

ORIGINAL

In The
SUPREME COURT OF OHIO

Allied Erecting & Dismantling Co.,
Inc.,

Appellant,

v.

The Public Utilities Commission of
Ohio,

Appellee.

Case No. 2014-0008

On appeal from the Public Utilities
Commission of Ohio, Case No. 07-905-
EL-CSS, *In the Matter of the Complaint
of Allied Erecting & Dismantling Co.,
Inc. v. Ohio Edison Company.*

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

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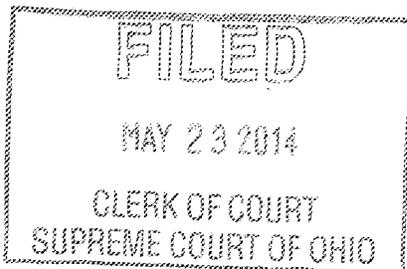
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SUPREME COURT OF OHIO**

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Appellant,	:	Case No. 2014-0008
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v.	:	On appeal from the Public Utilities Commission of Ohio, Case No. 07-905- EL-CSS, <i>In the Matter of the Complaint of Allied Erecting & Dismantling Co., Inc. v. Ohio Edison Company.</i>
The Public Utilities Commission of Ohio,	:	
	:	
Appellee.	:	

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

INTRODUCTION

Appellant, Allied Erecting & Dismantling Co., Inc. (Allied) asks this Court to reweigh certain factual findings made by the Public Utilities Commission of Ohio (Commission).¹ In this case, Ohio Edison Company (Ohio Edison or Company) did not read

¹ Although Allied named Ohio Edison as the Appellee in the caption of its Notice of Appeal, the Commission is the proper Appellee. R.C. 4903.13, Appellant's App. at 45 (hereinafter references to Appellee's appendix attached hereto are denoted "App. at ___;" references to Appellee's supplement are denoted "Supp. at ___;" references to Appellant's appendix are denoted "Appellant's App. at ___;" and references to Appellant's Supplement are denoted Appellant's Supp. at ___"). Under this Court's precedent, this is a non-jurisdictional defect. *Consolidated Rail Corp. v. Pub. Util. Comm.*, 40 Ohio St.3d 252, 254, 533 N.E.2d 317 (1988).

one of six meters at Allied's facility for several years. The Commission found that Ohio Edison violated a Commission rule when it failed to read this meter. However, even when a utility violates a Commission rule, its violation does not entitle a customer to free or discounted electric service. Therefore, the Commission weighed the evidence and ordered Allied to pay Ohio Edison for the electric service it received using a calculated estimate the Commission found reasonable. Allied appeals that Commission order.

Allied acknowledges that it owes something for the electricity it used, just not what the Commission found it owed. As the fact finder, the Commission held a hearing on the billing issue, took conflicting evidence, weighed that evidence, and reached a decision. While it found that Ohio Edison violated a Commission rule when it failed to obtain actual meter readings under O.A.C. 4901:1-10-05(I), the Commission also found that Allied failed to establish that Ohio Edison's backbilling and estimated monthly bills were unreliable or unreasonable. Allied also did not present evidence of an alternative calculation showing that it owed Ohio Edison a lower amount. The backbilling and estimated monthly bills were factual matters that the Commission properly considered. The Commission's order should be affirmed.

STATEMENT OF THE FACTS AND CASE

A customer's electricity usage is usually tracked and billed through a meter. Larger industrial customers, like Allied in this case, may have multiple meters at a facility. Here, a vehicle struck a pole and destroyed a meter at Allied's facility identified as meter 667. *In the Matter of the Complaint of Allied Erecting & Dismantling Co., Inc. vs.*

Ohio Edison Company (“*Complaint Case*”), Case No. 07-905-EL-CSS (Opinion and Order at 2) (Sep. 11, 2013), Appellant’s App. at 8. When Ohio Edison responded to destroyed meter 667, its work notifications incorrectly identified the damaged meter as meter 935 and mistakenly removed meter 935 from the Company’s billing system. *Id.* However, meter 935 was not damaged and continued to operate. *Id.* As a result, Allied was not billed for its electric usage for meter 935 beginning in February 2004. *Id.* at 3, Appellant’s App. at 9.

It was not until June 2006 when Ohio Edison discovered that meter 935 was no longer in Ohio Edison’s billing system or being read. *Id.* When Ohio Edison discovered its error, it calculated an estimate of Allied’s bill for its electric usage from February 2004 until December 2006. *Id.* The final backbilled amount was \$94,676.58. *Id.*

After a number of communications between Allied and Ohio Edison, Allied filed a complaint at the Commission.² *Id.* at 1, 3-4, Appellant’s App. at 7, 9-10. Following an evidentiary hearing, the Commission found that Ohio Edison violated O.A.C. 4901:1-10-05(I) when it failed to obtain actual readings as required under the rule. *Id.* at 5, Appellant’s App. at 11. The Commission ordered Ohio Edison to review its internal procedures

² In its complaint, Allied asked the Commission to require Ohio Edison to provide Allied with (1) an explanation as to why and how it was final billed in error, (2) an explanation of the backbilling’s accuracy, (3) protection from the assessment of interest and late fees, and (4) the preservation of an appropriate payment plan for any amount due. *Complaint Case*, Case No. 07-905-EL-CSS (Complaint at 4) (Aug. 10, 2007), Appellant’s Supp. at 112. The Commission’s Opinion and Order provided the relief that Allied requested. Allied received an explanation why it was backbilled in error and an explanation of the backbilling’s accuracy. Allied also did not have to pay interest or late fees and was able to use a payment plan.

and file a report with the Commission, which Ohio Edison did. *Id.* However, the Commission found that, as a complainant with the burden of proof, Allied failed to provide the Commission sufficient evidence to demonstrate that Ohio Edison improperly calculated Allied's backbilling or an alternative methodology to estimate Allied's bills. *Id.* at 11, Appellant's App. at 17. Therefore, based on the record, the Commission found that Allied owed \$94,676.58 to Ohio Edison for the electric service it received. *Id.* at 13, Appellant's App. at 19. This appeal ensued.

ARGUMENT

Proposition of Law No. I:

The Commission found, as a factual matter, that Allied failed to sustain its burden of proof of showing that Ohio Edison's backbilling and estimated monthly bills were unreliable. The Ohio Supreme Court will not reverse or modify the Commission decision where the 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.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50.

Allied challenges the Commission's factual determinations and thus bears the burden of showing that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*; *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966). This is a heavy burden. *See Constellation NewEnergy, Inc.*, at ¶ 50. 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 rec-

ord, such Court is of the opinion that such order was unlawful or unreasonable.” Appellant’s App. at 45. In matters involving the Commission’s special expertise and the exercise of its discretion, the Court generally defers to the judgment of the Commission. *Constellation NewEnergy, Inc.*, at ¶ 50. It should do so here. This case challenges factual determinations that pertain to customer backbilling based on electricity usage estimates, a matter within the Commission’s expertise. Allied asks the Court to reweigh the evidence and substitute its judgment for the Commission’s judgment. That is not the function of this Court on appeal. *See Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 39. The Commission’s decision was both reasonable and lawful. The Court will presume that Commission orders are reasonable; it falls to the appellant (Allied) to upset that presumption. *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 17 citing *Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 107, 163 N.E.2d 167 (1959). Allied fails to meet this burden and, therefore, this Court should affirm the order issued below.

A. Ohio Edison's tariff³ provides for backbilling based on estimated usage. Ohio Edison demonstrated that its billing estimates were accurate, fair, and reliable and Allied failed to demonstrate otherwise.

In Commission complaint proceedings such as the case below, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966). Allied, as the complainant, failed to sustain its burden of proof below.

Ohio Edison's tariff provides for customer billing based on estimated usage:

Estimated bills: The Company attempts to read meters on a monthly basis but there are occasions when it is impractical or impossible to do so. In such instances the Company will render an estimated bill based upon: past use of service and estimated customer load characteristics. Where the customer has a load meter and the actual load reading when obtained is less than the estimated load used in billing, the account will be recalculated using the actual load reading.

Article VII, Paragraph (F) of P.U.C.O No. 11, Appellant's Supp. at 7.

The Commission weighed the evidence and found that Ohio Edison's backbilling estimates were reasonably based on Allied's past use of service and average customer load characteristics. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 11) (Sep. 11, 2013), Appellant's App. at 17. Ohio Edison based the first twelve months of estimates on historical usage from the lowest meter reading recorded over a two-year period in the corresponding month. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion

³ A utility tariff is a schedule of a public utility's rates or charges that are approved by the Commission and on file with the Commission.

and Order at 11) (Sep. 11, 2013), Appellant's App. at 17; *id.* (Direct Testimony of L. Nentwick (OE Ex. 1 at 20-22) (Apr. 2, 2008), Supp. at 5-7; Tr. II at 216-219, Supp. at 27-31. An estimation methodology based off of the lowest meter reading is not only fair, but likely worked to Allied's benefit. *Complaint Case*, Case No. 07-905-EL-CSS (Entry on Rehearing at 5) (Nov. 6, 2013), Appellant's App. at 25. Ohio Edison estimated the remaining months using an average of historical usage and actual meter readings for the months that actual readings took place (June 2006, July 2006, and August 2006). *Id.*; *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 3) (Sep. 11, 2013), Appellant's App. at 9. That type of estimation was what the tariff required. The Commission appropriately found that Ohio Edison's backbilling calculations were appropriate and performed in a manner consistent with the Company's tariff.

Allied disagrees with the methodology Ohio Edison used to estimate Allied's bills, claiming it to be flawed and unreliable. However, Allied failed to rebut the reasonableness of Ohio Edison's estimate or provide a reasonable alternative estimate. Instead, Allied seems to indicate that backbilling estimates should be based upon the single (and not surprisingly the lowest) meter reading of 38 kW, which took place in June 2006. *See* Allied's Merit Brief at 12. But, the Commission found that the 38 kW meter reading was insufficient evidence that Ohio Edison's backbilling estimates were improper. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 11) (Sep. 11, 2013), Appellant's App. at 17. At hearing, Allied witness Hull testified that the actual reading of 38 kW in June 2006 indicated the demand for the previous 28 months was less than or equal to 38 kW. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10) (Sep. 11,

2013), Appellant's App. at 16; Tr. II at 208-209, 222-243, Supp. at 24-26, 32-55. But the Commission found Mr. Hull failed to substantiate any basis to adopt this conclusion and that he lacked experience in calculating customer bills. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10) (Sep. 11, 2013), Appellant's App. at 16. Mr. Hull admitted that, while he had worked at Ohio Edison for over 30 years, he was not responsible for calculating customer bills or calculating estimated bills, and had never worked in the customer support department. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10) (Sep. 11, 2013), Appellant's App. at 16; Tr. I at 180-183, Supp. at 14-17. The Commission found that additional facts undermined Mr. Hull's testimony including: his lack of knowledge about the Commission's requirements on estimated bills and his erroneous belief that Ohio Edison read every single meter for every single Ohio Edison customer. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10) (Sep. 11, 2013), Appellant's App. at 16; Tr. I at 210-214, Supp. at 18-22. The Commission, as the fact finder, properly afforded less weight to Mr. Hull's testimony.

As part of its case, Ohio Edison also provided evidence challenging the 38 kW meter reading's accuracy, which Allied failed to rebut. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10) (Sep. 11, 2013), Appellant's App. at 16. Specifi-

cally, Ohio Edison witness Nentwick testified that the 38 kW reading was likely a transcription error, a mistake that is not uncommon.⁴ *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10) (Sep. 11, 2013), Appellant’s App. at 16; Tr. II at 237-244, Supp. at 48-56. As the Commission noted, the June 2006 [38 kW] reading was “significantly less than any actual Allied load reading,” which raised questions as to the number’s reasonableness. *Complaint Case*, 07-905-EL-CSS, (Opinion and Order at 10) (Sep. 11, 2013), Appellant’s App. at 16. The “next actual readings of the meter in July and August of 2006 were 78 and 84 kW, respectively.” *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 11) (Sep. 11, 2013), Appellant’s App. at 17; *id.* (Direct Testimony of L. Nentwick (OE Ex. 1) at 23-25) (Apr. 2, 2008), Supp. at 8-10. Further, the record established that the lowest reading, other than the purported 38 kW reading, was 70 kW in 2003, and that the last actual reading of the meter prior to its removal from the billing system was 99 kW. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 10-11) (Sep. 11, 2013), Appellant’s App. at 16-17; Allied Erecting Electric usage History (Allied Ex. E), Supp. at 11-12. Based on these facts, the Commission found that “the record clearly establishes that the 38 kW reading is an outlier based on other actual readings.” *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 11) (Sep. 11, 2013), Appellant’s App. at 17.

⁴ Transcription errors are common because meters can be read from left to right or right to left. Tr. II at 244, Supp. at 55-56.

The accuracy of the 38 kW reading was further cast into doubt by Allied witness Ramun who indicated that Allied faced serious economic hardships in 2003, which required the company to significantly downsize its operations. *Id.* But, beginning in 2004 through 2006, he testified that Allied began to recover and “ramped up” operations. *Id.* He acknowledged that the company used more electricity as the company recovered from its economic hardships. *Id.* Although Mr. Ramun testified that Allied used external generators off and on throughout the years in question, Allied failed to establish any nexus between the low 38 kW reading and the use of the generators. *Id.* The Commission properly found that Allied failed to support its argument that the June 2006 meter read of 38 kW was accurate.

Allied failed to rebut the reasonableness of Ohio Edison’s estimate or provide a reasonable alternative estimate. Consequently, the Commission found that Allied failed to sustain its burden of proof of showing that Ohio Edison’s billing estimates were unreliable. *Id.* at 12, Appellant’s App at 18. In contrast, Ohio Edison offered evidence that showed it calculated estimated usage in a fair and reasonable manner consistent with its tariff. Allied asks this Court to supplant the Commission’s fact-finding efforts with its own. This is not the Court’s role and the Court should decline Allied’s invitation to do so. *See Consumers’ Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 301, 2008-Ohio-861, 883 N.E.2d 1035, ¶ 13.

B. The Commission's determination that Allied owed Ohio Edison \$94,676.58 for electric service was reasonable and supported by the record.

The Commission found that Ohio Edison violated O.A.C. 4901:1-10-05(I) when it failed to obtain actual readings of one of the meters serving Allied at least once each year. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 5) (Sep. 11, 2013), Appellant's App. at 11. Ohio Edison's rule violation does not mean that Allied sustained its burden of showing Ohio Edison improperly calculated the backbill. *Complaint Case*, Case No. 07-905-EL-CSS (Entry on Rehearing at 3) (Nov. 6, 2013), Appellant's App. at 23. To the contrary, the record reflects that Ohio Edison used historical averages to Allied's benefit in estimating the amount owed to the Company. Allied provided no alternative methodology or estimate as to what its electric usage could have been for the time period in question. *Id.* The Commission weighed the evidence to find that Ohio Edison's backbill calculation was proper. The Court should defer to the fact-finding role of the Commission and uphold the decision below.

Allied also claims that the Commission did not "enforce" Ohio Edison's tariff.⁵

Allied Merit Brief at 8. Ohio Edison's tariff provides that when a company cannot read a

⁵ Allied also argues the Commission failed to enforce R.C. 4905.22, which requires that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission." Appellant's App. at 46. Ohio Edison's charges to Allied were just and reasonable and were calculated using the Company's scheduled rates and Allied's estimated usage.

meter it should render an estimated bill based on past usage and estimated customer load characteristics. *Complaint Case*, Case No. 07-905-EL-CSS (Entry on Rehearing at 3-4) (Sep. 11, 2013), Appellant's App. at 23-24. The Commission found that Ohio Edison satisfied its tariff when it used actual readings to calculate usage for the months it had actual readings and used estimates for the months when actual readings were not available. *Id.* at 4, Appellant's App. at 24. 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.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 at ¶ 50. The Court should do so here.

Allied also failed to provide an alternative methodology to calculate what it owed Ohio Edison. *See Grossman*, 5 Ohio St.2d at 190, 214 N.E.2d 666 (finding complainant has the burden of proof in a Commission complaint case); *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 4) (Sep. 11, 2013), Appellant's App. at 10. Allied suggests that the Commission should have used the 38 kW reading from June 2006 to calculate the backbills for the 28 months that actual readings were not available for the meter. *See Allied Merit Brief* at 12. This type of backbilling would be nonsensical and inaccurate. Again, the Commission weighed the facts and found the 38 kW reading was unreliable. *Complaint Case*, Case No. 07-905-EL-CSS (Opinion and Order at 11) (Sep. 11, 2013), Appellant's App. at 17. It would be unreasonable for the Commission to backbill for the entire 28 months using a figure that was not supported by the record.

Allied also relies upon Ohio Edison's internal procedure manuals to conclude that the backbilling should be limited to a period of one year. *See Allied Merit Brief* at 14-

16. Internal procedural manuals are not legally binding and therefore do not establish a requirement that the Commission limit backbills to a period of one year. Furthermore, backbilling Allied for service for one year would allow Allied to essentially receive free electric service for two years. Again, Allied is not entitled to free electric service simply because the Company violated a Commission meter reading rule. Therefore, this Court should find that the Commission properly weighed the facts to determine that Allied owed Ohio Edison \$94,676.58 for the electric service it received, irrespective of the Company's violation of a Commission rule.

Proposition of Law No. II:

R.C. 4903.10 states that an application for rehearing “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.” Consequently, “setting forth specific grounds for a rehearing is a jurisdictional prerequisite” for this Court’s review. *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994).

The Court should affirm the Commission’s Opinion and Order because Allied did not properly preserve the issues it seeks to raise on appeal. R.C. 4903.10 imposes a jurisdictional requirement on Commission appeals and this Court has long held that setting forth specific grounds for rehearing is a jurisdictional prerequisite for judicial review. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462, ¶ 55; *Consumers’ Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d at 247,638 N.E.2d 550; *Akron v Pub. Util. Comm.*, 55 Ohio St.2d 155, 161-162, 378 N.E.2d 480 (1978); *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), ¶ 17 of the syllabus.

The Court has strictly construed the specificity test set forth in R.C. 4903.10. *Discount Cellular Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59 (stating “when an appellant’s grounds for rehearing fail to specifically allege in what respect the PUCO’s order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met”); *see also Consumers’ Counsel v. Pub Util. Comm.*, 70 Ohio St. at 248 (recognizing a “strict specificity test” in R.C. 4903.10). The strict specificity test is important to the appeals process because it allows the Commission to hear issues and correct them before those issues go before the Court. “[A]ny other course would only encourage others to withhold claimed errors that could be corrected by the commission until the case had been filed in court and thus removed from the commission's control. This would destroy the very purpose of an application for rehearing and make it an entirely meaningless procedural step.” *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. at 377.

This Court has found that even similarity between parts of some of the grounds stated in an application for rehearing and parts of some of the statements of law in an appellant’s brief on appeal are not sufficient to establish this Court’s jurisdiction. *Agin v. Pub. Util. Comm.*, 12 Ohio St.2d 97, 98, 232 N.E.2d 828 (1967) (stating “such a causal similarity does not, however, meet the requirements of Section 4903.10, Revised Code”). The Court further stated “where as here, it is necessary to examine minutely an appellant’s complaint before the commission, the order of the commission, appellant’s application for rehearing, his notice of appeal and his brief in this court merely to discover what

questions he is raising on appeal which were also presented to and decided by the Commission on the application for rehearing, appellant has failed to comply with the provisions of Section 4903.10, Revised Code.” *Id.* at 99.

This Court should reject Allied’s claims for lack of jurisdiction. Allied’s rehearing application did not set forth its claims with specificity. Rather, the application for rehearing provides statements that the Commission failed “to enforce Article VII, paragraph (F) of Ohio Edison’s tariff” and that the Commission’s findings related to Article VII, paragraph (F) of the Ohio Edison tariff are “unreasonable and unlawful.” Moreover, Allied entirely fails to mention R.C. 4905.22.

The Commission addressed Allied’s lack of specificity in its Entry on Rehearing. First, regarding Allied’s argument that the Commission failed to enforce Article VII, paragraph (F) of Ohio Edison’s tariff, the Commission noted Allied’s application for rehearing provides “no indication as to how the order is in any way unreasonable or unlawful...its assignment of error does not mention what action the Commission should have taken, nor does it make any cite or reference to the opinion and order.” *Complaint Case*, Case No. 07-905-EL-CSS (Entry on Rehearing at 3) (Nov. 6, 2013), Appellant’s App. at 23. Second, regarding Allied’s assertion that the Commission improperly determined that Ohio Edison did not violate its tariff, the Commission noted that Allied did not point to any evidence in the record that supports “its conclusory assignment of error.” *Id.* at 4, Appellant’s App. at 24.

Allied failed to explain the Commission’s alleged errors in its application for rehearing with specificity and consequently failed to preserve its right to raise these

errors on appeal. Therefore, consistent with this Court's well-established interpretation of R.C. 4903.10, the Court should reject both of Allied's propositions of law for lack of jurisdiction and uphold the Commission's order. Alternatively, as explained above, the Court should affirm the Commission's decision because the Commission properly determined that Allied failed to sustain its burden of proof that Ohio Edison improperly calculated the backbill for service provided to Allied.

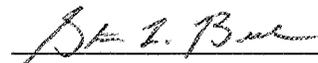
CONCLUSION

The Commission properly performed its fact-finding role and its factual determinations are supported by record evidence. The Commission's decision should be affirmed.

Respectfully submitted,

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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, or hand-delivered, upon the following parties of record, this 23rd day of May, 2014.



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APPENDIX

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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.

4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall, when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such

section upon request of the public utilities commission by mandamus or other appropriate proceedings.

4905.22 Service and facilities required - unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

4901:1-10-05 Metering.

(A) Electric energy delivered to the customer shall be metered, except where it is impractical to meter the electric usage, such as in street lighting and temporary or special installations. The usage in such exceptions may be calculated or billed on a demand or connected load rate as provided in an approved tariff on file with the commission.

(B) A customer's electric usage shall be metered by commercially acceptable measuring devices that comply with "American National Standards Institute" (ANSI) standards. Meter accuracy shall comply with the 2001 ANSI C 12.1 standards. No metering device shall be placed in service or knowingly allowed to remain in service if it does not comply with these standards.

(C) Electric utility employees or authorized agents of the electric utility shall have the right of access to the electric utility's metering equipment for the purpose of reading, replacing, repairing, or testing the meter, or determining that the installation of the metering equipment is in compliance with the electric utility's requirements.

(D) Meters that are not direct reading meters shall have the multiplier plainly marked on or adjacent to the meter. All charts taken from recording meters shall be marked with the date of the record, the meter number, the customer name, and the chart multiplier. The register ratio shall be marked on all meter registers. The watt-hour constant for the meter shall be placed on all watt-hour meters.

(E) The electric utility's meters shall be installed and removed by the electric utility's personnel or authorized agent. Before initial service to a service location is energized, the electric utility shall verify that the installation of the meter base and associated equipment has either been inspected and approved by the local inspection authority or, in any area where there is no local inspection authority, has been inspected by an electrician.

(F) Metering accuracy shall be the responsibility of the electric utility.

(1) Upon request by a customer, the electric utility shall test its meter to verify its compliance with the ANSI C 12.1 standards within thirty business days after the date of the request.

(2) The customer or the customer's representative may be present when the meter test is performed at the customer's request.

(3) A written explanation of the test results shall be provided to the customer within ten business days of the completed test.

(4) If the accuracy of the meter is found to be within the tolerances specified in this rule:

(a) The first test at the customer's request shall be free of charge.

(b) The electric utility may charge the customer an approved tariffed fee for each succeeding test conducted less than thirty-six months after the last test requested by the customer. Each electric utility shall notify the customer of such charge prior to the test.

(5) If the accuracy of the meter is found to be outside the tolerances specified in this rule, the electric utility:

(a) Shall not charge a fee or recover any testing expenses from the customer.

(b) Shall recalibrate the meter or provide a properly functioning meter that complies with the ANSI C 12.1 standards without charge to the customer.

(c) Shall, within thirty days, pay or credit any overpayment to the customer, in accordance with one of the following billing adjustments:

(i) When the electric utility or customer has established the period of meter inaccuracy, the overcharge shall be computed on the basis of metered usage prior and/or subsequent to such period, consistent with the rates in effect during that period.

(ii) When the electric utility and customer cannot establish the period of meter inaccuracy, the overcharge period shall be determined to be: the period since the customer's "on" date or the period since the date of most recent meter test performed, whichever is shorter. The applicable rates shall be those in effect during the period of inaccuracy in order to determine the appropriate credit or refund.

Paragraph (F)(5) of this rule shall not apply to meter or metering inaccuracies caused by tampering with or unauthorized reconnection of the meter or metering equipment.

(G) Each electric utility shall identify, by company name and/or parent trademark name and serial or assigned meter numbers and/or letters, placed in a conspicuous position on the meter, each customer meter that it owns, operates, or maintains.

(H) Each electric utility shall maintain the following records regarding each meter that it owns, operates, or maintains, for the life of each such meter plus three years:

(1) Serial or assigned meter number.

(2) Every location where the meter has been installed and removed, together with the dates of such installations and removals.

(3) Date of any customer request for a test of the meter.

(4) Date and reason for any test of the meter.

(5) Result of any test of the meter.

(6) Meter readings before and after each test of the meter.

(7) Accuracy of the meter found during each test, "as found" and "as left".

(I) Each electric utility shall comply with the following requirements regarding meter reading:

(1) The electric utility shall obtain actual readings of all its in-service customer meters at least once each calendar year. Every billing period, the electric utility shall make reasonable attempts to obtain accurate, actual readings of the energy and demand, if applicable, delivered for the billing period, except where the customer and the electric utility have agreed to other arrangements. Meter readings taken by electronic means shall be considered actual readings.

(2) In addition to the requirements of paragraph (I)(1) of this rule, the electric utility shall provide, upon the customer's request, two actual meter readings, without charge, per calendar year. The customer may only request an actual meter read if usage has been estimated for more than two of the immediately preceding billing cycles consecutively or if the customer has reasonable grounds to believe that the meter is malfunctioning.

(3) An actual meter reading is required at the initiation and/or the termination of service, if the meter has not been read within the sixty calendar days immediately preceding initiation and/or termination of service and access to the meter is provided.

(4) If the meter has most recently been read within the thirty-three to fifty-nine calendar days immediately preceding the initiation and/or termination of service, the electric utility

shall inform the customer, when the customer contacts the electric utility, of the option to have an actual meter read at no charge to the customer.

(5) If the meter has been read within the thirty-two calendar days immediately preceding the initiation and/or termination of service, the electric utility may estimate usage.