

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
FOREST HILLS SUPERMARKET, INC., D/B/A
KONNIS FAMILY FOODS,

COMPLAINANT,

v.

CASE No. 18-785-EL-CSS

THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND FIRSTENERGY CORP.,

RESPONDENTS.

ENTRY

Entered in the Journal on July 11, 2018

{¶ 1} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 2} On May 2, 2018, Forest Hills Supermarket, Inc., d/b/a Konnis Family Foods (Complainant) filed a complaint against The Cleveland Electric Illuminating Company (CEI) and FirstEnergy Corp. (FirstEnergy). Complainant states that it is a non-residential electric customer of CEI, whose parent company is FirstEnergy. Complainant asserts that CEI wrongfully and unreasonably billed Complainant for “unpaid and previously not billed charges” and/or “did not provide accurate metering.” More specifically, Complainant contends that in correspondence received on August 1, 2017, CEI informed Complainant that its “account [had] been billed from 12/9/2016 to 07/06/2017 due to [its] account not being established for the electric service at [Complainant’s business address]. This bill is based on the current read and the usage on the new meter. * * *.”¹ Complainant further contends that an unpaid previous balance of \$44,961.07 appeared,

¹ Although the complaint references an Exhibit A, no exhibit is attached.

for the first time, in its electric bill dated August 9, 2017. Additionally, Complainant asserts that the account was not a new account, that it had been doing business at the same address and had been a CEI customer for decades, and that no change of ownership had occurred that caused a change to the account. Taking these allegations as a whole, Complainant charges CEI with violating, inter alia, R.C. 4905.22 and various provisions of Ohio Adm.Code Chapter 4901:1-10. For redress, Complainant asks that the Commission enter judgment against CEI in the amount of \$44,961.07 and seeks treble damages.

{¶ 3} On May 22, 2018, CEI and FirstEnergy filed an answer to the complaint. FirstEnergy's response is limited. FirstEnergy admits that Complainant receives non-residential electric service from CEI, which is FirstEnergy's wholly-owned subsidiary, and that it is licensed to operate in the State of Ohio. FirstEnergy also joins CEI in asserting several affirmative defenses, but denies being a public utility that is subject to the Commission's jurisdiction under R.C. 4905.26.

{¶ 4} The remainder of the answer is asserted from the perspective of CEI. CEI admits that it provides non-residential electric service to Complainant, but denies that Complainant has always received that service under the same account number. Instead, CEI avers that Complainant has received electric service under two separate accounts. Specifically, CEI states that, after an upgrade was made to the electric service at the property and a new meter was installed in December 2016, Complainant received service under Account No. 110124917649; before December 2016, Complaint received service from CEI under Account No. 110023165209. Further answering, CEI explains that Complainant received the August 1, 2017 letter because CEI inadvertently charged service in connection with Complainant's meter to the wrong account. CEI states that, upon learning of its error, it billed Complainant for Complainant's previously unbilled usage in accordance with Ohio Adm.Code 4901:1-10-23. Thus, CEI submits that it lawfully rebilled Complainant in the amount of \$44,961.07 for electric service that had

been erroneously billed to the wrong account, notified Complainant of the rebilled amount by way of the August 1, 2017 letter, and otherwise acted pursuant to applicable law. In closing, CEI generally denies all other allegations of the complaint and asserts several affirmative defenses.

{¶ 5} Also on May 22, 2018, FirstEnergy filed a separate motion to dismiss for lack of jurisdiction over the person and failure to set forth reasonable grounds for complaint. As to the first argument, FirstEnergy submits that the Commission lacks jurisdiction to hear the complaint as against FirstEnergy because it is not a public utility subject to R.C. 4905.26. Instead, FirstEnergy states that while it owns electric distribution utilities in Ohio that fall within the definition of “public utility” as defined in R.C. 4905.02 and 4905.03, FirstEnergy itself is not a public utility or public utility company. In support of its argument, FirstEnergy points to those definitions, the statutory language of R.C. 4905.26, legal precedent from the Supreme Court of Ohio and the Commission, and Ohio Adm.Code 4901-9-01(C)(2), which allows a complained against party to move to dismiss a complaint on the grounds that the Commission lacks jurisdiction over the person. FirstEnergy also argues that the complaint must be dismissed because it fails to set forth reasonable grounds for complaint against it. Here, FirstEnergy indicates that the sole allegation in the Complaint related to FirstEnergy is that CEI is one of its wholly-owned subsidiaries. FirstEnergy contends that all other allegations of the complaint are asserted against CEI.

{¶ 6} Complainant did not file a response to FirstEnergy’s motion to dismiss.

{¶ 7} The Commission “has only such jurisdiction as is conferred by statute.” *Zanesville Terminal RR. Co. v. Pub. Util. Comm.*, 100 Ohio St. 225, 228, 126 N.E. 56 (1919). R.C. 4905.26 authorizes the Commission to hear a complaint “against any public utility * * *,” which is defined in R.C. 4905.02 as “every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in [R.C. 4905.03], * * *.” R.C. 4905.26; R.C. 4905.02(A). As is relevant here, R.C. 4905.03 states that

a corporation is “an electric light company when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state * * *.” R.C. 4905.03(C). Reading these statutory provisions together in the context of this case, the Commission’s jurisdictional authority to hear complaints is limited to those against a corporation engaged in the business of supplying electricity for light, heat, or power purposes to consumers within Ohio.

{¶ 8} Against this statutory framework, FirstEnergy does not fit into the definition of a public utility. FirstEnergy does not engage in the business of supplying electricity for light, heat, or power purposes to consumers in Ohio; it simply owns companies that do. This is not a new conclusion. The Commission has previously recognized that FirstEnergy is not a public utility for purposes of its jurisdiction in complaint proceedings. *In re the Application of Natl. Aeronautics & Space Administration at Glenn Research Ctr. to Establish a Reasonable Arrangement with The Cleveland Elec. Illum. Co. and FirstEnergy Corp. for Elec. Serv.*, Case No. 09-91-EL-AEC, Entry at ¶ 3 (Mar. 12, 2009) (“With regard to the motion to dismiss filed by CEI and [FirstEnergy], the Commission finds that [FirstEnergy] is not a public utility and should be dismissed as a party to this proceeding.”); *In re the Complaint of S.G. Foods, Inc., et al.*, Case No. 04-28-EL-CSS, et al., Entry at 26 (Mar. 7, 2006) (“Holding companies such as [FirstEnergy] * * * are not engaged in the business of supplying electricity to consumers and, thus, are not subject to our jurisdiction for purposes of service-quality complaints.”). The Supreme Court of Ohio has reached a similar conclusion. *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 2012-Ohio-5445, 980 N.E.2d 996 at ¶ 1 (“CEI and Ohio Edison * * * are wholly owned subsidiaries of appellant [FirstEnergy], which is not a public utility.”). Accordingly, the attorney examiner finds that FirstEnergy is not a public utility for purposes of conferring jurisdiction under the complaint statute, that the Commission therefore lacks jurisdiction to hear the complaint as against FirstEnergy, and that the motion to dismiss should be granted.

{¶ 9} The attorney examiner additionally finds that this matter should be scheduled for a settlement conference. The purpose of the settlement conference will be to explore the remaining parties' willingness to negotiate a resolution of the complaint against CEI in lieu of an evidentiary hearing. As stated in Ohio Adm.Code 4901-1-26, any statement made in an attempt to settle this matter without the need for an evidentiary hearing is generally inadmissible to prove liability or invalidity of a claim. An attorney examiner from the Commission's legal department will facilitate the settlement process. The parties, of course, remain free to initiate and pursue settlement negotiations prior to the scheduled settlement conference.

{¶ 10} Accordingly, a settlement conference shall be scheduled for August 14, 2018, at 10:00 a.m., at the offices of the Commission, Conference Room 1247, 180 East Broad Street, 12th Floor, Columbus, Ohio 43215. If a settlement is not reached at the conference, the attorney examiner may conduct a discussion of procedural issues including discovery deadlines and stipulations of fact.

{¶ 11} Pursuant to Ohio Adm.Code 4901-1-26(F), the representatives of the public utility shall investigate the issues raised in the complaint prior to the settlement conference, and all parties attending the conference shall be prepared to discuss settlement of the issues raised. Each party must arrive with authority to settle this matter. In addition, the parties shall bring with them all documents relevant to the matter or necessary to facilitate settlement negotiations.

{¶ 12} As is the case in all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 13} It is, therefore,

{¶ 14} ORDERED, That FirstEnergy's motion to dismiss be granted. It is, further,

{¶ 15} ORDERED, That a settlement conference be held on August 14, 2018, at 10:00 a.m., as stated in Paragraph 10. It is, further,

{¶ 16} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Patricia Schabo

By: Patricia A. Schabo
Attorney Examiner

JRJ/sc

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Case No(s). 18-0785-EL-CSS

Summary: Attorney Examiner Entry granting FirstEnergy's motion to dismiss and scheduling a settlement conference for 08/14/2018 at 10:00 a.m. in accordance with Paragraph 10 - electronically filed by Sandra Coffey on behalf of Patricia Schabo, Attorney Examiner, Public Utilities Commission of Ohio