

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

Lyssa Holder, aka Allyssa Holder	)	
Brandon Zehfus	)	
4327 Harding Ave.	)	
Cincinnati, OH 45211	)	
	)	
Complainants,	)	Case No. 13-1552-EL-CSS
	)	
v.	)	
	)	
Duke Energy Ohio, Inc.	)	
	)	
Respondent.	)	

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**RESPONDENT DUKE ENERGY OHIO, INC.'S  
MOTION TO DISMISS**

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Respondent Duke Energy Ohio, Inc. ("DE-Ohio") respectfully moves the Public Utilities Commission of Ohio to dismiss the formal Complaint filed by Complainants Lyssa Holder and Brandon Zehfus for failure and want of prosecution. A memorandum in support of this motion is attached.

Respectfully Submitted,

  
Robert A. McMahon (0064319)  
Eberly McMahon LLC  
2321 Kemper Lane, Suite 100  
Cincinnati, OH 45206  
513-533-3441  
513-533-3554 Fax  
[bmcmahon@emh-law.com](mailto:bmcmahon@emh-law.com)

Attorney for Respondent  
Duke Energy Ohio, Inc.

## MEMORANDUM OF LAW

Complainants filed their Complaint on July 1, 2013, and Respondent filed its Answer on July 18<sup>th</sup>. Thereafter, the Commission conducted the preliminary settlement conference on August 10<sup>th</sup>. The parties settled the case at the settlement conference, after which Respondent prepared and sent the settlement agreement and joint motion to dismiss to Complainants.

On September 18<sup>th</sup>, Complainant Holder acknowledged receipt of the settlement documents and indicated that she would sign and return everything to Respondent's attorney by the end of that week. One week later Complainant Holder sent two more emails, indicating that she had problems printing the settlement documents and needed copies mailed to her.<sup>1</sup> Respondent mailed the documents to her that same day, but the documents went to Complainants' former address.<sup>2</sup> When Complainants notified Respondent of the error, Respondent sent another set of settlement documents to Complainants by letter dated October 7<sup>th</sup>.<sup>3</sup>

Therefore, Complainant Holder apparently contacted the Commission on October 15, 2013, and misrepresented that the settlement documents (which she already had reviewed and approved) did not accurately reflect the parties' settlement. Accordingly, the Commission scheduled another settlement conference on October 18<sup>th</sup>. Respondent and its attorney called in for the conference with the attorney examiner, but neither Complainant participated in the settlement conference. The Commission then scheduled another settlement conference for November 12<sup>th</sup>. Once again, Respondent and its attorney called in for the conference with the attorney examiner, but neither Complainant participated in the settlement conference either. Yet

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<sup>1</sup> A email chain containing the September 18<sup>th</sup> and 25<sup>th</sup> emails is attached as Exhibit A.

<sup>2</sup> A copy of the September 25, 2013, letter from Respondent's attorney's office to Complainants is attached as Exhibit B.

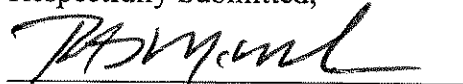
<sup>3</sup> A copy of October 7, 2013, letter is attached as Exhibit C.

again, the Commission scheduled another settlement conference for December 11<sup>th</sup>. This time the Commission's entry specifically provided, ""Complainant is advised that failure to participate in the December 11, 2013, settlement conference may result in dismissal of her complaint for lack of prosecution." Complainants thumbed their noses at the Commission by ignoring the Commission's order and failing to participate in the settlement conference.

Enough is enough. Complainants' Complaint should be dismissed for failure to prosecute. See, e.g., *In the Matter of the Complaint of H.M.T., Inc. v. The Cleveland Electric Illuminating Co.*, 2010 Ohio PUC LEXIS 1389 at \*2 (copy attached); *In the Matter of the Complaint of Rutherford Dawson v. The East Ohio Gas Co.*, 1993 Ohio PUC LEXIS 1041 (copy attached). Respondent should not have to continue defending a baseless claim when Complainants initially settled (as acknowledged in writing) and then refuse to participate in follow up settlement conferences scheduled by the Commission.

WHEREFORE, Respondent moves that the Commission dismiss the Complaint in these proceedings for Complainants' failure to prosecute.

Respectfully Submitted,



Robert A. McMahon (0064319)  
Eberly McMahon LLC  
2321 Kemper Lane, Suite 100  
Cincinnati, OH 45206  
513-533-3441  
513-533-3554 Fax  
[bmcMahon@emh-law.com](mailto:bmcMahon@emh-law.com)

Attorney for Respondent  
Duke Energy Ohio, Inc.


**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was served on the following Complainants by electronic mail and regular U.S. Mail, postage prepaid, on this 30<sup>th</sup> day of December, 2013:

Lyssa Holder  
Brandon Zehfus  
5694 Antoninus Dr  
Cincinnati, OH 45238

Lyssa Holder  
Brandon Zehfus  
4327 Harding Ave.  
Cincinnati, OH 45211

lyssa.planner@gmail.com

  
Robert A. McMahon

## 2010 Ohio PUC LEXIS 1389

Public Utilities Commission of Ohio  
December 21, 2010, Entered  
Case No. 10-159-EL-CSS

Reporter: 2010 Ohio PUC LEXIS 1389

**In the Matter of the Complaint of H.M.T., Inc., Complainant, v. The Cleveland Electric Illuminating Company dba The Illuminating Company and FirstEnergy Corp., Respondents**

### Core Terms

file, illuminate, electric, entry, rate, party, settlement conference, eliminate, statement, directed, hearing, unable, date, time, dba

**Panel:** [\*1] Alan R. Schriber, Chairman; Paul A. Centolella; Valerie A. Lemmie; Steven D. Lesser; Cheryl L. Roberto

### Opinion

#### ENTRY

The Commission finds:

- (1) On February 10, 2010, H.M.T., Inc. (HMT) filed a complaint against The Cleveland Electric Illuminating Company dba The Illuminating Company and FirstEnergy Corp. (collectively "respondents") alleging that respondents eliminated, without notice, the process heat rate, nights and weekends rate, and an off peak rate under which HMT had been charged for electricity. HMT claims that the elimination of these rates unjustly increased its electricity costs in violation of Sections 4905.22 and 4905.26, Revised Code.
- (2) On March 3, 2010, respondents filed an answer denying the material allegations of the complaint.
- (3) A prehearing settlement conference was held on April 13, 2010; however, the parties were unable to settle this matter at that time and requested additional time prior to the scheduling of a hearing.
- (4) Subsequent to the settlement conference, the attorney examiner directed the parties to provide periodic status reports on this matter. On October 29, [\*2] 2010, counsel for HMT advised the attorney examiner that his client is unable to pursue these matters any further.
- (5) By entry of November 23, 2010, HMT was directed to file a statement by December 3, 2010, indicating either that it is proceeding with its complaint and identifying prospective hearing dates or that it is dismissing its complaint. The entry also indicated that, absent such a filing, the attorney examiner would recommend that the Commission dismiss this complaint.
- (6) To date, HMT has failed to file a statement in accordance with the November 23, 2010 entry. Accordingly, this case should be dismissed for failure to prosecute.

It is, therefore,

ORDERED, That HMT's complaint is dismissed. It is, further, ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

ROBERT MCMAHON

Valerie A. Lemmie

Steven D. Lesser

Cheryl L. Roberto

## 1993 Ohio PUC LEXIS 1041

Public Utilities Commission of Ohio  
November 24, 1993  
Case No. 93-225-GA-CSS

Reporter: 1993 Ohio PUC LEXIS 1041

**In the Matter of the Complaint of Rutherford Dawson, Complainant, v. The East Ohio Gas Company, Respondent**

### Core Terms

filed, failed, application for rehearing, ruling, entry, time, motion to dismiss, opportunity, rehearing, response, attend, charge, hear

**Panel:** Craig A. Glazer, Chairman, J. Michael Biddison, Jolynn Barry Butler; Richard M. Fanelly, David W. Johnson

### Opinion

#### ENTRY ON REHEARING

The Commission finds:

- 1) On February 5, 1993, Rutherford Dawson, dba United Properties, filed a complaint against The East Ohio Gas Co. (East Ohio), alleging that he had been over-billed in the amount of approximately \$ 11,000 during the year 1990.
- 2) By entry of September 30, 1993, the Commission granted East Ohio's motion to dismiss this complaint based on the complainant's *failure* to *prosecute* his complaint.
- 3) On October 29, 1993, the complainant filed an application for rehearing of the Commission's September 30, 1993 ruling. Complainant states that the primary reason the Commission's ruling should be changed is that the charges to his account are not correct and he wishes another opportunity to settled this matter with East Ohio.
- 4) East Ohio filed a reply, opposing the complainant's request for rehearing of the Commission's ruling dismissing the complaint. East Ohio argues that the complainant has failed to provide any documentations to the Commission or East Ohio at any time during the complaint process to substantiate his claim of improper [\*2] charges. In addition, East Ohio states that it has gone to considerable expense and time to attend hearings, including bringing a witness requested by complainant, at which complainant has failed to appear.
- 5) The Commission finds that the complainant's application for rehearing should be denied. As noted in our September 30, 1993 entry, the complainant was given ample opportunity to pursue his complaint but failed to attend either of two hearings scheduled in this matter. The complainant also failed to file a response to East Ohio's motion to dismiss even though the attorney examiner permitted complainant additional time to file such response. The complainant has failed to set forth adequate grounds for rehearing.

It is, therefore,

ORDERED, That the application for rehearing filed by the complainant is denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

ROBERT MCMAHON

## Bob McMahon

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**From:** Lyssa Holder <lyssa.planner@gmail.com>  
**Sent:** Wednesday, September 25, 2013 4:41 PM  
**To:** Bob McMahon  
**Subject:** Re: Holder-Zehfus/Duke Energy: settlement

Ok. I'm sorry I'm not sure why it won't print at work. My printer isn't the greatest but I thought my work printer would work. Thank you I appreciate it. I wasn't sure what address you had. but its 5694 Antoninus Dr Cincinnati Ohio 45238

On Wed, Sep 25, 2013 at 3:25 PM, Bob McMahon <BMcMahon@emh-law.com> wrote:  
My secretary will mail the documents to you today. Both you and Mr. Zehfus need to sign everything so it would not do any good for you to stop by tomorrow.

Bob McMahon

Sent from my iPhone

On Sep 25, 2013, at 2:45 PM, "Lyssa Holder" <lyssa.planner@gmail.com> wrote:

I'm having some issues printing the docs. Is there a way I can stop in your office tomorrow and sign them? My printer is cutting alot off.

Sent from my Windows Phone

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**From:** Bob McMahon  
**Sent:** 9/25/2013 10:16 AM  
**To:** Lyssa Holder  
**Subject:** RE: Holder-Zehfus/Duke Energy: settlement

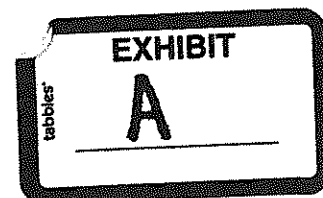
Ms. Holder,

I'm following up to confirm that (a) you and Mr. Zehfus signed and returned the settlement documents to me and (b) that you either paid or will soon bring your account current because that is a condition of any settlement and payment plan. Thanks

Bob McMahon

Robert A. McMahon

Eberly McMahon LLC





2321 Kemper Lane, Suite 100

Cincinnati, OH 45206

(513) 533-3441

(513) 533-3554 fax

bmcMahon@emh-law.com

**From:** Lyssa Holder [mailto:[lyssa.planner@gmail.com](mailto:lyssa.planner@gmail.com)]

**Sent:** Wednesday, September 18, 2013 2:25 PM

**To:** Bob McMahon

**Subject:** Re: Holder-Zehfus/Duke Energy: settlement

I did receive it thank you. I will get these back to you as soon as possible. All documents can be sent straight to you correct? Including the motion to dismiss? I should have them sent out by no later than Friday.

Thank you

Lyssa Holder

On Wed, Sep 18, 2013 at 2:11 PM, Bob McMahon <[BMcMahon@emh-law.com](mailto:BMcMahon@emh-law.com)> wrote:

Ms. Holder,

I separately emailed the settlement documents to you but forgot to include a delivery/read receipt so that I could confirm your receipt of the documents. I look forward to hearing from you so that we can wrap up this matter in a timely manner.

Regards,

Bob McMahon

Robert A. McMahon

Eberly McMahon LLC

2321 Kemper Lane, Suite 100

Cincinnati, OH 45206

(513) 533-3441

(513) 533-3554 fax

bmcMahon@emh-law.com

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# Eberly McMahon LLC

David A. Eberly\*\*  
Robert A. McMahon\*  
Ted Copetas

Attorneys at Law

\*Also admitted in Kentucky  
\*\*Also admitted in Indiana

September 25, 2013

Lyssa Holder  
Brandon Zehfus  
4327 Harding Ave.  
Cincinnati, OH 45211

Re: Holder, et al. v. Duke Energy Ohio, Inc.  
PUCO Case # 13-1552-EL-CSS

Dear Ms. Holder and Mr. Zehfus:

Enclosed are the Joint Motion to Dismiss and the Settlement and Release Agreement. Both of you need to sign where indicated and return the signed documents back to our office in the enclosed self-addressed, postage pre-paid envelope. Once we have received the signed documents our client will sign and we will mail a copy of the fully executed Settlement to you.

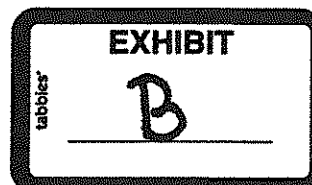
Please call with any questions.

Thank you.

Very Truly Yours,

**COPY**  
Jennifer Humphrey  
Legal Assistant to  
Robert A. McMahon, Esq.

Enc.



October 7, 2013

Lyssa Holder and  
Brandon Zehfus  
5694 Antoninus  
Cincinnati, OH 45238-1802

Re: Holder, et al. v. Duke Energy Ohio, Inc.  
PUCO Case # 13-1552-EL-CSS

Dear Ms. Holder and Mr. Zehfus:

Enclosed are the revised Settlement and Release Agreement and another copy of the Joint Motion to Dismiss. Both of you must sign the documents where indicated and then return the signed documents back to our office in the enclosed self-addressed, postage pre-paid envelope. Once we have received the signed documents, we will obtain our client's signatures, return fully-executed copies to you and file the Joint Motion to Dismiss with the PUCO.

Also, please note that your payments must be made by this Friday, October 11<sup>th</sup>. That includes both the amount necessary to bring your current account out of disconnection status and the settlement payment under the enclosed agreement. As set forth in the agreement, Duke Energy cannot do the settlement unless your account is out of disconnection status.

Please call or email with any questions.

Thank you.

Very Truly Yours,

**COPY**  
Robert A. McMahon

Enc.



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

**Commission of Ohio Docketing Information System on**

**12/30/2013 2:25:24 PM**

**in**

**Case No(s). 13-1552-EL-CSS**

Summary: Motion to Dismiss electronically filed by Mr. Robert A. McMahon on behalf of Duke Energy Ohio, Inc.