

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

FOREST HILLS SUPERMARKET, INC.)	
d/b/a KONNIS FAMILY FOODS)	
)	
Complainant,)	
)	
v.)	Case No. 18-785-EL-CSS
)	
THE CLEVELAND ELECTRIC)	
ILLUMINATING COMPANY,)	
)	
Respondent.)	

POST-HEARING REPLY BRIEF
OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

Robert M. Endris (0089886)
Counsel of Record
Joshua Eckert (0095715)
Emily Danford (0090747)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Telephone: (330) 384-5849
Facsimile: (330) 384-3875
rendris@firstenergycorp.com
jeckert@firstenergycorp.com
edanford@firstenergycorp.com

ATTORNEYS FOR THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY

I. INTRODUCTION

As directed by the Attorney Examiner at the conclusion of the evidentiary hearing in this matter Complainant Forest Hills Supermarket, Inc. d/b/a Konnis Family Foods (“Forest Hills” or “Complainant”) filed its Initial Hearing Brief (“Complainant’s Brief”) on March 15, 2019. Complainant’s Brief is a misguided and unwarranted rant against perceived violations of due process allegedly committed by the Attorney Examiner’s evidentiary rulings at the hearing. Complainant’s arguments that its due process rights and Commission rules have been violated should be summarily rejected by the Commission as set forth below.

II. LAW AND ARGUMENT

A. The Attorney Examiner’s Decision to Exclude Exhibits 5 and 6 Did Not Deny Due Process

Complainant first argues that the Attorney Examiner denied Complainant’s due process rights because its Exhibits 5 and 6 offered at the hearing should have been admitted.¹ Complainant identifies these exhibits as email correspondence between CEI’s attorney and Complainant’s attorney.² Complainant faults the Attorney Examiner’s reasoning for refusing to admit these exhibits over CEI’s objection that no witness was available to authenticate and be cross-examined. Complainant referenced the Ohio Rules of Professional Conduct 3.7(A)(3) and claimed that the rule requires a determination of “whether a “substantial hardship on the client; would occur.”³

However, Complainant has the operation of the rule exactly backwards—the rule does

¹ Complainant’s Brief at p. 2 (Complainant’s Brief does not include page numbers; therefore, reference is made to the apparent page numbers indicated in the electronic file).

² *Id.*

³ *Id.*

not *permit* a lawyer to both advocate and testify *unless* there is a conflict of interest that creates a substantial hardship on the client. Rather, it *prohibits* a lawyer from both advocating and testifying unless disqualifying the lawyer from advocating would work a substantial hardship on the client.⁴ Further, in the comments on conflict of interest the Rule refers to situations in which the lawyer “will be a necessary witness.”⁵ There was no testimony, evidence, or any argument at the hearing that Complainant was incapable of presenting a witness other than counsel to authenticate the documents or be cross-examined on their content.⁶ Inexplicably, Complainant chose not to pre-file testimony and brought no witnesses to the hearing. Any hardship was created by apparent strategic choice, not by necessity.

Moreover, Complainant’s characterizations of the email correspondence as “admissions” by CEI are untrue, as are its claims that CEI made “repeated refusals . . . to provide requested billing information.”⁷ Complainant’s argument that “Exhibits 5 and 6 contain admissions by CEI” and that “[t]hese statements by CEI attorney Eckert are not hearsay as they are admissions by a party opponent...”⁸ are untrue as a matter of law. While Complainant claims the emails by CEI Attorney Eckert constitute “judicial admissions” under *Peckham Iron Co. v. Harper* and that the exhibits should have been admitted,⁹ there is a crucial difference distinguishing *Peckham* from this case: in *Peckham* the admissions were made under oath in pleadings¹⁰ while in this

⁴ The full text of Ohio Rule of Prof. Cond. 3.7(a) states: “A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; (3) the disqualification of the lawyer would work *substantial* hardship on the client.”

⁵ Ohio Rule of Prof. Cond. 3.7 Comment [6].

⁶ The Rule specifically allows another lawyer in the firm to advocate for the client if the lawyer’s testimony is necessary.

⁷ Complainant’s Brief at 2. (While unadmitted and therefore not relevant as evidence, Complainant’s Exhibits 5 and 6 filed on March 15, 2019, illustrate that Complainant’s unsubstantiated claim that CEI refused to produce documents, is contradicted by Complainant’s counsel’s acknowledgment that CEI “provided exactly what [he] requested. Apparently [he] requested the wrong information.”⁷)

⁸ Complainant’s Brief at p. 3.

⁹ *Id.* (citing *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, 105-106 (1184)).

¹⁰ *Peckham* at 106 (“But though stricken out, the fact that the admission had been made under oath...offered in

case the email communications in question occurred long before the Complaint initiated this proceeding.¹¹

Indeed, Complainant repeatedly asserted at hearing that documents were “not produced” and that CEI “refused to give [him] the documents.”¹² Complainant demanded Company Witness Davis identify whether documents had been produced to him.¹³ And yet the record is undisputed that Complainant failed to serve even a single discovery request upon CEI.¹⁴ Again, the evidentiary crisis Complainant asserts is one of its own making.

B. The Attorney Examiner Did Not Err in Admitting the Pre-Filed Direct Testimony of CEI’s Expert Witness.

Complainant also asserts that it was a violation of the Ohio Rules of Evidence for the pre-filed direct testimony of CEI’s expert witness, Princess A. Davis, to be admitted over Complainant’s objection.¹⁵ Complainant complains that Company Witness Davis was not specifically identified as an expert in her pre-filed testimony.¹⁶ Complainant then complains that such lack of specific identification “deprived Forest Hills with the opportunity to obtain an expert witness to rebut Ms. Davis’ expert testimony.”¹⁷ These complaints are contrary to the Commission’s well-established jurisprudence, and without foundation in any event.

First, the Commission is empowered by statute to establish its own rules of procedure to govern its administrative proceedings.¹⁸ Pursuant to that authority, the Commission has

evidence by the plaintiff as a part of the original answer, it was still a part of the record....”)

¹¹ Transcript at p. 52, lines 24-25 to p. 53 line 1.

¹² Tr. at p. 52.

¹³ Tr. at p. 57, lines 9-11.

¹⁴ *Id.* lines 8-11 (“Mr. Endris: Your Honor, counsel has had ten months to conduct discovery and has not, and he’s objecting that he doesn’t have documents in his possession that he’s never asked for.”)

¹⁵ Complainant’s Brief at p. 4.

¹⁶ *Id.* at p. 6.

¹⁷ *Id.*

¹⁸ R.C. 4901.13 (“The public utilities commission may adopt and publish rules to govern its proceedings and to

promulgated rule 4901-1-29(A)(1)(h) that requires expert testimony to be pre-filed no later than seven days before any hearing.¹⁹ Further, the Attorney Examiner gave the parties more than the required minimum seven days by requiring testimony to be pre-filed *eleven* days before the scheduled hearing.²⁰ Instead of complying with the Commission's long-standing procedural rules and the Attorney Examiner's Entry, Complainant chose to object repeatedly at hearing and to assert now that due process has been violated.

Second, Company Witness Davis fully established her qualifications to testify as an expert on the various customer records pertinent to this and many other customer complaint cases.²¹ Complainant's Brief cites Ohio Rules of Evidence 701-705, but made no challenge at hearing on any of the three qualifications required for a witness to testify as an expert.²² Specifically, Company Witness Davis' pre-filed testimony described her: 1) education, training and experience; 2) specialized knowledge of company records in general; and 3) specialized knowledge of records related to this proceeding.²³ That Ms. Davis' expertise was beyond the ordinary knowledge of lay persons was clearly evident at the hearing from her detailed testimony both on direct examination and cross-examination regarding Company's records and systems.

Third, even if Complainant failed to perceive Company Witness Davis' pre-filed testimony as that of an expert, there was ample time pursuant to the Attorney Examiner's Entry for Complainant to probe the full nature of that testimonial evidence through deposition.²⁴ Contrary to Complainant's assertions, Complainant is not the victim of a procedural or

regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public.")

¹⁹ See, Tr. at p. 45

²⁰ Entry, November 21, 2018, at ¶6.

²¹ Direct Testimony of Princess A. Davis, p. 2.

²² Ohio Rule of Evidence 702.

²³ Davis Direct at p. 2-3.

²⁴ Entry at p.4 (requiring any testimony to be filed eleven days before the hearing "in order to allow sufficient time for review and depositions prior to the hearing.")

evidentiary ambush. The Commission's Entry clearly required the simultaneous pre-filing of testimony, as is common in Commission proceedings. Complainant was invited to meet its burden of proof by pre-filing the testimony of an expert of its choosing. Moreover, the Commission's Rules allow parties to engage in pre-hearing discovery, including depositions. The Complainant or its counsel having chosen not to take advantage of these opportunities to meet Complainant's burden, now accuses the Commission of denying due process. But simply put, there has been no due process violation in this case.

Complainant's choice to not conduct discovery and not pre-file testimony, together with its counsel's confusion²⁵ about the Commission's procedural rules, led to a difficult hearing.²⁶ But Complainant has not shown error, let alone an accumulation of errors adding up to reversible error. The Commission should reject Complainant's argument that it has been denied due process by the Commission.

C. CEI Did Not Violate Commission Rules and Properly Rebilled Complainant.

Complainant's sole evidence that CEI failed to provide required information on its bills to Complainant is that the initial rebill statement to Complainant did not have historical consumption information beyond January 2017 and presented a "lump sum" previous balance.²⁷ Complainant correctly notes that the service upgrade was requested by the landlord, but incorrectly accuses CEI of improperly installing the meter.²⁸ There was no evidence of any kind

²⁵ Tr. at p. 27, lines 20-27. (Complainant, after objection to the entirety of Company Witness Davis' pre-filed direct testimony on grounds of "classic hearsay" was overruled: "Again, just so that I'm clear on the procedure, and I apologize for my ignorance, your Honor, I know better, but when we come back on the record...the testimony set forth in Exhibit A is going to be - - I'm allowed to cross examine on.")

²⁶ See, for examples, Tr. at 41 ("I feel as though I've fallen down the rabbit hole."); Tr. at 45 ("All I'm asking is that I want specifics, and when I asked her about a specific she went back and reread her testimony, which is again insane, but that's my objection, your Honor." [followed by an apology]); Tr. at p. 58 ("Attorney Examiner Schabo: [to Complainant] 'Can we be a little less hostile to the witness? I'm sorry, that's the wrong word. Can we be a little less argumentative with the witness?'"")

²⁷ Complainant's Brief, pp 7-9.

²⁸ *Id.* at p. 8-9. ("CEI incorrectly installed the meter and further incorrectly billed Zaremba, not Forest Hills").

presented in this case that the meter was installed incorrectly.

Complainant disavows causing any of these billing issues. However, the record is undisputed that: 1) Complainant had known about billing issues with its account since December 2016;²⁹ 2) Complainant was aware that its usual monthly bills ranged from \$5,000 to \$7,000;³⁰ 3) Complainant was aware that it received a number of bill statements showing zero consumption;³¹ and 4) Complainant made no effort to contact CEI about its bills showing zero consumption;³². The conclusion is inescapable: Complainant knew it was receiving electricity and not paying for it. Complainant could have contacted CEI or set aside the normal monthly payment amount until the billing was straightened out. Instead, it has chosen to argue that it should not have to pay.

Complaint's Brief fails to identify any legal basis for not paying for its electric service. This is not surprising because there is none. Rebilling for previously unbilled electric service under these circumstances is specifically allowed by the Commission's rules and precedent. Moreover, even if the Commission were to determine that CEI's failure to initially bill Complainant for the correct meter violated Commission rules, that does not mean Complainant is entitled to free electricity.³³ In short, Complainant has failed to meet its burden of proof to demonstrate that it is entitled to the requested relief and, accordingly, the Complaint must be dismissed.

²⁹ CEI Initial Brief at p. 5.

³⁰ Tr. at p. 56, lines 4-7.

³¹ See Company Exhibits B-1 through B-4.

³² *Id.* at p. 7.

³³ See CEI Initial Brief at 7 (citing *In re the Complaint of Allied Erecting and Dismantling Co. v. Ohio Edison Co.*, Case No. 07-905-EL-CSS, Entry on Rehearing at ¶ 7 ("Allied does not point to any nexus as to how OE's violation of Rule 4901:1-10-05(1), O.A.C., should lead us to the conclusion that Allied sustained its burden of proof of showing that OE improperly calculated OE's backbill.")).

III. CONCLUSION

Complainant has not demonstrated that its due process rights have been violated. Complainant has not met its burden of proof that CEI violated Commission rules. And Complainant has not established any legal basis to receive free electricity. The Commission should dismiss the Complaint in its entirety, with prejudice.

Respectfully submitted,

/s/ Robert M. Endris
Robert M. Endris

Robert M. Endris (0089886)
Counsel of Record
Joshua Eckert (0095715)
Emily Danford (0090747)
FirstEnergy Service Company
76 S Main Street Akron, Ohio 44308
Telephone: (330) 384-5849
Facsimile: (330) 384-3875
rendris@firstenergycorp.com
jeckert@firstenergycorp.com
edanford@firstenergycorp.com

ATTORNEYS FOR THE
CLEVELAND ELECTRIC
ILLUMINATING COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief of Ohio Edison Company was sent to the following by U.S. mail on this 29th day of March, 2019.

/s/ Robert M. Endris
Attorney for The Cleveland Electric
Illuminating Company

Tom Wilson
Wargo & Wargo
30 Park Street
Berea, OH 44017
tom@wargoandwargo.com

patricia.schabo@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/29/2019 4:35:00 PM

in

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

Summary: Reply Post-Hearing Reply Brief of The Cleveland Electric Illuminating Company electronically filed by Mr Robert M Endris on behalf of The Cleveland Electric Illuminating Company