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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Sherry Wiley
5370 Aster Park Drive
Hamilton, OH 45011

Complainant,

V.

Duke Energy Ohio, Inc.

Respondent

Case No. 10-2463-EL-CSS

**RESPONDENT DUKE ENERGY OHIO, INC.'S
POST-HEARING BRIEF**

On May 12, 2011, the parties conducted the formal hearing before Attorney Examiner Kerry Sheets on the Amended Complaint of Complainant Sherry Wiley. As readily confirmed by the evidentiary record and applicable law, Complainant has failed to sustain her burden of proof that Respondent failed to provide reasonable and adequate service or otherwise violated its tariff on file with the Commission or failed to comply with an applicable rule or regulation regarding its provision of electric services to Complainant. Accordingly, the Commission should find in favor of Respondent and dismiss Complainant's Complaint and Amended Complaint with prejudice.

I. Introduction to Complainant's Factually and Legally Deficient Claims

Complainant's original Complaint focused entirely on Respondent's failure to comply with a non-existent payment arrangement about which Complainant could not offer any relevant details or rational explanation of any kind. Complainant literally could not offer any details about when she called Respondent; to whom she spoke; what they discussed; and the terms of

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the so-called payment plan. Even worse, what little explanation Complainant offered at the hearing flies in the face of common sense or the facts (for example, she mistakenly claimed that Respondent told her in September 2010 that a HEAP credit *would* be applied to her account when, in fact, that credit had been applied weeks previously in August 2010). Complainant included those baseless claims in her Amended Complaint, which also added a claim that Respondent had failed to bill her gas and electric usage in a proper manner and that Respondent again wrongfully disconnected her electric services. Needless to say Complainant did not produce a shred of evidence to support this allegation.

Therefore, for the reasons explained during the course of the hearing and below, the Commission must find in favor of Respondent and dismiss Complainant's original and Amended Complaint with prejudice.

- II. The Commission properly granted Respondent's motion to deem unanswered requests for admission as having been admitted by Complainant, thereby entitling Respondent to judgment in its favor.

On February 17, 2011, Respondent served Requests for Admission on Complainant, as authorized by Rule 4901-1-22, O.A.C. That rule provides, in part:

(B) Each matter of which an admission is requested shall be separately set forth. The party to whom a request for admission has been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within twenty days after the service of the request, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an attorney examiner may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, signed by the party or by his or her attorney. If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully make an admission or denial. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only part of the matter of which an admission is requested, the party shall specify that portion which is true and qualify or deny the remainder. An answering party may not give lack of information as a reason for failure to admit or deny a matter unless the party states that he or she has made reasonable inquiry and that information known or readily obtainable is insufficient to enable him or her to make an admission or denial. A party who

considers the truth of a matter of which an admission has been requested to be a genuine issue for the hearing may not, on that basis alone, object to the request, but may deny the matter or set forth the reasons why an admission or denial cannot be made.

On March 8, 2011, Complainant filed, among other things, a motion for protective order which she entitled “Motion to Object to the Respondent's 46 Statements entitled Request for Admission, the 8 Interrogatory statements and the Request for Production of Documents.” The Commission denied Complainant’s motion for protective order. *See In re Complaint of Sherry Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-EL-CSS, 2011 Ohio PUC LEXIS 369, 9-10 (Ohio PUC 2011).

Having failed in her bid for a protective order, Complainant should have responded to each of the Requests for Admission propounded by Respondent. She did not. Accordingly, at the beginning of the May 12th hearing, Respondent moved to have all 46 Requests for Admission deemed admitted as a result of Complainant’s failure to comply with Rule 4901-1-22, O.A.C.¹ The Commission originally took the motion under advisement and then subsequently granted the motion at the close of Complainant’s case.² The signed copy of the Requests for Admission was marked as Respondent’s Exhibit O and entered into evidence at the hearing.³

In light of the binding admissions, it is factually and legally impossible for Complainant to prevail on her claims against Respondent. Respondent’s 46 requests for admission—all of which have been deemed admitted—completely negate every aspect of Complainant’s case: from the accuracy and legitimacy of Respondent’s various utility bills to Complainant, to the false allegations surrounding the so-called payment arrangements, and right through Complainant’s failure to pay for her gas and electric usage at her home and Respondent’s

¹ *In re Complaint of Sherry Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-EL-CSS (Tr. at 7)(May 12, 2011). Future references to the hearing transcript will be made as “Wiley Tr. at ____.”

² Wiley Tr. at 11, 150, 156-157

³ Wiley Tr. at 151, 217

corresponding proper disconnection for nonpayment. As such, the Commission must rule in Respondent's favor and dismiss Complainant's original and Amended Complaint with prejudice.

III. Complainant has not sustained her burden of proof.

Having granted Respondent's motion to deem all 46 Requests for Admission as admitted, Respondent should have been entitled to a directed verdict after Complainant closed her case in chief.⁴ While that motion may have been denied, the combination of Complainant's own testimony and the evidence produced by Respondent at the hearing unequivocally confirms that Complainant has not sustained her burden of proof. In order for Complainant to prevail, she must have proven at the formal hearing by a preponderance of evidence that Respondent failed to provide reasonable and adequate service or otherwise violated a tariff or regulation.⁵ Complainant did not come close to satisfying that burden of proof. As is clear by the evidentiary record produced at the formal hearing, Complainant's case is not supported by a shred of evidence.

Respondent's Accurate Billing of Complainant's Gas & Electric Usage

Complainant did not dispute a single aspect of any of her monthly gas and electric bills with any semblance of rationality or credibility. Through the direct testimony of Cindy Givens,⁶ Respondent explained in detail the history of Complainant's utility account, from its inception on April 3, 2010, to the required deposit and all of the various disconnection notices for nonpayment, right up through its disconnection for nonpayment in October 2010 and again in March 2011 and beyond. All of Complainant's monthly utility bills were marked as exhibits to Ms. Givens' testimony and entered into evidence at the hearing.⁷ Respondent went through

⁴ Wiley Tr. at 157-158

⁵ *In re Complaint of John W. Wilson v. AT&T*, Case No 03-2294-TP-CSS (Opinion and Order at 16)(June 2, 2004).

⁶ Wiley Tr. at 159, 217; Exhibit 1

⁷ See Respondent Exhibits 1 at 15, Respondent Exhibits A-M, Wiley Tr. at 217

those bills with Complainant in painstaking detail on cross-examination.⁸ Notwithstanding Complainants' attempts to interject random, meaningless and unsubstantiated claims about her bills, Complainant ultimately admitted that the bills were accurate and could not point to anything done wrong by Respondent. Notably Complainant could not explain the factual bases for her claims that Respondent charged her twice for the \$140 deposit in May 2010; that Respondent failed to credit her account for the HEAP credit in August 2010; or that Respondent charged her for more gas and electric usage than actually provided to her residence at any time. Complainant's admissions throughout her cross-examination speak volumes about the factual and legal deficiencies of her claims.

Complainant's Failure to Pay Utility Bills

Similarly, Complainant's failure to pay her utility bills was well-established at the hearing, both through the direct testimony of Cindy Givens and the admissions by Complainant on cross-examination. Complainant did not offer any evidence of payments that were not reflected on her monthly utility bills introduced as evidence at the hearing. Nor did Complainant offer any evidence that Respondent failed to credit her for payments or third-party credits.

Non-existent Payment Arrangement

The evidence surrounding Complainant's so-called payment arrangement and Respondent's allegedly corresponding failure to comply with that arrangement was irrational. First, Complainant took issue with the HEAP credit that of \$271 that Respondent applied to her utility bill in August 2010. Complainant spent an hour or more of the hearing trying in vain to establish that Respondent did something wrong with that credit. That was a complete waste of time as both Cindy Givens and Lee Firich of the Ohio Department of Development ably testified about the issues surrounding that credit, how it happened, and the timing of when it was applied

⁸ Wiley Tr. at 96-134

to Complainant's account. Complainant herself readily acknowledged that the \$271 credit is reflected in her August 2010 utility bill.⁹

Notwithstanding that admission, Complainant claimed at the hearing that she entered into a payment arrangement with Respondent in September 2010 and that she was told that a HEAP credit was forthcoming. However, Complainant could not offer any credible evidence of the identity of the person employed by Respondent with whom she allegedly spoke, when she allegedly called Respondent, the terms of any payment arrangement, the amount she was required to pay and when, or why Respondent would refer to a future HEAP credit when Complainant already had received the only HEAP credit to which she was entitled, as confirmed by Mr. Firich of the Ohio Department of Development.¹⁰ Complainant also could not explain how the alleged payment arrangement conflicted with the monthly utility bills that she received in September and October 2010, both of which contained disconnection notices for nonpayment.¹¹

Similarly, Cindy Givens refuted what little explanation Complainant tried to offer about the payment arrangement. Ms. Givens confirmed Respondent's policies: the company would have a record of the phone call (none existed); the customer service agent would have noted the payment plan in Complainant's file (no notes exist); a concrete payment plan would have been required (none entered into, as Complainant acknowledged); a letter confirming the payment plan would have been sent to Complainant (no letter exists); Complainant's monthly bill generated on September 21, 2010, does not reflect a payment plan (and Complainant never called to dispute it); and, perhaps most importantly, Respondent already had applied the \$271 HEAP

⁹ Wiley Tr. at 103, Respondent Exhibit E

¹⁰ Wiley Tr. at 80-82

¹¹ Wiley Tr. at 111-113, Respondent Exhibits F and G

credit to Complainant's account weeks before she allegedly called and entered into the payment plan, thereby negating her entire story.¹²

In sum, Complainant failed to produce any credible evidence of the non-existing payment arrangement.

Respondent's Proper Disconnection of Complainant's Services in October 2010 and Restoration of Services Once Complainant Invoked the Winter Rule

Complainant could not refute Cindy Givens' testimony¹³ about the events surrounding her disconnection of services in October 2010 with any rationality or credibility. Having already admitted the accuracy of the various monthly bills and her payment history (or lack thereof) leading up to October 2010, Complainant did not offer any credible evidence to explain how or why Respondent allegedly "wrongfully" disconnected her account for nonpayment in October 2010. Complainant also admitted having been told about the Winter Rule,¹⁴ and further admitted the accuracy of her monthly bill reflecting the Winter Rule, her payment of \$175 and the corresponding payment arrangement.¹⁵ Having failed to prove that she had a payment plan with Respondent and that Respondent somehow broke that agreement, Complainant cannot prevail in her claim that Respondent "wrongfully" disconnected her services for nonpayment in October 2010.

Complainant's Failure to Pay Undisputed Utility Bills and Respondent's Proper Disconnection of Complainant's Services in March 2011 for Nonpayment

Complainant totally failed in her effort to prove the claim that she added to her Amended Complaint relating to the disconnection of her services in March 2011 for nonpayment.

Notwithstanding the allegations of her Amended Complainant, Respondent easily showed at the hearing that it did not disconnect Complainant's services for bills in dispute in this case and that

¹² Wiley Tr. at 217, Respondent Exhibit 1 at 13-14

¹³ Wiley Tr. at 217, Respondent Exhibit 1 at 9-11

¹⁴ Wiley Tr. at 114

¹⁵ Wiley Tr. at 115-116

the company properly disconnected Complainant's services for nonpayment of undisputed bills arising *after* Complainant filed her original Complaint. Indeed, the evidence confirmed that Complainant made a total of \$150 in payments to Respondent in December 2010 and February 2011 even though her monthly gas and electric usage and bills exceeded \$750. Complainant's own testimony and admissions refuted her claims in their entirety.¹⁶

Much like the rest of her case, Complainant also failed in her effort to prove that Respondent failed to abide by yet another, ill-defined and non-existent payment plan in March 2011. Again, Cindy Givens testified in detail about the amount owed by Complainant to reconnect her services, how that amount was calculated and how it was paid through a combination of a payments by Complainant totaling \$380 and another HEAP credit of \$425. Just as Respondent demonstrated at other times throughout the hearing, it was clear that Complainant simply does not understand her utility bills and how and when credits/payments are applied to her account history. Regardless, Complainant could not and did not refute any of Respondent's documentary and testimonial evidence at the hearing.¹⁷

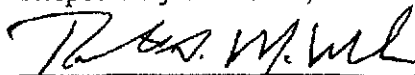
IV. Conclusion

For the reasons set forth above and during the course of the hearing, Respondent Duke Energy Ohio, Inc. respectfully requests the Commission find in is favor and against Complainant; further find that Respondent has not provided Complainant with unreasonable and inadequate service or otherwise violated or failed to comply with any tariff, rule or regulation, including but not limited to, the "Winter Rule; dismiss the Amended Complaint with prejudice; and grant Respondent such other, further and different relief as the Commission deems just and proper.

¹⁶ Wiley Tr. at 117-123, 217, Respondent Exhibit 1 at 12, 16-17

¹⁷ Wiley Tr. at 122-125, Respondent Exhibit 1 at 18-19, Respondent Exhibit N

Respectfully Submitted,



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Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served on Complainant by first class U.S. Mail, postage prepaid, on this 13th day of July, 2011.

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