

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>Forest Hills Supermarket, Inc., dba</b>	)	
<b>Konnis Family Foods</b>	)	
	)	
<b>Complainant,</b>	)	<b>Patricia A. Schabo, Attorney Examiner</b>
	)	
<b>vs.</b>	)	
	)	<b>Case No. 18-0785-EL-CSS</b>
<b>Cleveland Electric Illuminating Co.,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>First Energy Corp.</b>	)	
	)	
<b>Respondents,</b>	)	
	)	

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**INITIAL HEARING BRIEF OF COMPLAINANT FOREST HILLS  
SUPERMARKET, INC., dba KONNIS FAMILY FOODS**

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**1. FOREST HILLS SUPERMARKET HAS BEEN DENIED DUE PROCESS OF  
LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION AND  
THE OHIO CONSTITUTION**

On May 2, 2018, Forest Hills Supermarket, Inc., dba Konnis Family Foods (“Complainant or Forest Hills”) filed its Complaint on Service with the Public Utilities Commission of Ohio (the “Commission”) against the Cleveland Electric Illuminating Company (CEI”) and First Energy Corp. First Energy Corp was dismissed from this action on July 11, 2018. On November 11, 2018, the Commission issued an Entry which, among other items, scheduled an evidentiary hearing for February 26, 2019 which was conducted as scheduled on February 26, 2019 (Feb. 26 Hearing”). At the conclusion of the Feb. 26 Hearing, the Commission ordered that Initial Hearing Briefs from

all Parties were to be submitted on March 15, 2019 with Reply Briefs due on March 29, 2019. On March 12, 2019, a transcript of the February 26, 2019 was filed with the Commission (“TR”).

During the Feb 26 Hearing, Forest Hills submitted, and the Commission admitted, the following Exhibits:

Exhibit 1: August 1, 2017 correspondence from CEI;  
Exhibit 2: August 1, 2017 CEI bill for Account No.: 110 124 917 649;  
Exhibit 3: August 2, 2017 CEI bill for Account No.: 110 124 917 649;  
Exhibit 4: April 9, 2018 CEI bill for Account No.: 110 124 917649.  
(TR, p. 20).

After admitting these Exhibits from Forest Hills, Complainant further submitted Complainant Exhibits 5 and 6.<sup>1</sup> Exhibit 5 consists of an email chain beginning October 25, 2017 from First Energy Corp. attorney Joshua R. Eckert to Forest Hills attorney Thomas M. Wilson. Exhibit 6 is a continuation of the email chain set out in Exhibit 5 but, includes additional emails which conclude with an email dated November 13, 2019 from Attorney Eckert to Attorney Wilson. Exhibits 5 and 6 involve discussions concerning various discovery matters and contain certain CEI bills and summary pages for electric service to Forest Hills. Even though Exhibits 5 and 6 contain various CEI bills and explanations and admissions by CEI, along with repeated refusals by CEI to provide requested billing information, the Commission refused to admit Exhibits 5 and 6. The Commission gave the following reason for its refusal to admit Complainant Exhibits 5 and 6:

Attorney Examiner Schabo: Okay. Well, then—let’s just simplify this. Exhibits 5 and 6 are email exchanges between two attorneys. I will not swear you in on behalf of your client because that is a conflict. An attorney cannot act as a witness in their client’s own case. Exhibits 5 and 6 will not be admitted. (TR, p. 19-20)

However, any determination as to a potential conflict of interest is not automatic. Rather, it requires a determination of whether a “substantial hardship on the client” would occur. Ohio Prof.

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<sup>1</sup> For purposes of a complete record, Complaint Exhibits 5 and 6 have been filed contemporaneously with Complaint’s Initial Brief.

Cond. Rule 3.7(a)(3). In the instant case nothing in Exhibits 5 or 6, or in counsels limited testimony in identifying these documents, demonstrates the existence of any conflict and, the refusal of the Commission to permit the identification of the documents at the Feb 26 Hearing did constitute a substantial hardship on Complainant. More importantly, Exhibits 5 and 6 contain admissions by CEI that CEI committed errors in the installation of the meters which are at the heart of the issue before the Commission. For Example, in the email from CEI attorney Eckert dated October 25, 2017, CEI admits:

To begin, I would like to address the concerns expressed in your letter regarding Account No 11012417649 (“Account 649”). That account is served by meter number S314036132 (the “new electric meter” referenced in your letter). This meter was supposed to be associated with Account No.-649 as of December 2016; however, due to an error, this meter was incorrectly associated with Zaremba’s account until August 2017. To correct this error, an adjusted bill was issued on Account No.-649. (See Exhibits 5 and 6).<sup>2</sup>

These statements by CEI attorney Eckert are not hearsay as they are admissions by a party opponent,<sup>3</sup> and as such should have been admitted into evidence. CEI made no specific objection to Exhibits 5 and 6. Rather, CEI objected generally to the admission of all of Complainant’s Exhibits.

Mr. Endris: Thank you, your Honor. At this time the Company would object to the admission of these exhibits. There’s no witness here to authenticate these documents nor cross-examine about their content and/or the meaning of their content. (TR, p. 14-15).<sup>4</sup>

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<sup>2</sup> These statements by CEI attorney Eckert constitute judicial admissions and as such are admissible. See *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, 105-106 (1184) (“It is a well settled rule, that parties are bound by their written admissions made in the progress of a cause as substitute for proof of any material fact and cannot repudiate them at pleasure.”).

<sup>3</sup> See Ohio Evid. R. 801(D)(2).

<sup>4</sup> In response to this general objection, Complainant argued that these Exhibits were admissions by a party opponent. (TR p. 15).

In any event, CEI made no specific objection as to Exhibits 5 and 6. Rather, the Commission sui sponte determined the Exhibits inadmissible.

Moreover, during the Feb 26 Hearing, the Commission admitted into evidence, over the objection of Complainant, the previously filed Direct Testimony of Princess Davis on Behalf of the Cleveland Electric Illuminating Company (“Davis Testimony”).<sup>5</sup> As the Commission will remember, Complainant objected arguing that rather than rely upon the written testimony, of Ms. Davis, CEI should just present Ms. Davis as a live witness in its case in chief. (TR p. 26). The Commission allowed the written Davis Testimony to be admitted into evidence. Critically, after the commission denied Complainant’s objection to the admission and use of the written Davis Testimony, the Commission then allowed CEI to provide supplemental live testimony by Ms. Davis.

Mr. Endris: Your Honor, at this time, in light of the exhibits that may or may not come into the record, I’d like to begin with some rebuttal rather than go straight into cross-examination. (TR p. 19).

Simply put, CEI was permitted to have its cake and eat it too. More importantly, the Commission improperly allowed the “rebuttal testimony” of Ms. Davis before allowing cross-examination of Ms. Davis by Forest Hills, thereby allowing CEI to combine both the written testimony of Ms. Davis with the live testimony of Ms. Davis to the prejudice of Forest Hills.

Adding insult to injury, once Forest Hills was permitted to cross-examine Ms. Davis, Ms. Davis was repeatedly allowed to review her written testimony in order to answer questions posed to her by Complainant.

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<sup>5</sup> Ms. Davis was present at the Feb 26 Hearing.

Mr. Wilson: Objection. same objection. she's reading from her prior testimony.

She doesn't get to read from her prior testimony. She doesn't get to read from her prior testimony. If she doesn't [remember] it, she says she doesn't remember. She doesn't get to look at it. She's testifying on testifying. That's all, your honor. Attorney Examiner Schabo: The objection is overruled. (TR p. 49).

Additionally, during the course of cross-examination of Ms. Davis by Complainant, in an attempt to circumvent testimony by Ms. Davis that she had no personal knowledge of certain information, Ms. Davis testified that she was not a fact witness but rather was testifying as an "expert witness" for CEI.

Q. So you have no personal knowledge about 13598 Euclid Avenue?

A. No, but I am an expert witness for the Company and rely on information during my investigation from others within the Company to form my opinion and investigation analysis. (TR p. 37)

However, at no point prior to this revelation, which occurred, midway through cross-examination, had CEI identified Ms. Davis as an expert witness.<sup>6</sup> No expert report was provided to Forest Hills by CEI as required by Ohio Evid. R. 701-705. In fact, in the written Davis Testimony, CEI had the perfect opportunity to identify Ms. Davis as an expert witness but intentionally chose not to:

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THE PRESENT CASE?**

A. My testimony addresses several of the allegations raised in the Complaint by Forest Hills Supermarket ("Forest Hills") pertaining to the electric service at 13598 Euclid Ave., Cleveland, OH 44112 ("Property"). Specifically, my testimony addresses the non-payment of charges for the previously unbilled electric service delivered to the property. (Davis Testimony, p. 3) (emphasis in original)

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<sup>6</sup> In fact, to date, CEI has never identified Ms. Davis as an expert witness. Rather, it was only Ms. Davis who identified herself as a CEI expert witness.

If Ms. Davis was being offered as an expert witness by CEI, when she was asked by CEI what the purpose of her testimony was, Ms. Davis could have easily answered that she was providing expert testimony. She did not. Rather, CEI never identified Ms. Davis as an expert witness.<sup>7</sup> This deprived Forest Hills with the opportunity to obtain an expert witness to rebut Ms. Davis' expert testimony. Such conduct constitutes nothing less than trial by ambush and should not be permitted. *Di v. Cleveland Clinic Found.*, 2016-Ohio-686 (8<sup>th</sup> Dist. 2016).

Respondent CEI then used Ms. Davis' newly minted expert witness status to allow her to testify based upon documents which were never provided to Forest Hills.

Mr. Wilson: She's testified that somebody from someplace else contacted her to give her some information, and that person is not here and I have no opportunity to cross-examine it. It is hearsay.

Attorney Examiner Schabo: Mr. Endris.

Mr. Endris: Your Honor, this is not—this meets the exception to the hearsay rule regarding expert witness. She is an expert and is qualified to review the records and testify as to their content.

.....

Mr. Wilson: Again, your Honor, I feel like as if I've fallen down the rabbit hole. Sometimes the Rules of Evidence are enforced and sometimes they're not. In regard to expert testimony, I've not been provided with a single document in regard to this witness' review of anything, in which case that she's testifying about. I cannot cross-examine her about documents that I've never seen that she seems to have reviewed. (TR p. 40-41).

The Commission overruled Complainant's objection and Ms. Davis was permitted to continue testifying as an expert witness and based upon documents never produced to Complainant, all to the prejudice of Forest Hills.

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<sup>7</sup> Ms. Davis was never qualified as an expert witness by the Commission.

During the course of the instant proceedings, as demonstrated above, the Rules of Evidence were inconsistently enforced. The Rules of Civil Procedure were inconsistently enforced.<sup>8</sup> Taken together, the Commission proceedings to date, have denied Forest Hills due process of law as guaranteed by the Fourteenth Amendment of the United States constitution and Sections 2, Article I of the Ohio Constitution. This deprivation of due process has prejudiced Complainant's right to obtain a fair hearing from the Commission.

2. **THE BILLING PRACTICES OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY VIOLATE SECTION 4901:1-10-22 OF THE OHIO ADMINISTRATIVE CODE.**

Ohio Administrative Code Section 4901:1-10-22 provides in pertinent part:

(B) Customer bills issued by or for the electric utility shall be accurate, shall be rendered at monthly intervals, and shall contain clear and understandable form and language. Each bill shall state at least the following information:

.....

(13) any unpaid amounts due from previous bills, any customer credits, and the total amount due and payable.

(23) A numerical representation of the customer's historical consumption during each of the preceding twelve months, with a total average consumption for such twelve month period.

Forest Hills Exhibit 2, is the CEI bill dated August 1, 2017 for the period "Jun 08 to Jul 06, for 29 days." The historical consumption set out is only for January through July or seven months. OAC 4901:1-10-22 (B)(23) requires twelve months of historical consumption. Consequently, the CEI bill, as set forth in Exhibit 2 sent by CEI in violation of OAC 4901:1-10-22 (B)(23). CEI issued a

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<sup>8</sup> The cumulative error doctrine allows for the combination of numerous individual errors to constitute reversible error even if each of the individual errors, taken alone, do not in and of themselves, constitute reversible error. *Daniels v. Northcoast Anesthesia Providers, Inc.*, 2018-Ohio-2132 (8<sup>th</sup> Dist. 2018); accord *Ohio v. Garner*, 74 Ohio St. 3d 49 (1995).

subsequent bill on August 9, 2017 (Exhibit 3) which again violated OAC 4901:1-10-22 (B)(23) by only providing eight months of historical service.

CEI further violated OAC 4901:1-10-22 (B)(13) by providing a lump sum previous balance of \$37,384.63 in its August 1, 2017 bill (Exhibit 2). As to this violation the testimony of Ms. Davis is telling.

Q. So every month the client got a – Forest Hills got a bill that said, for Account 649, that said there is a previous balance of what ultimately totaled up to \$37,384.63, not the multi-bill, but I’m talking about specific bills?

A. No. The multi-bill—multi-monthly rebill was the first billing that would have been sent to Forest Hills Supermarket for the new meter showing the breakdown of each billing component, along with the rebill letter that was sent to them. They were also issued a rebill letter on August the 1st. (TR p. 67-68).

In other words, the first time Forest Hills received a bill for the \$37,384.63 was on the August 1, 2017 bill (Exhibit 2). However, OAC 4901:1-10-22 (B)(13) requires that all bills contain “any unpaid amounts from previous bills.”<sup>9</sup>

What became abundantly clear from the evidence and testimony presented at the Feb 26 Hearing, was that:

- 1.) a new meter was installed at 13598 Euclid at the request of Zaremba, not Forest Hills;
- 2.) CEI incorrectly installed the meter and further incorrectly billed Zaremba, not Forest Hills;
- 3.) On the August 1, 2017 CEI bill to Forest Hills, CEI, for the first time, billed Forest Hills for past electric consumption for the time period of “12/09/2016 to 07/06/2017. (Exhibit 1)
- 4.) CEI’s billing practice violated OAC 4901:1-10-22 (B)(23);
- 5.) CEI’s billing practice violated OAC 4901:1-10-22 (B)(13);
- 6.) None of these billing issues were caused in any manner by Forest Hills.

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<sup>9</sup> As CEI bills to Forest Hills for Account 110 023 165 2019 do not set forth any of the unpaid amount of \$37,384.63, CEI cannot argue that these unpaid amounts were sent to Forest Hills under tge 209 Account.



Consequently, based solely on CEI's own mistakes and errors, Forest Hills was improperly billed \$37,384.63. Forest Hills should not to pay for CEI's mistakes and the Commission should order this amount removed from any bill and further order that Forest Hills is not responsible for payment of this amount.<sup>10</sup>

Respectfully Submitted,

/s/ Thomas M. Wilson  
Thomas M. Wilson (#003893)  
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<sup>10</sup> Additionally, the Commission should further order that this billing issue should be removed from the credit record of Forest Hills.

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

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Summary: Brief INITIAL HEARING BRIEF OF COMPLAINANT FOREST HILLS  
SUPERMARKET, INC., dba KONNIS FAMILY FOODS electronically filed by Ms. Pat Fauver  
on behalf of Wilson, Thomas M Mr.