

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Jimmy	)	
Hayes,	)	Case No. 15-1662-EL-CSS
	)	
Complainant,	)	
	)	
v.	)	
	)	
The Cleveland Electric Illuminating	)	
Company,	)	
	)	
Respondent.	)	

**THE CLEVELAND ELECTRIC ILLUMINATING COMPANY’S  
RESPONSE IN OPPOSITION TO COMPLAINANT’S REQUEST FOR APPEAL**

**I. INTRODUCTION**

This matter arises out of a complaint filed by Complainant Jimmy Hayes (“Complainant”) against The Cleveland Electric Illuminating Company (“CEI” or the “Company”) on September 23, 2015 regarding the refund of an alleged October 1996 security deposit for electric service at a McDonald’s restaurant owned and operated by Complainant.

This case was heard on June 7, 2016. On November 29, 2017, the Public Utilities Commission of Ohio (“PUCO” or “Commission”) issued its Opinion and Order in favor of CEI, finding that: “Complainant has failed to carry the burden of proving that The Cleveland Electric Illuminating Company did not return the alleged October 1996 security deposit for a commercial electric service account that was closed in 2009.”<sup>1</sup> The Commission observed that:

The evidence in this case contains no documents regarding any activities on Complainant’s CEI account during the period from

---

<sup>1</sup> 11/29/17 Opinion and Order, p. 1, ¶ 1.

October 10 1996 to December 23, 1997. Moreover, the Commission finds that pursuant to the applicable record retention rules, CEI is not required to retain such records. In the absence of this evidence, CEI has presented cogent arguments that during this time period, it likely either refunded the security deposit funds to Complainant or applied them to the balance due on his account, in accordance with its tariff.<sup>2</sup>

Thus, the Commission concluded that “it is likely a refund to Complainant or a credit against charges owed to CEI occurred prior to 1998.”<sup>3</sup>

On December 28, 2017, Complainant filed “Complainant Request for Appeal” (“Request”)<sup>4</sup>, and on December 29, 2017, he emailed an addendum to the Request to the Attorney Examiner, who filed the addendum on the docket that same day.<sup>5</sup> In his Request, Complainant asks the Commission to “again review the case based on the need to physically see a full document that was shown to the PUCO but not presented to the [C]ommissioners.”<sup>6</sup>

It is not clear to which document Complainant is referring or why he contends that it was presented to the PUCO but not to the Commissioners. However, attached to his Request and the emailed addendum are two “new” documents that Complainant impermissibly seeks to introduce into the record: Exhibit 14 and Exhibit 15.<sup>7</sup> These documents are not new – both are from 1996. Exhibit 14 appears to be two pages of a three-page bank statement from Complainant’s bank account for October 1996. Exhibit 15 is a “Deposit Receipt” that is already in the record as Complainant’s Hearing Exhibit 5 (it was also attached to the Complaint<sup>8</sup> and to

---

<sup>2</sup> *Id.*, p. 8, ¶ 24.

<sup>3</sup> *Id.*, p. 9, ¶ 25.

<sup>4</sup> 12/28/17 Complainant Request for Appeal (“Request”).

<sup>5</sup> Emailed addendum (“Addendum”), docketed 12/29/17.

<sup>6</sup> 12/28/17 Request, p. 2.

<sup>7</sup> See attachments to 12/28/17 Request and attachment to 12/29/17 Addendum.

<sup>8</sup> See 9/23/15 Complaint.

CEI's Motion to Compel Discovery<sup>9</sup>), albeit with slight (but inconsequential) differences.<sup>10</sup> Exhibits 14 and 15 were presumably within Complainant's possession and control at all relevant times. He has offered no reason or explanation why he did not produce these documents in discovery or seek to introduce them at the hearing.

Complainant's Request must be denied. First, under Commission Rules, there is no right of "appeal" to the PUCO; therefore, a request for an appeal to the PUCO is procedurally improper. Nevertheless, even if the Request could be deemed to be an application for rehearing, Complainant has failed to properly articulate grounds for rehearing, and he has not identified any way in which the Opinion and Order is unreasonable or unlawful pursuant to Ohio Adm. Code 4901-1-35(A). Second, allowing Complainant to introduce "new" documents now – more than one and one half years after the hearing – would be unfairly prejudicial to CEI, particularly where CEI had to file a motion to compel discovery in an effort to obtain all of Complainant's evidence and where Complainant was repeatedly cautioned that he must present all of his evidence at the hearing. Finally, even if the Commission considered the "new" documents, the outcome of this case would not change because the documents have no impact on the determinative issue, which was CEI's refund or application of any security deposit paid by Complainant.

---

<sup>9</sup> See Ex. D to 4/4/16 Motion to Compel Discovery.

<sup>10</sup> There are two differences between Complainant's Hearing Exhibit 5 and Exhibit 15. First, Exhibit 15 is two pages (or two-sided), and the second page/side bears Complainant's name and address. Second, the first page/side of Exhibit 15 bears the following text in the upper right corner, which is partially obliterated or obscured on Exhibit 5: "The Illuminating Company The Energy Makers A Centerior Energy Company."

## II. DISCUSSION

### A. Complainant's Request for Appeal to the PUCO is Procedurally Improper under Commission Rules, but Even if the Request Were a Proper Application for Rehearing, It Must Nevertheless Be Denied.

Complainant's Request must be denied, because there is no right of appeal to the Commission. There is no Commission Rule or other legal authority that permits an appeal as Complainant has requested here,<sup>11</sup> and Complainant has cited to none.

Further, even if Complainant's Request were deemed to be an application for rehearing under Ohio Adm. Code 4901-1-35, it must still be denied. An application for rehearing must identify (in numbered or lettered paragraphs) the specific ground(s) upon which the applicant believes the Commission's order is unreasonable or unlawful, and it must be accompanied by a memorandum explaining the basis for each ground raised:

An application for rehearing must set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful. An application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing.<sup>12</sup>

Here, Complainant's Request fails to satisfy the requirements of the Rule. It does not contain numbered or lettered paragraphs, it does not articulate any grounds upon which Complainant claims the Opinion and Order is unreasonable or unlawful, and nowhere in the Request does Complainant actually ask for a rehearing. Instead, Complainant seeks to introduce two "new" pieces of evidence and re-argue matters that have already been addressed and resolved. Even if the Request were an application for rehearing, it would be impermissible for

---

<sup>11</sup> See generally, Ohio Adm. Code Chapter 4901-1.

<sup>12</sup> Ohio Adm. Code 4901-1-35(A).

Complainant to ask the Commission to review additional documents (or any new evidence) as he is doing here.

Since he is actually seeking to introduce “new” evidence into the record, Complainant’s Request is more akin to a request to reopen the proceedings. However, under Ohio Adm. Code 4901-1-34(A), the proceedings may only be reopened prior the issuance of a final order. Here, the final order was journalized on November 29, 2017 – well before Complainant’s Request was filed on December 28, 2017. Also, any request to reopen proceedings to introduce new evidence must include a justification as to why the evidence was not available earlier (*e.g.*, at the time of the hearing).<sup>13</sup> Complainant has not offered any explanation as to why Exhibits 14 and 15 (which are both 20+ -year-old documents) could not have been presented at the hearing in June 2016. Complainant’s Request must be denied.

**B. Allowing Complainant to Offer “New” Evidence Now – More than One and One Half Years After the Hearing – Would Be Unfairly Prejudicial to CEI.**

Complainant’s Request should be denied because its stated purpose – to permit the introduction of two additional documents for the Commission’s consideration – is unduly prejudicial to CEI. Throughout this case, Complainant stated or implied that he had additional, relevant documents in his possession that he had not produced. CEI issued discovery requests to Complainant,<sup>14</sup> but, despite telling counsel for CEI that he had a “suitcase” full of documents,<sup>15</sup> Complainant produced only a handful of pages.<sup>16</sup> After multiple unsuccessful attempts to resolve discovery issues with Complainant, CEI filed a motion to compel discovery.<sup>17</sup> On May

---

<sup>13</sup> Ohio Adm. Code 4901-1-34(B).

<sup>14</sup> See 3/4/16 discovery request letter from CEI to Complainant, attached as Ex. C to 4/4/16 Motion to Compel Discovery.

<sup>15</sup> See Ex. A to 4/4/16 Motion to Compel Discovery.

<sup>16</sup> See Ex. D to 4/4/16 Motion to Compel Discovery.

<sup>17</sup> 4/4/16 Motion to Compel Discovery.

11, 2016, the Commission journalized its Entry on CEI's motion to compel.<sup>18</sup> Among other things, the Commission cautioned Complainant regarding the use of documents at hearing as follows:

**Complainant is hereby put on notice that he will not be permitted at the hearing to use, refer to, or introduce any documents (or copies of documents) that have not already been either filed in the case docket or otherwise provided by him to Respondent by the day before the hearing. \* \* \***<sup>19</sup>

Complainant produced additional documents to CEI the afternoon before the June 7, 2016 hearing, yet at the hearing he continued to suggest that he had additional, relevant documents that had not been produced, even stating that they were in his car during the hearing:

THE WITNESS: I would like to testify they want the documents, **I got the document in the car for the years**, but I didn't – you know, over the years, even their statements, I got the bills for that.

MS. WATCHORN: I am going to object, your Honor, to testimony about documents that aren't here.

EXAMINER FULLIN: Right. I am allowing the testimony as it is, but it doesn't – it doesn't carry any kind of weight or it doesn't matter if you are telling me that you have things that you're not able to present here today so.

THE WITNESS: I can present them.

EXAMINER FULLIN: If you didn't bring them, they're not here present. If you want to present them, I either have to, you know, take another pause and let you go to your car and go get them, or I don't know if you have got extra copies to provide everyone and mark them. Again, if you think it's important, I might be willing to take the time to do that. I'm not sure what it is that the bills are going to show that we don't already have on the record but that's for you to decide.

**You were supposed to bring everything you needed to make your case, and I am still going to give you the opportunity to do**

---

<sup>18</sup> 5/11/16 Entry.

<sup>19</sup> 5/11/16 Entry, at ¶7 (emphasis added).

**so, but you needed to do it – we have already taken quite a few breaks trying to get you to get your documents together and present them in a way that I can receive them and know what they are when I receive them. Then I can refer to them as being introduced today.**

So the last statement on your testimony was you have documents that you don't have in front of you that you can't present at this moment and so that testimony while I will allow your statement to be in the record doesn't help me to identify what it is that you just testified about. So if you want to put a lot of importance on what you just said, you will need to ask me for a recess so that you can go get the documents you just referred to.

\* \* \*

EXAMINER FULLIN: Anything else?

THE WITNESS: No. I can be excused. I can go get the documents if it's important.

EXAMINER FULLIN: How long do you think it will take? **Again, it's something that I was expecting you should have known. I think I've told you before this hearing that you need to bring whatever it is you need to bring.** Let's go off the record for a moment.

(Discussion off the record.)<sup>20</sup>

Despite stating that he had relevant documents available and despite having been given an opportunity to take a recess to get them, Complainant did not actually produce any additional documents at the hearing. He was cautioned again by the Attorney Examiner that he was facing his last chance to introduce additional documents and evidence:

EXAMINER FULLIN: We'll go back on the record. I think that **when we left off, I was asking if you had anything further, and you said you didn't, so it would be my intention next to allow the company to cross-examine you on the evidence that you have already presented. And if you have anything further that you want to bring, now is your – really your last time to do it because after they start cross-examining you, then the only other thing you can bring up is things that relate to what they**

---

<sup>20</sup> 6/7/2016 Transcript of Proceedings ("Tr."), pp. 32 - 35 (emphasis added).

**are asking you about so you couldn't bring up new things that you might have. If you have any things to bring up before you are ready to close, now is your chance to do it. Do you have anything further that you wanted to present at this time?**

THE WITNESS: No more than the statements that they said, you know, Ms. Dunn, said I called up Ms. Dunn, you know called Ms. Whitney, Dunn, Mr. Fullin, Gable, and Belfer, Elizabeth Blackman, and a bunch of them, you know, and Eric paid by – they said it should have been paid. Carrie, Ms. Dunn, it should have been paid by '98 but itemized statements show no payment, okay?

\* \* \* <sup>21</sup>

After the close of evidence and during an on-the-record discussion of a briefing schedule, Complainant's daughter asked if the post-hearing brief could include new testimony and exhibits,<sup>22</sup> and Complainant was again advised that the only evidence that would be considered in deciding the case was that which had been introduced during the hearing:

EXAMINER FULLIN: No. Everything that will be considered has been presented today so it's really going to be, again, you can say anything you want, but **the only part that's going to be entitled to be considered by the Commission and entitled to any weight will be something that got presented here today.** So if you bring up other things, it's not that you couldn't say them but if I – if I made a ruling based on other things that came up later, it would be – it would be knocked down because I am not allowed to do that legally. So you can try but it wouldn't really accomplish much unless I didn't happen to catch it. So it's not – I am not precluding you from saying anything you want to say, but in order to prevail in this case, it's got to be an argument you made today or that they made and why it shouldn't be considered, why you should prevail.

So it's not about other things that weren't brought up today. \* \*

\* <sup>23</sup>

Thus, Complainant was notified on numerous occasions that the record evidence in the case would be that which was presented and admitted at hearing. For him to now suggest

---

<sup>21</sup> *Id.*, pp. 35-36 (emphasis added).

<sup>22</sup> *Id.*, p. 93.

<sup>23</sup> *Id.* (emphasis added).



that he should be able to present additional documents for purposes of an “appeal” of the Opinion and Order is disingenuous. He offers no reason why these documents could not have been provided in discovery and presented at the hearing. Complainant’s Request must be denied.

**C. Even if the Commission Considered the “New” Evidence, the Outcome of This Case Would Not Change.**

Complainant seems to suggest that Exhibit 15 would establish that he paid a security deposit to CEI, and that Exhibit 14 would explain why, when the alleged security deposit was \$5,900, he wrote a check in the amount of \$11,571.74.<sup>24</sup> Even if these documents could be properly introduced into evidence at this time (which they cannot), and even if they showed what Complainant contends they show (which they do not), their admission would not change the outcome of this case. The key issue in this case was whether or not CEI owed a refund of a security deposit to Complainant.<sup>25</sup> The documents that Complainant now seeks to have the Commission review have no bearing on this central issue. The Commission found in favor of CEI because it concluded, based upon the evidence (including CEI’s applicable tariff, CEI’s records, and the testimony of CEI’s witness), that CEI refunded any security deposit to Complainant or credited the deposit to his account prior to 1998.<sup>26</sup> Thus, even if Exhibits 14 and 15 showed that Complainant paid a deposit or explained the amount of the check, this would not change the Commission’s ultimate conclusion about the disposition of the security deposit.

---

<sup>24</sup> Request, p. 2. Regarding the amount of the check, the Commission noted in the Opinion and Order that: “[d]uring cross-examination of CEI’s witness, Complainant asserted that the check covered both the security deposit and his monthly bill . . . . However, at no point did Complainant produce a copy of the monthly bill or any other evidence to substantiate this claim.”<sup>24</sup> Opinion and Order, p. 4, ¶12. Even if it could be properly admitted, Exhibit 14, which is two pages of a heavily redacted bank statement, still does not substantiate Complainant’s claim that a portion of the check amount was for the payment of a monthly electric bill – it shows only a total check amount, not the purpose(s) for which the check was written.

<sup>25</sup> 11/29/17 Opinion and Order, p. 1, ¶ 1.

<sup>26</sup> *Id.*, p. 9, ¶ 25.

Complainant's Request states that "[w]ith this request for an appeal, Complainant requests CEI be directed to show proof that the refund was made or promptly pay Complainant plus interest."<sup>27</sup> This is the precise issue that has already been fully litigated in this case, through discovery, hearing, post-hearing briefing, and the Commission's decision. The Commission held that Complainant failed to meet his burden of proof and that no refund was owed.<sup>28</sup> Complainant's Request for Appeal must be denied.

### **III. CONCLUSION**

For the forgoing reasons, Respondent The Cleveland Electric Illuminating Company respectfully requests that The Public Utilities Commission of Ohio deny Complainant's Request for Appeal.

Respectfully submitted,

/s/Christine E. Watchorn

Carrie M. Dunn-Lucco

Counsel of Record

FirstEnergy Service Company

76 South Main Street

Akron, Ohio 44308

(330) 761-2352

Fax: (330) 384-3875

cdunn@firstenergycorp.com

Christine E. Watchorn (0075919)

Ulmer & Berne LLP

65 East State Street, Suite 1100

Columbus, Ohio 43215

(614) 229-0034

Fax: (614) 229-0035

cwatchorn@ulmer.com

*On behalf of The Cleveland Electric Illuminating  
Company*

---

<sup>27</sup> 12/28/17 Request, p. 6.

<sup>28</sup> 11/29/17 Opinion and Order, p. 8, ¶ 23.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *The Cleveland Electric Illuminating Company's Response in Opposition to Complainant's Request for Appeal* was served via U.S.

Mail this 8th day of January, 2018 upon:

Mr. Jimmy Hayes  
2723 Green Road  
Shaker Heights, Ohio 44122  
*Complainant, pro se*

/s/Christine E. Watchorn  
On behalf of The Cleveland Electric Illuminating  
Company

COL1997 276543  
29414.00072

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

**Commission of Ohio Docketing Information System on**

**1/8/2018 1:51:23 PM**

**in**

**Case No(s). 15-1662-EL-CSS**

Summary: Response The Cleveland Electric Illuminating Company's Response in Opposition to Complainant's Request for Appeal electronically filed by Ms. Christine E. Watchorn on behalf of The Cleveland Electric Illuminating Company