FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

PETER J. WIELICKI,	)	
	)	
	)	
Complainant,	)	
v.	)	**Case No. 10-2329-EL-CSS**
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,	)	
	)	
	)	
Respondent.	)	

RESPONDENT THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S POST-HEARING BRIEF

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ATTORNEYS FOR RESPONDENT
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY

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I. INTRODUCTION

Complainant Peter J. Wielicki ("Complainant") brings one claim in this case: that The Cleveland Electric Illuminating Company ("Company" or "CEI") allegedly violated R.C. 1303.40 by failing to honor an accord and satisfaction. (*See* Compl., pp. 1-4.) Specifically, Complainant alleges that the Company agreed to accept partial payment of the monthly bill dated August 16, 2006 ("August 2006 Bill") but failed to discharge his account balance after it received that partial payment in the form of a restrictively-endorsed check. (*See id.*)

But Complainant's claim suffers from two fatal procedural defects, and it should be dismissed for that reason alone. First, courts around the country have held that the Uniform Commercial Code ("U.C.C."), which includes the accord and satisfaction provision cited by Complainant, does not apply to electric utilities like the Company. *See infra* pp. 5-6. There is good reason to find that the U.C.C. does not apply here: were the Commission to adopt Complainant's interpretation of the U.C.C. in utility cases, the Company (and other utilities) would be forced to undertake significant, costly overhauls to their billing and payment-

processing systems, which costs likely would be passed on to ratepayers. This is unnecessary. There is no need to apply the payment rules of the U.C.C. to utilities; the Commission already can (and does) regulate the billing and payment-crediting practices of utilities. Revised Code Section 1303.40 does not apply to the Company.

Second, even if the Commission applies R.C. 1303.40 here (or merely assumes its application, without deciding it), the Complaint violates the U.C.C.'s statute of limitations. As explained below, Complainant's claim must have been brought within three years after the Company allegedly failed to honor the accord and satisfaction, in August 2006. *See infra* pp. 8-9. But the Complaint here was not filed until October 2010, well after the expiration of this three-year limitations period. Complainant's claim should be rejected out of hand.

Moreover, even if the Commission considers the claim on its merits, it should be dismissed. In order to prevail, Complainant must prove that (i) he "in good faith" tendered payment to the Company as full satisfaction of the August 2006 Bill; (ii) the amount of the August 2006 Bill was unliquidated or subject to a bona fide dispute; and (iii) his communications with the Company reflected a sufficiently "conspicuous statement" that described the basis of his dispute. *See infra* p. 9.

Complainant fails to prove any of those elements. In fact, Complainant's allegations are flatly contradicted by the record evidence. For example, in order to show that he tendered payment in "good faith," Complainant describes an agreement he purportedly reached with the Company to pay only a portion of the August 2006 Bill. But the credible evidence shows that there was no communication ***at all*** between the Company and Complainant regarding the August 2006 Bill—much less an agreement—until Complainant initiated an informal dispute process four years later. *See infra* pp. 3-5. Unlike for Complainant's later contacts, the Company has no

record of any discussion of the August 2006 Bill during the time Complainant alleges. Moreover, the purported facts Complainant offers in support of that agreement are highly suspect. According to his version, the Company agreed to a 70% reduction in his August 2006 Bill in a single phone call in late September 2006—***after*** Complainant paid that bill—and without any follow-up investigation or verification. Under Complainant's telling, the Company instructed him to send his correspondence to the attention of a job title that does not exist, and to an allegedly special address that plainly appears on every one of Complainant's bills. And although Complainant now claims that he had a bona fide dispute regarding the August 2006 Bill, he never mentioned that dispute in his initial phone calls or correspondence to the Company, and then did not contact the Company again for ***three years*** before he filed the Complaint. Complainant's story simply does not add up.

It is clear what Complainant is attempting to do: avoid full payment of a bill through the surreptitious use of restrictive endorsements, then manufacture—after-the-fact—a purported "agreement" to justify why he used those endorsements. In doing so, Complainant relies on purported facts that are not true and an interpretation of R.C. 1303.40 that is demonstrably wrong. As set forth below, the Commission should deny the Complaint and dismiss this case.

II. STATEMENT OF FACTS

A. The August 2006 Bill

On August 16, 2006, the Company sent Complainant the August 2006 Bill, which was in the amount of $354.59 and reflected usage between July 15 and August 15, 2006. (*See* CEI Ex. C.) On August 25, 2006, the Company received a check in the amount of $109.00 from Complainant, leaving a balance of $245.59 on his account. (*See id.*) Complainant has not produced a copy of that check. (*See* Tr., 24:11-13 (Wielicki Cross).) The Company's customer contact log indicates that Complainant did not call or write to the Company regarding the August

2006 Bill (or any other matter) in 2006. (*See* CEI Ex. D.) In fact, Complainant did not dispute—or even mention—the August 2006 Bill in any communication with the Company until he filed his Complaint in October 2010. (*See id.*)

B. Complainant's Disputes Regarding His Account

1. January 2007

In January 2007, the Company received a letter from Complainant, in which Complainant indicated that he was disputing his bill dated January 16, 2007. (*See* CEI Ex. E.) In the letter, Complainant did not explain the factual basis of his dispute and simply indicated, "I dispute the application of these charges." (*See id.*) Complainant's letter purportedly enclosed a check "as payment in full" on his account. (*See id.*) That check, which was written for $109.03, was for the full amount of Complainant's January 16, 2007 bill (leaving an outstanding balance dating to August 2006). (*See* CEI Ex. C, p. 1.) Complainant has not produced a copy of this check, either. In response to Complainant's correspondence, a Company representative attempted to call Complainant to discuss his concerns. (*See* CEI Ex. D, p. 6 ("I called bp to discuss . . . .").) When the representative did not get an answer to her call to Complainant's residence, she sent a letter asking Complainant to call her. (*See id.*)

On January 29, 2007, Complainant returned that phone call and discussed his participation in the Percentage Of Income Payment Plan ("PIPP") with the Company representative. (*See id.*) Complainant did not dispute—or even mention—his August 2006 Bill. (*See id.*)

2. June 2007

On June 7, 2007, the Company received a letter from Complainant, in which Complainant again disputed the balance on his account, indicating that "he does not think that he is behind." (*See* CEI Ex. D, p. 5.) In response, the Company sent Complainant a letter and

statement of account showing his billing and payment history. (*See, e.g.*, CEI Ex. C.) The Company did not receive a response to this letter.

On June 23, 2007, Complainant called the Company to discuss his account. Although he indicated that he was disputing his balance because of a restrictively-endorsed check he sent, Complainant again did not mention the August 2006 Bill. (*See* CEI Ex. D, p. 5.)

3. September 2007

On September 6, 2007, the Company received another letter from Complainant, in which he disputed his bill dated August 17, 2007. (*See* CEI Ex. E.) Again, Complainant did not mention the August 2006 Bill, instead indicating that his dispute was based solely on restrictively-endorsed checks he had sent to the Company. (*See id.*) The letter purportedly enclosed a restrictively-endorsed check in the amount of $172.86, which was the full amount of the August 17, 2007 bill (again leaving an unpaid balance). (*See id.*)

Complainant did not contact the Company again until after he initiated an informal complaint process, in the fall of 2010. (*See* CEI Ex. D, p. 2.) He filed his Complaint on October 8, 2010.

III. ARGUMENT

A. Ohio's Version Of The Uniform Commercial Code Does Not Apply To Electric Distribution Utilities Like The Company.

The Complaint contains one claim: that the Company allegedly violated R.C. 1303.40 by failing to honor an accord and satisfaction arising from its negotiation of restrictively-endorsed checks. (*See* Compl., pp. 2-4.) And that claim should be dismissed for a simple reason: Ohio's version of the U.C.C., of which R.C. 1303.40 is a part, does not apply to electric distribution utilities like the Company. Although no Ohio court apparently has addressed the precise issue, courts around the country have found that because electricity is not a "good," the U.C.C. does

not apply to transactions involving electricity. *See, e.g., G&K Dairy v. Princeton Elec. Plant Bd.*, 781 F. Supp. 485, 489-90 (W.D. Ky. 1991); *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 705 N.E. 2d 656, 661-62 (N.Y. 1998); *New Balance Athletic Shoe, Inc. v. Boston Edison Co.*, 95-5321, 1996 Mass. Super. LEXIS 496, at *7 (Mass. Super. Mar. 26, 1996); *Rural Elec. Convenience Cooperative Co. v. Soyland Power Cooperative*, 606 N.E. 2d 1269 (Ill. App. Ct. 1992); *Bowen v. Niagara Mohawk Power Corp.*, 183 A.D.2d 293 (N.Y. App. Div. 1992); *Singer Co. v. Baltimore Gas & Elec. Co.*, 558 A.2d 419, 421 (Md. Ct. Spec. App. 1989); *Navarro Cnty. Elec. Coop. v. Prince*, 640 S.W.2d 398, 400 (Tex. Civ. App. 1982); *Farina v. Niagara Mohawk Power Corp.*, 81 A.D.2d 700, 700-701 (N.Y. App. Dix. 1981); *Williams v. Detroit Edison Co.*, 234 N.W.2d 702 (Mich. Ct. App. 1975); *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 196 N.W.2d 316, 317 (Mich. Ct. App. 1972).

There is good reason to find that the U.C.C. does not apply here. In regulating an electric utility's processing of customer payments, the Commission requires that payments be "***immediately*** credited to the customer's account where feasible, and in any event be credited to the customer's account as of the date received at the business office or by the agent." Rule 4901:1-10-22(E) (emphasis added). Every day, the Company receives literally hundreds of thousands of checks from its customers, which it must process in accordance with this rule. (*See* Tr., 62:14-16 (Reinhart Cross).) In order to do so, the Company uses an automated system that scans the face of each check and any accompanying payment stub to ensure that payment is promptly posted to the customer's account. (*See id.* at 78:15-22.) This system does not read the endorsement side of those checks. (*See id.* at 23:25.) Thus, in order to accommodate the use of restrictive endorsements (without any prior communication between the customer and the Company's representatives), the Company may be forced to implement a costly and unnecessary

overhaul of this automated system, and those costs likely would be borne by ratepayers. (*See* CEI Ex. A, p. 7:15-8:4.) Moreover, enforcement of this U.C.C. provision against electric utilities likely would result in other costly changes, including the manual removal of restrictively-endorsed checks from the Company's processing system, detailed interpretation of the scope of any such endorsements and specific investigation and follow-up with the customer. (*See id.*) Again, the costs of these additional measures, which undoubtedly would require detailed attention by Company representatives, would be passed along to ratepayers.

There is no reason for these costly changes. Unlike other industries in which the U.C.C. properly applies, the electric utility industry in Ohio is subject to extensive oversight by the Commission, which can (and does) regulate utilities' receipt, processing and crediting of payments by customers. *See* R.C. 4905.04 (vesting Commission with broad authority to "supervise and regulate" public utilities); *New Balance Athletic Shoe*, 1996 Mass. Super. LEXIS 496 at *7 (finding that electricity was not "goods" given the extensive regulatory oversight of the utility industry). Put simply, the Commission—not the U.C.C.—supplies the rules governing transactions between electric utilities and their customers. Because Complainant has not (and cannot) identify any statute or Commission rule implicated by his dispute, and because the U.C.C. does not apply here, the Complaint should be dismissed.

B. Complainant Is Not Entitled To Relief Under R.C. 1303.40.

Even if the Commission determines (or assumes, for purposes of analysis) that the U.C.C. applies to Complainant's payments to the Company, those claims still fail. First, as set forth below, Complainant's U.C.C.-based claim for accord and satisfaction falls outside the three-year limitations period prescribed by R.C. 1303.16, and the Complaint should be dismissed for this reason alone. Second, Complainant's accord and satisfaction claim fails on the merits, as he has failed to demonstrate the critical elements of that claim. The Complaint should be dismissed.

1. The Complaint is outside the three-year limitations period prescribed by R.C. 1303.16.

The Complaint should be dismissed because its sole claim, for accord and satisfaction based on a restrictive endorsement, was brought outside the limitation period prescribed by the U.C.C. Revised Code Section 1303.16 establishes the limitations period for claims under the U.C.C. In subsections R.C. 1303.16(A) through (F), the statute establishes limitations periods for specifically-enumerated types of actions, such as an action to enforce a party's obligation to pay a note, draft, cashier's check or certificate of deposit. *See* R.C. 1303.16(A)-(F). All claims regarding any other "obligation, duty or right" under the U.C.C. that are not enumerated in those sections must be brought within three years after the cause of action accrues. *See* R.C. 1303.16(G)(3); *Cyphers v. Balzer*, 2007 Ohio 6133, ¶ 51 (2d App. Dist.) ("R.C. 1303.16(G)(3) is a residual subsection covering claims . . . that arise under R.C. Chapter 1303, but do not fit within the other subsections of R.C. 1303.16."); *see also Harris v. Liston* (1999), 86 Ohio St. 3d 203, 205 ("Generally, a cause of action accrues at the time the wrongful act is committed."); *Union Savings Bank v. Lawyers Title Ins. Co.*, 2010 Ohio 6396, ¶ 25 (10th App. Dist.). Thus, a claim that a party wrongfully failed to honor an accord and satisfaction must be brought within three years of that failure.

Because Complainant brings his dispute after the three-year limitations period has expired, the Complaint should be dismissed. To be sure, complaint cases based on R.C. 4905.26 generally do not have a limitations period. But Complainant's dispute is not based on the usual "unjust" or "unreasonable" service language of R.C. 4905.26. Rather, it is based on Ohio's version of the U.C.C., and as such, it is subject to the U.C.C.'s statute of limitations. *See Connors v. U.S. Bank*, 2008 Ohio 1838, ¶¶ 26-27 (10th App. Dist.) (affirming dismissal based on U.C.C. general statute of limitations); *Cyphers*, 2007 Ohio 6133 at ¶ 52 (same).

By any measure, the Complaint fails that three-year limitations period. Complainant purportedly disputes the August 2006 Bill and alleges that his payment of $109.00 on August 25, 2006, allegedly with a restrictively-endorsed check, should have discharged his obligation to pay the remainder of the August 2006 Bill. (Tr., 33:19-21 (Wielicki Cross); *see* CEI Ex. C (reflecting date of payment).) Accordingly, Complainant's claim that the Company allegedly failed to discharge his remaining payment obligation contrary to R.C. 1303.40 must have been brought by August 25, 2009—three years after the date of that alleged failure. But the Complaint here was not filed until October 8, 2010, long after the limitations period expired. Further, even if the Commission treats Complainant's claim as accruing in August 2007, when the Company received the last of Complainant's dispute letters, such claim must have been brought by August 2010. By any measure, Complainant's claim, which is based on the U.C.C., was brought outside the applicable three-year limitations period. The Complaint should be dismissed for this reason alone.

2. Complainant has failed to prove accord and satisfaction.

Even if the Commission considers Complainant's claim on the merits, that claim should be dismissed. Under R.C. 1303.40 and related authority, there is an accord and satisfaction only where (i) the person against whom the claim is asserted "in good faith tendered an instrument to the claimant as full satisfaction of the claim"; (ii) "the amount of the claim was unliquidated or subject to a bona fide dispute"; and (iii) there is a sufficiently "conspicuous statement" appearing on the instrument or check that describes the basis of the dispute. *See* R.C. 1303.40; *Allen v. R.G. Indus. Supply* (1993), 66 Ohio St. 3d 229, 235. Complainant bears the burden of proving these elements by a preponderance of the evidence. *See Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1990), 49 Ohio St. 3d 123, 126; *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189, 190; *Universal Energy Serv., Inc. v. Royal Petroleum Properties Inc.*, No. 3865, 1987 Ohio App.

LEXIS 9904, at *3 (11th App. Dist. Dec. 4, 1987) (holding that party seeking to establish accord and satisfaction bears the burden of proving it by a preponderance of the evidence). As set forth below, he has failed to do so, and his Complaint should be dismissed.

(a) Complainant's alleged tender of restrictively-endorsed checks or correspondence was not in "good faith."

Complainant's alleged tender of restrictively-endorsed checks or accompanying correspondence was not in "good faith." Under Ohio's U.C.C., "good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." R.C. 1303.01(A)(4). Ohio courts have elaborated on what this means in the context of accord and satisfaction: that there be a "meeting of the minds" among the parties that the amount tendered by the debtor fully satisfies the creditor's claim. *See, e.g., Conner v. Brown,* No. 90-T-4345, 1991 Ohio App. LEXIS 1754, at *8 (11th App. Dist.); *Kirk Williams Co. v. Six Indus., Inc.*, 11 Ohio App. 3d 152, 153-54 (2d App. Dist. 1983) ("An accord and satisfaction is the result of an agreement between the parties, and this agreement, like all others, must be consummated by a meeting of the minds of the parties."). Further, "[n]o accord and satisfaction can be predicated on the mere tender of a check in full satisfaction of a claim. Whether accord and satisfaction is effectuated depends on the intent of the parties inferred from the surrounding circumstances." *Conner* at *6.

For example, in *Universal Energy Services, Inc.*, 1987 Ohio App. LEXIS 9904 (11th App. Dist. Dec. 4, 1987), counsel for parties in a construction dispute met to discuss settlement of a claim, and at the conclusion of the discussion, the debtor tendered a check with a restrictive endorsement reading, "In full payment of cognovit note and for all work performed up to February 23, 1985." *Id.* at *2. Subsequently, the creditor submitted additional invoices for work that was begun but not completed prior to February 1985. *Id.* In the lawsuit that followed, the

debtor contended that the check constituted an accord and satisfaction covering the additional invoices. The trial and appellate courts disagreed. *Id.* at *2-3, 5. Specifically, on appeal, the court noted testimony that when the check was tendered, the creditor's representatives did not believe that it covered work in progress. *Id.* at *3-5 ("The record in the cause *sub judice* indicates that there was some dispute between the parties concerning the extent of the cognovit note's coverage by virtue of the terminology employed namely, "for all work *performed* up to February 23, 1985"). Because there was no evidence of the required "assent or meeting of the minds between the parties" regarding whether the check covered work in progress, the court affirmed that there was no accord and satisfaction and allowed the creditor to collect on the additional invoices. *Id.* at *5.

Here, to show that his tender was in "good faith," Complainant claims that he called the Company to dispute the August 2006 Bill, and that during this call, a Company manager agreed to allow him to pay $109 instead of the full $354.59 reflected in that Bill. (Tr., 20:24-21:2. (Wielicki Cross).) Complainant claims that he tendered a restrictively-endorsed check in August 2006, with an explanatory cover letter, to enforce this agreement. (*See id.* at 33:19-21.)

But the credible evidence shows that this simply is not true. As an initial matter, there is no evidence, aside from Complainant's say-so, that the check he tendered in August 2006 was restrictively endorsed. Although Complainant was able to produce a copy of at least one restrictively-endorsed check, he was unable to produce a copy of the check he allegedly sent in August 2006. (Tr., 24:11-13 (Wielicki Cross).) And although Complainant was able to produce copies of at least two dispute letters he sent to the Company, he was unable to produce any letter allegedly accompanying a check in August 2006. (Tr., 24:14-16. (Wielicki Cross).)

Complainant has failed to bear his burden of proving that he even sent a restrictively-endorsed check or accompanying letter in August 2006.

Moreover, even assuming that a restrictively-endorsed check and letter were sent in August 2006 (and they were not), the credible evidence shows that there was no "meeting of the minds," and that Complainant thus sent such check and letter not in a "good faith" attempt to memorialize the parties' agreement, but instead to avoid payment of the full amount of a bill.[1] Simply put, the conversation in which Complainant alleges that the Company agreed to partial payment of the August 2006 Bill never occurred, and the evidence shows that Complainant's testimony regarding that conversation is not credible. First, every time a customer calls the Company, the contact center representatives are trained to make an appropriate entry in the customer's contact log. (CEI Ex. A, p. 2:6-12 (Reinhart Dir.).) And in fact, the Company has diligently noted Complainant's contacts by phone and mail, as reflected in the seven-page log contained in CEI Exhibit C. But the Company has no record of ***any*** phone conversations with Complainant in 2006, much less any conversations in which the Company purportedly agreed to accept partial payment of the August 2006 Bill. (*See* Tr., 75:25-76:5 (Reinhart Re-Dir).) As Complainant indicated in his questioning at hearing, "If it doesn't appear in [the Company's] notes, then it's safe to say it didn't happen?" (Tr., 70:10-13 (Reinhart Cross).) The Company has no record of any agreement to allow Complainant to pay $109 instead of the full $354.59 amount of the August 2006 Bill, either by phone call or otherwise. That agreement simply did not happen.

[1] Notably, Complainant has at least one other unpaid bill from 2010, which he wrongly includes in the amount he seeks to recover here. (*See* CEI Ex. C, p. 3 (reflecting unpaid bill dated Mar. 15, 2010 in the amount of $132.02); Tr., 81:10-18 (Reinhart Re-Dir.).)

Moreover, Complainant's allegations regarding that agreement do not make sense. For example, although he alleges that the Company agreed to partial payment of the August 2006 Bill in a phone call in late September 2006, Complainant sent the $109 check approximately one month ***before*** that alleged conversation occurred, with the Company receiving the check on August 25, 2006. (*See* Tr., 33:19-21 (Wielicki Cross); CEI Ex. C, p. 1 (reflecting date of receipt of $109 check).) According to Complainant, the $109 amount was based on his and the Company's agreement to reduce the August 2006 Bill to around one third of the original amount. (Tr., 24:17-24 (Wielicki Cross).) But even under Complainant's allegations, that is impossible—Complainant sent the check ***before*** he had the conversation in which the $109 amount was allegedly decided on. Complainant's story does not add up.

Complainant's allegations do not make sense in several other ways. He claims that the Company's representatives never identified themselves during phone conversations because of a "company policy," but the Company has no such policy, and its representatives identify themselves by name at the start of every call. (*See* Tr., 25:6-15 (Wielicki Cross).) Complainant claims that during his first call with the Company, he was instructed to send his dispute correspondence to a "Customer Service Manager." (*See id.* at 24:5-10 (Wielicki Cross).) But there is no such corporate title for any employees at the Company. (*Id.* at 76:14-22 (Reinhart Re-Dir.).) He claims that he was instructed to send his restrictively-endorsed checks and letters to a particular address, "76 South Main Street, A-RPC, Akron, Ohio, 44308-1890." (*Id.* at 13:14-17 (Wielicki Dir.).) But this is address is not a special, private address; it is the general customer service address for the FirstEnergy Ohio operating companies, and it can be found on every bill that Complainant receives. (*Id.* at 76:23-77:10 (Reinhart Re-Dir.).) Further, Complainant claims that the Company representative agreed to accept $109 instead of the full

$354.59 amount—a nearly 70% discount—on the spot in a single phone call, without any follow-up investigation or verification by the Company, and without a meter test. (Tr., 20:24-23:16 (Wielicki Cross).) This simply is not believable. Complainant's description of the alleged "agreement" between he and the Company does not square with the credible record evidence. Even if the Commission assumes that that Complainant tendered a restrictively-endorsed check and cover letter in August 2006 (and there is no evidence that he did), that tender was not done in a "good faith" effort to enforce some prior agreement, as Complainant claims. It was simply to avoid paying the full amount of a bill. Complainant has failed to prove the "good faith" element required by R.C. 1303.40, and the Complaint should be dismissed for this reason alone.

(b) Complainant has failed to prove that there was a bona fide dispute regarding the August 2006 Bill or that the Company's claim was unliquidated.

Complainant has failed to prove another element required by R.C. 1303.40: that there was a bona fide dispute regarding the August 2006 Bill or that the Company's claim was unliquidated. First, there was no bona fide dispute regarding the August 2006 Bill. For purposes of this litigation, Complainant claims that he disputes the Bill because it was unreasonably high given his historical usage. (*See* Compl., p. 1.) But at the time, Complainant gave no indication of that dispute. *See Jacoby, Yuskewich & Bigley, Inc. v. Clark Jones and Associates, Inc.*, No. 88AP-745, 1989 Ohio App. LEXIS 945, at *6 (10th App. Dist.) (holding that the "bona fide dispute" must exist at the time the instrument is tendered). As explained above, Complainant never identified ***any*** dispute to the Company in 2006, either by phone or by letter. *See supra* pp. 3-5. Nor did Complainant complain about his August 2006 Bill at any other time until he filed the Complaint. The Company's contact log indicates that its representatives spoke over the phone with Complainant regarding this matter twice, in January and June 2007. (*See* CEI Ex. D, p. 5.) During those calls, Complainant never indicated that he disputed the August 2006 Bill because it

was too high—in fact, he did not mention the August 2006 Bill at all. (*See id.*) Rather, he merely alleged that he sent checks with a restrictive endorsement (and as explained in this brief, Complainant has failed to show that those checks accomplished an accord and satisfaction). (*See id.*)

Consistent with this theme, the dispute letters Complainant sent to the Company do not reflect a bona fide dispute, either. Those letters do not even mention the August 2006 Bill, much less describe, for example, the weather and temperature data Complainant presented at hearing that purportedly supports his dispute. (*See* CEI Ex. E.) Rather, those letters merely indicate, with no explanation whatsoever, that Complainant disputes his remaining balance after he sent restrictively-endorsed checks.[2] (*See id.*)

Until he filed the Complaint, in October 2010, Complainant purported to dispute his balance solely on the basis of the restrictively-endorsed checks he allegedly sent to the Company. But that is not a bona fide dispute. As a matter of law, Complainant cannot discharge the August 2006 Bill simply by sending a check with a restrictive endorsement. *See, e.g., Conner*, 1991 Ohio App. LEXIS 1754 at *6 ("No accord and satisfaction can be predicated on the mere tender of a check in full satisfaction of a claim."). Rather, Complainant must have had a bona fide

[2] As Company witness Deborah Reinhart explained at hearing, the Company has identified an alternative explanation for the relatively high usage associated with the August 2006 Bill: usage in the prior monthly period, which ended on July 14, 2006, was under-read. (Tr., 79:9-81:9 (Reinhart Re-Dir.).) Specifically, for the July/August bills during the prior year (in 2005), Complainant's household used a total of 3,724 kilowatt hours ("kWh"). (*See* CEI Exs. H, I (bills dated July 5 and August 4, 2005).) For the July/August bills in 2006, Complainant's household used a total of 3,836 kWh, representing only a small increase from the prior year. (*See* CEI Ex. B (including bills dated July 17 and August 16, 2006); *see also* Complainant's Ex. B (reflecting monthly kWh data).) Indeed, although Complainant's August 2006 Bill usage was 652 kWh greater than for the August 4, 2005 bill, his usage for the July 2006 bill was 540 kWh ***lower*** than for the July 2005 bill. (*See* CEI Exs. B, H, I.) Thus, taking the July/August periods together, Complainant's usage in 2006 was in line with historical usage. Because Complainant did not dispute the usage associated with the August 2006 Bill until years later, in 2010, it was impossible for the Company to determine definitively the source of the issue. In any case, Complainant is satisfied that the meter serving his property—the same one in place in 2006—is working properly. (*See* Tr., 79:2-4 (Reinhart Re-Dir.); 19:17-24 (Wielicki Cross) (agreeing that he is not disputing usage or bill amounts associated with any time *period other than August 2006 Bill).)*

dispute—at the time—which he in good faith believed entitled him to pay less than the amount of the August 2006 Bill. And as explained above, there was no evidence here that Complainant disputed that bill until late in 2010, there as such there is no bona fide dispute.

This is particularly true because under Ohio law, in order for there to be a bona fide dispute, "both parties to the dispute must have knowledge of the material facts . . . ." *Isaman v. Buser*, No. S-86-9, 1986 Ohio App. LEXIS 8301, at *3 (6th App. Dist. Sept. 19, 1986); 15 OhJur 3d, § 36 (2006); *see also Allen v. R.G. Industrial Supply* (1993), 66 Ohio St. 3d 229, 232 ("If there is not an *actual dispute* between the parties, there cannot be an accord and satisfaction.") (original emphasis). Here, because the Company had no idea Complainant was disputing the August 2006 Bill until years later, the Company certainly had no "knowledge of the material facts" surrounding that alleged dispute. The Commission should find that there was no bona fide dispute for this additional reason.[3]

Further, there is no dispute that the Company's claim was liquidated, not unliquidated. For purposes of accord and satisfaction, unliquidated claims are those where the amount alleged to be owed is unclear and "cannot be determined with exactness from an agreement between the parties or by arithmetical process or by application of definite rules of law." *Stan Gertz & Assoc., Inc. v. Donald K. Gant Realty*, No. 14805, 1991 Ohio App. LEXIS 2888, at *9-10 (9th App. Dist. June 12, 1991). A liquidated claim, by contrast, is one where the amount of the debt is clear or subject to reasonably certain calculation. *See Hill v. Petty*, No. 93CA15, 1993 Ohio App. LEXIS 5959, at *12 (4th App. Dist. Dec. 14, 1993). Here, the debt alleged to be owed to the Company

[3] This conclusion is confirmed by Complainant's approach to the disconnection notices he received from the Company. As shown at hearing, Complainant received disconnection notices with each monthly bill he received beginning in September 2006. (*See* Tr., 32:4-16 (Wielicki Cross); CEI Ex. D (reflecting sending of disconnection notices).) Yet after August 2007, he stopped calling or writing to the Company to dispute his account, essentially dropping the matter and ignoring the disconnection notices he received every month in 2008, 2009 and 2010 (until the Complaint was filed). (*See* CEI Ex. D.) This is further evidence that whatever the nature of Complainant's apparent objection, it was not a bona fide dispute.

is clear: $354.59, the full amount of the August 2006 Bill. Complainant has failed to prove either that he had a bona fide dispute or that the amount of the Company's claim was unliquidated.

(c) Complainant's communications with the Company failed to give the Company sufficient notice that they were offered to resolve a dispute regarding the August 2006 Bill.

Complainant failed to give sufficient notice to the Company that his purportedly restrictively-endorsed checks and correspondence were offered to resolve a dispute regarding the August 2006 Bill, and his claim fails for this additional reason. Under Ohio law, it is not enough for a debtor simply to indicate that he is disputing an amount and that the partial payment he offers is in settlement of that dispute. Rather, in order for a creditor to have a fair opportunity to evaluate that dispute, Ohio courts require that a debtor sufficiently describe it. *See, e.g., Allen v. R.G. Industrial Supply* (1993), 66 Ohio St. 3d 229, 235 (refusing to find accord and satisfaction where check, purportedly offered to settle damages arising from car accident, failed to state the date of the accident or other identifying information).

Here, Complainant's dispute letters utterly failed to describe the nature of his dispute. Although Complainant now claims that those letters were offered to settle his dispute regarding the August 2006 Bill, the letters themselves give no such indication. They do not describe Complainant's alleged belief that the amount of the August 2006 Bill was too high. (*See* CEI Ex. E.) They do not reference his alleged phone calls to the Company regarding this matter in September and November 2006. (*See* CEI Ex. E.) In fact, those letters do not reference the August 2006 Bill at all, much less indicate, in any way, why Complainant believed he should not have to pay the full amount of that bill. Instead, in those letters, Complainant merely stated that he disputed the amount of his then-current bill, without any reference to or description of any prior dispute. *See supra* pp. 3-5. As a result, the Company had no basis on which to evaluate

whether to settle the August 2006 Bill—in fact, until Complainant filed the Complaint, the Company had no reason to believe that his dispute letters had ***anything*** to do with the August 2006 Bill. As a matter of law, it was not enough for Complainant to attempt to pass a check with a restrictive endorsement, with no explanation for why he was doing so. Complainant's claim fails for this additional reason.

IV. CONCLUSION

For the foregoing reasons, the Company respectfully requests that the Commission deny the Complaint and dismiss this case with prejudice.

Dated: May 6, 2011

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by first class U.S. mail, postage prepaid, and e-mail to the following person this 6th day of May, 2011:

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