

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,**

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on April 8, 2020

I. SUMMARY

{¶ 1} The Commission finds that the complaint should be dismissed for failure of the complainant to demonstrate that The Cleveland Electric Illuminating Company engaged in any unlawful or unreasonable billing practices or otherwise violated any Commission rule.

II. PROCEDURAL BACKGROUND

{¶ 2} On May 2, 2018, Forest Hills Supermarket, Inc., d/b/a Konnis Family Foods (Forest Hills or Complainant) filed a complaint against The Cleveland Electric Illuminating Company (CEI) and FirstEnergy Corp. (FirstEnergy). The complaint alleges that CEI wrongfully and unreasonably billed Complainant and/or did not provide accurate metering and 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 filed an answer to the complaint. Therein, CEI admitted certain factual allegations, denied the remainder, and further denied any wrongdoing in connection with Complainant's account. CEI also asserted several affirmative defenses.

FirstEnergy joined the answer to admit that CEI is its wholly owned subsidiary but to otherwise deny being subject to the Commission's jurisdiction under R.C. 4905.26.

{¶ 4} Also on May 22, 2018, FirstEnergy separately filed a motion to dismiss for lack of jurisdiction. Complainant did not file a response to the motion to dismiss.

{¶ 5} On July 11, 2018, the attorney examiner issued an Entry granting FirstEnergy's motion to dismiss, leaving only Complainant's claims against CEI pending before the Commission. By the same Entry, the attorney examiner scheduled a settlement conference for August 14, 2018. Ultimately, the Complainant and Respondent were unable to reach a compromise.

{¶ 6} By Entry dated November 21, 2018, the attorney examiner scheduled a hearing for February 26, 2019. Additionally, the attorney examiner directed that pre-filed testimony be filed no later than February 15, 2019, in order to allow sufficient time for review and depositions prior to the hearing. Consistent with that procedural schedule, CEI filed the direct testimony of Princess Davis; Complainant did not submit any pre-filed testimony.

{¶ 7} The hearing commenced as scheduled on November 21, 2018. Complainant's counsel appeared, but Complainant sent no other representative or witnesses to testify. Princess Davis appeared to provide testimony on behalf of CEI.

III. DISCUSSION

A. *Applicable Law*

{¶ 8} CEI is a public utility as defined in R.C. 4905.02 and, as such, is subject to the Commission's jurisdiction of this Commission.

{¶ 9} R.C. 4905.22 provides that every public utility shall furnish service and facilities that are adequate, just, and reasonable, and that all charges made or demanded for any service be just, reasonable, and not more than the charges allowed by law or order of the Commission.

{¶ 10} 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.

{¶ 11} In complaint proceedings, the burden of proof is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, in this proceeding, it is Forest Hills' responsibility to present evidence in support of the allegations asserted in the complaint.

B. Summary of Testimony and Evidence

{¶ 12} As mentioned above, counsel for Forest Hills appeared at the hearing. Counsel delivered an opening statement and introduced exhibits but did not present any witnesses to testify on behalf of Complainant. Although not evidence, counsel's opening statement does explain the genesis of Forest Hills' complaint and provides context to this proceeding; therefore, a summary follows.

{¶ 13} Counsel related that Forest Hills is a small, family-run supermarket located at 13598 Euclid Avenue in East Cleveland, Ohio (the Property). The supermarket has been at the same address for the past 30 years and received electric service from CEI through two separate meters, which were billed under Account Number 209. In September of 2016, CEI installed a new meter; at this time, rather than continuing to bill Forest Hills through Account Number 209, CEI began to bill the supermarket's landlord for consumption registered on the new meter. Counsel further stated that, in May of 2017, the landlord contacted CEI to question the new bills. Subsequently, on June 19, 2017, CEI determined that the new meter was serving Forest Hills and that there was a mistake as to billing. (Tr. at 6-7.)

{¶ 14} Continuing, counsel related that on August 1, 2017, CEI sent a bill to Forest Hills under a new account, Account Number 649; the bill covered a 29-day period from June

8, 2017 to July 6, 2017, and showed a “previous balance” of \$37,384.63 and a monthly consumption charge of \$7,576.44, for a total amount due of \$44,961.07. Counsel stated that CEI also sent a letter dated August 1, 2017, to Forest Hills stating that the \$44,961.07 bill was for the time period of December 9, 2016 to July 6, 2017, a time period for which counsel asserted Forest Hills had not received a bill. Counsel further asserted that the letter’s characterization that the bill was for new service is untrue because Forest Hills had been there for 35 years and had been receiving consistent bills from CEI during that time. In other words, counsel disputed that there was new service. (Tr. at 7-8.)

{¶ 15} Lastly, counsel reported that CEI placed Forest Hills on a payment plan, which took the \$44,961.07 due and divided it by the seven months covered by that amount. This resulted in \$6,423.01 of additional monthly charges to the current monthly consumption charge. Counsel stated that this nearly doubled Forest Hills’ bill. Forest Hills paid its current consumption charges but did not pay the back amount, and, on April 9, 2018, Forest Hills received a disconnect notice for non-payment of the prior bill even though the supermarket had not received monthly bills for that amount until August of 2017. (Tr. at 8.)

{¶ 16} In addition to his opening statement, Complainant’s counsel offered six exhibits. Over the objection of opposing counsel, the attorney examiner admitted four of those exhibits into evidence: a letter dated August 1, 2017, from CEI to Complainant (Ex. 1); a billing statement dated August 1, 2017, for Account Number 649 (Ex. 2); a billing statement dated August 9, 2017, for Account Number 649 (Ex. 3); and a billing statement dated April 9, 2018, for Account Number 649 (Ex. 4).¹ (Tr. 10-13, 20.)

{¶ 17} Counsel for CEI also took the opportunity to provide an opening statement, during which he described this case as a simple, normal rebill process that CEI undertook in order to bill for electricity consumed by Forest Hills (Tr. at 9).

¹ Exhibits 2, 3, and 4 show the account number in its entirety, along with other information that could otherwise be considered confidential. Complainant’s counsel, however, waived confidentiality. For expediency, the Commission refers to the account numbers by the last three digits.

{¶ 18} Princess Davis provided pre-filed, direct written testimony on behalf of CEI (Company Ex. A) and was present for live cross-examination and rebuttal testimony. In addition to Ms. Davis' testimony, CEI presented a four-page packet of billing statements from CEI to Forest Hills dated April 12, 2017 (Company Ex. B-1), May 10, 2017 (Company Ex. B-2), June 12, 2017 (Company Ex. B-3), and July 12, 2017 (Company Ex. B-4), all of which were for Account Number 206, and a letter from Complainant's counsel to CEI dated August 9, 2017 (Company Ex. C). Exhibit B, as a package, was stipulated into evidence, Exhibit A was admitted over counsel's objection, and Exhibit C was admitted into evidence without objection.

{¶ 19} In her testimony, Ms. Davis stated that she has 18 years of experience in customer service and is currently employed by FirstEnergy Service Company as a Customer Services Compliance Specialist.² In that capacity, she is responsible for reviewing and responding to complaints made by customers of CEI. This process includes investigating facts including gathering information from subject matter experts. She describes the purpose of her testimony as addressing the non-payment of charges for the previously unbilled electric service delivered to the Property. (Company Ex. A at 2-3.)

{¶ 20} Ms. Davis testified that Forest Hills currently receives non-residential electric service at the Property from CEI under Account Number 649. Forest Hills began receiving service under Account Number 649 in December 2016 after a service upgrade requested by Complainant's landlord was made to the electric service at the Property. With this upgrade, a new meter (New Meter) was installed and initially set up on an existing account for the landlord. Prior to December 2016, Complainant received electric service at the Property solely through two meters (Old Meters). On September 6, 2016, CEI completed the upgrade project, energized service to the New Meter, and billed the New Meter to the landlord. CEI continued to bill Forest Hills for the Old Meters under Account Number 609, as service to

² FirstEnergy Service Company provides corporate support, including customer service, to FirstEnergy Corp.'s regulated public utility subsidiaries, of which CEI is one (Company Ex. A at 2).

Forest Hills continued to run through the Old Meters until a meter switchover in December 2016. (Company Ex. A at 3-4.)

{¶ 21} Ms. Davis explained that CEI was contacted on May 11, 2017, by a representative of Forest Hills' landlord, who questioned why the New Meter was appearing on its account (Company Ex. A at 5). On June 19, 2017, CEI confirmed that the New Meter served the Property and not the landlord's address (Company Ex. A at 4). To remedy the error, CEI completed a billing correction to bill the usage from the New Meter from December 9, 2016 to July 6, 2017 to the new account established for Complainant: Account Number 649 (Company Ex. A at 4, 5; Tr. at 65). CEI sent a letter to Complainant dated August 1, 2017, advising of the rebill amount and payment plan. Ms. Davis testified that a spreadsheet providing a breakdown of the billing from December 9, 2016, to July 6, 2017, was also included in the letter and that the term of the payment plan was set equal to the period of underbilling, i.e., seven months. (Company Ex. A at 4, 5; Tr. at 65-68.)

{¶ 22} Ms. Davis further stated that CEI's records show that CEI received a letter on August 20, 2017, from Complainant's attorney. The letter stated that counsel had reached out to the landlord to inquire why the New Meter was not being billed to Complainant and that he hoped to reach a resolution with the landlord. (Company Ex. A at 4.) CEI's records also indicate that on August 30, 2017—the due date of the August 1, 2017 bill (Ex. 2)—Complainant called CEI and requested a different arrangement for payment; the request was denied (Company Ex. A at 4-5; Tr. 47-48). Thereafter, Complainant paid only the current charges on the bill. Continuing, Ms. Davis testified that a CEI representative spoke with Complainant on November 10, 2017, and advised that CEI was willing to renegotiate payment terms; Complainant demurred, indicating a need to confer with its attorney. Ms. Davis also testified that, on January 11, 2018, CEI sent a disconnect notice to Forest Hills, and on February 1, 2018, Forest Hills entered into a second payment plan. Again, however, Forest Hills paid current charges only. With nothing being paid toward the rebill amount, CEI sent another disconnect notice on April 9, 2018, leading to Complainant's complaint on May 2, 2018. (Company Ex. A at 4-5; Tr. at 48.)

{¶ 23} Ms. Davis testified that the actions taken by CEI to correct the billing error complied with CEI's tariff and with Commission rules, specifically Ohio Adm.Code 4901:1-10-23 (Company Ex. A at 7). Ms. Davis noted that several measures were undertaken to ensure that Complainant was billed the proper amount. For example, CEI confirmed that the New Meter has only one service connection—the Property occupied by Complainant. Further, CEI used the actual meter data and applied the applicable tariff rates in effect at the time to produce the billed amounts. (Company Ex. A at 6.) Additionally, Ms. Davis explained that she examined Complainant's account data from before the meter change, during the rebill period, and after the New Meter was assigned to Forest Hills and found that the usage levels aligned (Company Ex. A at 6; Tr. at 68-69). Ms. Davis stated that the Old Meters began to record zero consumption after the meters were switched over, which is apparent on the billing statements Complainant received for Account Number 209 (Company Ex. A at 6-7; Tr. at 23-24; Company Ex. B). And, since no usage registered on Account Number 209 after the meter switchover, CEI cancelled the bills associated with Account Number 209 for the service period of January 6, 2017, to November 27, 2017, when the account was finally closed. Ms. Davis reported that cancelling the bills created an account credit of \$5,290.34, which was transferred and credited to Account Number 649 on January 20, 2018, to reduce the outstanding unpaid balance on that account. (Company Ex. A at 7.)

{¶ 24} At the conclusion of the hearing, the attorney examiner established a schedule for the submission of post-hearing briefs. Forest Hills and CEI filed initial post-hearing briefs. Only CEI filed a post-hearing reply brief.

C. *Evidentiary Challenges*

{¶ 25} In its brief, Forest Hills asserts that it was denied due process of law citing to certain evidentiary rulings made by the attorney examiner during the hearing.

1. Exhibit 5 and Exhibit 6.

{¶ 26} Forest Hills first asserts that its due process rights were hindered by the attorney examiner's refusal to admit Exhibit 5 and Exhibit 6 to the record. Complainant states that the exhibits contain admissions by CEI regarding errors that are at the heart of the issue before the Commission, constitute admissions by a party opponent, and should be considered by the Commission in rendering its decision on the complaint.

{¶ 27} When offered into evidence by counsel for Forest Hills, counsel for CEI objected to the admission of Exhibit 5 and Exhibit 6 citing the lack of a witness to authenticate the documents or to be cross-examined about their content and/or the meaning of the content (Tr. at 14-15).³ As is relevant, counsel for Forest Hills offered to be sworn in and testify as to Exhibits 5 and 6 (Tr. at 15-16). The attorney examiner did not rule on the admissibility of the exhibits immediately, but rather left the issue open such that Complainant's counsel would have the opportunity to have the documents properly identified during his cross-examination of Ms. Davis (Tr. at 16-17). Subsequently, the attorney examiner did admit Complainant's Exhibits 1 - 4 into the record because, even though no witness had been presented by Complainant to identify, lay a foundation, or authenticate the documents, the documents were referenced throughout the pleadings and within pre-filed testimony, were created by the party opposing their admission, and were sent to Complainant, presumably with the intention that they be received and relied upon (Tr. at 20). The attorney examiner refused, however, to admit Exhibits 5 and 6—email exchanges between counsel for Complainant and counsel for CEI—because there was no witness to properly introduce the exhibits or be cross-examined on their contents. Specifically, the attorney examiner stated, "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." (Tr. at 19-20.)

³ CEI's objection was lodged against the admission of any and all of Complainant's exhibits (Tr. 14-15).

{¶ 28} Complainant asserts that the attorney examiner erroneously applied the Rules of Professional Conduct in that a determination as to a potential conflict of interest is not automatic; instead, it requests a determination of whether a “substantial hardship on the client” would occur. Initial Brief at 2, citing Ohio Prof. Cond. Rule 3.7(a)(3). Forest Hills contends that nothing in the exhibits or in counsel’s limited testimony in identifying the documents demonstrates the existence of a conflict, but that the attorney examiner’s refusal to admit the same constitutes a substantial hardship on Complainant. Further, Complainant alleges that the statements of CEI’s counsel within the exhibits are judicial admissions and are, therefore, admissible.

{¶ 29} Responding, CEI states that Complainant misinterprets or misapplies the Rule. CEI also observes that the comments to the Rule speak to an attorney acting as a “necessary witness,” but there is no evidence or argument that Complainant was incapable of presenting a witness other than counsel to support its case or to authenticate documents and be cross-examined on their content. CEI also argues against Complainant’s characterization of the emails’ content as judicial admissions; CEI reminds the Commission that the email communications were exchanged before any litigation commenced and are unsworn.

{¶ 30} The Commission finds no error in the attorney examiner’s ruling to exclude Exhibit 5 and Exhibit 6 from the record. In relevant part, Ohio Prof. Cond. Rule 3.7(a)(3) states that “a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless * * * the disqualification of the lawyer would work *substantial* hardship on the client.” (Emphasis sic.) Thus, the rule states a general prohibition against an attorney acting as both counsel and witness, subject to stated exceptions. The Commission disagrees with Complainant’s argument that a conflict of interest is not automatic. The Commission understands that the Rules of Professional Conduct assume the conflict exists but provide a means by which to avoid the conflict if disqualification of counsel would work a substantial hardship on the client. Furthermore, Ohio Prof. Cond. Rule 3.7 contemplates excuse of the conflict only where the lawyer is likely to be a necessary

witness, i.e., “that the proposed testimony is material and relevant to the issues being litigated and that the evidence is unobtainable elsewhere.” *Akron v. Carter*, 190 Ohio App.3d 420, 2010-Ohio-5462, 942 N.E.2d 409, ¶ 20 (9th Dist.). In briefing, Complainant explained that the evidence it wished to admit through the Exhibits were statements made by CEI’s attorney, certain CEI bills, and summary pages for electric service to Forest Hills. Complainant could have obtained the bills and summary pages from CEI through discovery, but apparently chose not to do so (Tr. at 52). Furthermore, unsworn statements made by CEI’s counsel prior to the initiation of litigation do not qualify as judicial admissions as argued by Complainant. Regardless, the admission cited to by Complainant is one that was discussed openly by Ms. Davis in her testimony: the New Meter was to be associated with Forest Hills as of December 2016, but through mistake was associated with Forest Hills’ landlord; once the mistake was discovered, CEI proceeded to correct the error through billing adjustments to Account 649. In other words, the evidence was obtainable elsewhere. Thus, without delving into whether the evidence would be material or relevant, the Commission finds that the evidence was obtainable elsewhere, which negates any finding that counsel could act as both attorney and a necessary witness. The Commission concludes that the attorney examiner did not err in refusing to permit Complainant’s counsel to provided testimony on behalf of his client in this matter.

2. Direct Testimony of Princess Davis

{¶ 31} Complainant also reiterates its objection to the admission of Company Exhibit A, Ms. Davis’ pre-filed direct testimony, which counsel for Complainant regarded as her “prior testimony” and deemed “classic hearsay” (Tr. at 25-26). Complainant additionally restates its objection to the attorney examiner allowing Ms. Davis to reference her pre-filed testimony during cross-examination; again, the basis for the objection appearing to be that Complainant believes the pre-filed testimony is “her prior testimony” (Tr. at 26, 49, 54, 56, 62). Finally, but along a similar vein, Complainant also claims error in allowing Ms. Davis to testify as an expert witness where CEI failed to specifically name her as such.

{¶ 32} CEI submits that Ms. Davis' testimony was proper in all respects. CEI states that it submitted Ms. Davis' pre-filed, expert testimony in accordance with Ohio Adm.Code 4901-1-29 and the procedural schedule set forth in the attorney examiner's November 21, 2018 Entry. CEI also counters that Ms. Davis fully established her qualifications to testify as an expert regarding this customer complaint case and that Complainant made no effort to challenge that qualification at hearing. In short, CEI asserts that Complainant's own failure to conduct discovery is the only error that resulted in prejudice to Complainant's case.

{¶ 33} The Commission finds no fault in the admission of Ms. Davis' pre-filed testimony or in her treatment as an expert in this matter. Forest Hills repeatedly complains that the Ohio Rules of Evidence and the Ohio Rules of Civil Procedure were inconsistently applied and enforced during this proceeding, both during the hearing and in its post-hearing brief. This is somewhat by design. As an administrative body, the Commission is not "inhibited by the strict rules as to the admissibility of evidence which prevails in courts." *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 263, 126 N.E.2d 314 (1955).⁴ Instead, "with respect to its hearing process, the [Commission] 'is a body vested with broad discretionary powers'" as to the conduct of its hearings. *Elyria Telephone Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 444, 110 N.E.2d 59 (1953). Indeed, the legislature saw fit to grant the Commission the ability to adopt and publish rules to govern our proceedings and to regulate the mode and manner of all hearings relating to parties before it. R.C. 4901.13.

{¶ 34} To that end, the Commission promulgated Ohio Adm.Code 4901-1-29, which sets forth the Commission's rules regarding expert testimony and states, preliminarily, that "all expert testimony to be offered in commission proceedings * * * shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered." Ohio Adm.Code 4901-1-29(A). Furthermore, "[u]nless

⁴ Similarly, the Commission is not strictly bound to the Rules of Civil Procedure; rather, the Rules of Civil Procedure are to be "used wherever practicable" "without limiting the Commission's discretion." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, at ¶ 82, citing R.C. 4903.22.

otherwise ordered by the *** attorney examiner, *** all direct expert testimony to be offered in any other commission proceeding [such as this complaint case] shall be filed and served no later than seven days prior to the commences of the hearing.” Ohio Adm.Code 4901-1-29(A)(1)(h). In this case, the attorney examiner ordered that all pre-filed testimony be filed no later than February 15, 2019. Entry (Nov. 21, 2018) at ¶ 6, 9. Pursuant to that Entry, CEI filed and served Ms. Davis’ expert testimony on February 15, 2019. At hearing, Ms. Davis’ pre-filed testimony was presented, marked, and ultimately admitted into evidence as Company Exhibit A, which was not “prior testimony,” but her direct testimony for which she was present and subject to cross-examination.

{¶ 35} Ohio Adm.Code 4901-1-29 does not enumerate what qualifies as expert testimony; therefore, the Commission may look to the Ohio Rules of Evidence for guidance in making that determination. A review of Ms. Davis’ testimony convinces the Commission that Ms. Davis established herself as an expert in reviewing, investigating, and responding to customer complaints such as the one brought here by Complainant (Company Ex. A at 2-3; Tr. at 36-38; Ohio Evid. R. 702). Furthermore, the Commission finds that Complainant’s lament of not being provided an expert report is misplaced. According to CEI—with no contradiction from Complainant—Complainant did not engage in discovery and, thus, did not avail itself to the right to require CEI to identify any expert witness, state the subject matter on which the expert is expected to testify, and discover from the expert facts or data known or opinions held by the expert that are relevant to the stated subject matter (Tr. at 52). Ohio Adm.Code 4901-1-16.

{¶ 36} In short, Ms. Davis’ pre-filed, expert testimony by and of itself is not hearsay. Furthermore, the Commission finds no fault in allowing Ms. Davis to reference her direct testimony during her cross-examination in order to corroborate her memory on otherwise independently verifiable facts such as the date of a piece of correspondence or the meter number associated with a customer account (Tr. at 42, 44, 49, 62). Finally, to the degree that Complainant’s case was hindered by a lack of expert report or information, the wound was self-inflicted by failure to conduct discovery (Tr. at 52-53).

{¶ 37} Accordingly, the Commission concludes that Forest Hills was not denied due process of law.

D. Commission Conclusion

{¶ 38} Complainant alleges that CEI's billing practices regarding Complainant's account violate two sections of Ohio Adm.Code 4901:1-10-22. Forest Hills cites to Ohio Adm.Code 4901:1-10-22(B)(23), which provides that customer bills shall be accurate, shall be rendered at monthly intervals, shall contain clear and understandable form and language, and shall state a "numerical representation of the customer's historical consumption during each of the preceding twelve months, with a total and average consumption for such twelve-month period." Complainant asserts that the August 1, 2017 bill (Ex. 2) and the August 9, 2017 bill (Ex. 3) violate this Commission rule by providing historical consumption for only seven and eight months, respectively.

{¶ 39} The Commission disagrees. As admitted in evidence, both Exhibit 2 and Exhibit 3 comply with Ohio Adm.Code 4901:1-10-22(B)(23). It is undisputed that Complainant's usage was metered through the Old Meters until switched to the New Meter in December 2016 (Company Ex. A at 4). Thus, January 2017 would be the first billing month for which the New Meter would register consumption. Both Exhibit 2 and Exhibit 3 set forth, in the form of a bar graph, the consumption for all months for which the New Meter was in operation and had historical consumption to depict. Ohio Adm.Code 4901:1-10-22(B)(23) cannot be read to require a bill to show historical consumption where the associated meter was not in service and, therefore, had no historical consumption to report.

{¶ 40} Continuing, Complainant cites to Ohio Adm.Code 4901:1-10-22(B)(13), which provides that – in addition to being accurate, rendered at monthly intervals, containing clear and understandable language – each customer bill shall state any unpaid amounts due from previous bills, any customer credits, and the total amount due and payable. Forest Hills avers that CEI violated this provision by providing a lump sum previous balance of \$37,384.63 on the August 1, 2017 bill (Ex. 2). Ms. Davis explained that this figure represents

the total rebill amount, i.e., the amount previously billed to the landlord in error that was then correctively billed to Forest Hills (Company Ex. A at 4; Tr. at 65-68). Furthermore, the August 1, 2017 letter from CEI clearly stated that Forest Hills would be expected to pay the billing adjustment through a payment plan, as verified by the bill issued on August 9, 2017 (Ex. 2; Ex. 3; Tr. at 65-68).

{¶ 41} Thus, the Commission finds that Exhibit 2 complies with Ohio Adm.Code 4901:1-10-22(B)(13): it shows an unpaid amount due from previous bills (“previous balance \$37,384.63”), any customer credits (payments/adjustments \$0.00), and the total amount due and payable (“amount due by Aug. 28, 2017 \$44,961.07”).

{¶ 42} The Commission gleans that Complainant’s true complaint is that Forest Hills had not previously received monthly bills adding up to and reflecting the previous balance of \$37,384.63. Complainant’s case ignores Ohio Adm.Code 4901:1-10-23(A), which states:

(A) When an electric utility has undercharged any nonresidential customer as the result of a meter or metering inaccuracy, billing problem, or other continuing problem under the utility’s control, unless the customer and the electric utility agree otherwise, the maximum portion of the undercharge that may be billed to the customer in any billing month, based on the appropriate rates, shall be determined by dividing the amount of the undercharge by the number of months of undercharged service. The electric utility shall only bill the customer for the amount of the total undercharge amount rendered in the thirty-six month period immediately prior to the date the company remedies the metering inaccuracy. Each electric utility shall state the total amount to be collected in the first bill under this rule. * * *

In other words, electric utilities such as CEI may correct a situation in which a metering inaccuracy or billing problem under the utility’s control causes a billing inaccuracy. Here, CEI has provided evidence demonstrating that: a new meter was installed (Company Ex. A

at 4); the consumption corresponding to that meter was erroneously billed to the Complainant's landlord (Company Ex. A at 4-5; Tr. at 67) instead of Forest Hills, whose Property CEI confirmed was served by the New Meter (Company Ex. A at 4); and upon discovery of the error, CEI sent Complainant a bill stating the total amount to be rebilled due to the error (Company Ex. A at 4-5; Ex. 2; Tr. at 47).

{¶ 43} In addition to overlooking Ohio Adm.Code 4901:1-10-23, Forest Hills' Complaint ignores the fact that it received at least four bills for electric service from CEI that reflected zero consumption and total current charges ranging from \$49.64 to \$55.95, all while it continued to operate as a supermarket (Ex. B). Certainly, this should have prompted Forest Hills to realize that something was wrong with its account; it was consuming normal levels of electricity but being billed (and paying) for none. The Complainant bears some responsibility for not heeding the signs that something was amiss. *In re the Complaint of John Blanchard v. The Toledo Edison Co.*, Case No. 18-82-EL-CSS, Opinion and Order (Feb. 20, 2019) at ¶ 17, citing *In re the Complaint of Jane Ann Bidwell v. American Electric Power*, Case No. 15-1020-EL-CSS, Opinion and Order (October 20, 2017). Had Complainant contacted CEI when it began receiving unusually low billing statements reflecting zero usage in January 2017, this issue may have been resolved in a timelier manner and Complainant could have avoided the significantly larger unpaid balance later identified by CEI (Company Ex. B). See *In re the Complaint of Aa La Femme Boutique, Inc. v. Columbus S. Power Co. d/b/a American Elec. Power*, Case No. 02-3079-EL-CSS, Opinion and Order (May 27, 2004) at 7.

{¶ 44} Complainant provided no evidence to demonstrate that the procedure undertaken by CEI was unlawful or unreasonable. Complainant provided no evidence to demonstrate that the amount ultimately called due as a result of the rebill procedure was unlawful or unreasonable. And, the Complainant provided no evidence to demonstrate that any Commission rule was violated. This failure of proof, alone, is fatal to Complainant's case. The Commission is presented with more, however, in the form of evidence presented by CEI to support the reasonableness and lawfulness of the procedure undertaken pursuant to Ohio Adm.Code 4901:1-10-23 to correct a metering inaccuracy and billing problem under

the utility's control. Accordingly, and upon review of all evidence in the record, the Commission can only conclude that Complainant did not meet its burden of proof and has failed to demonstrate that CEI's actions or billing practices were unjust, unreasonable, or in violation of law. We direct CEI to establish a seven-month payment plan for Forest Hills to pay for its usage from December 9, 2016, to July 6, 2017, plus any adjustments or credits, with no interest or late fees to be applied toward the bill.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 45} On May 2, 2018, Forest Hills filed a complaint against CEI alleging that CEI wrongfully and unreasonably billed or inaccurately metered Complainant in violation of R.C. 4905.22 and various provisions of Ohio Adm.Code Chapter 4901:1-10. Forest Hills' complaint also named FirstEnergy as a respondent.

{¶ 46} On May 22, 2018, CEI and FirstEnergy filed an answer to Forest Hills' complaint. FirstEnergy also filed a separate motion to dismiss.

{¶ 47} On July 11, 2018, the attorney examiner granted FirstEnergy's motion to dismiss, leaving only Complainant's claims against CEI.

{¶ 48} A settlement conference was held on August 14, 2018.

{¶ 49} On February 26, 2019, the attorney examiner conducted the evidentiary hearing.

{¶ 50} The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 51} The Complainant failed to meet its burden of proof to demonstrate that CEI's actions or billing practices in this matter were unjust, unreasonable, or in violation of law or Commission rules.

V. ORDER

{¶ 52} It is, therefore,

{¶ 53} ORDERED, That this matter be decided in favor of CEI for failure of the Complainant to sustain the burden of proof. It is, further,

{¶ 54} ORDERED, That the complaint thus be denied and dismissed as a matter of record. It is, further,

{¶ 55} ORDERED, That CEI establish a payment plan for Forest Hills with no interest or late fees to be applied toward the total adjusted amount as stated in Paragraph 44. It is, further,

{¶ 56} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

PAS/hac

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

Summary: Opinion & Order dismissing the complaint for failure of the complainant to demonstrate that The Cleveland Electric Illuminating Company engaged in any unlawful or unreasonable billing practices or otherwise violated any Commission rule electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio