BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

JOHN BLANCHARD,	)	
	)	
Complainant,	)	
	)	**Case No. 18-82-EL-CSS**
v.	)	
	)	
THE TOLEDO EDISON COMPANY,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM CONTRA OF THE TOLEDO EDISON COMPANY'S TO COMPLAINANT'S MOTION TO COMPEL DISCOVERY

Pursuant to 4901-1-12, Ohio Admin. Code, Respondent The Toledo Edison Company ("Toledo Edison" or "Company") hereby submits this Memorandum Contra in opposition to Complainant's Motion to Compel filed August 1, 2018 with the Public Utilities Commission of Ohio ("Commission"). The Commission should deny Complainant's Motion to Compel Discovery for the reasons set forth below.

BACKGROUND

Complainant initiated electric service by calling the Company on March 17, 2017, and requested the Company's optional paperless electronic billing known as "eBill." On March 18, 2017, Complainant logged into his on-line account via the Company's website and completed the eBill registration process, including agreeing to the posted terms and conditions. Among those terms and conditions, in a section prominently entitled "Customer's Responsibilities," are the requirements that the Customer agrees: to receive electronic mail ("email") notices that an eBill is available in lieu of paper billing statements; that separate paper disconnection notices will not

be sent; and that if for any reason Customer fails to receive an eBill notice that the Customer remains solely responsible for timely payment of bills for services rendered.

Complainant then failed to make any payments on his account. After disconnection notices were included in his July, August, and September eBill statements, as well as three unsuccessful phone calls to Complainant, on October 4, 2017, the Company disconnected service for non-payment. Although Complainant admits that in June he received an email notification of his payment obligation, he ignored that message and thereafter failed to make any apparent attempt to ascertain or meet his payment obligations.

Complainant initiated this proceeding by filing a formal complaint with the Commission on January 8, 2018, alleging the Company improperly disconnected his electric service, and contending that the Company sent only the June email and did not send the other five monthly email notifications. Complainant's requested relief is for money damages in the amount of $50.00 for spoiled food, and an additional $500.00 "punishment." On March 27, 2018, a settlement conference was held at which the Company shared certain information about Complainant's account and agreed to treat Complainant's request for that information to be provided to him as an informal discovery request. Upon receiving this information from the Company on April 16, 2018, Complainant stated via email that he wanted more. The Company responded to this request two days later, explaining that some of the additional information being sought was already in Complainant's possession, and providing additional information including that an item of additional information being sought does not exist in the Company's records.

More than two months later, Complainant issued a formal discovery request to the Company on June 28, 2018. The Company timely responded to this request on July 18, 2018, stating applicable objections to questions that it found to be vague, ambiguous, overly broad,

unduly burdensome, irrelevant and unlikely to lead to the discovery of admissible evidence, and a mischaracterization of confidential settlement negotiations. Nevertheless, without waiving these objections the Company attempted to respond substantively to the request. Complainant made no effort to clarify his questions, nor to engage in discussion with the Company's counsel in order to resolve any dispute he may have had regarding the discovery responses. Instead, almost two weeks later and just 8 days before the scheduled evidentiary hearing, Complainant filed his Motion to Compel Discovery, requesting the Commission compel the Company to give the desired answers to his questions, and information that has yet to be sought through discovery.

LAW AND ARGUMENT

A motion to compel discovery is a last resort in the discovery process. Parties who appear pro se are held to the same standards as lawyers.[1] Complainant's Motion to Compel Discovery is not only defective, but also utterly fails on its merits. Section 4901-1-23(A), O.A.C., requires notice to affected parties.[2] Section 4901-1-23(C), Ohio Admin. Code, states: "No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought." The Commission's rules also require the party filing a motion to compel discovery to accompany the motion with a memorandum in support that includes a response to any objections raised.[3] Also required is an affidavit "setting forth the efforts which

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[1] *In the Matter of Michael Barker, D/B/A Comex Transport, Notice of Apparent Violation and Intent to Assess Forfeiture,* Case No. 16-2186-TR-CVF, p 9, 10 (July 12, 2017) ("In fact, "[a] party proceeding pro se is held to the same procedural standards as other litigants that have retained counsel. Although a court may, in practice, grant a certain amount of latitude toward pro se litigants, the court cannot simply disregard the [rules] in order to accommodate a party who fails to obtain counsel. The rationale for this policy is that if the court treats pro se litigants differently, "the court begins to depart from its duty of impartiality and prejudices the handling of the case as it relates to other litigants represented by counsel.") (internal citations omitted).

[2] Section 4901-1-23(A), O.A.C., in pertinent part states: "Any party, upon reasonable notice to all other parties and any persons affected thereby, may move for an order compelling discovery..."

[3] Section 4901-1-23(C)(1)(c), O.A.C.

have been made to resolve any differences with the party or person from whom discovery is sought."[4] These rules unmistakably establish a threshold burden on the party seeking to compel discovery.

A. Complainant's Motion to Compel Discovery Fails to Comply With Commission Rules.

Complainant's Motion to Compel Discovery consists of little more than self-serving rhetoric, speculation, and misrepresentations alleging that the Company has not given him the information he believes will support his Complaint. Complainant altogether omits the Memorandum in Support required by Section 4901-1-23(C)(1), O.A.C. There is no effort to respond to the Company's objections raised in its responses required in Section 4901-1-23(C)(1)(c), O.A.C. There is also no affidavit describing Complainant's efforts to work with the Company's counsel in order to resolve any deficiencies or disputes he perceived in the responses as required by Section 4901-1-23(C)(3). These are substantive requirements in the Commission's rules, not what could be considered "technical" omissions such as failing to sign his pleading[5] or failing to include a certificate of service.[6] Nor, as of the date of this Memorandum, has Complainant served or noticed his Motion to Compel upon Respondent other than by faxing the motion to the Commission. While technical omissions could have rendered the Motion unacceptable for filing, the substantive omissions and lack of merit should result in denial of Complainant's Motion to Compel Discovery.

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[4] Section 4901-1-23(C)(3), O.A.C.

[5] Section 4901-1-04, O.A.C., ("All applications, complaints, or other pleadings filed by any person shall be signed by that person or by his or her attorney, but need not be verified unless specifically required by law or by the commission. Persons who e-file or fax file documents shall use "/s/" followed by their name to indicate a signature or an electronic signature where applicable.")

[6] Section 4901-1-05(A), O.A.C., "Such pleadings or other papers shall contain a certificate of service.").

Further, Complainant's Motion to Compel Discovery is vague and ambiguous in what it asks the Commission to compel the Company to produce to him.[7] Complainant does not indicate specifically what information from the informal exchanges he contends was unresponsive, only what was misaligned with his assumptions. Complainant also does not identify which of the four formal interrogatories he finds acceptable, and which he perceives as unresponsive. Without, at a minimum, the explicit discussion in his Motion required by the rules, the Commission cannot even know what to compel. Neither the recipient of vague and ambiguous requests nor the Commission evaluating a Motion to Compel production should be held to guess as to what is being sought—that burden lies with the party seeking the discovery.

B. Complainant Made No Attempt to Resolve Discovery Issues.

It is unsurprising that Complainant failed to set forth an affidavit describing his efforts to resolve discovery conflicts. Not only did he fail to exhaust *all* efforts—a precondition required by 4901-1-23(C), O.A.C.—he failed to exhaust *any* efforts. Exhibit 1 attached hereto provides the sum total of Complainant's communications to the Company about its responses to discovery—three emails.[8] The latter two cannot be construed to engage Company's Counsel to resolve discovery issues. As discussed below and contrary to Complainant's mischaracterization, the Company provided appropriate responses to his requests.

After the Company's voluntary initial response to the informal verbal request, i.e., not requiring Complainant to reduce his request to writing and submit via formal service, Complainant emailed a clarification to which the Company provided a full and complete

[7] Except for the new information not yet requested in discovery, i.e., the identity of a person who can speak about "autodialing" and to answer certain follow-up questions.
[8] Emails describing portions of the settlement conference are required to address allegations raised by Complainant.

response within two days. Instead of following up with a more focused or detailed request, or a request for additional information, or any kind of dialogue for clarity, Complainant emailed a sarcastic retort effectively calling Counsel a liar ("Dear Sir, Despite your "belief" that First Energy does not retain copies of email billing; since Ohio law requires notification of customers prior to termination of service, I find it hard to believe that such records do not exist in some form of archival media - if they were indeed sent, as you claim. Regards, John Blanchard"). Notably, as can be seen by the Company's email response, Counsel had already politely and clearly confirmed to Complainant that its records do not include the electronic document information he had requested.

More than two months elapsed before Complainant's next request for discovery without any intervening communication from Complainant seeking to clarify the prior request and the information provided in response. On June 28, 2018, Complainant sent a written discovery request comprising four interrogatories that were objectionably vague, ambiguous, overly broad and unduly burdensome, and, in Interrogatory No. 4, was premised on a mischaracterization of privileged, confidential settlement negotiations. Nevertheless, in addition to objections the Company made a good faith effort to provide substantive responses to the extent possible given the vague, ambiguous, and overly broad nature of the requests. Instead of contacting Counsel to discuss the objections raised and/or clarify the requests or responses, or following with additional discovery, Complainant fired off yet another sarcastic retort: "Thank you for the non-response response." Complainant made no other attempt to communicate about discovery matters before filing the instant Motion. Nothing about these exchanges from Complainant can be described as an attempt to resolve a discovery dispute.

C. Complainant's Motion Mischaracterizes the Company's Responses and Seeks to Compel Production of Information Not Previously Requested in Discovery.

In his attempt to persuade the Commission to do his discovery for him, Complainant also mischaracterizes the Company's responses to his requests, insinuating that reasonable requests had been unreasonably stonewalled. Nothing could be further from the truth. In the most egregious example, Complainant states that "When asked why this document did not include email addresses to which these notices were sent, Mr. Endris (Respondent's attorney) replied that this information was 'unavailable,'" This is a complete fabrication of the exchange, clearly contradicted by Complainant's email to Respondent's attorney (See Exhibit 1), where his actual words were: "I note that the log does not list addressees. If you could send me copies of the emails themselves for the three billing periods prior to termination (I believe that would be July, August and September) that would be very helpful." (emphasis added). Complainant did not ask why email addresses were not included in the document as he asserts in his Motion, nor did he request that the email address be added to the document—he asked only for "copies of the emails themselves" which previously he had been told were not retained. Even though Complainant did not ask the Company to identify the email address to which the notices were sent, the Company confirmed that it did, indeed, have only one email address associated with his account and that it was the same one to which the June eBill notice was sent and received. The Company's accurate answer to the question asked is not proper grounds for a Motion to Compel.

Additionally, Complainant requests the Commission compel Toledo Edison to produce information that Complainant has never before requested the Company to provide. Complainant moves the Commission to "compel Respondent to furnish the identity of at least one individual familiar enough with the auto-dialing system to provide the following information: what were

the phone numbers dialed; what mechanism triggered the auto-dialing process; what would have been the contents of such a call." However, the only question ever posed by Complainant to the Company on this topic requested the Company to "[i]dentify the person(s) who made such attempts and the approximate date(s) those attempts were made."[9] Notably, the Company's response provided far more precision than requested: the exact date, hour and minute the calls were made, not just the "approximate date(s)".

Complainant ran out of time to request follow up discovery about auto-dialing because he waited until the eleventh hour to ask his question, and improperly moves the Commission to compel a response. Complainant took no action for three months after learning about the calls in the settlement conference, and upon being told that an auto-dialer was involved seeks to compel more data. A litigant's desire to conduct additional follow up discovery may warrant delaying the hearing to provide the opportunity to do so, but it cannot establish grounds for a motion to compel. Granting this Motion to Compel would reward Complainant's lack of diligent discovery with compulsory production. Even more serious, such compulsion for previously unrequested discovery would deny the Company its ability to state valid objections or assert privileges, and would completely undermine the cooperation and compromise fostered in the rules. Complainant seeks Commission help to *circumvent* the discovery rules, not to *enforce* them.

D. Complainant's Discovery is Abusive and Harassing.

Complainant has embarked upon a quixotic vendetta to prove his theory that the Company never sent the emails to him nor made the phone calls, and therefore should pay him spoiled food and "punishment" damages of $550. The sad truth that Complainant's Motion to Compel reveals is he is unlikely to ever be satisfied by the Company's responses to discovery

[9] Complainant's Interrogatory No. 4,

because they will not align with his firm but erroneous belief that copies of the eBill emails are archived by the Company. Any further responses, even if compelled by the Commission, will be delivered to him by a Company and its attorney whom he already has accused of lying. Having been told they do not exist in records, he demands "the contents of [all data files used in preparing this document], including record layout(s) and descriptions of the contents of all data fields."[10]

Further, Complainant's Interrogatory No. 3 as written could be interpreted to include hundreds of thousands of records including confidential customer information stored in hundreds of data fields residing in dozens of data files that are linked together in a database architecture supporting the graphical user interface screenshot information that was provided to Complainant. This overbroad and unduly burdensome request goes far beyond liberal discovery, and appears designed solely to make discovery painful to the Company rather than reasonably calculated to the discovery of admissible evidence. It is abusive and harassing, as is Complainant's vague, non-compliant and unmeritorious Motion.

Unfortunately for Complainant, even if the Company were to stipulate (which it does not) that it sent one email to the correct address but all of the rest of them to the wrong email address, and called the wrong telephone number three times, Complainant would still have been properly disconnected for non-payment under Ohio law because that is precisely to what he agreed when he voluntarily registered for the optional eBill program permitted by the Commission's rules. Complainant chose to go paperless, but then chose not to pay his bills.

[10] See Interrogatory No. 3, attached to Complainant's Motion to Compel Discovery.

CONCLUSION

Complainant's Motion to Compel Discovery is non-complaint with the Commission's rules, mischaracterizes the events of discovery and communications with the Company's attorney, and seeks to cure his failure to diligently pursue discovery through a Commission action to compel what he has yet to even request from the Company. Further, Complainant harassingly seeks to "prove the negative" about records he has already been told do not exist by asking for compulsion of vague, ambiguous, overbroad and unduly burdensome requests that he has made no effort to focus or clarify to the Company. Complainant seeks to circumvent and abuse the discovery process through a non-compliant Motion to Compel, which should be denied for all of the reasons set forth above.

Respectfully submitted,
/s/ Robert M. Endris
Robert M. Endris (#0089886)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
Phone: 330-384-5728
Fax: 330-384-3875

On behalf of The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served via electronic mail and U.S. Mail to the following person on this 16th day of August 2018.

wjblanchar@aol.com
John Blanchard
6040 Acres Rd Lot 3
Sylvania, OH 43560

/s/ Robert M. Endris
An Attorney for The Toledo Edison Company

Exhibit 1
P:1

From: wjblanchar@aol.com
To: Endris, Robert M
Subject: [EXTERNAL] Re: 18-82-EL-CSS Responses to Discovery
Date: Thursday, July 26, 2018 9:11:37 AM

Dear Mr. Endris,

Thank you for your non-responsive response.

John Blanchard

-----Original Message-----
From: Endris, Robert M <rendris@firstenergycorp.com>
To: wjblanchar <wjblanchar@aol.com>
Sent: Wed, Jul 18, 2018 5:58 pm
Subject: 18-82-EL-CSS Responses to Discovery

Dear Mr. Blanchard,

Please find attached the Company's responses to your discovery questions. A hard copy will follow. Please let me know if you have any questions.

Regards,
Robert M. Endris
Attorney
FirstEnergy Service Company
76 S. Main St.
Akron, OH 44308
330.384.5728 (ofc)
330.384.3875 (fax)

Exhib. 7 I
p. 2

From: wjblanchar@aol.com
To: Endris, Robert M
Subject: Re: [EXTERNAL] Re: 18-82-EL-CSS
Date: Friday, April 20, 2018 12:49:20 PM
Attachments: image001.png

Dear Sir,

Despite your "belief" that First Energy does not retain copies of email billing; since Ohio law requires notification of customers prior to termination of service, I find it hard to believe that such records do not exist in some form of archival media - if they were indeed sent, as you claim.

Regards,
John Blanchard

-----Original Message-----
From: Endris, Robert M <rendris@firstenergycorp.com>
To: wjblanchar <wjblanchar@aol.com>
Sent: Thu, Apr 19, 2018 9:43 am
Subject: RE: [EXTERNAL] Re: 18-82-EL-CSS

Dear Mr. Blanchard,

As you may recall, your July, August, and September bills were attached to the Company's Answer that was served to you, so you already have them in your possession. In the settlement conference I explained that the Company records show that email notices were sent each month, and I told you that I would send you this information which was delivered in the previous email. I also explained my belief that the Company does not retain the actual email messages, and am confirming the same. I would note that our records indicate that none of those email notices generated a "mail delivery failure" message. While the Company's records do not include the recipient email address for each email sent, I would note that the Company has only one email address for you associated with your account and the June email bill notice was received by you at that address, as demonstrated in your Complaint.

Further, the website where you signed up for the e-Bill option included the following information in the Frequently Asked Questions section:

What if the eBill email notification gets blocked from my email? How do I avoid this? –

It is your responsibility to ensure your electric bill is paid each month, even in the event your notification email is not successfully delivered to you (e.g. spam blockers).

To help avoid this issue, you may want to add ElectronicOnline@FirstEnergyCorp.com to your email address book. You can also sign up for monthly billing reminders by text message. If you sign up for text alerts, you can receive monthly reminders on your mobile phone when your bill is available and your payment is due and posted.

Please let me know if you have any questions about this matter.

Regards,
Robert Endris

Exhibit 1
P. 3

From: wjblanchar@aol.com [mailto:wjblanchar@aol.com]
Sent: Tuesday, April 17, 2018 1:38 PM
To: Endris, Robert M <rendris@firstenergycorp.com>
Subject: [EXTERNAL] Re: 18-82-EL-CSS

Dear Mr. Endris,

Thank you for the information. However it is not exactly the discovery I requested. I asked for copies of the last three e-bills leading up to the disconnection. What you have sent are not copies of the emails themselves but rather a log of some kind. The information in the log appears to agree with the one email which I did receive from Toledo Edison on June 15, 2017. I received none of the other emails in the log leading up to the date of termination of service.

I don't know why this would be the case. I note that the log does not list addressees. If you could send me copies of the emails themselves for the three billing periods prior to termination (I believe that would be July, August and September) that would be very helpful.

Regards,

John Blanchard

-----Original Message-----
From: Endris, Robert M <rendris@firstenergycorp.com>
To: wjblanchar <wjblanchar@aol.com>
Sent: Mon, Apr 16, 2018 4:20 pm
Subject: 18-82-EL-CSS

Mr. Blanchard,

Please find enclosed a copy of The Toledo Edison Company's response to your informal discovery inquiry made at the settlement conference on March 27, 2018, wherein you requested information regarding the Company's records of monthly email notices of bill statements.

Please let me know if you have any questions.

Sincerely,
Robert M. Endris

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/16/2018 3:12:26 PM

in

Case No(s). 18-0082-EL-CSS

Summary: Memorandum Contra of The Toledo Edison Company to Complainant's Motion to Compel electronically filed by Mrs. Ashlee E Waite on behalf of Endris, Robert M Mr. and The Toledo Edison Company