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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the matter of the Complaint of Lawrence A. Boros,	)	
Complainant,	)	
v.	)	Case No. 05-1281-EL-CSS
The Cleveland Electric Illuminating Company,	)	
Respondent.	)	

APPLICATION FOR REHEARING OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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On Behalf of Respondent, The Cleveland Electric Illuminating Company

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APPLICATION FOR REHEARING

I. INTRODUCTION

On April 28, 2007, the Commission issued its Opinion and Order ("Order") in this proceeding in which it concluded that the optional street lighting program, approved by the Commission and offered by Respondent, The Cleveland Electric Illuminating Company ("CEI"), is "unreasonable and insufficient" because CEI did not offer a post top shielded street light fixture desired by Complainant (Order, p. 6), even though 75% of the market in North America does not include this type of light fixture. (Tr. p. 156.)

The Commission also determined that Complainant, as an individual, had standing to bring a complaint against CEI related to a service for which Complainant does not qualify. The Commission's rationale was based on Complainant's personal experience in which he almost hit a boy with his car -- a boy who, according to Complainant, "had a death wish" and was skateboarding in the middle of the street – a

street on which Complainant was driving left of center. (Order, p. 3; Tr. pp. 42, 50, 53, 54.)

Pursuant to R.C. 4903.10 and Rule 4901-1-35 of the Ohio Administrative Code, CEI submits its Application for Rehearing on the basis that the Commission erred in the following respects:

- The Commission's finding that Complainant possessed the standing necessary to maintain his cause of action related to CEI's street lighting program is contrary to law; and
- The Commission's finding that the CEI street lighting program is "unreasonable and insufficient" because it does not include a shielded luminaire option is manifestly against the weight of the evidence.

As more fully discussed below, the Commission's findings with regard to CEI's street lighting program establishes a dangerous precedent that, if left intact, has far reaching ramifications beyond this case that are contrary to public policy. Moreover, the FirstEnergy Ohio operating companies are in the process of selecting a shielded post top light fixture that will be offered to governmental entities in the future.[1] The companies will make this offering regardless of the Commission's ultimate position in its final order and, if applicable, the outcome of any appeal.

Accordingly, CEI respectfully asks that the Commission reconsider its Order as it relates to CEI's street lighting program and find either that the program is reasonable and sufficient, or reverse its Order as now being moot, given that all of the FirstEnergy Ohio operating companies will offer a shielded post top street light fixture to governmental entities in the future.

[1] The FirstEnergy Ohio operating companies will incorporate this offering into the tariffs that they file consistent with the timeline set forth in the Order (within 120 days of April 28, 2007.) (Order, p. 6.)

II. ARGUMENT

A. The Commission's Finding that Complainant Possessed the Standing Necessary to Maintain his Street Lighting Cause of Action is Contrary to Law.

Both case law and the procedural rules in Ohio set forth requirements for standing that Complainant has failed to meet with regard to any claims against CEI's street lighting program. As more fully discussed below, Complainant failed to demonstrate that he was the real party in interest, that he suffered or will suffer an injury if CEI does not provide shielded post top street lights, or that he was a customer of CEI with regard to street lighting service. Accordingly, the Commission erred as a matter of law when it concluded that Complainant had standing to maintain the street lighting cause of action.

1. Complainant is not the real party in interest.

In *State ex rel Jones v. Suster* (1998), 84 Ohio St. 3d 70, 77, the Ohio Supreme Court indicated that a party lacks standing if that party is not the real party in interest. In this proceeding, the street lighting service offered by CEI is only available to municipal and other governmental entities. (P.U. C. O. No. 13, Rate Schedule 43, Street Lighting Schedule, p. 1.) Therefore, the obligations and duties of CEI under its street lighting program are set forth in Rate 43 and the street lighting contracts entered into between CEI and the applicable governmental entity.

In *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St. 3d 158, 161, the Court held that "[o]nly a party to a contract or an intended third party beneficiary of a contract may bring an action on a contract in Ohio." In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St. 3d 36, the Ohio Supreme Court adopted the Sixth Circuit Court of Appeals "intent to benefit" test in determining whether a third party is an

incidental or intended third party beneficiary, only recognizing standing with regard to the latter. In *Hill*, the court distinguished the two types of beneficiaries stating:

> If the promisee [CEI] intends that a third party [Complainant] should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.
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> [T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary. [Id. at 40, quoting *Norfolk & w. Co. v. United States* (C.A. 6, 1980), 641 F. 2d 1201, 1208.)]

Applying the *Hill* "intent to benefit" test, Complainant is simply an incidental beneficiary. As the Street Lighting Rate Schedule indicates, only governmental entities qualify for street lighting service offered by CEI. The service offered through this program is one involving the installation and maintenance of street light fixtures and is offered as a convenience to governmental entities.[2] Clearly any duties with regard to this service are owed to the governmental entity and not its individual constituents. Therefore, under *Hill*, these individual constituents, such as Complainant, are incidental beneficiaries of the street lighting program and have no standing to maintain a cause of action related to the terms and conditions under which CEI offers this service to government entities.

[2] The Commission may expand the service offering under CEI's street lighting program to also include an offering of electric service for purposes of energizing the street lights. Complainant cannot demonstrate that he is the real party in interest in any electric service contract between CEI and a governmental entity either because the duties owed under that contract are clearly directed to the customer (i.e., the governmental entity) taking electric service.

Inasmuch as Complainant is not the real party in interest with regard to the services offered under CEI's street lighting program, the Commission erred in finding that Complainant had the standing necessary to maintain his street lighting cause of action.

2. Complainant cannot demonstrate that he has suffered or will suffer an injury if CEI does not offer the fixture desired by Complainant.

In Ohio, the courts have ruled:

> Standing requires demonstration of a concrete injury in fact, rather than an abstract or suspected injury. Demonstration of injury in fact is limited to those situations where an individual can show he has suffered or will suffer a specific injury, even if slight, from the challenged action or inaction, and that this injury is likely to be redressed if the court invalidates the action or inaction. [*State Ex Rel Consumers League of Ohio v. Ratchford,* 8 Ohio App. 3d 420, 424 (10th Dist., 1982.)]

In the instant action, Complainant did not demonstrate that he suffered a specific injury as a result of CEI not including a shielded post top street light. The closest Complainant could come was to discuss *a single light* in *a single instance* in which Complainant *almost* hit someone who was in the middle of a street at the same time Complainant was admittedly driving left of center. This "almost accident", however, does not constitute an injury in fact. Indeed, it is telling that Complainant has been driving for more than 42 years and has never had an accident during night time driving, even though CEI did not offer the light fixture desired by Complainant during this period. (Tr. p. 40.)

Nor did Complainant demonstrate that he will suffer a specific injury if CEI does not offer the fixture requested by Complainant. The Commission noted that Complainant's near miss accident was a result of glare from the street light in the vicinity. (Order, p. 3.) Glare from a street light, however, is not an injury. It is simply a characteristic of lighting that can be exacerbated by numerous factors including weather

conditions, windshield conditions, age and fatigue level of the individual exposed to the light and the age of the light itself. (Tr. pp. 47-51.) Therefore, given the numerous variables that factor into the level of actual glare emitted from a light fixture and experienced by an individual, the actual level of glare that may affect Complainant in the future is mere speculation. And as the *Ratchford* Court stated, a demonstration of an abstract or suspected injury is insufficient to convey standing upon a party.

Complainant also claimed that glare causes "light pollution", thus making it more difficult for Complainant to look at the stars. (Order, p. 4.) The Commission may perceive this as a possible injury to Complainant. However, under *Ratchford,* Complainant must also demonstrate that "the injury is likely to be redressed if the [Commission] invalidates the action or inaction." *Ratchford, supra*, at 424. In this instance, there are numerous other sources of "light pollution", such as the gas station lighting referred to by Complainant as "dumb lighting." (Tr. pp. 22-23.) Furthermore, even if the Company offers the light fixture suggested by Complainant, there is nothing that requires a government entity to incur the additional cost to install this fixture.[3] The granting of Complainant's request will not redress this potential injury and, therefore, Complainant has failed to meet the criteria for standing set forth by the *Ratchford* Court.

3. Complainant does not meet the Commission's two prong test for standing set forth in the Order.

In its Order, the Commission stated that a "complainant has standing to bring a complaint where he is an Ohio customer or consumer of services provided by an Ohio utility and where he is directly affected by the alleged unreasonable activity." (Order, p. 3.) In support of this finding, the Commission cited *In re Complaints of S.G. Foods,*

[3] The cost of this fixture is approximately twice the cost of unshielded street light fixtures. (Tr. 154.)

Inc. et al v. The Cleveland Electric Illuminating Company, et al., Case No. 04-28-EL-CSS (Entry, March 7, 2006.) CEI does not dispute that the *S.G. Foods* case required that the complainant be a customer of an Ohio utility in order to maintain an action at the Commission. However, *S.G. Foods* dealt with a power outage that affected customers outside of the State of Ohio. When deciding the issue, the Commission in *S.G. Foods* did not hold that *any* customer could bring a complaint about *any* utility service offering. Rather, it found that the complainants complaining about a power outage had to be "customers or consumers of electricity." Complainant takes *electric service* from CEI, and if this case dealt with the electricity provided to Complainant, CEI agrees that Complainant would have standing to maintain this action (provided that he could also demonstrate harm.) However, as has already been discussed, this service is only offered to governmental entities and, therefore, Complainant cannot be a customer of CEI for purposes of street lighting service. To extend the Commission's two prong test to *any* customer who takes *any* service from a utility sets a dangerous precedent that, for example, would allow a residential customer to complain about the types of substations that a utility offers through a substation program to a large industrial customer simply because Complainant's sleep is affected by the humming from the substation. Moreover, such a result would be contrary to the Court's findings in *Hill* and *Ratchford*. Because the Commission could not have intended such an absurd result, the Commission erred in its application of the *S.G. Foods* test when it found that Complainant had standing to maintain his street lighting cause of action simply because Complainant received electric service from CEI at his home.

4. Summary

In sum, Complainant lacks standing if he fails any one of the tests discussed above. In this instance, Complainant fails all three. He is not the real party in interest in the street lighting agreement between CEI and the government entity. (*Hill.*) He did not demonstrate that he suffered or would suffer an injury if CEI did not offer the light fixture selected by Complainant (*Ratchford*). And he was not a street lighting customer of CEI (*S.G. Foods*). Accordingly, the Commission erred as a matter of law when it found that Complainant had the standing necessary to maintain the cause of action related to CEI's street lighting program.

B. The Commission's Finding that CEI's Street Lighting Program is Unreasonable and Insufficient is Against the Manifest Weight of the Evidence.

1. The Commission's Findings Ignore the Evidence of Record

In its Order, the Commission concluded that CEI's street lighting program is unreasonable and insufficient because CEI does not offer to its customers the option of shielded street light luminaires. (Order, p. 6.) This finding, however, fails to recognize several significant facts. First, CEI already offers a shielded street light fixture in its street lighting program. As Complainant acknowledged, CEI offers a full cut off cobra head street light. (Tr. pp. 55-56.) And, as indicated on page 9 of the street light rate schedule (Rate 43), the Company will install a shield on any street light for a fee. The fact that government entities elect not to incur the additional cost to install the shields does not make CEI's street lighting program unreasonable or insufficient. Clearly, if Complainant does not agree with the decisions made by governmental entities, his complaint lies with them and not CEI.

2. The fact that CEI does not offer the fixture selected by Complainant does not make its street lighting program unreasonable or insufficient.

As the record clearly shows, this case is not about whether CEI offers a shielded street light fixture. Clearly it does. Rather, this case is about whether CEI offers the street light fixture that Complainant wants. Complainant took no surveys, nor did he even bother to ask any of the other residents of the City of Mentor, the city in which Complainant lives, if they desire the fixture that Complainant requests. (Tr. pp. 85-86.) Rather, Complainant simply presumed that these customers were "oblivious" to lighting issues and took it upon himself to decide what was best for everyone. (Tr. p. 86.) But programs should not be designed for the masses based on the opinions of one individual. As explained in Section II (C), *infra*, it is bad public policy. Moreover, the fact that CEI included an alternative shielding option that differed from that requested by Complainant does not render its street lighting program unreasonable or insufficient.

3. The Weight of the Evidence does not Support the Commission's Findings.

The Commission's conclusions are based on a selective reading of the facts and ignore significant factual evidence of record that, when taken as a whole, cannot support the Commission's findings Commission. In support of its findings, the Commission stated that Complainant "presented substantial evidence showing that unshielded street lights ... cause glare, as well as other problems." (Order, p. 6.) Yet, the Commission did not find CEI's failure to offer the light fixture desired by Complainant to be an unsafe practice. (Order, p. 6.) Nor, with regard to street lighting did the Commission discuss any "other problems." Moreover, the "substantial evidence" referred to by the Commission included Complainant's testimony of a *single* light and a *single* incident in

which Complainant *almost* hit a skateboarder in a street. The Commission concluded that this near miss accident was "a result of the glare from unshielded street lighting." (Order, p. 3.) [4] As the evidentiary record clearly demonstrates, there were other significant factors related to this near miss accident. For example:

- The skateboarder was in the middle of the road, rather than on a sidewalk or side of the street. (Tr. p. 50.)
- Complainant was inattentive and in a hurry to get home and go to bed. (Tr. pp. 42, 49-50.)
- Complainant was driving left of center, "cutting the [S curve] as straight as [he could.]" (Tr. pp. 42, 53.)
- Complainant was fatigued, which contributes to the level of glare experienced by Complainant. (Tr. p. 49.)
- The condition of Complainant's windshield affected the level of glare that he experienced. (Tr. p. 47.)
- The level of glare experienced by an individual is physiological, based on the individual's age. (Tr. p. 49.) Complainant's age contributed to the level of glare that he experienced. (Tr. p. 21.)
- The light fixture was relatively new, thus affecting the level of glare. (Tr. p. 50.)

For the Commission to find that the glare emitted from this single street light was the sole cause of this near miss accident is contrary to the weight of the evidence.

Other "substantial evidence" referred to by the Commission was Complainant's claim that one state (California) installed the fixture desired by Complainant (Order, p. 5), even though Complainant knew nothing of the street light offerings made by other

[4] The Commission determined that Complainant was directly affected by CEI's lighting tariffs. While it did not specifically state that the near miss accident was directly caused by the glare from the street lights, it implicitly adopts the position set forth by Complainant since it only cited Complainant's description of the situation in support of its finding and only discusses issues related to glare when discussing CEI's street light program. (Order, p. 3.)

Ohio utilities (Tr. p. 46), the Company submitted uncontroverted testimony that 75% of the lighting market in North America does not include the fixture proposed by Complainant (Tr. p. 156) and the Company follows the luminance guidelines of the Illuminating Engineering Society of North America ("IESNA") when installing street lights.[5] (Tr. p. 145.)

4. Summary

The Commission's finding that CEI's street lighting program was unreasonable and insufficient was based solely on the incorrect premise that CEI does not include a shielded light option in its street light program. Clearly, the record indicates that CEI offers such an option and therefore, the Commission's finding is in error. Further, a lone customer's wish for CEI to offer an additional lighting fixture in its street lighting program is not sufficient evidence to find that CEI's street lighting program is unreasonable or insufficient, especially when the Commission ignored significant portions of the evidentiary record in making such a finding. Accordingly, the Commission erred when it made findings that were manifestly against the weight of the evidence.

C. The Commission's Order Establishes a Dangerous Precedent that Could Have Negative Public Policy Implications.

As discussed below, the Commission's Order establishes several potentially dangerous precedents. For example, this case was brought by a single individual who single handedly selected the street light fixtures that were best for all governmental

[5] According to Complainant, members of the IESNA take lighting seriously, understand the importance of it, and try to stay abreast of the latest developments. (Tr. p. 65.)

entities within the State of Ohio.[6] Complainant did not seek the opinions of other individuals (Tr. p. 86), nor did the Commission solicit the views of others, including other lighting experts and other utilities that could be affected by the Commission's Order. Rather, the Commission, based on a selective reading of the facts in the record, made a policy decision that affects every customer and every utility in the State without any comprehensive, independent investigation. Such a precedent is contrary to public policy and portrays the Commission as being reactive rather than proactive.

From a utility's perspective, the Order can be interpreted that a near miss traffic accident was caused solely by the glare from an unshielded street light. The combination of this finding with the finding that a utility's street light program is unreasonable and insufficient if it does not include a shielded luminaire option may inadvertently expand the potential for a utility's liability in traffic accidents involving street lights. Accordingly, CEI asks that the Commission reconsider its Order in light of the potential rippling effects its decision may have in future tort litigation.

III. SUMMARY

In sum, the Company has demonstrated that the Order in this proceeding is contrary to the law, the evidence and public policy. Complainant failed to meet the criteria for standing as set forth in any of the three tests presented. The Commission's findings ignore significant facts in evidence that negate the need for the Commission's ruling on issues related to the street lighting cause of action. Clearly the Company offered shielded street lights prior to the complaint, thus meeting the sole criterion on

[6] If the Commission agrees with the Company that its holding is limited to a requirement that any shielded option be offered, then no such result occurs. However, if the Commission determines that a utility must offer the shield option suggested by Complainant, then this statement holds true.

which the Commission concluded that its street lighting program is unreasonable and insufficient. Had the Commission recognized this fact prior to the opinion there would have been no need for the Commission to discuss any of the issues related to street lighting. Based on this fact, as well as the potential negative public policy ramifications and the fact that all FirstEnergy Ohio operating companies will offer an additional shielded option within the next three months, Respondent, The Cleveland Electric Illuminating Company, respectfully asks the Commission to reconsider its Order and either reverse or withdraw those portions of the Order that involve street lighting issues.

Respectfully submitted,

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On Behalf of Respondent, The Cleveland
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2007, a copy of the Application of Rehearing of The Cleveland Electric Illuminating Company was served upon Lawrence A. Boros, 5883 Dorrwood Drive, Mentor, Ohio 44060, by first class mail, postage prepaid.

Kathy J. Kolich/DRC

Kathy J. Kolich, Esquire