

FILE

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

MARCENA UPP,

Complainant,

v.

THE TOLEDO EDISON COMPANY,

Respondent.

Case No. 11-5427-EL-CSS

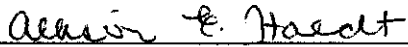
THE TOLEDO EDISON COMPANY'S
MOTION TO DISMISS FOR FAILURE TO PROSECUTE

Pursuant to Ohio Administrative Code ("O.A.C.") Rule 4901-1-23(F) and other applicable authority, The Toledo Edison Company ("Toledo Edison") hereby moves to dismiss this case due to Complainant Marcena Upp's ("Complainant's") failure to comply with the Attorney Examiner's Entry dated November 1, 2012, in which Complainant was ordered to respond to Toledo Edison's Requests For Production and Interrogatories 10, 17, and 19 on or before November 21, 2012. Complainant has neglected her obligation to respond to the Requests for Production and applicable Interrogatories and has also failed to follow the Attorney Examiner's instructions. This case should be dismissed for that reason alone. Moreover, Toledo Edison's Requests For Production and the applicable Interrogatories go to the heart of Complainant's claims. Requiring Toledo Edison to proceed to hearing without the benefit of Complainant's complete responses would be severely prejudicial. As set forth in the attached Memorandum in Support, this case should be dismissed with prejudice.

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Dated: November 28, 2012

Respectfully submitted,


Allison E. Haedt (0082243)
Counsel of Record
Jones Day
Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: aehaedt@jonesday.com

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

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

ATTORNEYS FOR RESPONDENT

**BEFORE
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MARCENA UPP,

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v.

THE TOLEDO EDISON COMPANY,

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Case No. 11-5427-EL-CSS

MEMORANDUM IN SUPPORT

Complainant has neglected her discovery obligations and ignored the Attorney Examiner's Entry ("November 1 Entry") ordering her to respond to Toledo Edison's Requests For Production and Interrogatories 10, 17, and 19 by November 21, 2012. She has failed to prosecute her case against Toledo Edison, so it should be promptly dismissed with prejudice.

I. BACKGROUND

On June 27, 2012, Toledo Edison served its First Set of Interrogatories, Requests For Production, and Requests For Admission ("Discovery Requests") on Complainant. *See* Toledo Edison's Mot. to Compel dated September 6, 2012. Under the Commission's rules, responses to the Discovery Requests were due no later than July 20, 2012. *See* O.A.C. Rule 4901-1-19. Toledo Edison did not receive responses from Complainant by that date, nor any request for an extension to provide them. *See* Toledo Edison's Mot. to Compel dated September 6, 2012, at 4.

On July 20, 2012, counsel for Toledo Edison sent a letter to Complainant reminding her of her obligation to respond to the Discovery Requests and indicating that a motion to compel would be filed if responses were not received by July 24, 2012. *See id.* Complainant provided

untimely and deficient responses by facsimile on July 23, 2012. Complainant failed to respond to any of Toledo Edison's Requests for Production and did not produce any documents that Toledo Edison had asked her to provide. In addition, Complainant's responses to several of Toledo Edison's Interrogatories were improper or incomplete. Counsel for Toledo Edison sent a second letter to Complainant on August 10, 2012, asking her to contact Toledo Edison regarding its discovery requests by August 17, 2012.¹ Toledo Edison once again reserved the right to file a motion to compel. *See id.* Complainant did not respond to the second letter in any fashion.

Counsel for Toledo Edison filed a Motion to Compel on September 6, 2012. *See id.* at 1–2. Complainant left counsel for Toledo Edison a voicemail on October 2, 2012. She stated that she did not have any documents to tender or additional information to offer beyond the facts provided in her Complaint. Complainant did not serve or file a written response to Toledo Edison's Motion to Compel. On November 1, 2012, the Attorney Examiner granted Toledo Edison's Motion to Compel in part and ordered Complainant to respond to Toledo Edison's Requests For Production and Interrogatories 10, 17, and 19 on or before November 21, 2012. *See* November 1 Entry, p. 5. Complainant contacted counsel for Toledo Edison by telephone on November 20, 2012, indicating that she could provide documents and information, but that she did not plan to timely comply with the November 1 Entry due to illness. To date, Complainant has not provided any responses to Toledo Edison's Requests For Production or the applicable Interrogatories and has never served Toledo Edison with the documents it has requested. She also has not filed or served any document requesting additional time to abide by the Entry.

¹ Throughout this litigation, counsel for Toledo Edison has struggled to communicate with Complainant about the Discovery Requests and other matters. Complainant has asked that Toledo Edison not contact her via her work telephone number, which is the only telephone number she has provided to Toledo Edison or the Commission. As a result, Toledo Edison has been able to communicate with Complainant by mail only.

II. ARGUMENT

A complainant has a duty to prosecute her case, which includes responding to discovery requests and obeying orders of the Commission and Attorney Examiner. *See* O.A.C. 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 her to do so. *See, e.g., Ebert-Hunter v. The Cleveland Elec. Illuminating Co.*, No. 01-545-EL-CSS, Entry dated Oct. 24, 2011, ¶ 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, ¶ 10, 2000 Ohio PUC LEXIS 689, at *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) (the Commission may dismiss cases for a complainant's failure to obey order compelling discovery responses).

Here, Complainant has cast aside her obligation to fully respond to Toledo Edison's Discovery Requests, even though the November 1 Entry compelled her to do so. Toledo Edison served its Discovery Requests approximately five months ago. In that time, Complainant has not provided any responses to Toledo Edison's Requests For Production and has failed to produce a single requested document. She also has not provided complete responses to Interrogatories 10, 17, or 19. When counsel for Toledo Edison sent a letter regarding the deficiencies in her responses, Complainant failed to respond in any fashion. And when ordered by the Attorney Examiner to provide discovery responses by November 21, 2012, Complainant waited until the eleventh hour and then informed counsel for Toledo Edison that illness prevented her from timely responding. Prior to that date, Complainant had nearly three weeks to comply with the November 1 Entry or seek an extension of time. She took neither action. In short, Complainant has had multiple opportunities to meaningfully engage in the discovery process, but she has not done so. Her refusal to cooperate demonstrates a failure to prosecute her case.

Complainants' failure to fully respond to Toledo Edison's Discovery Requests is not merely a technical failure; it would severely prejudice Toledo Edison were this case allowed to proceed to hearing. Toledo Edison has asserted, among other things, that Complainant is not entitled relief because Complainant was chronically delinquent on her bills and appropriate notices of disconnection for non-payment were sent. Toledo Edison also contends that all medical certificates were correctly processed and that Complainant was offered an appropriate payment plan based on her income. To support those contentions, Toledo Edison asked Complainant to produce documents related to: (1) payments that Complainant has made to Toledo Edison in the past five years; (2) notices of disconnection that Complainant received at her home; (3) medical certificates Complainant has submitted to Toledo Edison; and (4) documents related to medical care Complainant's daughter allegedly received due to Toledo Edison's improper disconnection of Complainant's electric service. *See* Toledo Edison's Mot. to Compel dated September 6, 2012, at Ex. 1 (Requests For Production 5, 6, 7, and 8). Toledo Edison also asked Complainant to: (1) identify facts and documents supporting Complainant's allegation that Toledo Edison's improper disconnection for non-payment caused Complainant's daughter to become ill; (2) explain how Toledo Edison violated parents of disabled childrens' rights; and (3) identify her household income. *Id.* (Interrogatories 10, 17, and 19).

Toledo Edison's Discovery Requests go to the heart of Complainant's allegations. As the Attorney Examiner found, Complainant had an obligation to respond to them. Allowing a hearing to be held without requiring Complainant to fully answer those Discovery Requests would be severely prejudicial to Toledo Edison and could hinder its ability to present its defenses. Complainant should not be allowed to proceed to hearing without having responded fully and

completely to the Discovery Requests. Given that Complainant ignored the Examiner's November 1 Entry compelling her to do so, this case should be dismissed with prejudice.

III. CONCLUSION

Toledo Edison respectfully requests that this case be dismissed with prejudice.

Dated: November 28, 2012

Respectfully submitted,

Allison E. Haedt

Allison E. Haedt (0082243)

Counsel of Record

Jones Day

Mailing Address:

P.O. Box 165017

Columbus, OH 43216-5017

Street Address:

325 John H. McConnell Blvd., Suite 600

Columbus, OH 43215

Telephone: (614) 469-3939

Facsimile: (614) 461-4198

E-mail: aehaedt@jonesday.com

David A. Kutik (0006418)

JONES DAY

North Point, 901 Lakeside Avenue

Cleveland, Ohio 44114-1190

Telephone: (216) 586-3939

Facsimile: (216) 579-0212

E-mail: dakutik@jonesday.com

Carrie M. Dunn (0076952)

FirstEnergy Service Company

76 South Main Street

Akron, OH 44308

Telephone: (330) 761-2352

Facsimile: (330) 384-3875

Email: cdunn@firstenergycorp.com

ATTORNEYS FOR RESPONDENT

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 28th day of November, 2012:

Marcena Upp
4801 Imperial Drive
Toledo, OH 43623

Allison E. Haedt
An Attorney For The Toledo Edison Company