" means a person who requests or makes application for service.

O.A.C. 4901: 1-10-02(E) provides:

Except as set forth below, the rules of this chapter supersede any inconsistent provisions, terms, and conditions of the electric utility's tariffs. An electric utility may adopt or maintain tariffs providing superior standards of service, reliability or safety, or greater protection for customers or consumers. Further, an electric utility may adopt or maintain tariffs which are not inconsistent with the rules of this chapter.

O.A.C. 4901: 1-10-12 provides:

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:

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

It is patently clear from the record, through the telephone conversations and through the testimony of C. Richard Smith, that Mr. Smith made a request for service. Mr. Smith was an applicant pursuant to O.A.C. 4901:1-10-1(A). Mr. Smith therefore qualifies under O.A.C. 4901:1-10-12; i.e. “upon application for service”. Ohio Edison repeatedly stated that Mr. Smith would require “new service”. As a result of Mr. Smith’s request for service, Mr. Smith becomes a new customer, who upon application for service, is required to receive a written summary of his “rights and obligations” pursuant to O.A.C. 4901:1-10-12. Within the written summary, Mr. Smith should have been provided an explanation of what each applicant must do to receive service from that electric utility. O.A.C. 4901:1-10-12(B)(5).

Ohio Edison and the Public Utilities Commission both contend that C. Richard Smith was not entitled to any rights, protections, or even a written explanation of his rights, because he did not complete the formal application process required by Ohio Edison’s Tariff. This formal application was submitted as OE Exhibit D. Both Ohio Edison and the Public Utilities Commission ignore O.A.C. 4901:1-10-02(E). If there is a conflict between the Rules provided by the Ohio Administrative Code and any Tariff by the electrical utility company, then the Rules prevail. “[T]he rules of this chapter supersede any inconsistent provisions, terms, and conditions of the electric utility’s tariffs.” O.A.C. 4901:1-10-02(E)(*emphasis added*).

In the direct testimony of Carlos Vidal, he testifies that “Under Section II of Ohio Edison’s tariff, in order for Ohio Edison to establish service with a customer, the customer must first make an application for service, which must then be accepted by Ohio Edison. These

applications typically are processed by the contact center, and there are several procedures that must be followed in processing such applications.” These additional procedures are provided for in the Tariff and are inconsistent with the minimal requirements of the Rules set forth above. Ohio Edison and the Public Utility Commission do not even attempt to argue that the two are consistent. Instead, it is simply how it has always been done.

The court has “complete and independent power of review as to all questions of law” in appeals from the commission. *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 678 N.E.2d 922. The court has explained that it may rely on the expertise of a state agency in interpreting a law where “highly specialized issues” are involved and “where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.” *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

Both Ohio Edison and the Public Utilities Commission argue that this Court must give deference to the Commission because this case involves an area of “highly specialized issues” requiring “agency expertise”. This is not a highly specialized area. The agency expertise is not required. Instead, Ohio Edison and the Public Utilities Commission seem to deal with this issue so often, that tradition and normal procedures have apparently overtaken the Rules set forth in the Ohio Administrative Code. C. Richard Smith, at a minimum, made a request for electric service and was required to receive a written explanation of what was required of him to become a customer of Ohio Edison. Without providing C. Richard Smith the written explanation of what was required of him, Ohio Edison and the Public Utilities Commission can not require C. Richard Smith to fulfill the application requirements set forth in the Ohio Edison Tariff.

Similarly, Ohio Edison and the Public Utilities Commission are constrained by the normal procedures and standard course of action in determining whether C. Richard Smith was a customer. Both Appellee and Intervenor-Appellee ignore the Rules established by the Ohio Administrative Code.

A "customer" is defined by O.A.C. 4901:1-18-01(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. C. Richard Smith was a customer of Ohio Edison if he entered into an agreement to purchase electricity for 1930 Mahoning Avenue with Ohio Edison.

[T]he relationship between a utility and its customer is one of contract. The Public Utilities Commission of Ohio, in resolving utility service disputes under R.C. 4905.04, has held that even a consumer of utility services is not liable for unpaid bills in the absence of a contractual relationship. *Abele v. Columbia Gas of Ohio, Inc.* (Opinion and Order issued Feb. 19, 1985), Case No. 84-73-GA-CSS; *Kiebler v. Ohio Power Co.* (Opinion and Order issued May 8, 1984), Case No. 83-1212-EL-CSS. The only party responsible for the payment of bills is a "customer," defined in Ohio Adm.Code 4901:1-18-02 as "any person who enters a contractual agreement with the company to receive electric or gas service." *Id.* *Cincinnati Gas & Electric Company, v. Sinkfield*, (Apr. 8, 1987), Hamilton App. No. C-860323.

"Express" and "implied" contracts are both contracts. To recover on either, the proponent must prove that an agreement, based on a meeting of the minds of the parties and on mutual assent, existed, to which the parties intended to be bound. *Columbus, Hocking Valley & Toledo Ry. Co. v. Gaffney* (1901), 65 Ohio St. 104, 61 N.E. 152. *Lucas v. Costantini* (1983), 13 Ohio App.3d 367.

Here, C. Richard Smith was a customer of Ohio Edison as there was an agreement between the parties for the provision of services and for the payment of the same. This agreement was evidenced by the telephone conference between C. Richard Smith and Ms. Partello on November 5, 2008.

MS. PARTELLO: Okay. Well, as far as I'm showing, I mean, you haven't used that much electricity since all of that happened.

MR. SMITH: Correct.

MS. PARTELLO: And it may have been our error that we actually did never disconnect it. Now, the inspection, it looks like the inspection was received and they had to put the order in the system just for the inspection to be tied up to that.

MR. SMITH: Uh-huh.

MS. PARTELLO: So I'm showing the note that the inspection was received and approved. Now, as far as getting the service started after the inspection is done, what we're going to have to do, everything looks okay as far as getting the service started. Now, any usage that has been used, of

course, you would be responsible for, for recently. Now, I looked at it and it's only like a hundred to 200 kilowatt hours, I believe, and that's for the last month.

MR. SMITH: Yeah. Well, the only thing he plugged in is a couple drills and stuff in it.

MS. PARTELLO: So it shouldn't be much that you should be responsible for, but of course, you would need to pay for that usage. Now, what I'm going to do is get all that noted and then I'll get you over to our New Service Department. They're the ones that handle the inspection. They will be able to tie the order and the inspection together and then go ahead and get the service put into your name for you.

(Td. 19, pages 23-24.).

The service to be provided was understood, and the rate at which the service would be charged was also established. Further, in Ohio Edison's brief, it states at footnote 10 that "unit of measurement, and rates are not subject to negotiation". This makes it even more clear that the terms of the contract were understood by the parties. C. Richard Smith entered into an agreement with Ohio Edison; C. Richard Smith had a contract with Ohio Edison. Pursuant to O.A.C. 4901:1-18-01(G) C. Richard Smith was a customer of Ohio Edison. But once again, because C. Richard Smith did not become a customer in the manner in which Ohio Edison and the Public Utilities Commission are familiar, these entities ignore that C. Richard Smith was a customer. Instead, these entities make the same argument: C. Richard Smith cannot be a customer because he did not follow the application process described in Ohio Edison's tariff.

Rule 4901:1-18-05, O.A.C., requires that a utility company provide at least 14 days notice of pending disconnection and provide the customer with personal notice on the day of disconnection. Section 4933.122, Revised Code, states that reasonable prior notice and a reasonable opportunity to dispute the reasons for disconnection must be given by a utility company before termination of service to a residential customer.

In the Matter of the Complaint of Emma Binford, v. Duke Energy Ohio, Inc. 2010 WL 5262377 (Ohio P.U.C.) No. 09-669-EL-CSS.

C. Richard Smith entered into an agreement with Ohio Edison and thereby became a customer of Ohio Edison. As a customer of Ohio Edison he was entitled to prior notice of the disconnection. Ohio Edison did not provide any such prior notice and therefore, the Public

Utilities Commission erred in failing to find that Ohio Edison improperly disconnected electrical service without proper prior notification.

Ohio Edison and the Public Utilities Commission assert that C. Richard Smith agreed that “tampering” occurred and therefore service could be terminated without prior notice. First, C. Richard Smith did not agree that tampering had occurred as defined by the Ohio Administrative Code. There was no effort to bypass the meter or obtain unmetered electricity. C. Richard Smith was the party who advised Ohio Edison that the electricity was still on. C. Richard Smith explains that vagrants were living in the premises. C. Richard Smith surmises that the vagrants had something to do with the power still being on.

Ohio Edison relies upon the use of the word “tampering” by C. Richard Smith as the only evidence that “tampering” had occurred. Mr. Smith does not use the word tampering until representatives of Ohio Edison use the word in his third or fourth telephone conversation with Ohio Edison in November of 2008. In fact, Ms. Partello states that the power may still be on as a result of Ohio Edison’s mistake. “And it may have been our error that we actually did never disconnect it.”

Mr. Padovan’s testimony demonstrates the attempt by Ohio Edison to bootstrap the disconnection for “safety reasons” with the phrase “tampering”.

A. No. All it said on there, it was final and it had the previous tenant's name on the computer. If it was a turn on it would show C. Richard Smith or any new tenant showing on the top of my screen. This showed it was final, that it was inactive, and we had no new customer signed up. And when I have that and I go to a house and it's obviously empty and I have tampering, I pull the meter for the safety of the public.

(Tp. 19, page 189, line 1-10.).

O.A.C. 4901:1-10-20 (B) Disconnection of service for tampering or unauthorized reconnection, provides:

(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.

Ohio Edison assumed that “tampering” occurred, because Mr. Padovan failed to recognize C. Richard Smith as a customer of Ohio Edison. Even though Mr. Smith entered into an agreement for electrical service with Ohio Edison, C. Richard Smith was not considered to be a customer. Mr. Padovan, regardless of his use of the phrase “safety of the public”, disconnected service because the meter was running and there was not a “new customer” on Mr. Padovan’s computer screen.

Ohio Edison and the Public Utilities Commission improperly interpret O.A.C. 4901:1-10-20(B) to mean that a safety reason exists, negating the need for prior notification, every time Ohio Edison can establish “tampering” or a unauthorized “reconnected service”. The above quoted Ohio Administrative Code Section is more properly interpreted that Ohio Edison may disconnect electrical service without prior notice “for safety reasons” in two situations (1) tampering or (2) unauthorized reconnected service. Ohio Edison must still establish a “safety reason” under O.A.C. 4901:1-10-20(B). Ohio Edison cannot establish a “safety reason” justifying the disconnection without prior notice, given the fact that Ohio Edison was advised that the electric service was on during C. Richard Smith’s initial telephone call on September 10, 2008.

Based upon the above, as well as, the arguments set forth in Appellant C. Richard Smith’s merit brief, this Court should find that C. Richard Smith was a customer of Ohio Edison

entitled to prior notice for before electrical service was disconnected. Ohio Edison cannot rely upon "safety reasons" to justify its lack of prior notice when no such "safety reason" existed. Ohio Edison was aware that the electric service was being provided to 1930 Mahoning Avenue since September 10, 2008.

Proposition of Law No. 3

The Public Utilities commission erred in denying the application for rehearing when the application presented evidence that tape recorded conversations played at the hearing may have been altered.

The Public Utilities Commission erred in denying Mr. Smith's application for rehearing. Mr. Smith's application provided the reasons why the evidence was not presented at the initial hearing. The evidence was only discovered shortly before the application for rehearing was filed. Ohio Edison relies upon the possession of the tapes for six days prior the initial hearing. Ohio Edison and the Public Utilities Commission assert that C. Richard Smith should have raised the issue at the hearing after this short period of time. Never mind the intervening weekend and holiday. Forget about the passage of time from the September 10, 2008 telephone call and the February 23, 2011 hearing.

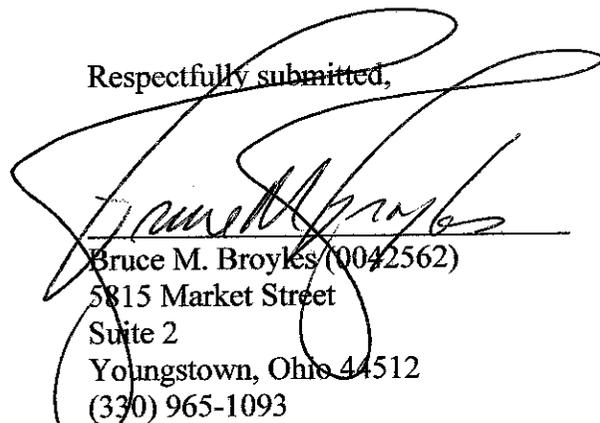
At the February 23, 2011 hearing, a majority of the evidence was presented by way of audio tapes of telephone conversations between C. Richard Smith and Ohio Edison representatives. The audio recording was submitted as Exhibit G. A copy of Exhibit G was forwarded to an expert, Arlo West of Creative Forensic Services. From Mr. West's examination of the first telephone conference dated September 10, 2008, Mr. West has identified thirteen (13) areas of concern.

The enormity of the issue raised in the application for rehearing, should require additional consideration. Instead, both Ohio Edison and the Public Utilities Commission rely upon the standard course of conduct and normal procedure, "there was no record evidence" presented. There was no ability to present record evidence of the possible alteration of the tape recordings. Evidence was not available until after the hearing, despite Appellant's diligent efforts.

Based upon the above, as well as the arguments in Appellant C. Richard Smith's merit brief, this Court should reverse the decision of the Public Utilities Commission and allow a rehearing.

This Court should reverse the determination of the Ohio Public Utilities Commission and find that Ohio Edison violated the Ohio Administrative Code requiring prior written notice and a reasonable opportunity to dispute the termination of electrical services. Ohio Edison also violated those Ohio Administrative Code provisions which severely limit the ability to disconnect a customer's electrical service during the winter season. The required prior notice and reasonable opportunity to dispute the connection should not be denied based upon an alleged safety reason that Ohio Edison ignored for 136 days.

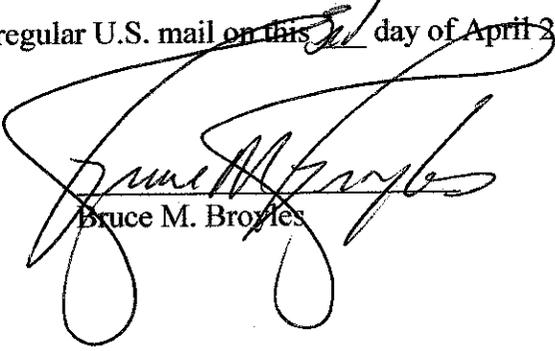
Respectfully submitted,



Bruce M. Broyles (0042562)
5815 Market Street
Suite 2
Youngstown, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Appellant
C. Richard Smith

CERTIFICATE OF SERVICE

A copy of the reply brief was served upon Richard Michael Dewine, Ohio Attorney general, c/o Public Utilities Section, 180 East Broad Street, 6th Floor, Columbus, Ohio 43215-3793, and upon Allison Haedt, Attorney for Ohio Edison, of Jones Day, at P.O. 165017, Columbus, Ohio 43216-5017 Ohio 44446, by regular U.S. mail on this 21 day of April 2012.



Bruce M. Broyles