

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)	
Thomas E. Merchant,)	
)	
Complainant,)	
)	
v.)	Case No. 08-428-EL-CSS
)	
Ohio Edison Company,)	
)	
Respondent.)	

ENTRY

The Commission finds:

- (1) On April 2, 2008, Thomas E. Merchant (complainant) filed a complaint with the Commission against Ohio Edison Company (OhioEd). Mr. Merchant states, among other things, that he resides at 808 Brookfield Avenue, Masury, Ohio, and although the property was formerly commercial, he resides in the five room apartment located on the second floor. Mr. Merchant states that he contacted OhioEd in November 2007 to explain that the property is now residential and to request a payment plan for the outstanding bill. According to the complainant, OhioEd sent a service representative to investigate and verify that the property was being used as a residence. Mr. Merchant also alleges that he is being charged for service to a floodlight for his neighbor's commercial building. Finally, Mr. Merchant requests that OhioEd be prohibited from disconnecting his service while his complaint is pending before the Commission.
- (2) On April 10, 2008, OhioEd filed its answer to the complaint. In its answer, OhioEd states, among other things, that the company does not offer a three-phase residential service. The company contends that three-phase service qualifies for OhioEd's General Service Rate Schedules 21 and 23. Further, OhioEd states that Mr. Merchant initiated service in June 2007 and that his service has not been disconnected despite the outstanding bill which totaled \$9,231.35 as of the time the answer was filed. OhioEd also admits that a representative

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inspected the property and found that there was a bedroom and a kitchen on the premises.

- (3) Pursuant to entry issued May 14, 2008, a conference in this case was scheduled for June 3, 2008. The May 14, 2008 entry also indicated that additional information was necessary to develop an interim payment arrangement during the pendency of this complaint and, if the parties were not able to negotiate a settlement, the interim payment arrangement and other procedural issues would be addressed immediately following the conference. At complainant's request the conference was rescheduled to June 25, 2008.
- (4) OhioEd and Mr. Merchant tentatively agreed that Mr. Merchant would make a monthly payment of \$100 to OhioEd, commencing July 20, 2008, during the pendency of the complaint to stay the disconnection of his electric service. Counsel for OhioEd drafted the payment agreement and sent it to Mr. Merchant for his review and signature.
- (5) By way of discovery request served upon Mr. Merchant on June 6, 2008, OhioEd requests access to the premises located at 808 Brookfield Avenue, Masury, Ohio. By way of a conference call on June 20, 2008, the parties had an opportunity to discuss the issue with the Attorney Examiner. Mr. Merchant contends that an OhioEd representative has already entered the premises and determined that the property included a bedroom and a kitchen and, therefore, met the requirements for residential service. The Attorney Examiner informed Mr. Merchant and OhioEd that, in light of Mr. Merchant's request for residential service at 808 Brookfield Avenue, which is a commercial property, OhioEd's request for access is relevant and directed Mr. Merchant to allow access to the premises. Thereupon, Mr. Merchant informed the Attorney Examiner and OhioEd that he would not allow OhioEd access to his property and confirmed such by a subsequent e-mail.
- (6) The conference was conducted on June 25, 2008. However, the parties were unable to negotiate a resolution to the dispute. At the conclusion of the conference, Mr. Merchant, counsel for OhioEd and the Attorney Examiner discussed the procedural schedule and other issues. During the discussion, Mr. Merchant represented that he would provide counsel for

OhioEd with responses to the company's first set of interrogatories by June 30, 2008. Counsel for OhioEd stated that she had not yet received a signed copy of the payment agreement from Mr. Merchant, declared that OhioEd was withdrawing its offer to accept the \$100 monthly payment during the pendency of this proceeding and would be filing a motion to dismiss the complaint in light of Mr. Merchant's refusal to allow OhioEd's counsel access to the premises.

- (7) On July 3, 2008, OhioEd filed a motion to dismiss or, in the alternative, to establish a minimum payment schedule during the pendency of this proceeding. OhioEd argues that Mr. Merchant, as of the filing of the motion, had not responded to discovery requests which were due on June 26, 2008 and the complainant agreed to provide by June 30, 2008. Further, OhioEd notes that Mr. Merchant has refused to grant counsel for OhioEd access to the premises despite the Commission's order to the contrary. Counsel for OhioEd states that Mr. Merchant has not returned her calls to discuss the case.

OhioEd reasons that the Attorney Examiner's decision to grant OhioEd access to the premises at issue was correct given that the central issue in this matter is the nature of the premises. OhioEd admits that the company visited the premises in February 2008 to determine whether there was a kitchen and a bedroom on the premises. OhioEd argues that the service representative is not an attorney and is not familiar with the laws, rules and regulations surrounding the characterization of the facility as residential or commercial for purposes of litigation. Furthermore, OhioEd states that it is entitled to a visual inspection of the property to prepare its defense. The company also states that based on a photograph taken of a sign which is allegedly outside of the premises at issue, the company has reason to believe that the nature of the use of the facility has changed (Exhibit B). The sign reads "opening June 15 arcade style game room 4 the under 21." For these reasons, OhioEd requests that the complaint be dismissed with prejudice. The Supreme Court of Ohio, according to OhioEd, supports the dismissal of an action when the conduct of a party is so negligent, irresponsible, contumacious or dilatory as to provide substantial grounds for a dismissal with prejudice for a failure to obey a court order. *Quonset Hut, Inc., v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 48, 684 N.E.2d 319, quoting *Tokles &*

Son, Inc. v. Midwestern Indemn. Co. (1992), 65 OhioSt.3d 621, 632 605 N.E.2d 936. The court, however, cautioned that dismissals purely on procedural grounds should be done carefully and cautiously. OhioEd notes that the complainant has cancelled the prehearing conference, asserts that he is not available for a hearing until September 11, 2008, has prevented OhioEd from gathering crucial evidence to prepare its defense by not providing responses to discovery and ignoring a Commission directive to allow access to the premises at issue. Furthermore, OhioEd states that the complainant is in essence receiving free electric service, has not made a payment since November 2007 and, as of the filing of this motion, accrued an arrearage of more than \$10,000. OhioEd asserts that Mr. Merchant has filed bankruptcy eight times, twice resulting in discharge, which resulted in OhioEd's subsidiary, Pennsylvania Power Company being required to write-off almost \$50,000 in unpaid electric bills. Further, the company states that Mr. Merchant seeks all available assistance to avoid the disconnection of his utility service including the maximum number of medical certificates allowed, low income assistance programs until his participation is terminated for failure to make the minimum payment required and the filing of complaints. OhioEd argues that the complainant's actions justify the dismissal of this action with prejudice.

In the alternative, OhioEd requested that a minimum payment arrangement be established. OhioEd notes that the rules require a minimum payment by the complainant and requests that the complainant be required to pay, during the pendency of this complaint, the amount due pursuant to the company's residential rates.

- (8) By entry issued July 10, 2008, the Attorney Examiner reaffirmed her ruling regarding access to the premises and concluded that in light of the outstanding balance on the account, the fact that no payments have been made on the account since November 2007 and that the hearing is not scheduled to commence until September 11, 2008, it was imperative that a minimum payment arrangement be established immediately. The entry further stated that OhioEd's July 3, 2008, motions in the alternative would be addressed as two independent motions. Therefore, Mr. Merchant, in accordance with Rule 4901-1-12(B)(1), Ohio

Administrative Code (O.A.C), was informed that any memorandum contra OhioEd's motion to dismiss needed to be filed with the Commission within 15 days after service of the motion.

- (9) In regards to the minimum payment necessary to retain his electric service, the July 10, 2008 entry directed Mr. Merchant to pay his current monthly bill, in full, as it becomes due for all bills due after the issuance of the entry. The entry further provided that any failure by Mr. Merchant to make timely payments of the current amount due by the due date shall entitle the company to initiate notice and disconnection procedures applicable to commercial customers as set forth in the O.A.C. and OhioEd's tariff.
- (10) On July 11, 2008, OhioEd filed a motion to compel discovery or, in the alternative, to dismiss the complaint. OhioEd states, among other things, that: (a) Mr. Merchant has not responded to the discovery requests which were due by June 26, 2008 and that he represented he would provide to counsel by June 30, 2008; (b) On or about July 2, 2008, counsel for OhioEd served Mr. Merchant with a notice of deposition to be held in Youngstown, Ohio. Counsel states that she attempted to reach Mr. Merchant at least four times between July 1, 2008 and July 9, 2008, to confirm his availability for the deposition. Counsel states that Mr. Merchant did not respond to any of her messages and did not appear for the deposition; and (c) As previously discussed in this entry, Mr. Merchant refuses to grant counsel access to the premises on a mutually agreeable date and time. Thus, OhioEd argues that it is precluded from preparing its defense to the allegations set forth in the complaint. For these reasons, in additions to those set forth in the July 3, 2008 motion, OhioEd requests that the Commission either order Mr. Merchant to respond to the discovery request, grant counsel access to the premises and reschedule the deposition to a mutually agreeable date or that the complaint be dismissed.
- (11) On July 18, 2008, Mr. Merchant filed a response to OhioEd's motion to dismiss. In his response, Mr. Merchant contends, among other things, that he is disputing each of his monthly bills in their entirety from November 2007 and each bill issued thereafter until the Commission issues a ruling on this case

since OhioEd does not offer three-phase residential service. Further, Mr. Merchant argues that he can not be directed to pay his current bill amount because Rule 4901-9-01(E) and 4901:1-10-19, O.A.C., state that a complainant may avoid the disconnection of his service during the pendency of a complaint provided the customer pays either the undisputed portion of the bill or the amount paid for the same billing period in the previous year. Mr. Merchant notes that his June 2007 bill was \$116.17 and that OhioEd was willing to accept \$100 per month. Mr. Merchant notes that attached to OhioEd's June 3, 2008 motion is a chart which sets forth the complainant's total bill at the commercial rate he is presently charged and his recalculated bill at the applicable residential rate. Based on the chart, OhioEd asserts that Mr. Merchant's bills for the period would actually total approximately \$3,000 more under the residential rate. Further, Mr. Merchant asserts that Exhibit D of OhioEd's July 3, 2008 motion, which consists of 60 pages of customer interaction center notes, indicates that OhioEd planned to rebill his account at residential rates per the notes of December 21, 2007. Mr. Merchant, although he admits to using the sign as a form of advertisement for friends, argues that the photograph of the sign was taken by an unknown source, is not dated, is a two-sided sign and that the content was staged.

- (12) On July 23, 2008, OhioEd filed a reply to Mr. Merchant's response. OhioEd argues that Rule 4901:1-10-19(C), O.A.C., is applicable to residential accounts not commercial accounts. Further, OhioEd notes that the complainant's consumption is approximately 20,000 kWh per month, which far exceeds residential level usage. OhioEd asserts that the complainant did not reside at the premises at issue during the previous year and, therefore, the consumption levels of the previous year are not a proxy for current usage, as the rule contemplates. Further, OhioEd contends that the company is charging the rates approved by the Commission, which do not include a three-phase residential service rate, and notes that Mr. Merchant is actually paying less for his utility service under the commercial rates. Using this logic, OhioEd asserts that the customer is being billed pursuant to the least cost rate offered by the company. OhioEd further notes that to date the complainant has:

- (a) failed to abide by the directive to provide the company access to the premises at issue;
- (b) failed to respond to written interrogatories;
- (c) failed to provide documents requested through the discovery process;
- (d) prevented the delivery of overnight packages to the premises;
- (e) blocked OhioEd's counsel's telephone number and e-mail address, thus preventing counsel from contacting the complainant by any other means than the U.S. mail to discuss the proceeding; and
- (f) failed to appear for his deposition.

Thus, the company reiterates the request to dismiss this complaint with prejudice.

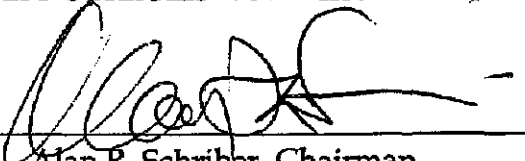
- (13) The Commission notes that, while Mr. Merchant has availed himself of the complaint process offered by the Commission, he has failed to responded to discovery requests in a timely manner, failed to appear or attempt to reschedule his deposition, refuses to communicate with counsel for OhioEd to discuss the proceeding other than by way of the U. S. mail, and refuses to grant OhioEd access to the premises in compliance with the entry issued July 10, 2008. We find such actions contrary to the complaint process and, in light of Mr. Merchant's failure to timely comply with the provisions of the O.A.C. and the entries issued thereunder, the Commission finds that this case should be dismissed and closed of record.

It is, therefore,

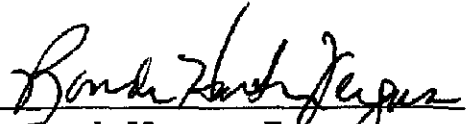
ORDERED, That this complaint is dismissed and the matter closed of record. It is, further,

ORDERED, That a copy of this entry be served upon Thomas Merchant, OhioEd and its counsel, and all other interested persons of record.

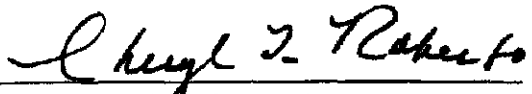
THE PUBLIC UTILITIES COMMISSION OF OHIO


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Entered in the Journal

AUG 20 2008


Renee J. Jenkins
Secretary