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*Via Federal Express
and Facsimile (614-466-0313)*

January 16, 2007

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215-3793

Dear Ms. Jenkins:

Re: *Merit Brief of The Cleveland Electric Illuminating Company*
Case No. 05-1281-EL-CSS

Enclosed for filing, please find the original and twelve (12) copies of the *Merit Brief of The Cleveland Electric Illuminating Company* regarding the above-referenced case. Please file the enclosed *Merit Brief*, time-stamping the two extras and returning them to me in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

kag
Enclosures
cc: Parties of Record

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**On Behalf of Respondent, The
Cleveland Electric Illuminating
Company**

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the matter of the Complaint of)	
Lawrence A. Boros,)	
)	
Complainant,)	
)	
v.)	Case No. 05-1281-EL-CSS
)	
The Cleveland Electric)	
Illuminating Company,)	
)	
Respondent.)	

**MERIT BRIEF OF
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

I. INTRODUCTION

This case concerns Complainant, Lawrence A. Boros ("Mr. Boros or Complainant"), an individual who filed a Complaint against The Cleveland Electric Illuminating Company ("CEI") requesting two specific types of relief: (1) that the Commission order CEI to offer the "Salem SEMT" fixture and similar full cut off versions of residential street lighting fixtures as an optional street lighting lamp; and (2) that the Commission order CEI to provide optional shielding on floodlights for private outdoor use. Complainant does not allege any wrong doing by CEI, nor does he allege a violation of CEI's tariff or process. Right, wrong or indifferent, Mr. Boros simply desires to improve street lighting and private outdoor lighting one lamp at a time. Although Complainant pursues this cause with great enthusiasm, as further explained below, he has failed to demonstrate that CEI's street lighting and POL service as offered is unjust,

unreasonable, or unlawful. Accordingly, CEI respectfully asks the Commission to deny Complainant's request and dismiss this case.

II. ARGUMENT

This case deals with the equipment options offered by CEI through its street lighting and private outdoor lighting ("POL") services. Complainant is not alleging that CEI's street lighting or POL programs are unlawful, or that CEI is charging the wrong price for these services. (Tr. 43) Nor is Complainant claiming that a light outside of his property is improperly shining on his property, or that CEI is refusing to provide service to Complainant. (Tr. 43-44) In fact, Complainant is not even alleging that the street lights offered by CEI are unsafe. (Tr. 45) As Mr. Boros admitted, this complaint is simply about CEI failing to offer a post top cutoff street light option and shielding for private outdoor lights. (Tr. 46)

Pursuant to R.C. 4905.26, Complainant has the burden to demonstrate that

...any regulation, measurement, or practice affecting or relating to any service furnished by [a] public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained.

In light of this, the ultimate issue in this proceeding is whether CEI's failure to offer a full cut-off post top street light option and shielding for private outdoor lights is unreasonable. As discussed below, it is not.

A. CEI's Street Lighting Program is Reasonable.

Noticeably absent from this case is any allegation that CEI's street lighting tariffs are unlawful, unjust or unreasonable or even that CEI violated provisions of its tariff. In fact, while this legal standard is the basis on which the Commission evaluates complaints

(See Ohio Revised Code 4905.26), Complainant indicates that this standard is not germane or relevant to his complaint. (Tr. 43, 105-106, Boros Exh. 1, p. 12) Rather, Complainant specifically states that lighting quality is at issue in the case and not the tariffs themselves. (Boros Exh. 1, p. 14) Complainant simply wants to make things better by, in his opinion, "improving" lighting (Tr. 11, 62, Boros Exh. 1, p. 3) and increasing the number of lighting options available to customers. (Tr. 60-61) While perhaps a noble cause, Mr. Boros' position forms no legal basis for a legitimate complaint, nor is it necessarily consistent with the desires of other customers.

1. Complainant Lacks the Standing Necessary to Maintain His First Cause of Action Regarding Street Lighting Service.

As a preliminary matter, CEI's street lighting program is offered through Rate 43 of CEI's tariff, P.U.C.O. No. 13. This program is available to "*any municipality or governmental authority* for the lighting of its streets, roadways, avenues, alleys, sidewalks, parks and other public grounds" (P.U.C.O. No. 13, Rate 43, p. 1) (emphasis added.) Mr. Boros has admitted that he is not representing the City of Mentor or that the City has authorized Mr. Boros to represent their interests in this proceeding.¹ (Tr. P. 44) Nor has Mr. Boros alleged representing the interests of any other municipality or governmental authority. Indeed, Mr. Boros admits that he is just representing himself as an individual. (Id.) He has not asked other customers if they agree with his request. (Tr. 86-87) Inasmuch as CEI's Rate 43 street lighting program is offered only to municipalities and other governmental authorities, Mr. Boros lacks the standing necessary to maintain his first cause of action. Furthermore, the City of Mentor's

¹ Mr. Boros is a resident of the City of Mentor. Therefore, it is assumed that if standing were to exist, it would be limited to the street lights installed within the city limits of Mentor. The standing argument, however, applies regardless of the scope of Mr. Boros' complaint.

Department of Public Works determines the types of street lights that are installed in the City. (Tr. p. 94) Therefore, if Mr. Boros has concerns regarding the types of lights installed in the City of Mentor, his complaint lies with the City, and not with CEI.

2. Even if it is Found that Complainant has Standing to Maintain His First Cause of Action, Complainant has Failed to Demonstrate that CEI's Street Lighting Program is Unreasonable.

Complainant has the burden to demonstrate the unreasonableness of CEI's street light offerings, *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d (1966), which he has failed to do. Although unclear, based on the pleadings in this case, it appears that Complainant attempts to support his position based on the fact that other utilities offer full cut off street lights (Tr. 117-119) and that, at least in once instance, a single light within CEI's service territory supposedly was to blame for a near miss accident between Complainant and a skate boarder. (Boros Exh. 1, p. 3) The evidence of record, however, does not support a finding of unreasonableness based on either argument.

A review of the evidence demonstrates that CEI offers at least one option (a cobra head cut off light) that meets Complainant's request. (Tr. 45) Moreover, Complainant could present no evidence that his request is standard within the industry. Indeed, the record supports a finding of the opposite. Complainant has indicated that he has no knowledge of whether other Ohio utilities offer the cut off lighting options requested by Complainant (Tr. 46-47), and Complainant's expert witness indicated that he knows of only two utilities, out of possibly hundreds across the nation, that offer full cut off options. (Tr. 119) Further, CEI Witness Deligatti stated that the street lights suggested by Mr. Boros comprise about 25% of the market today. (Tr. 156.) Clearly Complainant has

failed to prove that CEI's street lighting program offered under Rate 43 is contrary to industry standards. Nor can he demonstrate that it is unsafe.

Lighting glare cannot be eliminated in its entirety and, in some cases, it is unavoidable. (Tr. 106-107) Nowhere did Mr. Boros present evidence that CEI's street lights are in violation of safety codes and, in fact, CEI Witness Delligatti stated that he is not aware of any instance in which CEI's street lighting program failed to meet any relevant safety codes and procedures. (Company Exh. 2, pp. 2-3) As Mr. Delligatti also explained, while CEI endeavors to optimize lighting placement when installing street lights, placement of the lighting and orientation of the luminaire is a function of several other significant factors, including span lengths and property lines. (Tr. 147-150) Notwithstanding, these installations also comply with all applicable safety requirements.

Even Complainant does not allege that CEI street lights are unsafe *per se*.² Rather, Complainant alleges that they could possibly be made safer. (Tr. 45, 62) Yet, Complainant has also failed to demonstrate this. The only evidence presented by Complainant related to the safety of the CEI street light program is based on an isolated story of an unfortunate night-time incident in which Complainant nearly struck a boy on a skateboard. (Boros Exh. 1, p. 3) Mr. Boros argues that the street lighting glare from a single lamp within CEI's service territory was the proximate cause of this near disastrous event. (Id.) The facts, however, indicate that several critical and aggravating factors played a key role in Complainant's initial inability to see the boy. For example, in Complainant's own words, "[I]ncreasing sensitivity to glare is one of the reasons that older folks stop driving at night ... I am 62 right now. I can see an amazing difference

² Although Mr. Boros admitted this fact, given that only one brief will be filed in this proceeding, CEI, in an abundance of caution, will nevertheless address this issue.

compared to when I was in my 30s". (Tr. 21, 49) Complainant's other witness, Terry McGowan, confirmed this fact: "As people age, they become more sensitive to glare according to the [Illuminating Engineering Society of North America] and this increased sensitivity is why many older people stop driving at night". (Boros Exh. 8, p. 6) Additionally, when the incident occurred, Complainant admits that he was working late and, after a long day at work, he was tired and inattentive. (Tr. 42, 49-50, Boros Exh. 1, p. 3) As Mr. Boros described it, he was "hunched over the wheel" (Tr. 50), driving left of center "cutting the street as straight as [he could]" (Tr. 42, 53), just "trying to get home and go to bed." (Tr. 50) Further, the evidence shows that the skate boarder was not on the side of the road, but in the center. As Mr. Boros explained, he was "approaching a kid with a death wish on the road." (Tr. 50) This alarming set of circumstances illustrates a situation that clearly falls far short of supporting the argument that somehow glare from a single street light caused this near-miss accident. Probably most important is the fact that even with all of these other contributing factors, Mr. Boros did, indeed, see the skate boarder in time to avoid hitting him.

Complainant also freely admits that the glare experienced by a driver is not solely caused by a street light. The age of the driver plays a factor, as do weather conditions and the condition of the driver's windshield, the driver (i.e., level of fatigue, condition of eyesight), and the lamp. (Tr. pp. 47-51) With all of these intervening factors, it cannot be determined with any level of certainty (and certainly not by a preponderance of the evidence) that the street lamp was the proximate cause of this near miss accident, or that the street lights installed by CEI are unsafe. It is indeed telling that Complainant knows of no actual accidents or injuries that have been caused by street lighting glare, or that in

the 42 years he has been driving, approximately one-third of which has been night time driving, has Complainant ever been involved in an accident in which street lighting played a roll. (Tr. 40-41) The same is true of Complainant's other witness, Terry McGowan. (Tr. 123) And finally, neither CEI witness Hadick nor Delligatti (with a combined 46 years of experience) can recall a situation in which glare from CEI street lighting caused an accident, injury or resulted in a safety issue of any kind. (Company Exh. 1, p. 6, Company Exh. 2, p. 3) Consequently, Complainant's allegations, that safety has been compromised by not offering full cut-off street lights, are baseless and unsupported by the record.

3. Non-utility Alternatives to CEI's Street Lighting Program Exist for Customers.

Nothing prevents a municipality or other governmental entity from purchasing and installing the street lights that they desire, taking only metered electric service from CEI. (Tr. 161-162, Company Exh. 1, p. 4)

4. Summary.

In sum, CEI's street light Rate 43 is an optional program offered to municipalities and other governmental entities. These entities are responsible for selecting the types of street lights to be installed in their respective boundaries. Therefore, if Mr. Boros has a complaint, it lies with these governmental entities and not with CEI. Mr. Boros lacks the standing necessary to maintain this aspect of his complaint and accordingly, his first cause of action should be summarily dismissed. However, if the Commission desires to entertain this issue, then Complainant has failed to demonstrate that CEI's Rate 43 street lighting program is unlawful, unjust or unreasonable. The record demonstrates neither that CEI's street lighting program is contrary to industry standard, or that it is unsafe.

Accordingly, CEI respectfully asks the Commission to reject Complainant's first cause of action related to CEI's street lighting program.

B. CEI's Private Outdoor Lighting Program is Reasonable.

CEI also offers an *optional* private outdoor lighting program. This program is offered through CEI's tariff, P.U.C.O. No. 13, Rate 42, and is available to "any customer for the installation of unmetered outdoor lighting *for private property*." (Rate 42, p. 1) (emphasis added) As more fully discussed below, Mr. Boros lacks the standing necessary to maintain this aspect of his complaint, and, again fails to meet his burden to prove that the POL program offered by CEI is unreasonable.

1. Complainant Lacks the Standing Necessary to Bring His Second Cause of Action Related to Private Outdoor Lighting.

As indicated above, CEI's Rate 42 POL service is available to customers desiring to install outdoor lighting on their *private property*. As Mr. Boros admits, he is not alleging anything related to a private outdoor light installed under CEI's program that impacts his property. (Tr. p. 43) Nor is he claiming that CEI has refused him POL service. (Tr., p. 44) In fact, there is nothing in the record that would indicate that Complainant actually asked CEI to install on his private property an outdoor light with a shield. Because Mr. Boros is representing only himself in this matter, and he has not even attempted to obtain the POL service offered by CEI, he cannot demonstrate any injury suffered under CEI's POL program and, therefore, he has no standing to pursue his second cause of action on behalf of others.³

³ See, *State, ex rel. Consumers League of Ohio et al., v. Ratchford, Supt., et al.*, 8 Ohio App.3d 420, 424 (1982) stating that standing requires demonstration of concrete injury in fact rather than abstract or suspected injury; demonstration of injury in fact is limited to those situations where the individual can show he has suffered or will suffer specific injury ... and that this injury is likely to be redressed if the court invalidates action or inaction.

2. If the Commission Finds that Complainant has Standing to Maintain His Second Cause of Action Related to Private Outdoor Lighting, Complainant Has Failed to Meet His Burden of Proof.

Assuming that the Commission finds that Mr. Boros has standing to maintain his second cause of action, he, again, has failed to demonstrate that CEI's POL program is unreasonable. Nowhere does Mr. Boros provide evidence that other utilities offer an optional shield for flood lights. Nor has he demonstrated that other customers even want the shields being requested. As Mr. Boros acknowledges, there are costs associated with these shields and he believes the customers should ultimately pay for them. (Tr. 60, 114) Mr. Boros did not survey other customers to determine if they too want the relief being sought by Mr. Boros (Tr. 86), which is extremely relevant, especially since there would be additional costs associated with the additional options. Further, as Mr. Boros admits, the customer can install the flood light of their choice through Lowes or Home Depot, neither of which mandates that lights purchased by their customers include a light shield. (Tr. p. 92) In fact, in the City of Mentor, at least one customer, BankOne, did not install shields even when it was required by city ordinance to do so. (Tr. p. 93) Recognizing the need to balance costs for purposes of economic development with results, the City of Mentor chose, at least in the BankOne situation, not to enforce the ordinance. In light of the foregoing, Complainant has failed to demonstrate that any customer, other than Mr. Boros, (or even the City of Mentor) desires flood light shields, or that CEI's failure to include shields as an optional accessory to its POL program is contrary to industry standards or is unreasonable.

3. Customers are Not Required to Take POL Service From CEI.

Like the street lighting program offered by CEI, the Rate 42 POL Program is an optional program offered for the convenience of CEI's customers. (Company Exh. 1, p. 4) There is nothing that prevents these customers from installing any type of private outdoor light (or shield) that they desire. (Tr. 161-162) A customer, if they want, can hire an electrician to install an outdoor light on the customer's property and simply take metered electric service from CEI. (Tr. 84) Further, there is nothing that prevents a customer from hiring an electrician to install a shield on a light installed by CEI. In other words, the installation of shields is not a regulated service and therefore, CEI should not be mandated to offer it. Just because Mr. Boros believes that "customers are oblivious to the value of low glare productive lighting and will continue ordering and installing counterproductive high-glare lighting" (Boros Exh. 2, p. 4), does not make it so; nor does it make CEI's Rate 42 unreasonable.

4. Summary.

In sum, there is nothing in the record that would indicate that Complainant attempted to obtain POL service from CEI, thus raising an issue as to whether Complainant even has standing to maintain his second cause of action related to private outdoor lighting. Assuming that the Commission finds that he does, he has failed to demonstrate that the failure of CEI to offer an optional shielding accessory in its POL program is unreasonable. There is no evidence that other utilities offer this option, nor is there evidence that customers desire to incur the cost of these shields. In fact, based on the example provided by Complainant, at least with regard to Bank One, it appears that they do not; or that the City of Mentor intends to require them to do so. Mr. Boros

surveyed no one to determine their desires but, instead, presumes to know what they want. Clearly, this lack of evidence fails to come close to meeting Complainant's burden of proof to demonstrate that the POL program offered by CEI is unreasonable, especially when it is being offered as an *optional* program, approved by the Commission, for the convenience of CEI's customers.

C. Complainant's Proposal Results in Significant Costs That CEI Is Not Authorized to Recover.

Complainant initially contends that the full cut off street light that he proposes (SEMT) costs the same as the non-cut off version (SEML) (Tr. 59) and adamantly proclaims that his street lighting request is "modest" and does not involve compensatory issues. (Boros Exh. 1, p. 7) Ironically, he later admits that he really does not know the price CEI would pay for his proposed lighting (Tr. 59), nor does he know the cost of inventorying these lights. (Tr. 59) He does, however, agree that there are inventory costs associated with his suggestion, as well as carrying costs. (Tr. 60) Further, Complainant's other witness, Terry McGowan, admits that he too has no knowledge of the costs of Mr. Boros' proposal but recognizes that "inventorying and maintaining lighting is an expensive process not to be taken lightly." (Tr. 111-112) CEI Witness Delligatti explained that the cost of the SEMT cutoff street light fixtures proposed by Mr. Boros are approximately twice the cost of the same non-cutoff (SEML) version currently offered by CEI. (Tr. 154-155)

As CEI Witness Hadick explained, if CEI was to inventory, install and maintain the equipment for the options requested by Complainant, CEI would not be able to recover the incremental cost of this equipment and related operational and administrative costs today because it is only permitted to recover costs that are currently in base rates.

(Company Exh. 1, p. 5)⁴ The current base rate for both street lighting and private outdoor lighting does not include these costs and, therefore, would not be recoverable in rates until CEI's next base rate case. (Id) Inasmuch as CEI is currently committed to maintain existing base distribution rates, these incremental costs could not be recovered at least until 2009. It is unreasonable for the Commission to order CEI to incur such costs without an opportunity for recovery. Therefore, while CEI believes that Complainant's requested relief should be denied, if the Commission orders CEI to offer the options requested by Complainant, CEI asks that the Commission also authorize deferral of the incremental costs to provide these options until CEI's next rate case in which recovery should be granted.

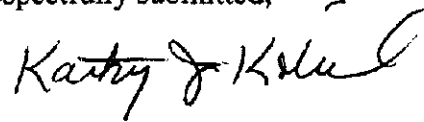
III. CONCLUSION

Complainant lacks the standing necessary to maintain his complaint. However, even if the Commission was to find proper standing, Complainant has failed to demonstrate that CEI's failure to offer cut-off post top street lights or shields for private

⁴ See PUCO Order in Docket No. 05-1125-EL-ATA

outdoor lighting is unreasonable. Accordingly, CEI respectfully asks that the Commission deny Complainant's request and dismiss the Complaint with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathy J. Kolich", with a stylized flourish at the end.

Kathy J. Kolich (Reg. No. 0038855)

Trial Attorney

Mark A. Hayden (Reg. No.0081077)

FirstEnergy Service Company

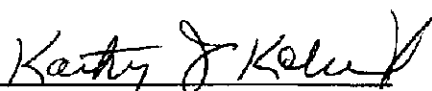
76 South Main Street

Akron, Ohio 44308

On Behalf of Respondent, The Cleveland
Electric Illuminating Company

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2007, a copy of the Merit Brief of The Cleveland Electric Illuminating Company was served upon Lawrence A. Boros, 5883 Dorrwood Drive, Mentor, Ohio 44060, by first class mail, postage prepaid, and by electronic mail to Larry@boros.net.



Kathy J. Kolich, Esq.