

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

GWENDOLYN TANDY,)	
)	
Complainant,)	
)	
v.)	Case No. 12-2103-GA-CSS
)	
THE EAST OHIO GAS COMPANY d/b/a)	
DOMINION EAST OHIO,)	
)	
Respondent.)	

**MOTION TO DISMISS WITH PREJUDICE FOR FAILURE TO PROSECUTE
AND MEMORANDUM IN SUPPORT OF
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

In accordance with Ohio Adm. Code 4901-1-12, The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO” or “the Company”) respectfully requests that the Public Utilities Commission of Ohio (“the Commission”) dismiss the complaint in this case with prejudice. Good cause exists to grant the Company’s motion to dismiss with prejudice, which is set forth in the attached Memorandum in Support.

Dated: March 4, 2013

Respectfully submitted,

/s/ Gregory L. Williams

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DOMINION EAST OHIO

MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

Ms. Gwendolyn Tandy filed the first iteration of her complaint against DEO in this matter on July 17, 2012. Thereafter, Ms. Tandy filed numerous additions to her complaint on August 22, 2012,¹ October 29, 2012, November 8, 2012, and January 11, 2013. On August 7, 2012, and September 17, 2012, the Company filed its answer and supplemental answer, respectively, to Ms. Tandy's complaint with the Commission.

By entry dated September 13, 2012, the Commission scheduled a settlement conference in this matter for September 27, 2012. (Sept. 13, 2012 Entry at 2.) While both parties appeared for this conference, they were unable to reach a settlement. Consequently, by entries dated November 1, 2012, November 27, 2012, January 23, 2013, and February 13, 2013, the Commission scheduled and rescheduled this matter for hearing. Two hearings were scheduled for November 27 (the first with the Cleveland Electric Illuminating Company, Case No. 12-2102-EL-CSS), and while Ms. Tandy appeared, she was both late and unprepared to proceed, which resulted in DEO's hearing being rescheduled. On January 23 and February 14, Ms. Tandy failed to appear. For each of these three hearing dates, DEO Witness Roxie Edwards or counsel for the Company, however, were present.

II. ARGUMENT

Ms. Tandy's consistent and unsubstantiated failure to appear for hearing in this matter provides substantial grounds for dismissal with prejudice for failure to prosecute. Despite the fact that the Commission has given Ms. Tandy three distinct opportunities to prosecute her

¹ Filed in case number 12-2326-GA-CSS. By Entry dated September 5, 2012, "the attorney examiner found that all issues raised in 12-2326 should be incorporated into and addressed in" this case. (Sept. 5, 2012 Entry at 1.)

complaint against DEO, she has consistently failed to do so. Her last absence even followed the Commission's warning that her complaint would be dismissed should she again fail to appear.

As set forth below, the Commission can and should dismiss Ms. Tandy's complaint with prejudice for failure to prosecute.

A. The Commission has the authority to dismiss Ms. Tandy's complaint with prejudice for failure to prosecute.

"[A]s an administrative body, the Commission is not bound by the provisions of the Ohio Rules of Civil Procedure," but "uses said rules * * * as a guide in making determinations." *In re the Complaint of Frederick Mills v. The Ohio Bell Telephone Company*, Entry, Case No. 84-763-TP-CSS, 1984 Ohio PUC LEXIS 350, at *4 (1984). These rules and the cases construing them show that the Commission can and should dismiss this case with prejudice.

Under Civ.R. 41(B)(1), "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." And such dismissal, if not otherwise specified is with prejudice. Subsection (B)(3) states that such a "dismissal . . . operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." The decision whether to dismiss with prejudice is reviewed deferentially, under an "abuse-of-discretion" standard. *Jones v. Hartranft*, 78 Ohio St.3d 368, 371 (1997). This deferential standard is in recognition that a fact-finding tribunal must have the ability to "manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." *Pembaur v. Leis*, 1 Ohio St.3d 89, 91 (1982).

The Supreme Court has recognized that "where a plaintiff totally fails to appear, a dismissal with prejudice may be proper for such a failure indicates a lack of interest in pursuing the case." *Id.* (internal brackets, ellipsis, and quotations omitted). *See also Hartranft*, 78 Ohio

St.3d at 372 (“evidence that a plaintiff is deliberately proceeding in dilatory fashion” supports dismissal with prejudice”). Where “the conduct of a party is . . . negligent, irresponsible, contumacious or dilatory,” this “provide[s] substantial grounds for a dismissal with prejudice for a failure to prosecute.” *See Sazima v. Chalko*, 86 Ohio St.3d 151, 158 (1999). Such a dismissal is proper when the complainant evinces a “complete disregard for the judicial system or the rights of the opposing party.” *Id.*

The Commission has exercised this authority to dismiss a complaint with prejudice for failure to prosecute. For example, in *In re the Complaint of Drew Hansel v. Windstream Western Reserve, Inc.*, the Commission dismissed the complaint with prejudice when the complainant refused to appear at the prehearing conference; refused to respond to discovery requests; and refused to appear at the hearing despite being given notice of the proceedings, and a warning that failure to comply with an attorney examiner (“AE”) entry could result in dismissal of the complaint. Finding and Order, Case No. 07-89-TP-CSS, 2008 Ohio PUC LEXIS 17, at *3 (2008).

Likewise, in *In re Complaint of Thomas Robinson v. The Ohio Bell Telephone Company*, the Commission dismissed a complaint with prejudice for failure to prosecute because the complainant failed to participate in a prehearing conference; failed to substantiate his assertions that he was unable to appear for a hearing; and failed to comply with the directive of an AE entry. Entry, Case No. 92-2237-TP-CSS, 1993 Ohio PUC LEXIS 809, at *4 (1993). *See also In re the Complaint of Tom Robinson v. Ameritech Ohio*, Entry, Case No. 95-553-TP-CSS, 1996 Ohio PUC LEXIS 37, at *3 (1996); *In re the Complaint of Ria Mercer v. The Ohio Bell Telephone Company*, Entry, Case No. 85-1760-TP-CSS, 1986 Ohio PUC LEXIS 1611, at *3 (1986).

B. Ms. Tandy’s behavior provides substantial grounds for dismissal with prejudice for failure to prosecute, and the Commission should exercise its authority and so dismiss her complaint.

These authorities compel dismissal of the complaint with prejudice. The Commission has already rescheduled the hearing on Ms. Tandy’s complaint three separate times. Although DEO has been prepared to proceed each time, Ms. Tandy has yet to have even appeared for her hearing in this case.

1. Ms. Tandy was late and unprepared for the first hearing, causing it to be rescheduled.

By entry dated November 1, 2012, the Commission scheduled a hearing in this matter for December 4, 2012. (Nov. 1, 2012 Entry at 5–6.) Ms. Tandy, however, informed the Commission that she would be unable to attend the December 4 hearing at the scheduled time “as a result of [her] transportation arrangements.” (Nov. 27, 2012 Entry at 2.) Thus, “the hearing in this matter was [rescheduled] to commence immediately after another proceeding filed by [Ms. Tandy] on January 15, 2013.” (Jan. 23, 2013 Entry at 1.)

At the rescheduled hearing, Ms. Tandy was approximately an hour late and despite her lateness, still unprepared to begin. (*Compare In re the Complaint of Gwendolyn Tandy v. The Cleveland Electric Illuminating Co.*, Case No. 12-2102-EL-CSS (Nov. 27, 2012 Entry at 2) (hearing scheduled to commence at 11:00 a.m.) *with* Tr. at 1 (hearing called at 11:57 a.m.); *see also* Jan. 23, 2013 Entry at 1 (“due to Ms. Tandy’s limited availability on January 15, 2013, the hearing on this complaint was not held as scheduled.”).) Both DEO Witness Edwards—who forfeited a productive workday to travel from Cleveland to Columbus, Ohio—and counsel for DEO were present for the January 15 hearing.

2. Ms. Tandy failed to appear for the second hearing.

The Commission accordingly rescheduled the hearing for February 6, 2013. (Jan. 23, 2012 Entry at 1.) Once again, DEO Witness Edwards had traveled from Cleveland to Columbus, and counsel for DEO was present and prepared. Ms. Tandy, however, was nowhere to be seen.

Approximately an hour after the hearing was scheduled to begin, and after the Company's witness and counsel were dismissed by AE Greta See, "Ms. Tandy contacted the Attorney Examiner claiming that she was unaware of the hearing date and stating that she had a death in the family." (Feb. 13, 2013 Entry at 1.)

3. Despite being warned of the consequence of dismissal, Ms. Tandy failed again to appear for the third hearing.

Thus, for the third time, the hearing in this matter was reschedule, this time for February 28, 2013. (*Id.*) Unlike the previous entries scheduling this matter for hearing, this entry contained an explicit warning to Ms. Tandy should she fail appear for this most recently rescheduled hearing: "Should Ms. Tandy fail to appear, the Attorney Examiner will recommend to the Commission that this case be dismissed." (*Id.* at 2.)

Notwithstanding this third rescheduling, and the notice and warning of the dismissal, on the morning of the February 28 hearing, Ms. Tandy again did not appear for the hearing. This time she left a voicemail for AE See informing her that she would be unable to appear at the hearing due to an unexplained "emergency." AE See contacted DEO Witness Edwards—who was en route from Cleveland to Columbus to appear at the hearing for the third time—and informed her that due to Ms. Tandy's inability to appear, her presence was unnecessary. Counsel for DEO, however, was present for the February 28, 2013 hearing, and entered an appearance on behalf of the Company.

4. This case history shows that Ms. Tandy has no intention of prosecuting this complaint.

All this shows that Ms. Tandy has consistently failed to appear for a hearing in this matter after the Commission has directed her to appear. She has offered no substantiation of her claims of family emergency, and her claim of lack of notice is belied by the fact that she called the Commission the morning of the hearing. Indeed, Ms. Tandy has even failed to appear after the Commission specifically warned her that such a failure would result in the dismissal of her complaint. Such disregard for the Commission's entries betrays a lack of interest in pursuing her complaint that justifies dismissal with prejudice for failure to prosecute.

Moreover, not only has Ms. Tandy exhibited disregard for the Commission's procedure, time, and resources, she has also exhibited a disregard for "the rights of the opposing party," that is, the time, energy, and resources of DEO. *See Sazima*, 86 Ohio St.3d at 158. On two, separate occasions, DEO Witness Edwards has been made to travel the five-hour round trip from Cleveland to Columbus and back again to appear at the hearing in this matter; for Ms. Tandy's third bite at the apple, Ms. Edwards was halfway to Columbus from Cleveland before she was told that the hearing would not proceed. These travels have not simply been in vain, but have caused Ms. Edwards to forfeit three days of productive work.

Ms. Tandy's behavior has not only worked to the detriment of both the Commission and DEO, but it has accrued to the benefit of Ms. Tandy. So long as Ms. Tandy has an open, active complaint about DEO's service before the Commission, the disconnection status of her account is on hold, and her natural gas service will not be disconnected—despite the fact that Ms. Tandy has been delinquent on undisputed amounts since she filed her complaint in July 2012. This alone suggests a motive to delay the disposition of this complaint, and evinces behavior so "negligent, irresponsible, contumacious, and dilatory" as to provide a substantial, stand-alone

ground for a dismissal with prejudice for a failure to prosecute. *See Sazima*, 86 Ohio St.3d at 158.

C. The Commission should dismiss this case with prejudice.

This case has consumed a great deal of resources on the part of the Commission, the Company, and its counsel. Ms. Tandy has been given every opportunity to try this case, and it has become clear that she will not treat the Commission or DEO with the simple respect of showing up. At some point, the loop must be closed—Ms. Tandy has no right, and the Commission should not allow her, to prolong this litigation indefinitely by continuously filing pleadings and continuously accruing new hearing dates. If the Commission does not dismiss this case with prejudice, there is *nothing* to prevent Ms. Tandy from refiling an identical complaint the next week. And DEO will have no remedy but to answer and begin what has been long, expensive, pointless process all over again.

Ms. Tandy has had *three* chances to try this case. She has missed every one. Three strikes should make an out.

III. CONCLUSION

In accordance with the foregoing, DEO respectfully requests that the Commission grant its motion to dismiss Ms. Tandy’s complaint with prejudice for failure to prosecute.

Dated: March 4, 2013

Respectfully submitted,

/s/ Gregory L. Williams

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer was served by U.S. mail to the following person on this 4th day of March 2013:

Gwendolyn Tandy
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/s/ Gregory L. Williams
One of the Attorneys for
The East Ohio Gas Company d/b/a
Dominion East Ohio

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Summary: Motion to Dismiss with Prejudice electronically filed by Mr. Gregory L. Williams on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio