

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**LEWIS C. ZAJAC,**

**Complainant,**

**v.**

**OHIO EDISON COMPANY,**

**Respondent.**

**Case No. 10-2310-EL-CSS**

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**MOTION TO DISMISS FOR FAILURE TO PROSECUTE OF THE  
OHIO EDISON COMPANY**

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Pursuant to Rule 4901-1-23(F), Ohio Administrative Code (“O.A.C.”), the Ohio Edison Company (the “Company”) hereby moves to dismiss this case due to Complainant’s failure to obey the Attorney Examiner’s Entry dated July 11, 2011 (“July 11 Entry”), in which he was ordered to respond to the Company’s first set of discovery requests by July 18, 2011. Complainant consistently refused to return several phone calls regarding those discovery requests left at his residence by counsel for the Company. On July 21, 2011, at approximately 9:00 p.m., Complainant finally telephoned counsel for the Company. Pursuant to this telephone conversation, on July 22, 2011, counsel for the Company re-sent the Company’s first set of discovery requests to Complainant. In the accompanying enclosure letter, counsel for the Company communicated to Complainant that he had until 5:00 p.m. on July 29, 2011 to respond to the enclosed discovery requests or a motion to dismiss this case for failure to prosecute would be filed with the Commission. Complainant has once again failed to respond to the Company’s discovery requests and counsel for the Company has had no further communications with him. Complainant has completely ignored his obligation to respond to discovery requests and to obey

the Attorney Examiner's instructions in this case, and this case should be dismissed for that reason alone. Moreover, the Company's discovery requests go to the heart of Complainant's claims, and requiring the Company to proceed to a hearing without the benefit of Complainant's complete responses would be severely prejudicial to the Company's defense. As set forth in the attached memorandum in support, this case should be dismissed with prejudice.

DATED: August 2, 2011

Respectfully submitted,

/s/ Martin T. Harvey

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David A. Kutik (0006418)  
Martin T. Harvey (0085215)  
Counsel of Record  
JONES DAY  
North Point, 901 Lakeside Avenue  
Cleveland, Ohio 44114-1190  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212  
E-mail: dakutik@jonesday.com  
E-mail: mtharvey@jonesday.com

Carrie M. Dunn (0076952)  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
Telephone: (330) 761-2352  
Facsimile: (330) 384-3875  
E-mail: cdunn@firstenergycorp.com

ATTORNEYS FOR RESPONDENT  
OHIO EDISON COMPANY

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**MEMORANDUM IN SUPPORT OF THE OHIO EDISON COMPANY'S MOTION TO  
DISMISS**

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**I. INTRODUCTION**

Complainant has shown no intention of prosecuting this case and has ignored the July 11 Entry ordering him to respond to the Company's discovery requests. Accordingly, this case should be dismissed with prejudice.

On May 11, 2011, the Company served its First Set of Interrogatories and Requests for Production of Documents on Complainant. *See* Company's Mot. to Compel dated July 1, 2011. Under the Commission's rules, responses to those requests were due on June 3, 2011, 2011. *See* Rule 4901-1-19. The Company did not receive any responses from Complainant by that date, nor any request for an extension to provide them. *See* Company's Mot. to Compel dated July 1, 2011. On June 16, 2011, counsel for the Company sent a letter to Complainant reminding him of his obligation to respond to that discovery and requesting responses by June 23, 2011, but the Company received no response to this letter. *See id.* Counsel for the Company also sent Complainant's spouse, Mrs. Michelle Zajac, two e-mail messages concerning Complainant's

obligation to respond to the Company's discovery requests (Complainant does not have an e-mail account). *See id.* These e-mail messages received no response. *See id.* Throughout this litigation, counsel for the Company also has repeatedly left messages at the phone number listed on the Complaint in order to communicate with Complainant about these discovery requests. *See id.* Complainant has not returned those calls. *See id.*

On July 1, 2011, the Company filed a Motion to Compel Complainant to respond to those discovery requests. Complainant did not respond to that motion. On July 11, 2011, the Attorney Examiner granted the Company's Motion to Compel and ordered Complainants to respond to the Company's discovery requests no later than July 18, 2011. *See* July 11 Entry, ¶ 4. In that Entry, the Attorney Examiner also warned that, pursuant to Rule 4901-1-23(F)(4), O.A.C., "if any party disobeys an order of the Commission compelling discovery, the Commission may dismiss the proceeding that was initiated by the disobedient party." *Id.* at ¶ 6.

On July 19, July 20, and July 21, 2011 counsel for the Company left phone messages with Complainant warning him that the Company would seek to dismiss his complaint for failure to prosecute unless Complainant met his discovery obligations. On July 21, 2011, at approximately 9:00 p.m., Complainant finally telephoned counsel for the Company. Complainant informed counsel for the Company that he had been on vacation for the past three weeks. Complainant further indicated that he had no intention of responding to the Company's discovery requests in writing prior to the hearing, and would only respond to the Company's discovery requests verbally during the hearing. Counsel for the Company informed Complainant that his complaint was possibly subject to dismissal, per the July 11 Entry, for failure to prosecute his case if he did not respond to the Company's discovery requests. Complainant eventually stated that if counsel for the Company would re-send him the Company's discovery

requests then he would respond accordingly. On July 22, 2011, counsel for the Company re-sent the Company's first set of discovery requests to Complainant. *See* Ex. MTH-1. A copy of the July 11 Entry was also enclosed for Complainant's reference. *Id.* In the accompanying enclosure letter, counsel for the Company warned Complainant that he had until 5:00 p.m. on July 29, 2011 to respond to these requests or counsel for the Company would file a motion to dismiss. *Id.* As has occurred repeatedly throughout this litigation, Complainant has once again failed to respond to the Company's discovery requests and, further, has given no indication that he intends to abide by the July 11 Entry.

## **II. ARGUMENT**

A complainant has a duty to prosecute its case, and this includes responding to discovery requests and obeying orders of the Commission and Attorney Examiner. *See* Rules 4901-1-16, 4901-1-23(F)(4). The Commission thus routinely dismisses cases for want of prosecution where a complainant fails to respond to discovery requests and fails to obey an order compelling them to do so. *See, e.g., Nelson v. SBC Ohio*, No. 03-682-TP-CSS, Entry dated Sept. 29, 2004, ¶ 22, 2004 Ohio PUC LEXIS 425, at \*7; *Ebert-Hunter v. The Cleveland Elec. Illuminating Co.*, No. 01-545-EL-CSS, Entry dated Oct. 24, 2001, ¶ 13, 2001 Ohio PUC LEXIS 743, at \*4-5; *Harris v. Cincinnati Bell Tel. Co.*, No. 99-1238-TP-CSS, Entry dated July 20, 2000, 2000 Ohio PUC LEXIS 689, at \*2-3; *In re WeShare, Inc. v. Ameritech Ohio*, No. 96-770-TP-CSS, Entry dated Oct. 9, 1997, 1997 Ohio PUC LEXIS 780, at \*5-6; *see also* Rule 4901-1-23(F)(4) (stating that Commission may dismiss cases for complainant's failure to obey order compelling discovery responses).

Here, Complainant has completely ignored his obligation to respond to the Company's discovery requests or to obey the Attorney Examiner's order compelling those responses. He has not provided a single substantive response to the Company's interrogatories or requests for

production, which were served over two months ago. When contacted by counsel for the Company regarding those discovery requests, he did not respond to counsel's letter, did not answer a single call, did not return repeated phone messages and did not respond via his spouse's email account. When the Company filed its Motion to Compel, Complainant did not file a response. And when ordered by the Attorney Examiner to provide discovery responses by July 18, 2011, Complainant ignored that instruction and only contacted counsel for the Company at approximately 9:00 p.m. on July 21, 2011. Pursuant to that telephone conversation, counsel for the Company re-sent the Company's first set of discovery requests, along with a copy of the July 11 Entry, and an enclosure letter communicating to Complainant that a motion to dismiss his complaint would be filed with the Commission unless Complainant responded to the Company's discovery requests by 5:00 p.m. on July 29, 2011. *See* Ex. MTH-1. Complainant, once again, has failed to respond and counsel for the Company has had no further communications with him.

Indeed, Complainant has not manifested any intention of obeying the July 11 Entry, despite the Attorney Examiner's warning that this approach may result in dismissal of his case. Complainant has been given multiple opportunities to prosecute this case and has ignored the Company's counsel's (and the Attorney Examiner's) repeated attempts to engage him. He has shown no interest in continuing with this litigation. This case should be dismissed with prejudice.

Moreover, Complainants' failure to respond to the Company's discovery requests is not merely a technical failure. Rather, it would prejudice the Company were this case allowed to proceed to hearing. Complainant's responses to the propounded interrogatories are necessary for the Company's defense. *See* Company's Mot. to Compel dated July 1, 2011. Likewise, the Company needs Complainant to provide all requested documents. *See id.* This discovery goes

to the heart of Complainants' allegations, and as the Attorney Examiner found, Complainant has an obligation to respond to it. See July 11 Entry, ¶ 4. Complainant should thus not be allowed to proceed to hearing without having responded fully and completely to those requests. And given that Complainant has ignored the Attorney Examiner's order compelling him to do so, this case should be dismissed with prejudice.

### III. CONCLUSION

For the foregoing reasons, the Company respectfully requests that this case be dismissed with prejudice.

DATED: August 2, 2011

Respectfully submitted,

*/s/ Martin T. Harvey*

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David A. Kutik (0006418)  
Martin T. Harvey (0085215)  
Counsel of Record  
Jones Day  
North Point, 901 Lakeside Avenue  
Cleveland, Ohio 44114-1190  
Telephone: (216) 586-3939  
Facsimile: (216) 579-0212  
E-mail: dakutik@jonesday.com  
E-mail: mtharvey@jonesday.com

Carrie M. Dunn (0076952)  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
Telephone: (330) 761-2352  
Facsimile: (330) 384-3875  
E-mail: cdunn@firstenergycorp.com

ATTORNEYS FOR RESPONDENT  
THE OHIO EDISON COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was delivered to the following person by first class mail, postage prepaid, this 2nd day of August, 2011:

Lewis C. Zajac  
4969 Old State Road  
West Farmington, OH 44491

/s/ Martin T. Harvey  
An Attorney For Respondent

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**8/2/2011 12:35:32 PM**

**in**

**Case No(s). 10-2310-EL-CSS**

Summary: Motion to Dismiss for Failure to Prosecute of the Ohio Edison Company and Memorandum in Support electronically filed by Mr. Martin T Harvey on behalf of Ohio Edison Company