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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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MICHAEL L. NICHOLSON,

Complainant,

v.

DOMINION EAST OHIO,

Respondent.

Case No. 09-78-GA-CSS

**POST-HEARING BRIEF OF RESPONDENT
THE EAST OHIO GAS COMPANY d/b/a DOMINION EAST OHIO**

Pursuant to the Attorney Examiner's instructions at the May 21, 2009 hearing in this matter, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby submits its post-hearing brief.

I. INTRODUCTION

Complainant Michael Nicholson alleges that DEO improperly denied Complainant's enrollment in an Energy Choice program. According to Complainant, DEO's denial of the enrollment caused Complainant to spend over \$4,000 more for his gas supply over the next three years than if DEO had accepted the enrollment. Complainant bears the burden of proof for his claims against DEO. See Luntz Corp. v. Public Util. Comm'n., 79 Ohio St. 3d 509, 513 (1997)(citing Grossman v. Public Util. Comm'n., 5 Ohio St. 2d 189, 190 (1966)). Complainant cannot meet this burden.

The reason DEO denied Complainant's enrollment with a competitive supplier is because Complainant was not eligible to participate in Energy Choice. Complainant was ineligible for Energy Choice because his account with DEO was more (much more) than 30 days in arrears at the time of his attempted enrollment. Thus, DEO's tariff precluded Complainant's enrollment with a competitive supplier. DEO's compliance with its tariff cannot constitute inadequate,

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unreasonable or unlawful service under R.C. 4905.26, or any other statute or regulation. The Complaint must be dismissed.

II. STATEMENT OF UNDISPUTED FACTS

Complainant owns commercial property located at 715 E. Midlothian Blvd. in Youngstown, Ohio (the "Property"). (Transcript of May 21, 2009 Hearing ("Tr.") at 19:24-20:6.) Complainant operates an insurance agency from part of the Property and rents the remainder to several different commercial tenants. (Id.) The Property contains four gas furnaces and a gas water heater. (Id. at 21:8-22:3.) Between December 1, 2004 and March 1, 2005 (the time period relevant to this Complaint), Complainant and his tenants used gas at the Property on a daily basis. (Id. at 22:10-15.) All of the gas usage at the Property is registered by a single meter. (Id. at 22:4-6.)

Complainant received a \$367.17 gas bill for the Property, dated December 20, 2004, for usage during the period November 15 through December 16. (Id. at 23:7-9; DEO Exhibit 1.3.) Complainant paid \$200.00 toward this bill, leaving an arrearage of \$167.17. (Id. at 24:18-22; DEO Exhibit 1.0 (Direct Testimony of Margaret Callahan) at 5:9-17; DEO Exhibits 1.3 and 1.4.) Complainant felt that because the bill was based on an estimated meter reading, it was okay for Complainant to make an "estimated payment:"

Q: And you received bills for 715 East Midlothian that were based on estimated readings; that's correct?

A: Yes.

Q: And it was your standard practice to estimate what you believed you owed DEO on estimated bills?

A: Sometimes.

Q: And you would only pay the amounts you estimated you owed on estimated bills; is that correct?

A: Sometimes.

Q: And when you say "sometimes," one of those times was with regard to your December 2004 bill for 715 East Midlothian, is that correct?

A: Yes.

(Tr. 30:5-19.)

On or about December 23, 2004, Complainant attempted to enroll in a gas supply program with MX Energy. (See Tr. at 26:5-9; DEO Exhibit 1.0 at 4:18-23.) Although Complainant provided no documentation of the terms of the MX Energy offer, he testified that it was a 36 month program at a fixed rate of \$8.99/mcf beginning in February 2005. (See Tr. at 27:13-25.) As DEO's Margaret Callahan explained, it generally takes about one or two billing cycles to complete an Energy Choice enrollment. (See DEO Exhibit 1.0 at 4:15-16.)

While Complainant's enrollment with MX Energy was pending, he received another gas bill from DEO, dated January 24, 2005, in the amount of \$539.78. (Tr. at 23:10-12; DEO Exhibit 1.4.) Of this amount, \$372.61 was for current charges and \$167.17 was for the December arrearage. (Id.; DEO Exhibit 1.0 at 5:19-6:4; DEO Exhibits 1.4 and 1.5.) Payment on the bill was due on or before February 9, 2005. (Id.) Complainant paid nothing toward this bill. (Id.; Tr. 25:10-20.)

DEO's Energy Choice Transportation Service ("ECTS") tariff governs customer eligibility for participation in Energy Choice. (DEO Exhibit 1.0 at 3:11-22.) DEO Exhibit 1.1 is a copy of the ECTS tariff in effect in 2005. Among other the eligibility criteria, the ECTS tariff required that customers "have no arrears of 30 days or more or are current on a payment plan to discharge such arrears" (DEO Exhibit 1.1, ¶ 1(c)). As of February 22, 2005, Complainant's account was over 60 days in arrears: \$167.17 remained past due from the December 2004 bill, and \$372.61 was past due from the January 2005 bill. (See Tr. at 23:16-18; DEO Exhibit 1.0 at

5:19-6:4; DEO Exhibits 1.5 and 1.6.) DEO therefore denied Complainant's enrollment in the MX Energy program. (DEO Exhibit 1.0 at 5:2-3; 5-7.)

Complainant's next gas bill was dated February 26, 2005. (See Tr. at 23:16-18; DEO Exhibit 1.6.)¹ The February 2005 bill was \$675.68. (Id.) Of this amount, \$135.90 was for current charges, along with arrearages of \$167.17 and \$372.61 from the December 2004 and January 2005 bills, respectively. (Id.; DEO Exhibit 1.0 at 6:6-15.) Complainant paid the February 2005 bill in full on March 7, 2009 -- two weeks after the enrollment with MX Energy had been denied. (Tr. at 25:1-9.)

Complainant claims he did not learn that his enrollment with MX Energy was denied until the end of 2005. (Tr. 27:3-12.) Upon learning of the denial, he requested a Statement of Account from DEO, which DEO provided to him in December 2005. (DEO Exhibit 1.0 at 7:7-12.) Three years later, Complainant decided to file his Complaint.

III. ARGUMENT

The only issue that the Commission needs to resolve in this case is whether Complainant was eligible to participate in Energy Choice. The record evidence establishes that he was not. The applicable ECTS tariff precludes enrollment of customers who are more than 30 days in arrears. As explained above, as of February 22, 2005 (the date DEO denied Complainant's enrollment), Complainant owed \$167.17 on his December 2004 bill and \$372.16 on his January 2005 bill. Thus, a portion of the arrearage exceeded 60 days. Complainant simply was not eligible to participate in Energy Choice.

For his part, Complainant attempts to manufacture a fact dispute where none exists.

¹ There were two bills issued in February 2005. (See DEO Exhibit 1.0 at 5:19-6:15.) The first bill, dated February 22, 2005, was based on an estimated read of \$321.05. (Id.) In the interim, a customer reading was called in which, if accurate, showed the current charges to be \$135.90. (Id.) Based on the \$135.90 reading, DEO issued the second February bill on February 26, 2005. (Id.)

Specifically, Complainant argues that the presence of a "blank space" under the "Acct Balance" column of the Statement of Account (DEO Exhibit 1.8) for February 18, 2005 and February 25, 2005 indicates that the account balance was zero at the time he attempted to enroll with MX Energy. (Tr. at 36:20-39:19; 41:25-42:9.) Complainant is mistaken. Ms. Callahan, the Supervisor of DEO's Akron Call Center, explained that, as to the February 18, 2005 and February 25, 2005 entries, "any blanks in the 'ACCT BALANCE' column merely reflect that the corresponding transaction to the left of the chart did not result in a new bill being issued on the account." (See DEO Exhibit 1.0 at 7:7-8:4.) She confirmed that the account balance on the dates in question was in fact \$675.68. (Tr. at 36:20-38:23; DEO Exhibit 1.0 at 6:6-15; 7:7-8:4.) Ms. Callahan also explained that the Statement of Account is not mailed to customers to inform them of charges due on their accounts. (Tr. at 40:22-41:7.) Rather, the monthly bills, which Complainant concedes he received, are how DEO informs customers of what they owe. (Id.) The Statement of Account does not help Complainant's case.

While not particularly relevant to the claims in this case, Complainant also used the evidentiary hearing as a platform to complain about bills based on estimated meter readings. Complainant seemed to suggest that DEO's practice of rendering bills based on estimated reads excused Complainant from paying the full amount of a bill based on an estimated reading. This, of course, is not the case. The full amount of the bill is due by the due date, regardless of whether usage is based on an estimated or actual read. Estimated reads are periodically "trued-up" with actual reads. (DEO Exhibit 1.0 8:16-10:3.)

DEO's tariff in effect in 2004 and 2005 required DEO to use its "best efforts" to obtain an actual meter read once every twelve months. (DEO Exhibit 1.0 at 8:16-20; DEO Exhibit 1.1.) DEO met this requirement by obtaining actual reads at the Property on March 11, 2004, July 20, 2004, February 10, 2005, March 16, 2005 and December 15, 2005. (DEO Exhibit 1.0 at 9:1-7.)

Moreover, Complainant never requested DEO test the accuracy of the gas meter at the Property, nor is there any reason to believe that the gas meter at the Property does not comply with the accuracy standards of R.C. 4933.09. (*Id.* at 10:9-11; 13-15.) Ms. Callahan also explained the procedures DEO follows in rendering bills based on estimated reads, and confirmed that these procedures were followed with regard to bills sent to Complainant. (*Id.* at 9:9-10:3; 10:5-7.)

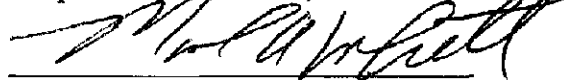
Given that the Commission lacks authority to award the monetary damages that Complainant seeks,² combined with the fact that Complainant is not entitled to damages in any event, DEO will address Complainant's damages claim only briefly. Complainant argues that he is entitled to reimbursement of \$4,055.33. (Complainant Exhibit 1.) He calculates this amount by multiplying the cost of gas from his December 2005 bill (\$15.42 MCF) by 36 months. (Tr. at 30:20-31:3.) This calculation is meaningless. Complainant concedes that the price of gas fluctuates monthly and that his actual cost of gas between February 2005 and February 2008 could have been lower than \$15.42 MCF. (*Id.* at 30:20-31:8; 31:13-16.) Indeed, the Commission is certainly aware, through DEO's monthly GCR and SSO filings, that commodity costs began to drop significantly after the winter of 2004/2005. Complainant has not even established whether in fact he would have saved money had he been enrolled with MX Energy from February 2005 through February 2008. Complainant's damages calculation should be disregarded.

² See, e.g., *R. Allen Hodge v. Ohio Edison Co.*, Case No. 02-1483-EL-CSS, Entry of July 18, 2002, ¶ 3 ("It should be noted that although the Commission does have jurisdiction over the facts alleged in this case, it may not order monetary damages."); *Westfield Ins. Co. v. Dayton Power & Light Co.*, Case No. 00-571-EL-CSS, Entry of April 28, 2000, ¶ 3 ("It should be noted that the Commission does not have jurisdiction to award monetary damages.")

IV. CONCLUSION

The record evidence in this proceeding demonstrates, without question, that DEO rightfully denied Complainant's enrollment with MX Energy because Complainant was ineligible to participate in Energy Choice. The Complaint should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief of Respondent The East Ohio Gas Company d/b/a Dominion East Ohio was served by ordinary U.S. mail, postage prepaid, to the following on this 1st day of July, 2009:

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