

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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| James G. Schaeffer, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Case No. 14-1898-EL-CSS |
| |) | |
| American Electric Power Company, |) | |
| |) | |
| Respondent. |) | |

**ANSWER AND MOTION TO DISMISS
OF AEP OHIO**

Ohio Power Company (hereinafter “AEP Ohio”)¹ submits this answer and motion to dismiss in response to the October 29, 2014 complaint filed in this proceeding by James G. Schaeffer.

ANSWER TO ALLEGATIONS

1. AEP Ohio denies that its billed charges to Mr. Schaeffer’s account at 17850 Polasky Road, Salesville, Ohio 43778 are incorrect, and AEP Ohio further denies that the digital meter at the address is defective or improper.

AFFIRMATIVE DEFENSES

1. AEP Ohio asserts as an affirmative defense that under R.C. 4905.26 and O.A.C. 4901-9-01(B)(3), Mr. Schaeffer has failed to set forth reasonable grounds for a complaint.

2. AEP Ohio asserts as an affirmative defense that at all times relevant to Mr. Schaeffer’s claims, AEP has complied with all applicable regulations and policies, has kept accurate records, and has provided reasonable and adequate service to Mr. Schaeffer according

¹ The complaint names American Electric Power Company (“AEP”) as the relevant utility, but because Mr. Schaeffer is a customer of AEP subsidiary Ohio Power Company (doing business as “AEP Ohio”), this answer and motion to dismiss is filed on behalf of Ohio Power Company.

to all provisions of Title 49 of the Ohio Revised Code and regulations promulgated thereunder and in accordance with all of AEP Ohio's filed tariffs.

3. AEP Ohio asserts as an affirmative defense that the complaint is barred in whole or in part by the statute of limitations.

4. AEP Ohio asserts as an affirmative defense that the complaint is barred by *res judicata*.

5. AEP Ohio reserves the right to raise additional affirmative defenses or to withdraw any of the foregoing affirmative defenses as may become necessary during the investigation and discovery of this matter.

MOTION TO DISMISS

This complaint should be dismissed for two reasons. First, the complaint is barred by *res judicata*. All allegations in this complaint arise from the installation of a digital meter at Mr. Schaeffer's residence in 2008. But in 2011, Mr. Schaeffer filed a formal complaint challenging the installation of the very same digital meter at his residence, and the Commission dismissed that first complaint for failure to prosecute. Because a dismissal for failure to prosecute is an adjudication on the merits, this second complaint is barred by *res judicata*.

Second, the complaint fails to set forth reasonable grounds for complaint. The complaint does not allege that AEP Ohio has violated any statute, Commission order, or tariff. Mr. Schaeffer's grievance is that AEP Ohio has installed a digital meter at his residence – a meter he admits “work[s] perfectly.” Compl. ¶ 1. But digital meters benefit ratepayers by accurately reading electricity usage and reducing AEP Ohio's costs of maintenance and meter reading. If the installation of a digital meter were alone sufficient grounds for a formal complaint, public

utilities would be discouraged from modernizing their infrastructure, reducing their costs, and best serving their customers. The complaint should be dismissed.

I. The doctrine of *res judicata* bars this complaint because Mr. Schaeffer brought the same allegations in a 2011 complaint that was dismissed for failure to prosecute

Mr. Schaeffer's complaint should be dismissed under the doctrine of *res judicata* because Mr. Schaeffer made the very same allegations in a previous complaint (Case No. 11-5779-EL-CSS) that was dismissed for failure to prosecute. *Res judicata* applies with full effect in administrative proceedings, *see, e.g., Office of Consumers' Counsel v. PUCO*, 16 Ohio St. 3d 9, 10 (1985), including formal complaint cases before the Commission, *see, e.g., Entry, In re Complaint of Union Rural Electric Cooperative, Inc.*, Case No. 88-947-EL-CSS (PUCO Aug. 16, 1988). Applying that doctrine here, the complaint must be dismissed.

Precedent makes clear that when a complaint is dismissed for failure to prosecute, such a dismissal is "with prejudice" unless the order of dismissal indicates otherwise, meaning the dismissal is an "adjudication on the merits" for purposes of *res judicata* and precludes the complainant from raising the same issues in a subsequent complaint. *See, e.g., Silver v. Krulak*, 2011-Ohio-1666, ¶¶ 3, 7, 11-12 (8th Dist.) (citing Civ. R. 41(B)(3); *Thomas v. Freeman*, 79 Ohio St. 3d 221, 224 (1997)). For example, in *Silver*, a pro se plaintiff brought a complaint, and the court dismissed it for failure to prosecute. *Id.* ¶ 2. When the plaintiff filed a second complaint raising the same claims, the court held that the first dismissal was "with prejudice" because the order of dismissal did not specify otherwise. *Id.* ¶¶ 3, 5. The court then dismissed the second complaint under *res judicata* because its claims "ar[ose] out of the transaction or occurrence that was the subject matter of the prior action." *Id.* ¶¶ 2, 9-12.

Applying that reasoning here, Mr. Schaeffer's complaint in this case should be dismissed because he raised the same claims in a previous complaint that was dismissed for failure to

prosecute. In 2011, Mr. Schaeffer filed a formal complaint against AEP Ohio alleging that a new digital meter installed at his property was “defective” because he experienced “extremely high usage . . . compared to what [he was experiencing] from 1992-2008 before this [digital] meter was installed.” Compl. ¶ 2, PUCO No. 11-5779-EL-CSS (Nov. 14, 2011). He asked for a credit to his bill and “replacement of the meter to a mechanical one.” *Id.* ¶ 3. However, after unsuccessful attempts to schedule a settlement conference, the Commission filed an entry noting that although Mr. Schaeffer had “advised the attorney examiner by e-mail that he wishes to dismiss the complaint,” he had “not filed a pleading requesting a dismissal.” Entry ¶ 3, Case No. 11-5779-EL-CSS (Oct. 24, 2011). Accordingly, the Commission held that “[i]f there is no such filing from the complainant within 20 days, the complaint shall be dismissed without further action from the Commission.” *Id.* ¶ 4. Mr. Schaeffer did nothing, and the complaint was thus automatically dismissed.

Given those circumstances, the Commission’s entry in Case No. 11-5779-EL-CSS constitutes a dismissal with prejudice for failure to prosecute. After filing the first complaint, Mr. Schaeffer did nothing to pursue his case; he neither appeared for a settlement conference nor filed anything on the docket. Thus, the Commission’s resolution of the case was a quintessential example of dismissal for failure to prosecute. That dismissal, moreover, must be treated as a dismissal “with prejudice” – that is, an adjudication on the merits for purposes of *res judicata* – because the Commission’s entry did not specify otherwise. *See Silver*, 2011-Ohio-1666, ¶ 3 (“when a trial court dismisses a case for failure to prosecute, such dismissal operates as an adjudication on the merits, unless the court, in its order of dismissal, otherwise specifies”).

Furthermore, because the Commission dismissed Mr. Schaeffer’s first complaint with prejudice, this second complaint must be dismissed under *res judicata* because it “arises out of

the transaction or occurrence that was the subject matter of the prior action.” *Silver*, 2011-Ohio-1666, ¶ 11. In this second complaint – just as in the first complaint – Mr. Schaeffer takes issue with the digital meter installed at his residence. But as the complaint makes clear, Mr. Schaeffer’s current meter is the very same meter that was the subject of Mr. Schaeffer’s first complaint in 2011. *See* Compl. ¶ 1, Case No. 14-1898-EL-CSS (Oct. 29, 2014). Mr. Schaeffer does not allege that anything about his meter has changed since his 2011 complaint; rather, the complaint makes clear that Mr. Schaeffer’s grievance has existed “since [the meter’s] installation in 2008.” *Id.* ¶ 1. He also requests the same relief that he requested in his first complaint – that is, a credit on his bill and a different meter. This second complaint, therefore, “arises out of the transaction or occurrence that was the subject matter of the prior action” – namely, the installation of a digital meter at Mr. Schaeffer’s residence. *Silver*, 2011-Ohio-1666, ¶ 11. As a result, this second complaint is barred by *res judicata*. *Id.*

Were the Commission to reach a different conclusion and permit Mr. Schaeffer to proceed with this second complaint, it would set a troubling precedent in which complainants are permitted to bring – and abandon – multiple complaints addressing the same subject matter without consequences. The filing of a formal complaint is no trifle – AEP Ohio takes such complaints seriously and expends resources investigating and attempting to resolve every complaint that is filed. The Commission and its Staff must also expend resources to adjudicate each complaint. When an individual brings a complaint, therefore, he or she should be expected to pursue the complaint or else abandon the claims raised therein. Where, as here, an individual brings a complaint, abandons it, and brings the very same complaint three years later, the complainant abuses the system and wastes the resources of all involved. This second complaint should be barred under *res judicata*.

II. The complaint should be dismissed because it fails to set forth reasonable grounds for complaint

Even if Mr. Schaeffer's complaint were not barred by *res judicata* (as described above, it is), the complaint nevertheless should be dismissed because it fails to state reasonable grounds for complaint. Under R.C. 4905.26, the Commission may hold a hearing on a complaint only "if it appears that reasonable grounds for complaint are stated." Mr. Schaeffer's complaint states no such reasonable grounds and, therefore, should be dismissed.

Mr. Schaeffer fails to make any allegations showing that AEP Ohio's service has been unreasonable or in violation of any statute, Commission order, or tariff. The part of AEP Ohio's tariff addressing meter accuracy provides in relevant part:

The Company will test its meters at its discretion or at the request of the customer. Any kilowatt-hour meter found by test to be registering within the range of plus or minus two percent (+/- 2%) will be considered as registering accurately. . . . The Company will replace at its expense any meter registering incorrectly and make billing corrections in accordance with the Billing and Bills Payable section.

Ohio Power Company Tariff, P.U.C.O. No. 20, Original Sheet No. 103-1, Terms and Conditions of Service § 14 (effective Jan. 1, 2012) (hereinafter "Tariff"). AEP Ohio has complied with every aspect of this tariff, and the complaint does not allege otherwise. To the contrary, as the complaint alludes to, *see* Compl. ¶ 1 (referencing "AEP's inspector"), an AEP Ohio technician recently visited Mr. Schaeffer's residence, tested his meter, and found that it was working within acceptable limits. Tellingly, moreover, Mr. Schaeffer himself does not even allege that the meter is malfunctioning; rather, he admits that "it does work perfectly." *Id.*

Instead, Mr. Schaeffer's sole grievance is that his meter is a newer digital model and not a mechanical model, but that is not a valid claim for relief. The complaint does not – and cannot – claim that the digital meter violates OAC 4901:1-10-05 (metering), AEP Ohio's tariff, or any other relevant standard. To the contrary, for many years, AEP Ohio and other utilities in Ohio

have been replacing aging, inaccurate mechanical meters with modern, accurate digital meters. These new meters benefit ratepayers by accurately reading electricity usage and by reducing AEP Ohio's costs of maintenance and meter reading – costs that often would have been passed on to ratepayers. If the Commission were to hold that the installation of a digital meter alone is sufficient grounds to merit a hearing on a complaint, it would create a disincentive for AEP Ohio and other public utilities to modernize their infrastructure, reduce their costs, and best serve their customers.

Finally, Mr. Schaeffer's citation to Itron marketing materials does not establish reasonable grounds for complaint. When the marketing pamphlet states that the digital meter "captures energy that is not recorded by electromechanical meters," *see* Compl. Attach. 1, p. 2, it clearly means that the digital meter is *more accurate* than its mechanical predecessor – that is, it can, in certain circumstances, record energy that is actually used by the residence but previously was not recorded by a mechanical meter. There is nothing unjust or unreasonable about using a more accurate meter.

In short, Mr. Schaeffer has failed to allege that AEP Ohio has violated any statute, Commission order, or tariff, nor has he alleged that AEP Ohio has provided inadequate or unreasonable service. The complaint, therefore, should be dismissed under R.C. 4905.26 for failure to set forth reasonable grounds for complaint.

CONCLUSION

The complaint should be dismissed under *res judicata* and for failure to set forth reasonable grounds for complaint.

Respectfully submitted,

//s// Steven T. Nourse

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer and Motion to Dismiss of AEP Ohio was served by regular mail upon James G. Schaeffer at the address listed below, on this 18th day of November, 2014.

//s// Steven T. Nourse
Steven T. Nourse

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Case No(s). 14-1898-EL-CSS

Summary: Answer -Answer and Motion to Dismiss of AEP Ohio electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company