ORIGINAL

IN THE SUPREME COURT OF OHIO

ALLIED ERECTING & DISMANTLING CO., INC.	:	
Appellant,	:	**Case No. 2014-0008**
v.	:	**On Appeal from the Public Utilities Commission of Ohio in Case No. 07-905-EL-CSS**
PUBLIC UTILITIES COMMISSION OF OHIO,	:	
Appellee,	:	
v.	:	
OHIO EDISON COMPANY,	:	
Intervening-Appellee.	:	

MERIT BRIEF OF INTERVENING-APPELLEE OHIO EDISON COMPANY

Christopher R. Opalinski (0084504)
(Counsel of Record)
Timothy D. Berkebile (PHV 4834-2014)
ECKERT SEAMANS CHERIN & MELLOTT, LLC
Pa. Firm No. 075
44th Floor, 600 Grant Street
Pittsburgh, PA 15219
Telephone.: 412-566-5963
Facsimile: 412-566-6099
copalinski@eckertseamans.com
tberkebile@eckertseamans.com

Counsel for Appellant,
Allied Erecting & Dismantling Co., Inc.

Carrie M. Dunn (0076952)
(Counsel of Record)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: 330-761-2352
Facsimile: 330-384-3875
cdunn@firstenergycorp.com

Counsel for Intervening-Appellee,
Ohio Edison Company

FILED
MAY 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Michael DeWine (0009181)
Attorney General of Ohio

Steven L. Beeler (0078076)
Katie L. Johnson (0091064)
Assistant Attorneys General
PUBLIC UTILITIES SECTION
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
Telephone: 614-466-4397
Facsimile: 614-466-8764
Steven.beeler@puc.state.oh.us
Katie.johnson@puc.state.oh.us

Counsel for Appellee,
Public Utilities Commission of Ohio

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

A. Removal of the 935 Meter from Ohio Edison's Billing System 2

B. Rediscovery of the 935 Meter 3

C. Calculation of the Back Bill 3

III. PROCEDURAL HISTORY 5

IV. LAW AND ARGUMENT 7

Proposition of Law 1:

WHEN A PARTY'S APPLICATION FOR REHEARING BEFORE THE PUBLIC UTILITIES COMMISSION FAILS TO SPECIFICALLY ALLEGE IN WHAT RESPECT THE COMMISSION'S ORDER WAS UNREASONABLE OR UNLAWFUL, THE REQUIREMENTS OF R.C. 4903.10 ARE NOT MET, AND THE PARTY FORFEITS ITS RIGHT TO ASSERT CLAIMS ON APPEAL THAT WERE NOT PRESERVED IN A PROPER APPLICATION FOR REHEARING. *DISCOUNT CELLULAR, INC. V. PUB. UTIL. COMM.*, 112 OHIO ST.3d 360, 2007-OHIO-53, 859 N.E.2d 957, ¶ 59, APPROVED AND FOLLOWED 8

A. The application for rehearing never mentions R.C. 4905.22 and alleges only in the most conclusory fashion that the Commission's findings with respect to Article VII, paragraph (F) of the Ohio Edison tariff are "unreasonable and unlawful." 8

B. R.C. 4903.10 is a jurisdictional requirement that bars the assertion of claims on appeal that were not preserved with specificity in the application for rehearing. 10

Proposition of Law No. 2

ESTIMATED BACK BILLING IS PERMISSIBLE EVEN WHEN THE UTILITY'S CONDUCT NECESSITATES THE NEED FOR BACK BILLING AND THE COMMISSION'S DETERMINATION THAT A UTILITY HAS PROPERLY ESTIMATED THE AMOUNT TO BE BACK BILLED SHOULD NOT BE REVERSED UNLESS THE CUSTOMER HAS CARRIED ITS BURDEN TO SHOW THAT THE ESTIMATE IS "MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE" AND "SO CLEARLY UNSUPPORTED BY THE RECORD AS TO SHOW MISAPPREHENSION, MISTAKE OR WILLFUL DISREGARD OF DUTY." OHIO CONSUMERS' COUNSEL V. PUB. UTIL. COMM., 127 OHIO ST.3D 524, 526, 2010-OHIO-6239, 941 N.E.2D 757 13

A. The Commission correctly determined that the actual reading of 38kW in June 2006 was not an accurate measure of demand to use for the back bill 15

B. The Commission correctly determined that Ohio Edison's estimated back bill was fair and accurate 17

V. CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

CASES

Agin v. Pub. Util. Comm., 12 Ohio St.2d 97, 232 N.E.2d 828 (1967) 12

Akron v. Pub. Util. Comm., 55 Ohio St.2d 155, 378 N.E.2d 480 (1978) 10

Cameron Creek Apts. v. Columbia Gas of Ohio, Inc., 136 Ohio St.3d 333, 2013-Ohio-3705, 995 N.E.2d 1160 ..... 21, 13

Cincinnati Gas & Elec. Co. v. Joseph Chevrolet Co., 153 Ohio App. 3d 95, 2003-Ohio-1367, 791 N.E.2d 1016 (First Dist.) 18

Cincinnati v. Pub. Util. Comm., 151 Ohio St. 353, 86 N.E.2d 10 (1949) 10, 11

Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885 15

Consumers' Counsel v. Pub. Util. Comm., 70 Ohio St.3d 244, 638 N.E.2d 550 (1994) 10

Discount Cellular Inc. v. Pub. Util. Comm., 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957 ..... 8, 10, 11

In re Application of Columbus S. Power Co., __ Ohio St.3d __, 2014-Ohio-462 ..... 7, 12

In re Columbus S. Power Co., 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751 11

Norman v Pub. Util. Comm., 62 Ohio St.2d 354, 406 N.E.2d 492 (1980) 14, 17, 18, 19

Ohio Consumers' Counsel v. Pub. Util. Comm., 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757 ..... 13, 15, 19

Sunoco, Inc. (R&M) v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285 15

STATE STATUES AND ADMINISTRATIVE REGULATIONS

R.C. 4903.10 ..... *passim*

R.C. 4903.13 14

R.C. 4905.22 ..... 8, 9, 12

R.C. 4905.32 ..... 14, 19

R.C. 4905.33 ..... 14, 19

R.C. 4933.28 ..... 13, 18

Ohio Adm.Code 4901:1-10-05(I) 6, 9

I. INTRODUCTION

Despite its attempt to dress up its dissatisfaction with the Commission's factual findings with legal argument, Allied Erecting & Dismantling Co. Inc. ("Allied") cannot disguise the fact that the only issue before this Court is the Commission's finding that Ohio Edison's back bill to Allied is reasonable and supported by the record. Before the Court can even reach this issue, however, it must decide whether Allied preserved its arguments for appeal. As discussed below, the Court does not have jurisdiction to decide either of Allied's propositions of law because Allied failed to follow the strict mandates of R.C. 4903.10. The Court should, therefore, dismiss the appeal.

Should the Court not dismiss the appeal, however, it should affirm the Commission's decision in this case. Allied simply does not like the fact that it must pay for the electricity it used and, therefore, attacks the Commission's determination that Ohio Edison's back bill is a fair and reasonable estimate of the cost for the service Allied received. Indeed, in its Order, the Commission pointed out that "Allied does not dispute that a nonresidential entity may be back billed as a result of an electric utility under charging for a problem under the electric utility's control." (Opinion and Order at 6.) (Allied Appx-12.) The Commission found that Allied failed to sustain its burden of proof, and Allied offers nothing in its brief to support a reversal of the Commission's determination. Because the Commission reasonably and lawfully found that the back bill was reasonably calculated, Allied must pay the bill.

II. STATEMENT OF FACTS.

A. Removal of the 935 Meter from Ohio Edison's Billing System

The events that gave rise to a back bill being sent to Allied in January 2007 stem from a car-pole accident that occurred in December 2003. Company witness Nentwick explained that the accident destroyed a meter at Allied's Poland Avenue facility in Youngstown. (Ohio Edison Ex. 1, p. 4 ¶¶ 9-10.) (OE Supp. 6.) At that time, Allied had at least six electric meters at its Poland Avenue facility located at two different addresses: 2100 Poland Avenue and 2100 ½ Poland Avenue (*Id.*) The meter that was destroyed in the accident was located at the 2100 ½ address, was identified by a number ending in the digits "667," and was billed by Ohio Edison under an account number ending in the digits "492" (identified at hearing as the "Burned Meter"). (Tr. Vol. II, p. 107.) When an Allied employee reported the accident to Ohio Edison, however, the record made of the call erroneously identified the damaged meter as located at 2100 Poland Avenue and bearing the identification number ending in "935." (Ohio Edison Ex. 1, pp. 4-5 ¶ 10.) Due to a series of errors, the 935 meter was mistakenly deleted from Ohio Edison's billing system rather than the Burned Meter. (Ohio Edison Ex. 1, p. 5 ¶ 11.) (OE Supp. 7.) The 935 meter, however, remained in the field at Allied's property and continued to work properly and record Allied's electric usage for the entire period of the back bill submitted to Allied. (*Id.* at p.1 ¶ 13; Tr. Vol. II, p. 119, p. 278.)

Because there was no record of the 935 Meter in Ohio Edison's billing system, however, beginning in February 2004, Allied was not billed for electric usage recorded by that meter. (Ohio Edison Ex. 1, pp. 5-6 ¶¶ 11, 14.) (OE Supp. 7-8) From 2001 to 2003, the two years before the 935 Meter was deleted from the billing system, the 935 Meter accounted for between 45 and 68 percent of Allied's total electric bill for all of the six meters at

Allied's Poland Avenue facility. (*Id.* pp. 16-17 ¶ 54.) (OE Supp. 18-19.) During those two years Allied's bill for the 935 meter ranged from $3,718.06 to $2,242.05 per month. (*Id.*)

B. Rediscovery of the 935 Meter

In June 2006, an Ohio Edison meter reader noticed that the 935 Meter was located near his meter reading route. (Ohio Edison Ex. 1, p. 6 ¶ 14.) (OE Supp. 8.) (Opinion and Order at 3.) (Allied Appx-9.) It was then discovered that the meter was not in Ohio Edison's billing system (*Id.*) Because the meter was not in the billing system, it was not being read or billed. (*Id.*) Following the discovery that the 935 Meter had not been billed since February 2004, actual load and kilowatt hour readings were obtained from the meter in June, July and August 2006. (Ohio Edison, Ex. 1 p. 20 ¶ 62.) (OE Supp. 22.) The actual meter load reading of the 935 Meter was 38kW in June 2006, 78 kW in July 2006, and 84 kW in August 2006. (*Id.*, p. 24 ¶ 72) (OE Supp. 26.) (Opinion and Order at 3.) (Allied Appx-9.) Readings for the 935 meter were estimated for September to December 2006 and in January 2007 the meter was reinstated in the billing system. (Tr. Vol. II, p. 148, p. 150.) An actual read of 92 kW was taken during the January 2007 billing cycle. (*Id.*) After conducting a thorough investigation into the reason why the 935 Meter had not been billed prior to sending a back bill to Allied, Ohio Edison sent a bill to Allied for the prior unbilled usage for the period February 2004 through December 2006. (Opinion and Order at 3.) (Allied Appx-9.)

C. Calculation of the Back Bill

Ms. Nentwick testified that the methodology used to calculate a back bill depends on whether actual meter reads are available. (Ohio Edison Ex. 1, pp. 17-18 ¶ 55.) (OE Supp. 19-20.) An "actual read" means that the meter recorded, and Ohio Edison knows, the actual electric usage during the unbilled period. Electric usage is measured by a meter in terms of

both load (kW) and kilowatt hours (kWhs). (*Id.*) To the extent that an actual read of load and kilowatt hours is available in a given month, the actual read is input into Ohio Edison's computer billing system for that month. (*Id.*) The computer system in turn calculates the dollar amount of the bill based on the particular customer's rate schedule. (*Id.*) If actual reads are not available, Ohio Edison estimates the load and kilowatt hours consumed by the customer during the unbilled period based on at least two years of historical usage. (*Id.;* Tr. Vol. I, p. 223, p. 225.)

Allied's back bill was calculated based on a combination of actual and historical usage. The bill covered a time period from February 2004 to January 2007 (Ohio Edison Ex. 1, pp. 20-21 ¶ 62.) (OE Supp. 22.) Actual reads from the 935 meter were available for June, July and August of 2006, and were used to calculate Allied's bill for those three months. (*Id.,* Tr. Vol. II, p. 225, p. 116.) For the remaining months, Ms. Nentwick estimated the load and kilowatt hour consumption based on 24 months of Allied's historical usage. (Ohio Edison Ex. 1, p. 21 ¶ 64.) (OE Supp. 23.) All of the historical usage information used to calculate the Allied bill was based on actual reads of the 935 Meter during the years from 2001 to 2003 (Tr. Vol. I, p. 215, p. 216.) To calculate the first twelve months of Allied's back bill, Ms. Nentwick took the lowest load and kilowatt hour reading for the corresponding month from Allied's historical usage years. (Ohio Edison Ex. 1, p. 22 ¶ 67.) (OE Supp. 24.) (Opinion and Order at 3.) (Allied Appx-9.) For the remaining months, she used an approximate average of the historical usage because, based on her 18 years of experience calculating rebills and back bills, it is improbable that Allied's electric usage during the time period not billed would always equal the lowest historical usage. (Tr. Vol. II, p. 273.)

These are the relevant facts that frame the issue before the Court. Allied's statement of the facts, however, is laden with criticism of Ohio Edison's conduct and communication regarding this dispute and goes so far as to suggest that Ohio Edison back billed Allied for service it indisputably received in retaliation for other unrelated litigation between the parties. The Commission recognized that the genesis of this case was an administrative error on the part of Ohio Edison that resulted in Allied receiving unbilled service for almost three years. The Commission concluded that this oversight was properly, and necessarily corrected, by the calculation of a fair and reasonable back bill for the service rendered, which Allied is allowed to pay without interest over an extended payment plan. The Commission was not persuaded by Allied's criticisms of Ohio Edison or retaliation claims, and Allied did not seek rehearing on the Commission's decision to not address these issues. The Court likewise should not be distracted by Allied's caustic comments and innuendo about Ohio Edison's decision to pursue back billing, as was its right and obligation.

III. PROCEDURAL HISTORY

In its Complaint before the Commission, Allied specifically sought the following relief: (1) an explanation as to why it was final billed in error; (2) a definitive explanation regarding (and credible assurance of) the accuracy of these back charges in light of Ohio Edison's failure to obtain actual meter readings for nearly two and one-half years; (3) protection from the unwarranted assessment of interest and late fees; and (4) if any amounts are due, the preservation of an appropriate payment plan in accordance with Ohio law. (Compl., pp. 2, 4.) (Opinion and Order at 1.) (Allied Appx-7.) Allied received all the relief it sought from the Commission.

The Commission ultimately found, however, that Allied's "arguments that the backbilling was unreasonable and excessive are unpersuasive." (Opinion and Order at 10.) (Allied Appx-16.) The Commission explained that it could not "afford much weight" to Allied's witness Hull's testimony that the back bill should be based on an alleged actual reading of 38kW in June 2006, especially in light of the fact that Ohio Edison provided "persuasive arguments challenging the accuracy of the meter reading." (*Id.*) Moreover, the Commission found that Allied "failed to present any alternative methodology to estimate Allied's bills over the 29 month period." (*Id.*) The Commission found that Ohio Edison "provided sufficient evidence to support its accuracy of the bill estimates . . . . based upon past use of service and average customer load characteristics." (Opinion and Order at 11.) (Allied Appx-17.) Therefore, the Commission concluded "[w]ithout any relevant evidence for us to consider, we find that Allied did not sustain its burden of proof of showing that OE's billing estimates are unreliable. For these reasons, we find that Allied's complaint as to the billing estimates should be dismissed." (*Id.*) The Commission directed Ohio Edison to establish a 36-month payment plan for Allied to pay for its January 2004 to January 2007 usage, with no interest or late fees to be applied toward the bill. (*Id.*)

The Commission also ordered corrective action based upon its determination that Ohio Edison violated Ohio Admin.Code 4901:1-10-05(I) by not obtaining actual readings of its in-service customer meters at least once per year. (Opinion and Order at 5.) (Allied Appx-11.) The Commission ordered Ohio Edison to conduct a review of its internal practices, procedures, and policies relating to its billing operations for accounts with multiple meters and to file a report of its findings with the Commission. (*Id.*) Ohio Edison complied with the Commission's Order and did not seek rehearing of that Order.

Allied filed an application for rehearing listing ten assignments of error. (Allied Appx-31–34.) Allied did not file any memorandum in support specifically discussing how or where the Commission erred and offered no legal or factual argument in support of its assigned errors. In its Entry on Rehearing, the Commission denied Allied's Application for Rehearing, noting several times that the application did not meet the specificity requirements for applications for rehearing, but also finding that it lacked merit. (Allied Appx-21.)

In its Notice of Appeal, Allied reiterated all of the assignments of error it listed in its Application for Rehearing. (Allied Appx-1.) However, in its Merit Brief, Allied abandons all but two of its assignments of error and limits its appeal to the following two propositions of law:

> The Commission's Failure to Enforce Ohio Edison's Tariff and R.C. 4905.22 Renders the Commission's Opinion and Order Unlawful and Unreasonable.
>
> Article VII, Paragraph (F) of Ohio Edison's Tariff does not provide Ohio Edison with a legal basis for using estimates to generate the rebills.

Neither proposition of law was properly preserved in its Application for Rehearing, and neither has merit.

IV. LAW AND ARGUMENT

The Court should summarily affirm the Commission's Opinion and Order because Allied did not properly preserve the issues it seeks to raise on appeal by raising these issues with specificity in its application for rehearing as required by R.C. 4903.10. The statute imposes a jurisdictional requirement that results in the forfeiture of issues not properly preserved. *In re Application of Columbus S. Power Co.*, __ Ohio St.3d __, 2014-Ohio-462, ¶ 55. Alternatively, 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 back bill for service provided to Allied.

Proposition of Law 1:

WHEN A PARTY'S APPLICATION FOR REHEARING BEFORE THE PUBLIC UTILITIES COMMISSION FAILS TO SPECIFICALLY ALLEGE IN WHAT RESPECT THE COMMISSION'S ORDER WAS UNREASONABLE OR UNLAWFUL, THE REQUIREMENTS OF R.C. 4903.10 ARE NOT MET, AND THE PARTY FORFEITS ITS RIGHT TO ASSERT CLAIMS ON APPEAL THAT WERE NOT PRESERVED IN A PROPER APPLICATION FOR REHEARING. *DISCOUNT CELLULAR, INC. V. PUB. UTIL. COMM.*, 112 OHIO ST.3d 360, 2007-OHIO-53, 859 N.E.2d 957, ¶ 59, APPROVED AND FOLLOWED.

Allied raises three claims in its two propositions of law: 1) that the Commission's order violates R.C. 4905.22 (Allied Br., Proposition of Law No. 1 at 8-9, 17); 2) that the Commission failed to enforce Ohio Edison Tariff Article VII, paragraph (F) (*id.* at 9-17); and, 3) that Article VII, paragraph (F) of the Ohio Edison Tariff does not provide a legal basis for using estimates to generate the rebills in this case. (Allied Br., Proposition of Law No. 2 at 17-20). Not one of these claims was properly preserved in Allied's application for rehearing.

A. The application for rehearing never mentions R.C. 4905.22 and alleges only in the most conclusory fashion that the Commission's findings with respect to Article VII, paragraph (F) of the Ohio Edison tariff are "unreasonable and unlawful."

The application for rehearing is set out in its entirety at pages 31-34 of Allied's Appendix. While Allied lists ten separate grounds for rehearing, it did not identify a single legal defect in any of the Commission's findings or offer any explanation for why or how the Commission erred. Its grounds for rehearing are merely conclusory statements registering Allied's dissatisfaction with the Commission's findings and conclusion, and the application for rehearing was not accompanied by any memorandum in support that actually discussed

the basis for Allied's assertions. Significantly, R.C. 4905.22 is never mentioned in the application for rehearing. Two references to Article VII, paragraph (F) of the Tariff are found in the application for rehearing (at paragraphs 2 and 3), but Allied merely recites that the Commission's "failure to enforce Article VII, paragraph (F)" and its "finding that Ohio Edison did not violate Article VII, paragraph (F)" are "unreasonable and unlawful, especially in light of the Commission's express finding that Ohio Edison violated Rule 4901:1-10-05(I) by not obtaining actual readings of its in-service customer meters at least once each year." (Application for Rehearing at 1-2.) (Allied Appx-31-32.) There is no explanation as to why a violation of Ohio Adm.Code 4901:1-10-05(I) necessarily requires or precludes any particular calculation of the amount owed for service not previously billed. And, most importantly, there is no discussion of the alleged errors Allied now raises in its brief.

The Commission expressly noted the lack of any specificity as to these issues in its Entry on Rehearing. With respect to Allied's assertion that the Commission failed to enforce Article VII, paragraph (F), the Commission noted:

> [T]here is no indication as to how the order is in any way unreasonable or unlawful. While Allied claims that the Commission failed to enforce Article VII, paragraph (F) of OE's tariff, 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.

(Entry on Rehearing, at ¶ 8.) (Allied Appx-23.) With respect to Allied's assertion that the Commission's determination that Ohio Edison did not violate its tariff was improper, the Commission noted that Allied did not point to any evidence in the record that supports "its conclusory assignment of error." (*Id.* at ¶ 9.) (Allied Appx-24.) Thus, it was readily apparent to the Commission that Allied failed to provide it with any explanation or rationale for why or how the Commission failed to enforce the tariff or erred in finding no tariff

violation. And, by failing to bring its perceived errors to the Commission's attention for rehearing, Allied forfeited its right to raise these errors on appeal.

B. R.C. 4903.10 is a jurisdictional requirement that bars the assertion of claims on appeal that were not preserved with specificity in the application for rehearing.

R.C. 4903.10 provides 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." The Court has long held that setting forth specific grounds for rehearing is a jurisdictional prerequisite for judicial review. *See Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994); *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), paragraph seventeen of 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. *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 appropriate because, as this Court recognized early on, the purpose of the application for rehearing is to allow the Commission to correct issues before going to the Court. *See Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. at 377 ("[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.")

R.C. 4903.10 demands more than simply reciting a particular finding of fact and claiming that it is "not supported or sustained by the evidence, [is] manifestly against the weight, [is] in clear and direct conflict therewith, [or is] unreasonable and contrary to law." *Id.* Rather, it demands that the party seeking rehearing "identify a legal problem with the commission's approach," *In re Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751, ¶ 20, and "specifically allege in what respect the PUCO's order was unreasonable or unlawful," *Discount Cellular Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, at ¶ 59. "Where an application for rehearing fails to do so, the requirements of R.C. 4903.10 have not been met." *Id.*

For example, in *Cincinnati v. Pub. Util. Comm.*, after the City of Cincinnati established new gas rates by ordinance for The Cincinnati Gas & Electric Co. ("CG&E"), the gas company filed a complaint with the Commission alleging that the rates were unjust and unreasonable. *Id.*, 151 Ohio St. at 359. After a hearing, the Commission agreed with CG&E and ordered rates that were higher than those established by the City's ordinance. *Id.* at 361-63. The City applied to the Commission for rehearing, alleging simply that the Commission's "findings and order 'are not supported or sustained by the evidence, are manifestly against the weight of the evidence, are in clear and direct conflict therewith [and] are unreasonable and contrary to law.'" *Id.* at paragraph 18 of the syllabus. The Court, affirming the Commission's denial of rehearing, found that such "general grounds do not 'set forth specifically'.... as the General Assembly intended." *Id.* at 377. The Court opined that "by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question." *Id.*

Most recently, in *Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.*, 136 Ohio St.3d 333, 337-338, 2013-Ohio-3705, 995 N.E.2d 1160, ¶ 24, the Court dismissed a proposition of law for lack of jurisdiction. The Court found that Columbia's rehearing application did not "set forth specifically" the claim asserted in its proposition of law and held that "regardless of what appears in Columbia's brief on appeal, the failure to set forth specifically those arguments on rehearing as required by R.C. 4903.10 deprives this court of jurisdiction over Columbia's first proposition of law." *See also, In re Application of Columbus S. Power*, 2014-Ohio-462 at ¶ 55 ("appellants have forfeited these claims by failing to present them to the commission on rehearing").

Here, too, the Court should reject for lack of jurisdiction Allied's claim under R.C. 4905.22. The rehearing application did not "set forth specifically" this claim; indeed, nowhere in its rehearing application does Allied even mention R.C. 4905.22. The Court also lacks jurisdiction over Allied's claims that the Commission failed to enforce Article VII, paragraph (F) of the tariff and that Article VII, paragraph (F) of the tariff does not provide Ohio Edison with a legal basis to use an estimated bill. Merely reciting that the Commission's tariff interpretation was unreasonable and unlawful, without presenting a legal argument for *how* the Commission erred, falls drastically short of meeting the specificity requirement in R.C. 4903.10.

This Court holds that even where there is some similarity between parts of some of the grounds stated in an application for rehearing before the Commission and parts of some of the statements of law in an appellant's brief on appeal, "[s]uch a causal similarity does not, however, meet the requirements of Section 4903.10, Revised Code." *Agin v. Pub. Util. Comm.,* 12 Ohio St.2d 97, 98, 232 N.E.2d 828 (1967). 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. Moreover, it is not enough that the application for rehearing state that the Commission erred on some issue, the application must "cite supportive evidence" and provide argument as to how the Commission erred, not just that it erred. *Cameron Creek Apts. v. Columbia Gas*, 136 Ohio St.3d 333 at ¶ 24, n. 2.

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 affirm the decision below.

Proposition of Law No. 2

> **ESTIMATED BACK BILLING IS PERMISSIBLE EVEN WHEN THE UTILITY'S CONDUCT NECESSITATES THE NEED FOR BACK BILLING AND THE COMMISSION'S DETERMINATION THAT A UTILITY HAS PROPERLY ESTIMATED THE AMOUNT TO BE BACK BILLED SHOULD NOT BE REVERSED UNLESS THE CUSTOMER HAS CARRIED ITS BURDEN TO SHOW THAT THE ESTIMATE IS "MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE" AND "SO CLEARLY UNSUPPORTED BY THE RECORD AS TO SHOW MISAPPREHENSION, MISTAKE OR WILLFUL DISREGARD OF DUTY." *OHIO CONSUMERS' COUNSEL V. PUB. UTIL. COMM.*, 127 OHIO ST.3d 524, 526, 2010-OHIO-6239, 941 N.E.2d 757.**

Ohio law is clear that neither negligence nor other fault on the part of the utility negates the utility's right and obligation to back bill. *See* R.C. 4933.28 (specifically allowing back billing of residential customers by a gas, natural gas or electric utility "as the result of a meter or metering inaccuracy or other continuing problem under its control"). In fact, the Court has recognized that the need to back bill for service is a necessary corollary of the

utility's duty to charge just and reasonable rates and not to give discriminatory preferences to some customers. *See Norman v. Pub. Util. Comm.*, 62 Ohio St.2d 354, 355, 406 N.E.2d 492 (1980) (construing R.C. 4905.32 and R.C. 4905.33). Allied does not dispute Ohio Edison's right and obligation to back bill it for the service it received. (Allied Brief at 11 (citing *Norman v. Pub. Util. Comm.*)). Rather, it challenges the Commission's factual determination that Ohio Edison properly estimated the amount to be back billed.

Allied argues in its second proposition of law that Article VII, paragraph (F) of the Ohio Edison tariff required Ohio Edison to calculate the back bill to Allied using actual meter readings only, and argues in its first proposition of law that Ohio Edison should have used the actual meter reading for June 2006 (a reading Ohio Edison established could not be accurate) not only for that month but for the prior twenty-eight months as well. The Commission rejected these arguments in the proceeding below based upon its interpretation of the Ohio Edison tariff and its evaluation of the evidence presented. The Commission specifically found, based upon the testimony, that Allied failed to demonstrate that the incorrect actual read of 38 kW of load was a reliable reading that Ohio Edison should have utilized in calculating the back bill. (Opinion and Order at 10.) (Allied Appx-16.) It also found that "OE provided sufficient evidence to support its accuracy of the bill estimates" and that "Allied did not sustain its burden of proof of showing that OE's billing estimates are unreliable." (Opinion and Order at 11.) (Allied Appx-17.) The Commission based its findings on evidence presented by the parties and its determination as to the credibility and weight to be given the evidence. The Commission's findings are entitled to the due deference to be given to factual determinations within the Commission's special expertise and should be affirmed.

Pursuant to R.C. 4903.13, this Court may only reverse, vacate or modify a Commission decision "when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 540, 2004-Ohio-6767, 820 N.E.2d 885. In addition, this Court may reverse the Commission's factual determinations only if Appellant demonstrates that they are "manifestly against the weight of the evidence and . . . so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 526, 2010-Ohio-6239, 941 N.E.2d 757, (internal citation omitted). The appellant bears the burden of demonstrating that the Commission's decision should be reversed. *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 401, 2011-Ohio-2720, 953 N.E.2d 285.

A. The Commission correctly determined that the actual reading of 38 kW in June 2006 was not an accurate measure of demand to use for the back bill.

Allied argues that the Commission's failure to enforce Ohio Edison's tariff renders its decision unlawful and unreasonable. Specifically, Allied asserts that Ohio Edison's failure to use the actual June 2006 load reading of 38 kW violated Article VII, paragraph (F) of Ohio Edison's tariff. (Allied Brief at 12-13.) The Commission, however, properly found that Allied failed to demonstrate that the 38 kW load reading was a correct reading, especially when Ohio Edison demonstrated that the 38kW reading was not correct. (Opinion and Order at 10.) (Allied Appx-16.)

Article VII, Paragraph (F) of Ohio Edison's tariff states, in relevant part:

> 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. On such instances the Company will render an estimated bill based on past use of

> service and estimated load characteristics. When 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. The recalculated amount will be compared with the amount originally billed and the customer will be billed the lesser of the two amounts.

(Allied Supp 7.) In response to Allied's contention that the actual June 19, 2006 demand reading of 38 kW should have been used to calculate the back bill, however, Ohio Edison demonstrated through the testimony of Company witness Nentwick that the reading was not correct. During the historical usage years of 2002 and 2003, Allied's load never dropped below 70kW, almost double the erroneous 38kW load reading in June 2006. The last actual read before the meter was deleted from the billing system was 99kW in January 2004. In addition, the actual reading in July 2006 was 78 kW and in August 2006 it was 84 kW. (Ohio Edison Ex. 1, p. 24.) (OE Supp. 26.) Ms. Nentwick testified that the 38 kW reading was likely a transcription error. (Opinion and Order at 10.) (Allied Appx-16, citing Tr. Vol. I, p. 237-243.)

Allied argues that the Commission unreasonably determined that its witness Hull's testimony was not credible. (Allied Brief at 14.) Mr. Hull testified that it was unlikely that the 38 kW reading in June 2006 was an error. The Commission found that "it cannot afford much weight to Mr. Hull's testimony." (Opinion and Order at 10.) (Allied App-16.) At hearing, Mr. Hull testified that the actual reading of 38 kW indicated the demand for the previous 28 months was less than or equal to 38 kW, but did not substantiate any basis to adopt this conclusion. (Opinion and Order at 10-11.) (Allied Appx-16-17.) Mr. Hull's testimony was further discredited by his admission that he was unaware of what Allied's actual load was at any point in time from 2004 to 2006. (Tr. Vol. I, p. 191.) In addition, Mr. Hull had no response as to why Allied's load would have increased from 38 kW in June 2006

to 79 kW in July 2006. (Ohio Edison Ex. 1, pp. 23-25) (OE Supp. 25-27.) Moreover, Mr. Hull had no experience in customer billing or customer support. (Tr. Vol. I, pp. 180-183.) Lastly, as the Commission correctly found, Allied's witness Ramun acknowledged that Allied was using more electricity in 2006. (Opinion and Order at 11, citing Tr. Vol. I, p. 147, p. 149.) (Allied Appx-17.) Based on the record evidence, the Commission correctly determined that "the fact that the June 2006 reading is shown to be significantly less than any actual Allied load reading raises questions as to the number's reasonableness" and that the "record clearly establishes that the 38 kW reading is an outlier based on other actual readings." (Opinion and Order at 10-11.) (Allied Appx-16-17.) Therefore, Ohio Edison's decision not to use the 38kW reading to calculate Allied's back bill did not violate its tariff and was shown to be reasonable. The Court should affirm the Commission's order.

B. The Commission correctly determined that Ohio Edison's estimated back bill was fair and accurate.

Allied argues that the Ohio Edison's tariff does not permit it to use estimates for the back bill. However, as Allied noted in its Brief, this Court has recognized that back billing is permitted in cases where the back billing estimation process is shown to be fair, reasonable and accurate. *Norman v. Pub. Util. Comm.*, 62 Ohio St.2d 345 at 353-355. (Allied Brief at 11.) Here, based on record evidence, the Commission correctly determined that Ohio Edison's estimated back bill was fair and reliable and that Allied "did not sustain its burden of proof of showing that Ohio Edison's billing estimates are unreliable." (Opinion and Order at 11.) (Allied Appx-17.)

In support of its rebill calculation, Ohio Edison demonstrated that the back bill was based on a combination of actual and historical usage. (Opinion and Order at 11.) (Allied

Appx-17.); (Ohio Edison Ex. 1, pp. 20-22.) (OE Supp. 22-24.) (Tr. Vol. II 216-219.) This calculation was especially reliable and conservative given that Ms. Nentwick used the lowest historical usage and the amount based on actual reads, which reduced the estimated billing to Allied's benefit. (Ohio Edison Ex. 1, p. 26.) (OE Supp. 28.) (Tr. Vol. II, p. 258-259.) And, Allied's witness Ramun testified that Allied actually used *more* electricity during the time period of the back bill than during the historical usage years used to calculate the bill. Thus, the back bill Ohio Edison calculated is actually less than what Allied would have paid if it had been charged monthly for electric service.

Moreover, and equally significant, the Commission found that "[n]owhere in the record does Allied provide the Commission with an alternate methodology to calculate the back billing, nor does Allied provide an approximate estimate of what it believes its electric usage for the 29 month period should have been or what the dollar amount should have been in the backbilling." (Opinion and Order at 11.) (Allied Appx-17.) Allied is bound by the record in this appeal and cannot cure or overcome its failure to present the Commission with any evidence to establish what it believes should have been the proper amount of the back bill for the service it concedes it received over a period of almost three years.

Although Allied sprinkles its Brief with its criticism of Ohio Edison for causing the need to have to back bill, Ohio Edison's failure to read the 935 Meter is irrelevant. Ohio law is clear that fault on the part of a utility does not affect the utility's right and obligation to collect a back bill for electric service. R.C. 4933.28 (applicable to residential customers); *Norman v. Pub. Util. Comm.*, 62 Ohio St.2d at 354-355; *Cincinnati Gas & Elec. Co. v. Joseph Chevrolet Co.*, 153 Ohio App.3d 95, 103-105, 2003-Ohio-1367, 791 N.E.2d 1016 (1st Dist.). Allied's interpretation of Article VII, paragraph (F) to mean that back billing is

allowed only when it is "impractical or impossible" to bill monthly would essentially impose a strict liability standard and preclude estimated billing in violation of R.C. 4905.32 and R.C. 4905.33. *See Norman*, 62 Ohio St.2d at 353 (noting that "[t]hese two sections require the service regulations, as approved by the commission, to be interpreted to allow backbilling.") Moreover, in claiming that it was not impractical to read the meter, Allied fails to explain how Ohio Edison could have read it without knowing that it was not in the billing system or on any meter reader's route. (Tr. vol. II, p. 249-250.)

For all of those reasons, the Commission properly determined that the back bill was fair and accurate.

V. CONCLUSION

The Court should dismiss Allied's propositions of law because they raise claims that were not properly preserved in Allied's application for rehearing. Alternatively, the Court should affirm the Commission's Order because Allied has not shown that the Commission's finding that Ohio Edison's back bill to Allied was manifestly against the weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d at 526.

Respectfully submitted,

Carrie M. Dunn (Reg. No. 0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: 330-761-2352
Facsimile: 330-384-3875
E-mail: cdunn@firstenergycorp.com

Counsel for Intervening Appellee
Ohio Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Ohio Edison Company was delivered to the following via regular U.S. mail this 27th day of May 2014:

Christopher R. Opalinski
Timothy D. Berkebile
ECKERT SEAMANS CHERIN & MELLOTT, LLC
44th Floor, 600 Grant Street
Pittsburgh, PA 15219

Steven L. Beeler
Katie L. Johnson
Assistant Attorneys General
PUBLIC UTILITIES SECTION
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793

Counsel for Intervening Appellee
Ohio Edison Company

APPENDIX

R.C. 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.

R.C.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.

R.C. 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.

R.C. 4905.32 Schedule rate collected.

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

R.C. 4933.28 Correcting residential utility billings.

(A) Whenever a gas, natural gas, or electric light company operated for profit or not for profit has undercharged any residential customer as the result of a meter or metering inaccuracy or other continuing problem under its control, the company may only bill the customer for the amount of the unmetered gas or electricity rendered in the three hundred sixty-five days immediately prior to the date the company remedies the meter inaccuracy. The maximum portion of the undercharge for unmetered gas or electricity rendered that may be recovered from the customer in any billing month shall be determined by dividing the amount of the undercharge by twelve and the quotient is the maximum portion of the undercharge that the company may, subject to division (C) of this section, recover from the customer in any billing month, in addition to either regular monthly charges of any type or regular level payment amounts billed in accordance with an agreement between the customer and the company. Subject to division (C) of this section, the time period over which the undercharge may be collected shall be twelve consecutive months.

(B) No company shall recover any interest charge, service charge, or fee, whether or not a percentage is utilized for its computation, for billings made pursuant to this section.

(C) Nothing in this section shall be construed to prevent the customer from paying an undercharge or any portion thereof in a time shorter than that stated in this section. Nothing in this section shall be construed to prevent a gas, natural gas, or electric light company from collecting an undercharge or any portion thereof in a time longer than that stated in this section.

(D) A gas, natural gas, or electric light company may not collect any amount otherwise permitted to be collected under this section unless the company, in the first bill the purpose of which is to collect the amount for unmetered gas or electric service, states the entire amount that it seeks to collect.

(E) No gas, natural gas, or electric light company that is required to follow this section in order to collect an undercharge from a customer may shut off the service of the customer except for safety reasons, except in the event of a request by the customer, and except to enforce a shut-off provision in its filed tariffs with the public utilities commission that is triggered by nonpayment by a customer of a lawfully owing past due amount.

(F) This section does not apply to any act that is a theft offense, as defined in section 2913.01 of the Revised Code, and that involves tampering with utility equipment or theft of utility service, or where a physical act of a customer or its agent causes inaccurate or no recording of the meter reading, or inaccurate or no measurement of the gas or electricity rendered.