

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION TO STRIKE AND MEMORANDUM IN SUPPORT OF  
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

**I. MOTION TO STRIKE**

In accordance with Ohio Adm. Code 4901-1-12(A), The Cleveland Electric Illuminating Company (“CEI” or “the Company”) hereby requests that the Commission strike Complainant Gwendolyn Tandy’s April 9, 2013 filing submitting additional information. Good cause exists to strike the April 9 filing in its entirety because it was not timely filed in accordance with any filing deadline applicable to this proceeding.

For these reasons, as explained in the following memorandum in support, CEI respectfully requests that Commission grant its motion to strike.

**II. MEMORANDUM IN SUPPORT**

On March 6, 2013, the Commission issued an Opinion and Order dismissing the complaint filed in this case. Over 30 days later, on April 9, Ms. Tandy filed an untitled document that, based on its contents, appears to be one of three things: an application for rehearing; an attempt to submit evidence regarding her claims; or a supplemental brief. However the April 9 filing is construed, it should be struck in its entirety because it was untimely filed in accordance with any procedural deadline applicable to this case.

**A. To the extent the April 9 filing is considered an application for rehearing, the entire document should be stricken because the Commission has no jurisdiction to consider it.**

After an order has been entered, R.C. 4903.10 provides that a party may “apply for rehearing in respect to any matters determined in the proceeding.” R.C. 4903.10 requires that rehearing requests must be filed within 30 days of the entry of the challenged order.

This deadline is jurisdictional. “The commission . . . has no power to entertain an application for rehearing filed after the expiration of such 30-day period.” *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 362 (1961); *In re Thomas Mustric v. Columbia Gas of Ohio*, Case No. 01-2472-GA-CSS, Second Entry on Rehg. at 15 (Mar. 25, 2003) (“The 30-day time period established [for rehearing] by the Ohio General Assembly is jurisdictional and cannot be waived by the Commission.”). Notably, this deadline cannot be evaded by calling a request for rehearing something else. *E.g.*, *In re the Authorization of Norfolk S. Ry.*, Case No. 05-297-RR-FED, Entry on Rehg. ¶ 5 (Jan. 18, 2006) (denying motions to stay and to dismiss upon “find[ing] that these should be considered applications for rehearing . . . that were not filed within the 30-day time requirement”); *In re the Commission’s Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry at 17 (Jan. 23, 2003) (denying motion to alter access-charge recovery upon finding “that it is in actuality an untimely and improper request . . . for the Commission to [grant] rehear[ing]”).

Although the April 9 filing is not given any title, it should be considered an application for rehearing. The filing is focused on an issue resolved by the March 6 Opinion and Order dismissing this case, namely, the transfer of a balance from 1441 Sulzer Ave. to 1439 Sulzer Ave. *Compare* Opin. & Order at 8 (“the complainant has not sustained her burden of proof with regard to the outstanding account balance that has accrued on the account for 1439 Sulzer Avenue, including the February 17, 2012 transfer of charges accrued at 1441 Sulzer Avenue”)

with April 9 Filing at 1 (stating that the filing is “in regards to a transfer from [Acct. No.] 7153 [at 1441 Sulzer] to [Acct. No.] 0079 [at 1439 Sulzer]”). And the purpose is clearly to contest that Commission’s conclusion: “I do not owe the . . . transfer that took place . . . . And I can prove it.” (April 9 Filing at 2.) Given that the stated purpose of the filing is to contest a conclusion of the Commission’s Order, the filing should be considered an application for rehearing.

That being the case, it follows that the Commission lacks jurisdiction to consider the April 9 filing. April 9 is more than 30 days after March 6, and thus the filing occurred after the jurisdictional deadline established by R.C. 4903.10. Because the Commission is without jurisdiction to consider the April 9 filing, it should strike it from the record.

**B. If the document is considered anything else, it should also be stricken because it has been filed after any applicable deadlines.**

Given that the purpose of the April 9 filing is to challenge the Commission’s order, it is an untimely application for rehearing. But even were the document to be considered a brief or a submission of evidence, it remains untimely.

**1. To the extent the document is a brief, it is late and must be struck.**

For example, if the document is considered a brief, it is late by two months.

The Commission has found that where a document is filed past the deadline set by the procedural schedule, 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) (“[T]he 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).

To the extent the filing is considered a brief, 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.) Thus, if it is a brief, Ms. Tandy's filing is late by two months, and should be struck from the record for that reason.

**2. To the extent the document is evidence, the hearing has closed and the document must be struck.**

Likewise, Ms. Tandy's filing should also be struck to the extent it is construed as a submission of evidence.

Ms. Tandy's opportunity to introduce new evidence ended at the hearing. *See Columbus Bd. of Educ. v. Franklin County Bd. of Revision*, 76 Ohio St.3d 13, 16–17 (1996) (holding that “documents [that] were not part of the original record . . . and were submitted after the [agency's] hearing . . . must be disregarded by the BTA”); *In re the Application of Black Fork Wind Energy*, Case No. 10-2865-EL-BGN, 2012 Ohio PUC LEXIS 299, at \*35 (Mar. 26, 2012) (“there is no basis on which to admit an exhibit outside of a hearing, after the close of the record of the case”).

The late filing of evidence not only contradicts this precedent, but it also contradicts the instructions given by the examiner in this case. At the hearing, the examiner informed Ms. Tandy that she could file “a brief” by February 12, and she explained that a brief is “a written summary of what you think you've proven [in] the testimony submitted today.” (Tr. 101.) Despite this instruction, Ms. Tandy's first, apparent attempt at a brief contained only 2 original pages of actual “written summary” and 44 pages of “evidentiary” material. (*See* Feb. 14 Filing.)

The Commission struck all but the two pages of original briefing, agreeing that “[a]fter the close of the record, there is no basis to admit [the proffered evidentiary material].” Opin. & Order at 3.

Despite these instructions and experience, Ms. Tandy has deposited yet another cache of documents and information in this docket following the close of the hearing. It is not necessary to determine what pages contain briefing, evidence, or both, because no matter what the document is, it is far too late. The document must be struck from the record.<sup>1</sup>

### III. CONCLUSION

For the foregoing reasons, CEI respectfully requests that the Commission strike the April 9, 2013 filing in its entirety.

Dated: April 19, 2013

Respectfully submitted,

/s/ Gregory L. Williams  
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<sup>1</sup> As set forth in its Motion to Strike filed on February 25, 2013, CEI would also note that relying on evidence submitted after the trial to the detriment of CEI would raise constitutional, due-process issues. (*See* pp. 4–5.) It incorporates that discussion by reference here.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Strike was served by U.S. mail to the following person this 19th day of April, 2013:

Ms. Gwendolyn Tandy  
1439 Sulzer Ave.  
Euclid, Ohio 44132

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

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Summary: Motion to Strike Complainant's April 9 Filing electronically filed by Mr. Andrew J Campbell on behalf of The Cleveland Electric Illuminating Company