

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Complaint of Peter J. Wielicki, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Case No. 10-2329-EL-CSS |
| |) | |
| The Cleveland Electric Illuminating Company, |) | |
| |) | |
| Respondent. |) | |

OPINION AND ORDER

The Commission, considering the public hearing held on March 31, 2009, issues its opinion and order in this matter.

APPEARANCES:

Peter J. Wielicki, 3314 Fortune Avenue, Parma, Ohio 44134, on his own behalf.

Jones Day, by Grant W. Garber, 325 John H. McConnel Boulevard, Suite 600, Columbus, Ohio 43215-2673, on behalf of The Cleveland Electric Illuminating Company.

OPINION:

I. History of the Proceeding:

On October 8, 2010, Peter J. Wielicki (Mr. Wielicki or complainant) filed a complaint with the Commission against The Cleveland Electric Illuminating Company (CEI or company). In the complaint, Mr. Wielicki stated that at some point prior to or in 2007, he experienced a sharp spike in his electric bill which did not match his previous normal usage records. He stated that, after contacting a customer service manager at CEI, an investigation determined that the usage was abnormal and may have occurred due to a number of reasons, including a faulty meter reading. Mr. Wielicki noted that an adjustment in the payment was discussed with the CEI manager and agreed upon. Further, he told the manager that he would be sending the agreed-upon payment via a restrictively endorsed check attached to a letter acknowledging the agreement. Mr.

Wielicki stated that he sent a check for \$172.86 to CEI with the restrictive endorsement¹ and that the check was negotiated by the company. But instead of correcting the account records to reflect the agreement, the company breached the agreement by continuing to demand payment including fees and interest. Mr. Wielicki argued that the Commission should decide that an accord and satisfaction² is applicable and that the company should be required to credit his account for the amount claimed plus fees and interest.

On October 28, 2010, CEI filed an answer that generally denied the allegations in the complaint. CEI stated in its answer that the endorsement on complainant's check does not entitle him to any relief. CEI also argued that the Uniform Commercial Code (U.C.C.), as adopted in Title 13 of the Revised Code, does not apply to the distribution services provided by CEI or to its related business operations.

A settlement conference was convened in this matter on January 24, 2011. The parties, however, were unable to reach a settlement agreement at the conference. A hearing was convened in the matter on March 31, 2011. Mr. Wielicki filed his brief in the case on April 11, 2011, and CEI filed its brief on May 6, 2011. Thereafter, Mr. Wielicki filed his reply brief on May 16, 2011, and CEI filed its reply brief on May 20, 2011.

II. APPLICABLE LAW

CEI is an electric light company as defined by Section 4905.03(A)(4), Revised Code, and a public utility by virtue of Section 4905.02, Revised Code. CEI is, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

Section 4905.22, Revised Code, requires, in part, that a public utility furnish necessary and adequate service and facilities. Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law or that any practice affecting or relating to any service furnished is unjust or unreasonable.

¹ The following endorsement appeared in red ink on the back of Mr. Wielicki's check to CEI: "RESTRICTIVE ENDORSEMENT. Negotiation of this check voids all previous agreements and contracts, constitutes full accord and satisfaction without protest, and voids all future claims on this account. Payee further agrees to remove all derogatory credit bureau information" (Tr. at 16).

² An accord and satisfaction concerns the purchase of a release from a debt. The accord is the agreement to discharge the debt and the satisfaction is the legal consideration which binds the parties to the agreement. The payment is usually less than what is owed. Under Section 1303.40, Revised Code, the cashing of a check tendered by a person as full payment of a debt can operate to discharge that debt. In order for a discharge of the debt to occur, there must be good faith, a bona fide dispute, an agreement to settle the dispute, and the performance of the agreement, i.e., the cashing of the check. See 15 Ohio Jur. 3d Section 28, Section 36.

In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189. Therefore, it is the responsibility of a complainant to present evidence in support of the allegations made in a complaint.

III. HEARING

Peter J. Wielicki

Peter J. Wielicki noticed that his electric bill increased in August 2006, with a usage of 2,750 kilowatt hours (kWh) and a charge of \$354.59.³ According to Mr. Wielicki, a listing his historical usage for a seven-year period (Complainant's Exhibit B), which includes average temperature data from the National Weather Bureau, shows that the 2,750 kWh usage for August 2006 was about three times what it should have been. Mr. Wielicki stated that he had no major life-style changes and no major changes to his house that would justify a three-fold increase in August 2006. He stated that, from August 2006 to about August 2007, he continued to dispute the reading with CEI. In August 2007, he sent the company a restrictively endorsed check for \$172.86,⁴ and a letter stating that the check was meant as a complete accord and satisfaction of his August 17, 2007, billing statement (Complainant's Exhibit A). Further, the check and letter made it clear that the check was to settle the current amount due and also any claims CEI had for prior amounts. CEI cashed the check instead of returning it (Complainant's Exhibit C – Mr. Wielicki's bank statement for August/September 2007). (Tr. at 8-14.)

Mr. Wielicki argued that his check and its accompanying letter discharged the entire amount of his August 2006 bill under Section 1303.40, Revised Code (Section 1303.40).⁵ He maintained that the bill was discharged because he complied with the

³ Mr. Wielicki testified that he is only disputing the amount of his August 2006 bill (Tr. at 19-20). However, at hearing, company witness Reinhart testified that the amount in dispute includes a bill from March 2010, \$132.02, that was not paid by Mr. Wielicki (Tr. at 81-82).

⁴ Mr. Wielicki testified that he sent a restrictively endorsed check for \$109.00 to CEI in August 2006 in settlement of his August 2006 electric bill. He testified that he subsequently sent four more restrictively endorsed checks to the company, each with an explanatory letter stating that the check was meant as a complete accord and satisfaction. Each check carried a restrictive endorsement. Those checks were: #3286 for \$88.57 on January 1, 2007, #3314 for \$109.03 on January 28, 2007, #3425 for \$77.06 on June 14, 2007, and #3528 for \$172.86 on August 19, 2007. A copy of the check for \$172.86 was attached to Mr. Wielicki's complaint. No copies of the other checks were produced for this proceeding. Further, each of the subsequent four checks was for the full amount of that particular month's billing. According to Mr. Wielicki, the subsequent four checks were sent because he did not receive the return of the first check from his bank, and the other checks were sent as additional "insurance" on his part. (Tr. at 32-36.)

⁵ Section 1303.40, accord and satisfaction by use of instrument – UCC 3-311, reads as follows:

If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated

requirements necessary to achieve an accord and satisfaction under Section 1303.40, i.e., (1) the check was tendered in good faith, (2) there was a bona fide dispute over the amount of the August 2006 bill, (3) the check and accompanying letter contained conspicuous statements announcing the intended purpose of the check, and (4) the check was cashed by CEI. (Complainant's Post-Hearing Brief at 4-6.)

Mr. Wielicki noted that Section 1303.40 contains two protections against the accidental cashing of restrictively endorsed checks. Under Section 1303.40, the recipient has 90 days to return the check or the accepted amount with a statement that the money was not accepted as an accord and satisfaction, or alternatively, before the check is tendered, the recipient may send to the person sending the check a conspicuous statement noting that such communications are to be sent to a particular office. Mr. Wielicki argued that the company failed to utilize either of these relief provisions thus barring it from collection. (Complainant's Post-Hearing Brief at 6.)

or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, all the following apply:

- (A) Unless division (B) of this section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
- (B) Subject to division (C) of this section, a claim is not discharged under division (A) of this section if either of the following applies:
 - (1) The claimant, if an organization, proves both of the following:
 - (a) Within a reasonable time before the person against whom the claim is asserted tendered the instrument to the claimant, the claimant sent a conspicuous statement to the person that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place.
 - (b) The instrument or accompanying communication was not received by that designated person, office, or place.
 - (2) The claimant, whether or not an organization, proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. Division (B)(2) of this section does not apply if the claimant is an organization that sent a statement complying with division (B)(1) of this section.
- (C) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

CEI

CEI submitted a variety of arguments to support its position that the company's cashing of Mr. Wielicki's checks did not work an accord and satisfaction. CEI noted that, while no Ohio court apparently has addressed this 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 (CEI Post-Hearing Brief at 5-6, citing *G&K Dairy v. Princeton Elec. Plant Bd*, 781 F. Supp. 485, 489-90 (W.D. Ky. 1991); *Norcon Power Partners, LP. v. Niagara Mohawk Power Corp.*, 705 N.E. 2d 656, 661-62 (N.Y. 1998)). CEI also noted that the Commission already regulates billing and payment-credit practices of utilities, and argued that there is no need to adopt the payment rules of the U.C.C., especially since those rules would force utilities into costly overhauls of their automated billing and payment processing systems. In addition, CEI argued that the complainant's claim involving a 2006 bill violates the U.C.C.'s statute of limitations and that complainant's check was not tendered in good faith, thereby abrogating the necessary "good faith" provision of an accord and satisfaction under Section 1303.40. (CEI Post-Hearing Brief at 1-2, 5-7.)

CEI stated that, 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. The evidence, however, shows that there was no communication between the company and complainant regarding the August 2006 bill until complainant initiated an informal dispute process four years later. The company has no record of any discussion of the August 2006 bill during the time complainant alleges. (CEI Exhibit D, at 2-6.)

According to company witness Reinhart, complainant's check in the amount of \$172.86 to CEI in August 2007 was not sent in connection with any agreement with CEI. Instead, the bill dated August 17, 2007, which did not include late payment charges, was for \$172.86. The check dated August 19, 2007, was a monthly payment made by complainant in connection with that bill. (CEI Exhibit A at 7.)

Ms. Reinhart testified that, in comparing the billings for July and August 2006 with the billings for July and August 2005, it is possible that the July 2006 usage was under-read on the meter at Mr. Wielicki's residence. Ms. Reinhart stated that Mr. Wielicki's usage for July and August 2005 was 3,724 kWh; whereas, his usage for July and August 2006 was 3,836 kWh (CEI Exhibit B – bills dated July 17, 2006, and August 16, 2006; Complainant's Exhibit B – monthly kilowatt data). Further, even though Mr. Wielicki's usage was 652 kWh greater in August 2006 than it was in August 2005, his usage in July 2006 was 540 kWh less than his usage in July 2005 (CEI Exhibits B, H, I). So, when compared, Mr. Wielicki's usage in July and August 2006 was at approximately the same level as his usage in July and August 2005. (Tr. at 79-81.)

CEI stated that complainant's allegations also do not make sense. CEI noted that, although complainant alleges that the company agreed to partial payment of the August 2006 bill in a phone call in late September 2006, he sent the \$109 check approximately one month before that alleged conversation occurred, with the company receiving the check on August 25, 2006 (Tr. at 33; CEI Ex. C at 1 - reflecting date of receipt of the \$109 check). CEI noted that, 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. at 20-21). But complainant sent the check before he had the conversation in which the \$109 amount was allegedly decided on. (CEI Post-Hearing Brief at 3, 13.)

CEI argued that complainant is attempting to avoid full payment of a bill through the use of restrictive endorsements and the after-the-fact manufacture of 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 Section 1303.40 that is demonstrably wrong. CEI argued that the Commission should deny the complaint and dismiss this case. (CEI Post-Hearing Brief at 3, 14.)

IV. DISCUSSION AND CONCLUSION

Mr. Wielicki argued that his restrictively endorsed checks, in particular the last check that he sent to CEI for \$172.86, constituted full payment of a \$354.59 August 2006 bill for electric usage at his residence. More specifically, Mr. Wielicki argued that because CEI cashed the checks, and did not take certain actions specified under Section 1303.40, the legal concept of an accord and satisfaction controls the situation, and CEI now must accept partial payment as full payment of the August 2006 bill that he owed the company. CEI argued that there was no agreement between the company and Mr. Wielicki to reduce his August 2006 bill and, consequently, the company's cashing of the checks did not work an accord and satisfaction.

The Commission first would observe, as the company pointed out, that Mr. Wielicki sent a restrictively endorsed check for \$109.00 to CEI in August 2006, which was before the September 2006 telephone conversation in which CEI supposedly agreed that he could tender the \$109.00 amount as full payment of his August 2006 bill (Tr. at 20-21, 33; CEI Exhibit C). Mr. Wielicki offered no explanation for this apparent incongruity in his testimony.

We make no direct comment about when Mr. Wielicki sent the \$109.00 check to CEI; however, we do note company witness Reinhart's testimony about why Mr. Wielicki experienced a higher electric bill in August 2006. According to Ms. Reinhart, it is possible that the July 2006 usage was under-read on the meter at Mr. Wielicki's residence and that, when considered with the July and August 2005 billings, the July and August 2006 billings did not vary greatly. Further, the amount in dispute, \$354.59, contains a carry-over of \$132.02 from an unpaid March 2010 bill. (Tr. at 79-82.) Ms. Reinhart's testimony remains

uncontroverted in this matter. Mr. Wielicki made no attempt to rebut it at hearing or on brief. Indeed, he testified that he had no problem with the way the meter at his residence was running (Tr. at 52). Instead, Mr. Wielicki focused on the principle of accord and satisfaction, arguing that CEI's acceptance of his checks constituted an accord and satisfaction in his favor with regard to his August 2006 bill (Complainant's Post-Hearing Brief at 1).

In reviewing this matter, the Commission is mindful of our jurisdiction. As noted earlier in this opinion and order, our jurisdiction is set forth in Section 4905.26, Revised Code. That statute provides, in part, that:

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the 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 to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.

The Ohio Supreme Court has interpreted Section 4905.26, Revised Code, to confer jurisdiction upon the Commission to hear all complaints pertaining to rates and/or service provided by a public utility. See *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 151 (1991). This does not mean, however, that every claim asserted against a public utility is within the exclusive jurisdiction of the Commission. Cases involving actions at law should be brought in court. For example, pure contract and common-law tort claims against a public utility should be brought in a common pleas court even though brought against corporations subject to the authority of the Commission. See *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191 (1978).

Moreover, in a recent case involving a public utility alleged to have committed a tort, the Court used the following two-part test to determine if the Commission has jurisdiction: First, is the Commission's administrative expertise required to resolve the

issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility? If the answer to either question is in the negative, the claim is not within the Commission's exclusive jurisdiction. See *Corrigan v. Illum. Co.*, 122 Ohio St. 3rd 265 (2009), quoting *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St. 3rd (2008).

With regard to the first question of the Court's test, although the complaint as filed indicated that a faulty meter might be the cause of a high electric bill, it is apparent from the evidence of record that the substance of Mr. Wielicki's dispute with CEI really has to do with whether an accord and satisfaction, under Section 1303.40, is applicable in this situation. Clearly, an accord and satisfaction is a legal concept that concerns the purchase of a release from a debt. Section 1303.40 is part of the U.C.C. Complaints within the scope of the U.C.C. are actions at law, not administrative matters. Even assuming the truth of Mr. Wielicki's allegation against CEI, we find that our administrative expertise is not required to resolve the issue in dispute. With regard to the second question, Mr. Wielicki complained that, after receiving an abnormally high electric bill, and reaching an agreement with CEI to pay a lower amount, CEI continued to demand full payment of the bill. The billing for electric usage is a practice normally authorized by the utility. Therefore, the second part of the test is satisfied. However, inasmuch as the answer to the first question is in the negative, we find that Mr. Wielicki's complaint is not within our exclusive jurisdiction. Accordingly, after considering the evidence of record, the Commission finds that this case should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) Peter J. Wielicki filed a complaint against CEI on October 8, 2010. In the complaint, Mr. Wielicki stated that, after experiencing an abnormal increase in his electric bill, he contacted CEI and a reduction in the payment was agreed upon. Mr. Wielicki noted that he paid his bill with a restrictively endorsed check attached to a letter acknowledging the agreement. Mr. Wielicki alleged that CEI breached the agreement by continuing to demand full payment after negotiating his check.
- (2) CEI is a public utility and an electric company pursuant to Sections 4905.02 and 4905.03, Revised Code. Thus, CEI is subject to the jurisdiction of this Commission under the authority of Sections 4905.04 through 4905.06, Revised Code.
- (3) Complainant's dispute with CEI concerns whether an accord and satisfaction, under Section 1303.40, is applicable to the checks that he sent CEI in payment of his August 2006 electric bill.

- (4) An accord and satisfaction under Section 1303.40 is part of the U.C.C. Complaints within the scope of the U.C.C. are actions at law, not administrative matters, and should be filed in the civil courts.
- (5) This matter does not fall within our jurisdiction. The complaint should be dismissed.

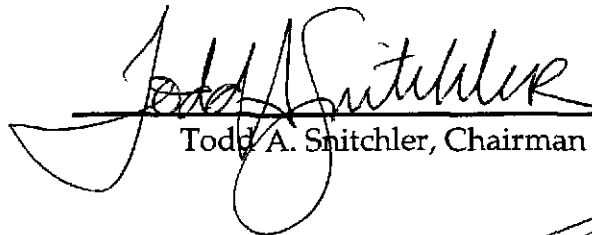
ORDER:

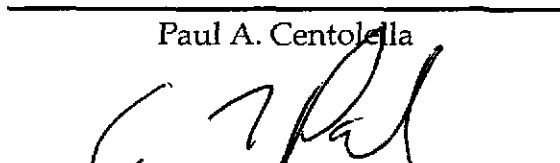
It is, therefore,

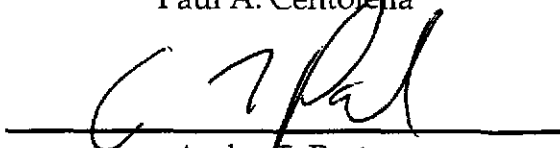
ORDERED, That this complaint be dismissed. It is, further,

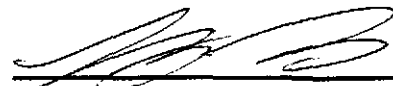
ORDERED, That a copy of this order be served upon each party of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Andre T. Porter

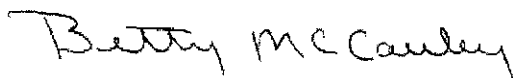

Steven D. Lesser


Cheryl L. Roberto

KKS/vrm

Entered in the Journal

JUL 27 2011


Betty McCauley
Secretary