

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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**REPLY BRIEF OF APPELLANT ALLIED ERECTING & DISMANTLING CO., INC.**

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## ARGUMENT

### Reply in Support of Proposition of Law No. 1

#### **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.**

The grounds for Allied Erecting and Dismantling Co., Inc.'s ("Allied") first assignment of error are simple and straightforward: the Public Utilities Commission of Ohio (the "Commission") failed to enforce the plain meaning of Ohio Edison Company's ("Ohio Edison") tariff, ("P.U.C.O. No. 11"), specifically Article VII, Paragraph F. Pursuant to Article VII, Paragraph F, where a monthly reading of a customer's meter "is impractical or impossible[.]" Ohio Edison may "render an estimated bill based upon past use of service and estimated customer load characteristics," but "[w]here 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." (Supp. 7.) The customer is then to be billed the lesser of the two calculated amounts. (Supp. 7.) Ohio Edison admits that this is not what occurred. Clearly, the Commission should have required Ohio Edison to comply with the terms of P.U.C.O. No. 11, and to recalculate the bill using the actual load reading and charge Allied the lesser of the two calculated amounts.

The terms of Article VII, Paragraph F of P.U.C.O. No. 11 are neither qualified nor limited by any entity's perception of reliability or accuracy, yet Ohio Edison and the Commission go to great lengths discrediting the actual reading taken by Ohio Edison's own employee.<sup>1</sup> Such discussions are irrelevant. Any inaccuracy in the meter reading is compounded

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<sup>1</sup> Allied disputes the assertion that it failed to rebut evidence challenging the 38 kW actual meter reading's accuracy. To the contrary, Allied did rebut this evidence, as set forth on page 13 of Allied's Merit Brief. Furthermore, as stated above, P.U.C.O. No. 11 does not condition compliance with its terms on the accuracy of the reading, especially when the reading is taken by Ohio Edison's employee.

by Ohio Edison's own failures to take regular readings, which it does at its own risk according to P.U.C.O. No. 11.<sup>2</sup> Failing to conform to P.U.C.O. No. 11 results in an unjust and unreasonable charge that is in excess of the charge allowed by law. R.C. § 4905.22. Neither Appellee points to any authority excusing Ohio Edison's failure to comply with the terms of its tariff where, as here, the utility disregards an actual load reading. Accordingly, Commission's Order should be reversed in this regard.

**Reply in Support of Proposition of Law No. 2**

**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.**

The grounds for Allied Erecting and Dismantling Co., Inc.'s ("Allied") second assignment of error are equally simple and straightforward: the Commission erred in finding that it was impractical or impossible for Ohio Edison to obtain actual load readings for almost three years. Article VII, Paragraph F authorizes the use of estimates "based upon past use of service and estimated customer load characteristics" when it is "impractical or impossible" to obtain readings. (Supp. 7.) Neither Appellee has adequately explained how it was impractical or impossible for Ohio Edison to obtain actual load readings for almost three years. The Commission ignores this issue and Ohio Edison provides a one paragraph discussion at the end of its brief. (See Ohio Edison Merit Brief pp. 18-19.)

Ohio Edison argues that applying the plain meaning of this standard would preclude estimated billing. Allied agrees only to the extent that P.U.C.O. No. 11 precludes the use of estimated billing under the facts of this case—where no actual reading was taken for a period of almost three years and there is an actual reading that directly contradicts the estimated billing.

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<sup>2</sup> See Appx-18 (finding that Ohio Edison violated Rule 4901:1-10-05(I) by failing to obtain actual readings of in-service customer meters at least once each calendar year). The risk of a transcription error is greatly reduced if actual readings are taken regularly.

Allied agrees that there may be legitimate applications of estimated billing where actual impracticality and impossibility exist. This is simply not one of those cases. Ohio Edison further argues that Ohio Edison could not have read the meter when it did not know that the meter was not in the billing system or on any meter reader's route. Ohio Edison created this so-called "impossibility." Such an error on Ohio Edison's part should not be used to excuse Ohio Edison from honoring its obligations under P.U.C.O. No. 11. Accordingly, Commission's Order also should be reversed in this regard.

**Proposition of Law No. 3**

**R.C. 4903.10 Provides That An Application For Rehearing Shall Specifically Set Forth The Ways In Which The Order Under Review Is Unreasonable Or Unlawful. Allied's Application For Rehearing Set Forth Grounds For Rehearing With Sufficient Specificity To Preserve Its Assignments Of Error And Confer Jurisdiction Upon This Court.**

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." Indeed, The Court has "strictly construed the specificity test set forth in R.C. 4903.10." In re Complaint of Cameron Creek Apts. v. Columbia Gas of Ohio, Inc., 136 Ohio St. 3d 333, 337, 995 N.E.2d 1160, 1165 (Ohio 2013). The Court explains "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." Cameron Creek Apts., 136 Ohio St. 3d at 337-38, 995 N.E.2d at 1165.

Allied presented two Propositions of Law in its Merit Brief. First, Allied asserts that 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. (See Allied Merit Brief pp. 8-17.) This proposition was specifically set forth and preserved in paragraph 2 of the Application for Rehearing, which states:

The Commission's failure to enforce Article VII, paragraph (F) of Ohio Edison's tariff, requiring that the customer be billed the lesser of the billing amounts calculated using the estimated load or the actual load reading, is unreasonable and unlawful, especially in light of the Commission's express finding that Ohio Edison violated Rule 4901:1-10-05(I), O.A.C. by not obtaining actual readings of its in-service customer meters at least once each year.

(Appx-31.) This statement concisely and completely states the grounds on which Allied considers the Commission's Order to be unreasonable and unlawful. The Commission and Ohio Edison point out that R.C. § 4905.22 is not mentioned therein. This omission is immaterial. The significant of R.C. § 4905.22 is its mandate that "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." It is Ohio Edison's failure to comply with Article VII, paragraph (F) of P.U.C.O. No. 11 that renders the charge unjust, unreasonable, and in excess of the amount allowable by law. Even without reference to R.C. § 4905.22, Ohio Edison's disregard of Article VII, paragraph (F) warrants reversal. The Commission fails to apply the express terms of P.U.C.O. No. 11, thus the legal defect in the Commission's Order is manifest. Paragraph 2 of the Application for Rehearing further references the Commission's finding that that Ohio Edison violated Rule 4901:1-10-05(I), O.A.C. This reference to the supporting factual finding and legal determination of the Commission emphasizes the inherent contradiction giving rise to the

Commission's error. Ohio Edison failed to take an actual reading for over three years, and, when it did, it didn't like the result so it ignored the express terms of its own tariff.

Allied's next asserts that "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." (See Allied Merit Brief pp. 17-20.) This proposition was specifically set forth and preserved in paragraph 4 of the Application for Rehearing, which states:

The Commission's finding that Ohio Edison did not violate Article VII, paragraph (F) of Ohio Edison's tariff by rendering estimated billings when obtaining actual readings was not impractical is unreasonable and unlawful, especially in light of the Commission's express finding that Ohio Edison violated Rule 4901:1-10-05(I), O.A.C. by not obtaining actual readings of its in-service customer meters at least once each year.

(Appx-32.) Again, this statement concisely and completely states the grounds on which Allied considers the Commission's Order to be unreasonable and unlawful. Paragraph 4 of the Application for Rehearing further references the Commission's finding that that Ohio Edison violated Rule 4901:1-10-05(I), O.A.C. This reference to the supporting factual finding and legal determination of the Commission is directly related to and supports Allied's argument that Ohio Edison obtaining actual readings was not impractical.

Allied did not employ a shotgun approach in seeking review of these issues. The two propositions of law raised before This Court were identified with precision in the Application for Reargument. While Allied identified numerous additional grounds for a rehearing and appeal, the additional grounds were corollary arguments that supported and were subsumed by the two primary Propositions or Law asserted. The straightforward nature of this appeal does not require a lengthy brief to specifically set forth Allied's grounds. Allied respectfully rejects the notion that a full-blown brief requesting rehearing on either of these matters would have offered the

Appellees a more specific and clear statement of the perceived errors than what was provided in Allied's Application for Rehearing.

## CONCLUSION

For all the forgoing reasons and authorities, Appellant Allied Erecting and Dismantling Co., Inc. respectfully submits that the Public Utility Commission of Ohio's Opinion and Order entered in its Journal on September 11, 2013 and Entry on Rehearing entered in its journal on November 6, 2013 are unreasonable and unlawful and should be reversed, and further requests that the case be remanded thereto with instruction to apply the terms of Ohio Edison Company's Tariff, P.U.C.O. No. 11.

Respectfully submitted



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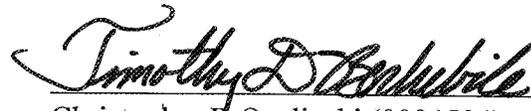
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Reply Brief of Appellant Allied Erecting & Dismantling Co., Inc.** was served by electronic mail and First Class United States Mail, postage prepaid, this 16<sup>th</sup> day of June, 2014, upon the following parties of record:

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