BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

GWENDOLYN TANDY	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 12-2102-EL-CSS
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM IN RESPONSE TO COMPLAINANT'S APRIL 5, 2013 FILING

I. INTRODUCTION

On March 6, 2013, the Commission dismissed the complaint filed in this case by the complainant, Gwendolyn Tandy. On April 5, 2013, Ms. Tandy filed an untitled document in this docket expressing her "disagree[ment] with the dismissal of [her] complaint." (April 5 Filing at 1.) In the event the Commission treats Ms. Tandy's filing as an Application for Rehearing, The Cleveland Electric Illuminating Company ("CEI" or "the Company") files a responsive memorandum to that filing within the 10-day response time specified by Ohio Adm. Code 4901-1-35(B). For all of the reasons discussed below, CEI asserts that no action by the Commission is necessary.

II. ARGUMENT

A. To the extent the Commission considers the April 5 filing as an application for rehearing, the Commission should take no action on the filing.

The time for seeking rehearing from the March 6 Opinion and Order is now expired. To the extent the Commission considers the April 5 filing as an application for rehearing, it should take no action because the application has no merit, as discussed below. Under R.C. 4903.10,

"[i]f the commission does not grant or deny [an] application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law." The letter raises no issues of merit, and if the Commission issues an entry on rehearing, that will only restart another 30-day clock, and allow Ms. Tandy the opportunity to continue troubling the Commission and CEI with more filings, such as her uninvited, unauthorized filing on April 9 (and to which CEI will be responding in the near future). While Ms. Tandy generally has not acted in accordance with the Commission's orders, she has shown that she will continue to make filings in the docket and continue to require the attention of CEI and the Commission.

If the Commission takes no action with respect to this letter, the jurisdictional bar that has now fallen against post-April-5 filings by Ms. Tandy will remain in place. *See, e.g.*, *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 362 (1961) ("The commission . . . has no power to entertain an application for rehearing filed after the expiration of such 30-day period"). This case will then come to an end, as it should. CEI respectfully proposes this course of action to the Commission, as it is clear that the April 5 filing neither complies with nor has any merit under the standards imposed by R.C. 4903.10.

B. The document fails to comply with R.C. 4903.10 and no action should be taken.

Ms. Tandy's filing contains no title, no specific request to the Commission, no citation to any law or other authority, and nothing that amounts to an argument or explanation of what the Commission has done wrong. It simply expresses Ms. Tandy's "disagree[ment]" with the decision rendered against her, and states that "[t]he PUCO provided no one to repr[e]sent me" and that she "wasn[']t prepaired [sic] to stand alone against 3 attorneys representing the Illuminating Co." (April 5 Filing at 1.) R.C. 4903.10, which creates the Commission's jurisdiction to review applications for rehearing, requires that "[s]uch application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers

the order to be unreasonable or unlawful." R.C. 4903.10. While the document is in writing, it does not satisfy the second requirement, setting forth "specific[]" grounds on which the order should be considered "unreasonable or unlawful." *Id*.

The letter does not purport to allege any law or other authority that the Commission violated, and it does not explain how the underlying order was unreasonable. Indeed, the letter simply makes descriptive statements. It does not present any argument. The letter states that the Commission did not appoint an attorney and that Ms. Tandy "wasn't prepaired [sic]" (April 5 Filing at 1); these are simply statements of fact. She does not elaborate at all on these two sentences, meaning that she never explains why or how the order was unreasonable or unlawful. The problem is not that Ms. Tandy failed to present a well-polished brief; the problem is that Ms. Tandy did not present any argument at all.

In short, the document is not titled as an application for rehearing, and it does not comply with the functional requirements of R.C. 4903.10. Therefore, on that basis alone, the Commission should not take any action on the document and allow it to be denied by operation of law.

C. Ms. Tandy has forfeited any argument that the Commission should have appointed counsel.

As CEI noted above, Ms. Tandy does not present any argument, per se. To the extent her declarative statements are construed as complaints about this case, her primary assertion pertains to the fact that CEI was represented by counsel while she was not. Ms. Tandy has forfeited her right to raise any complaint on this ground.

Ms. Tandy had notice at least since the filing of the answer on August 6 that CEI was represented by counsel, and she was on notice since November 19, 2012, that as many as four attorneys were representing CEI. (*See* Notice of Appearance of Counsel at 1 (Nov. 19, 2012)

(notifying the Commission and Ms. Tandy that attorneys Carrie Dunn, Mark Whitt, Andrew J. Campbell, and Gregory L. Williams were serving "as co-counsel for CEI").) And certainly she could and did see at the hearing that CEI was represented by counsel. Likewise, Ms. Tandy knew at all times before and during the hearing that she had not secured the representation of an attorney. Nevertheless, despite many months of notice of the issue, she neither requested the appointment of counsel nor raised any issue regarding such a right until April 5, almost three months *after* the hearing and after the complaint had finally been dismissed.

This issue must be considered forfeited by Ms. Tandy's inaction. The time to have raised this issue was well in advance of the hearing, not well after it. Because she failed to raise this issue in a timely fashion, the Commission should reject it as waived. *See, e.g.*, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, ¶ 18 (a party's "failure to challenge [an issue] at an earlier juncture constitutes a forfeiture of the objection because it deprived the commission of an opportunity to cure any error when it reasonably could have"); *Parma v. Pub. Util. Comm.*, 86 Ohio St. 3d 144, 148 (1999) ("we do not accept . . . objections" when an appellant has "deprived the commission of an opportunity to redress any injury or prejudice that may have occurred").

D. Ms. Tandy has no right to the appointment of counsel.

Moreover, even had Ms. Tandy preserved the issue of appointed counsel, she is not entitled to be provided counsel by the Commission. "[U]nlike criminal litigation, there is no general right of counsel in civil litigation." *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, Slip Opinion No. 2013-Ohio-65, ¶ 9, *quoting State ex rel. Burnes v. Athens Cty. Clerk of Courts*, 83 Ohio St.3d 523, 524 (1998). Commission proceedings are obviously not criminal proceedings, as the Commission has recognized. *In re Complaint of Wilbur Irwin v. Ohio Edison Co.*, Case No. 84-1145-EL-CSS, 1986 Ohio PUC LEXIS 761,

Opin. & Order at *23 (1986) ("criminal proceedings are far more rigorous than Commission complaint case proceedings"); *In re Settlement Agreement Between the Staff, the Ohio Consumers' Counsel, and Aqua Ohio, Inc.*, Case No. 08-1125-WW-UNC, 2009 Ohio PUC LEXIS 854, Entry on Rehg. at *6 (2009) ("this case is not a criminal proceeding"). CEI is not aware of any authority requiring the appointment of counsel in Commission proceedings, and Ms. Tandy has not cited any.

The fact that counsel was not appointed, then, is irrelevant to the reasonableness and lawfulness of the order dismissing the complaint.

E. Ms. Tandy has only herself to blame for being unprepared to try her case.

Finally, Ms. Tandy avows that she was unprepared to try her case. That is undoubtedly true—in fact, it is a matter of record—but it is no one's fault but her own. The hearing was held on January 15, 2013, and it had been scheduled nearly two months before, on November 27, 2012. The complaint itself had been filed July 17, 2012—five and a half months before the hearing. Nevertheless, despite having *at least* half a year to prepare for hearing, she appeared an hour late and opened by declaring that she was "not quite ready." (*See* Tr. 6.) Neither the Commission nor the Company prevented Ms. Tandy from preparing for the hearing, and she had more than enough time to do so.

The truth is, no amount of preparation could save her complaint. There are simply no issues here, and the dismissal of this complaint was the correct outcome.

F. To the extent the document is considered anything else, it is untimely and should not be considered.

If the document is not considered an application for rehearing, it is untimely filed. If the letter is presented as a brief, presentation of evidence, additional pleading, or anything else, it was both unauthorized by rule or entry and filed well past any applicable filing deadline.

Where a document is filed past the deadline set by the procedural schedule for a certain matter, that document should be struck from the record. *See, e.g.*, *In re the Application of Columbus Southern Power Co.*, Case No. 11-346- EL-SSO, 2012 Ohio PUC LEXIS 738, at *27 (Aug. 8, 2012) ("the attorney examiner set an expedited procedural schedule establishing that any memoranda contra be filed within five calendar days after the service of any motions. Therefore, as FES filed its memorandum contra 17 days after OCC/APJN filed its motion, OCC/APJN's motion to strike shall be granted."); *In re the Investigation into Ameritech Ohio's Entry Into In-Region InterLATA Service*, Case No. 00- 942-TP-COI, 2001 Ohio PUC LEXIS 961, at *16 (Dec. 20, 2001) (striking reply brief filed after the procedural deadline).

In this case, the last procedural entry ordered that post-hearing briefs be filed with the Commission no later than February 12, 2013. (January 24, 2013 Entry at 1.) All other applicable deadlines fell earlier. Thus, to the extent Ms. Tandy's letter should be construed as any other filing, it is untimely filed and should be rejected for that reason.

III. CONCLUSION

For the foregoing reasons, CEI respectfully proposes that the Commission need not take any action on this letter; it can and should stand on the prior order dismissing this case with prejudice.

Dated: April 15, 2013

Respectfully submitted,

/s/ Gregory L. Williams

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response was served by U.S. mail to the following person this 15th day of April, 2013:

Ms. Gwendolyn Tandy
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/s/ Gregory L. Williams
One of the Attorneys for
The Cleveland Electric Illuminating
Company

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4/15/2013 3:24:25 PM

in

Case No(s). 12-2102-EL-CSS

Summary: Memorandum in Response to Complainant's April 5, 2013 Filing electronically filed by Mr. Andrew J Campbell on behalf of The Cleveland Electric Illuminating Company