

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

GWENDOLYN TANDY,)	
)	
Complainant,)	
)	
v.)	Case No. 12-2103-GA-CSS
)	
THE EAST OHIO GAS COMPANY d/b/a)	
DOMINION EAST OHIO,)	
)	
Respondent.)	

MOTION TO STRIKE COMPLAINANT’S APRIL 9, 2013 FILINGS

I. MOTION TO STRIKE

In accordance with Ohio Adm. Code 4901-1-12(A), The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO” or “the Company”) hereby requests that the Commission strike both of Complainant Gwendolyn Tandy’s April 9, 2013 filings submitting additional information. Good cause exists to strike the April 9 filings in their entirety because they were neither timely filed in accordance with any filing deadline applicable to this proceeding nor otherwise authorized by the Commission.

For these reasons, as explained in the following memorandum in support, DEO respectfully requests that the Commission grant its motion to strike.

II. MEMORANDUM IN SUPPORT

On March 27, 2013, the Commission issued an entry dismissing this complaint with prejudice based on Ms. Tandy’s failure to prosecute her case. On April 9, Ms. Tandy filed a pair of documents that, based on their contents, appear to be one of two things (or perhaps both): an attempt to submit evidence regarding her claims, or an attempt to file a brief stating her case. But however these April 9 filings are construed, they should be struck in their entirety.

A. To the extent the documents represent a submission of evidence, they must be struck.

If Ms. Tandy's filings are considered submissions of evidence, they must be struck from the record. This is the most natural way to understand the filings. For example, the first page of the 25-page filing states, "The enclosed information is in respon[s]e to Ms. Edwards written testimony" Likewise, the first page of the 15-page filing states, "This note is to . . . elaborate what happen[ed] from Jan. 2009–Dec. 2009." The filings essentially offer written, factual testimony and submit additional documents.

But these submissions are improper. Ms. Tandy had opportunities to introduce evidence on January 15, February 6, *and* February 28, namely, the three hearing dates scheduled in this case. She forfeited her opportunity by failing to appear for any of her hearings against DEO. The time to present evidence has come and gone, several times now.

What she now attempts—submitting evidence outside of the hearing process—is unlawful, and the proffered documents cannot be considered. *See Columbus Bd. of Educ. v. Franklin County Bd. of Revision*, 76 Ohio St.3d 13, 16–17 (1996) (holding that "documents [that] were not part of the original record . . . and were submitted after the [agency's] hearing . . . must be disregarded by the BTA"); *In re the Application of Black Fork Wind Energy*, Case No. 10-2865-EL-BGN, 2012 Ohio PUC LEXIS 299, at *35 (Mar. 26, 2012) ("there is no basis on which to admit an exhibit outside of a hearing, after the close of the record of the case"); *In re Complaint of Wendell Thompson*, Case No. 04-22-GA-CSS, 2005 Ohio PUC LEXIS 274, at *50–51 (June 1, 2005) (granting motion to strike "documents attached to . . . post-hearing brief . . . that were not admitted as evidence in the hearing" and noting such documents "would not be supported by testimony and the opposing party would have no opportunity to cross-examine regarding the documents or to rebut the arguments related thereto"); *cf. State v. Hill*, 90

Ohio St.3d 571, 573 (2001) (“A reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter”). Indeed, in Ms. Tandy’s companion case against CEI, the Commission recognized precisely this fact, when it struck from the record 44 pages of “evidentiary” material that Ms. Tandy had submitted following the hearing: “[a]fter the close of the record, there is no basis to admit [the proffered evidentiary material].” *In re Complaint of Gwendolyn Tandy*, Case No. 12-2102-EL-CSS, Opin. & Order at 3 (March 5, 2013).

These filings must be struck from the record. From the very beginning of this proceeding, Ms. Tandy has not been shy about filing “additional information.” By DEO’s count, her latest filing raises the tally in this docket to at least 177 pages of heavily marked-up complaint forms, bills, letters, and other documents. But when the times have come to actually make her case before the Commission, she has repeatedly failed to deliver. This case has already imposed excessive costs and inconvenience upon the Commission and the Company, costs out of all proportion to the issues raised in the complaint. The Commission should strike the April 9 filings from the record.

B. If the April 9 filings are considered an attempt at briefing, they should be struck because no briefs have been authorized.

To the extent the filings are considered briefs, they cannot be accepted and should also be struck. Because this case has never reached the hearing stage, there has never been a procedural entry authorizing the filing of post-hearing briefs. (January 24, 2013 Entry at 1.) Ohio Adm. Code 4901-1-31(A) states that briefs are allowed when a representative of the Commission “permit[s] or require[s] the filing of briefs or memoranda.” No such permission has been given in this case—indeed, permission has not even been sought.

Thus, to the extent the April 9 filings are considered attempts at briefing, they are unauthorized and should either be struck from the record or simply disregarded. *See In re Application of Columbus S. Power Co.*, Case No. 08-917-EL-SSO, 2011 Ohio PUC LEXIS 797, at *4 (June 29, 2011) (where the “Commission’s rules do not provide for [a certain filing], and [the proponent] did not request leave to make such a filing, [the filing] will not be considered by the Commission”; motion to strike denied as moot); *In re Complaint of IEU-Ohio v. NOPEC*, Case No. 04-1129-EL-CSS, 2004 Ohio PUC LEXIS 542, at *2 (Nov. 15, 2004) (holding that where the “Commission’s rules do not provide for a [particular filing],” the “unauthorized filing will not be considered”; motion to strike denied as moot); *cf. In re Application of FiberNet Telecommunications Cincinnati, Inc.*, Case No. 92-1653-TP-ACE, 1992 Ohio PUC LEXIS 1164, at *4–5 (Dec. 23, 1992) (because Cincinnati Bell was not granted intervenor status in the case, its request to hold the application in abeyance was unauthorized and denied).

C. The April 9 filings should not be considered applications for rehearing.

DEO would conclude by noting that the April 9 filings should *not* be construed as applications for rehearing. The documents do not pertain to or ask the Commission to revisit any conclusion in the entry dismissing her complaint, but rather pertain to the underlying merits of her complaint. (In contrast, her April 5 filing—while lacking any merit—does respond to the entry.) Given that her April 9 filings are not responsive to the entry, they cannot be considered applications for rehearing.

III. CONCLUSION

For the foregoing reasons, DEO respectfully requests that the Commission strike the April 9, 2013 filings in their entirety.

Dated: April 19, 2013

Respectfully submitted,

/s/ Gregory L. Williams

Mark A. Whitt (Counsel of Record)

Andrew J. Campbell

Gregory L. Williams

WHITT STURTEVANT LLP

The KeyBank Building

88 East Broad Street, Suite 1590

Columbus, Ohio 43215

Telephone: (614) 224-3946

Facsimile: (614) 224-3960

whitt@whitt-sturtevant.com

campbell@whitt-sturtevant.com

williams@whitt-sturtevant.com

ATTORNEYS FOR THE EAST OHIO
GAS COMPANY D/B/A DOMINION
EAST OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served by U.S. mail to the following person on this 19th day of April, 2013:

Gwendolyn Tandy
1439 Sulzer Avenue
Euclid, Ohio 44132

/s/ Gregory L. Williams
One of the Attorneys for The East Ohio Gas
Company d/b/a Dominion East Ohio

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/19/2013 11:10:46 AM

in

Case No(s). 12-2103-GA-CSS

Summary: Motion to Strike Complainant's April 9 Filings electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio