

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

EUGENE HOLMES,)	
)	
Complainant,)	
)	Case No. 12-2980-EL-CSS
v.)	
)	
THE CLEVELAND ELECTRIC)	
ILLUMINATING COMPANY,)	
)	
Respondent.)	

**MEMORANDUM CONTRA OF RESPONDENT THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY TO COMPLAINANT’S APPLICATION FOR
REHEARING**

I. INTRODUCTION

In its March 20, 2013 Entry, the Commission correctly found that Complainant Eugene Holmes lacks standing to bring an action against The Cleveland Electric Illuminating Company (“CEI”). The Commission also correctly found that the Complaint fails to state reasonable grounds for the Commission to proceed any further with this case. As a result, the Commission properly granted CEI’s motion to dismiss and denied Complainant’s request for the Commission to proceed with this case on its own initiative.

In his Application for Rehearing, Complainant argues that the Commission erred by making these findings. But Complainant’s first argument rests on an incorrect reading of the March 20, 2013 Entry. In the Entry, the Commission summarized the arguments made by both Complainant and CEI. This summary included CEI’s position that allowing this case to proceed

based on Complainant's general allegations would be tantamount to turning this case into a class action on behalf of the public, which is a form of proceeding that is not allowed by the Commission. The Commission, however, did not find that Complainant requested a class action. Thus, Complainant's argument that the Commission erred by making such a "finding" must be rejected.

The remainder of the Application for Rehearing improperly repeats arguments that Complainant made in response to CEI's Motion to Dismiss. As set forth below, the Commission addressed and properly rejected these arguments in its March 20, 2013 entry. Therefore, Complainant fails to show any basis for rehearing. As a result, the Commission should deny Complainant's Application for Rehearing.

II. ARGUMENT

A. The Commission Should Deny Complainant's Application For Rehearing Because It Is Based On Arguments That The Commission Has Heard And Already Rejected.

The Commission should deny Complainant's Application for Rehearing because Complainant is merely repeating the same arguments that he has made previously and that the Commission considered and rejected in its March 20, 2103 Entry. The Commission routinely holds that a party's mere repetition of an argument that was previously thoroughly considered is not grounds for granting rehearing. *E.g., Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, *6-7 (Nov. 29, 2011) (rejecting an application for rehearing where "the application for rehearing simply reiterates arguments that were considered and rejected by the Commission"); *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, *15-16 (May 4, 2011) (rejecting an

application for rehearing that “raises nothing new”); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 680, *19-20 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, *9-10 (Nov. 1, 2011) (denying application for rehearing because applicant “raised nothing new on rehearing that was not thoroughly considered” in the Commission order at issue).

In his Application for Rehearing, Complainant argues that the Commission erred because “Complainant was directly and indirectly affected” by the power outage caused by Hurricane Sandy. (Application for Rehearing at 2.) Complainant further contends that the power outage “caused a financial and otherwise burden on the Complainant” because he provides “support services” to a customer of CEI. (*Id.*) Complainant also argues that this case concerns “great public interest” and that the Commission should have proceeded with this case based on its “fiduciary responsibilities to the general public and the interest that this case would command.” (*Id.*)

Complainant, however, raised these same arguments in his Response to the Motion to Dismiss. Indeed, the Commission’s March 20, 2013 Entry included a summary of these arguments. Specifically, the March 20, 2013 Entry provided:

In his memorandum contra CEI’s motion to dismiss, the complainant claims that he ‘is a directly and indirectly affected party’ in as much as he ‘provides support for’ his 80-year old aunt, who happens to be a customer of the respondent, and who needs such support in order to live independently.

* * *

Beyond this, the complainant notes that, even if the Commission determines that the complainant lacks standing to bring this case on his own, it is within the Commission's authority, to order on its own initiative, that a hearing be held under Section 4905.26, Revised Code. The complainant requests that the Commission should exercise its own discretion to set such a hearing, based upon the respondent's alleged 'abuse and fiduciary lapse of same' . . .

(March 20, 2013 Entry at pp. 2-3.)

In its March 20, 2013, the Commission thoroughly considered and rejected each of these arguments. First, the Commission found that Complainant lacked standing to bring his Complaint. Specifically, the Commission held:

Upon review of the record as a whole, the Commission finds that, because the complainant is neither a customer nor a consumer of any utility service provided by CEI, he lacks standing to bring a complaint, on his own behalf, alleging inadequate service against CEI, under Section 4905.26, Revised Code. There is no indication of record that the complainant is an attorney licensed to practice law in the state of Ohio who, as such, holds the requisite authority to represent the legal interests of any persons other than himself before this Commission. For this reason, it is also true that the complainant lacks standing to bring the complaint he has filed in this case on behalf of any other person, besides himself (including his aunt who happens to be a customer of CEI). Consequently, CEI's motion to dismiss should be granted and this case should be dismissed based on the complainant's lack of standing to bring it.

(March 20, 2013 Entry at p. 4.)

Second, the Commission held that Complainant failed to state any reason why the Commission should proceed further with this case on its own initiative. Specifically, the Commission held:

Secondly, upon consideration of all of the allegations brought by the complainant considered as a whole, the Commission concludes that complainant has failed to present any reason why the Commission should proceed further with this case, on its own motion, such as by scheduling a hearing pursuant to Section 4905.26, Revised Code. The complaint, as filed, does not allege a violation by the respondent of any statute, public policy. Commission rule, or precedent. As such, it fails to state reasonable

grounds for complaint against CEI or any other public utility. As such, it presents no grounds for the Commission, on its own initiative, to launch any investigatory or other specific regulatory proceeding in response to the allegations made in this case by the complainant. Therefore, the Commission denies the complainant's request that the Commission should, in the event that it finds the complainant lacks standing to bring this complaint himself, proceed further with this case on its own motion.

(March 20, 2013 Entry at p. 4.)

Therefore, the Commission has already thoroughly considered and rejected Complainant's arguments for rehearing. The Commission thus should deny Complainant's Application for Rehearing.

B. The Commission Properly Dismissed This Case And Denied Complainant's Request To Proceed With The Case On Its Own Initiative.

Complainant's Application for Rehearing also should be denied because Complainant has failed to meet his burden to show that the Commission's order is "unreasonable or unlawful." *See* R.C. § 4903.10; *see also* O.A.C. Rule 4901-1-35(A). As set forth below, nothing contained within the Commission's March 20, 2013 Opinion and Order was either "unreasonable or unlawful."

First, the Commission properly dismissed this case because the Commission correctly found that the Complainant lacks standing to bring a complaint under Ohio Revised Code § 4905.26. The Commission correctly found that Complainant does not have standing because "complainant is neither a customer nor a consumer of any utility service provided by CEI." (March 20, 2013 Entry at p. 4.) Section 4905.26 limits the Commission's jurisdiction over complaint cases to "service-quality complaints by customers of Ohio utilities and consumers of electricity in Ohio, against the providers of that electricity." *S.G. Foods v. Cleveland Elec. Illum. Co.*, No. 04-28-EL-CSS, (Entry of March 7, 2006, at 24). A claim for inadequate service under Section 4905.26 thus requires that the complainant allege that he is a customer or consumer of

the utility's services. *Id.* As CEI previously demonstrated and the Commission correctly found, the Complaint must be dismissed because Complainant failed to allege that he is either a customer or consumer of CEI's services.

The Commission also correctly found that Complainant does not have standing to bring his Complaint on behalf of any other person, including his aunt who happens to be a customer of CEI. (March 20, 2013 Entry at p. 4.) Complainant does not have standing to represent any other person because Complainant is not an attorney who is authorized to practice law in Ohio. (*Id.*); *see also* O.A.C. Rule 4901-1-08(A-B)(requiring that a person seeking to represent another party's interest is licensed to practice law). Therefore, the Commission correctly found that Complainant does not have standing to bring his Complaint against CEI.

Second, the Commission properly denied Complainant's request for the Commission to proceed with this case on its own initiative because the Commission correctly found that "[t]he [C]omplaint, as filed does not allege a violation by the respondent of any statute, public policy, Commission rule, or precedent." (March 20, 2013 Entry at p. 4.) Complainant's request for a hearing is based on his general concern regarding CEI's response to the power outages caused by Hurricane Sandy. (*Id.* at p. 2.) These concerns fail to allege facts to support a claim for inadequate service or any violation of public policy, Commission rule or precedent. Indeed, the Commission has *repeatedly* held that the fact of an outage does not constitute inadequate service. *E.g., Yerian v. Buckeye Rural Elec. Co-op*, No. 02-2548-EL-CSS (Opinion and Order of Oct. 13, 2003, at 11-12); *Miami Wabash Paper, LLC v. Cincinnati Gas & Elec. Co.*, No. 02-2162-EL-CSS (Opinion and Order of Sept. 23, 2003, at 7); *Verkest v. American Elec. Power*, No. 01-2397-EL-CSS (Opinion and Order of Oct. 31, 2002, at 8); *Cogswell v. Toledo Edison Co.*, No. 91-1421-EL-CSS (Opinion and Order of July 22, 1993, at 4); *Martin v. Dayton Power & Light Co.*,

No. 91-618-EL-CSS (Opinion and Order of Sept. 10, 1992, at 7). An electric utility “is not a guarantor of electric service in its service territory” (*id.* at 15) and therefore “cannot guarantee that outages and momentary interruptions will never occur.” *Verkest*, at 8; *Cogswell*, at 15.

In sum, the Commission properly dismissed this case and denied Complainant’s request for the Commission to proceed with this case on its own initiative. As a result, the Complainant cannot meet his burden to show that the Commission’s March 20, 2013 Entry was “unreasonable or unlawful.” Therefore, the Commission should deny Complainant’s Application for Rehearing.

III. CONCLUSION

For the foregoing reasons, the Commission should deny Complainant’s Application for Rehearing.

Dated: April 19, 2013

Respectfully submitted,

s/ Lydia M. Floyd

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of The Cleveland Electric Illuminating Company to Complainant's Application For Rehearing was sent by first class U.S. mail, postage prepaid, to the following person this 19th day of April, 2013.

Eugene Holmes
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s/ Lydia M. Floyd
An Attorney for Respondent

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