

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

FOREST HILLS SUPERMARKET, INC.,)
d/b/a KONNIS FAMILY FOODS,)

Complainant,)

v.)

THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY,)

Respondent.)

Case No. 09-800-EL-CSS

REPLY IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

I. ARGUMENT

In opposing this Motion, Complainant Forest Hills Supermarket, Inc. d/b/a Konnis Family Foods ("Complainant") reiterates a handful of its (insufficient) allegations—and attempts to add a few others. (See Opposition, p. 3 (discussing alleged "pattern and practice" of giving advance "notice and warning" of outages.) But Complainant does not (and cannot) refute the basic legal proposition requiring dismissal of its Complaint: allegations of a single outage, without more, do not constitute inadequate service. *E.g., Yerian v. Buckeye Rural Elec. Co-op*, No. 02-2548-EL-CSS, Opinion and Order dated Oct. 15, 2003, pp. 11-12; *Miami Wabash Paper, LLC v. Cincinnati Gas & Elec. Co.*, No. 02-2162-EL-CSS, Opinion and Order dated Sept. 23, 2003, p. 7; *Verkest v. American Elec. Power*, No. 01-2397-EL-CSS, Opinion and Order dated Oct. 31, 2002, p. 8; *Cogswell v. Toledo Edison Co.*, No. 91-1421-EL-CSS, Opinion and Order dated July 22, 1993, p. 4; *Martin v. Dayton Power & Light Co.*, No. 91-618-EL-CSS, Opinion and Order dated Sept. 10, 1992, p. 7. At bottom, Complainant alleges that Respondent The Cleveland Electric Illuminating Company ("CEI") provided inadequate service because

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Complainant experienced a single outage lasting one or two days in September 2008. As a matter of law, these allegations are insufficient, and the Complaint should be dismissed.

Moreover, in its reply, Complainant for the first time alleges that CEI made an “arbitrary decision” to shut off Complainant’s electricity. (*See* Opposition, p. 3.) This allegation is not included in the Complaint, and it should be ignored for purposes of deciding this Motion. *See State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St. 3d 206, 207 (“[C]ourts cannot rely on evidence or allegations outside the complaint to determine Civ. R. 12(B)(6) motion.”) But more fundamentally, it does not change the nature of Complainant’s claim. Regardless whether Complainant’s outage was caused by Hurricane Ike or some unspecified “arbitrary decision” by CEI, Complainant’s claim remains founded solely on allegations of a single outage, with no contention that CEI violated any statute, regulation or tariff provision, and the Commission need not resolve this factual issue in order to decide this Motion. Even if Complainant’s electricity was cut by some affirmative act by CEI, such allegations are insufficient as a matter of law.

Complainant also alleges in its opposition—for the first time—that CEI has a “pattern and practice” of giving its customers advance notice of outages. (*See* Opposition, p. 3.) Again, Complainant did not include this allegation in its Complaint, and it should be ignored.¹ But even if CEI had such “pattern and practice,” there is no allegation that a violation of this practice would constitute inadequate service. Although Complainant is not required to allege every detail of its claim, it is required to set forth—in its Complaint—the basic propositions of law and fact entitling it to relief. Complainant has not met this basic burden, and the Complaint therefore should be dismissed.

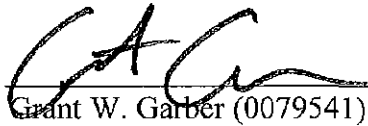
¹ For the same reason, Complainant’s new allegation regarding statements made by an employee of Respondent also should be ignored. (*See id.*)

II. CONCLUSION

For the foregoing reasons, CEI respectfully requests that the Commission dismiss the Complaint.

DATED: October 26, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Respondent's Motion to Dismiss was sent by first class U.S. mail, postage prepaid, to the following person this 26th day of October, 2009:

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