

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF CLEVELAND  
METROPOLITAN SCHOOL DISTRICT,

COMPLAINANT,

v.

CASE NO. 18-1815-EL-CSS

THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY,

RESPONDENT.

## ENTRY

Entered in the Journal on September 28, 2020

{¶ 1} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 2} The Cleveland Electric Illuminating Company (CEI or Company), is a public utility as defined in R.C. 4905.02. As such, CEI is subject to the Commission's jurisdiction.

{¶ 3} On December 7, 2018, the Cleveland Metropolitan School District (Complainant or CMSD) filed a complaint against CEI, alleging that the Company was providing inadequate service and proposing to charge unjust, unreasonable, and discriminatory costs related to CMSD's recent initiative to install its own transformation facilities to permit schools currently served by CEI to convert from secondary to primary service. Specifically, CMSD notes that bids it has received to install transformers at various school facilities to enable the conversion included an embedded estimate of CMSD's contribution toward the reconfiguration work required to be done by CEI, which CMSD had estimated around \$220,000, given recent charges to the Toledo Public Schools for similar work completed by CEI's sister company, The Toledo Edison Company (Toledo Edison). CMSD further states in its complaint that the actual contribution estimate provided by CEI was \$314,000. CMSD adds that CEI has attempted to justify the significantly higher cost by

arguing that a recloser would be necessary for each location, although Toledo Edison found that such equipment was not necessary to install for Toledo Public Schools' similar request, and that CMSD would be responsible to pay the total cost of reconfiguring the delivery arrangement, even though Toledo Edison, when utilizing identical tariffed Electric Service Regulations, calculated the required customer contribution in aid of construction at 40 percent of the estimated cost for Toledo Public Schools. Accordingly, CMSD maintains that CEI has committed violations of R.C. 4905.22, 4905.32, and 4905.35, and requests that the Commission direct the Company to propose a "fair and reasonable charge that reflects only the necessary costs it will incur in reconfiguring the delivery arrangements to the CMSD schools" and which is calculated in accordance with CEI's Electric Service Regulations.

{¶ 4} On December 19, 2018, CEI filed its answer to the complaint. CEI admits some basic factual allegations while denying any wrongdoing. For example, the Company admits that, due to the physical configuration of its distribution system, reclosers are required for interconnections of the kind proposed by CMSD and customers are required to pay for those reclosers. CEI further agrees that Toledo Edison and the Company are separate legal entities and adds that Toledo Edison is not a party to this proceeding. CEI, however, denies any allegation that the Company is not in compliance with Ohio statutes or its applicable tariffs. In addition, CEI sets forth several affirmative defenses.

{¶ 5} A settlement conference was scheduled and held on April 18, 2019; however, the parties were unable to settle this matter.

{¶ 6} A prehearing status conference was held on November 14, 2019, at which the parties indicated their interest to have a procedural schedule issued in this matter.

{¶ 7} By Entry issued November 25, 2019, the attorney examiner adopted the procedural schedule proposed by the parties. According to that schedule, parties were directed to file testimony by February 18, 2020, and the evidentiary hearing was set to commence on March 3, 2020.

{¶ 8} On January 9, 2020, the parties filed a joint motion requesting a 60-day

extension of the procedural schedule due to counsel for Complainant experiencing serious health issues.

{¶ 9} By Entry issued January 13, 2020, the attorney examiner granted the joint motion and adopted a new procedural schedule proposed by the parties. According to that schedule, written discovery requests were permitted until March 13, 2020, parties were directed to file testimony by April 20, 2020, and the evidentiary hearing was set to commence on May 4, 2020.

{¶ 10} On February 28, 2020, Devin D. Parram and the law firm of Bricker & Eckler LLP filed a notice of substitution of counsel, substituting Mr. Parram for Barth E. Royer and the law firm of Barth E. Royer, LLC as Counsel of Record for Complainant. Counsel indicated that Adrian D. Thompson and Josh M. Mandel of Taft Stettinius & Hollister LLP would continue representing CMSD as co-counsel in this proceeding.

{¶ 11} On March 9, 2020, CEI filed a motion to continue the current procedural schedule and to schedule a prehearing conference to establish a new procedural schedule. CEI advised that initial counsel for Complainant, Barth E. Royer, passed away shortly after the January 13, 2020 Entry and that the procedural schedule was no longer workable for reasons related to this unfortunate circumstance. Consequently, CEI requested a prehearing conference be scheduled to establish a revised procedural schedule.

{¶ 12} By Entry issued on March 12, 2020, the attorney examiner granted CEI's motion for continuance of the current procedural schedule and scheduled a prehearing conference to establish a revised procedural schedule.

{¶ 13} A prehearing status conference was held on March 17, 2020, at which the parties indicated their interest to have a revised procedural schedule issued in this matter.

{¶ 14} By Entry issued April 1, 2020, the attorney examiner adopted a new procedural schedule. According to that schedule, written discovery requests are permitted until October 16, 2020, parties are directed to file testimony by November 24, 2020, and the

evidentiary hearing is set to commence on December 8, 2020.

{¶ 15} On September 16, 2020, CMSD filed a motion to compel, motion for prehearing conference, and request for expedited treatment. CMSD represents that CEI has, so far, withheld certain discovery regarding two interrogatories because CEI has been unwilling to agree to the terms of a reasonable protective agreement, thereby limiting CMSD's ability to meaningfully participate in this proceeding and to prosecute its claims against CEI. According to the attachments to CMSD's motion, CMSD requested information from CEI regarding the number of customers currently served under its primary service and general secondary service, and the number of customers who have been required to pay CEI for the installation of a recloser or comparable protective equipment as a condition of becoming a primary-metered customer.

{¶ 16} CMSD attached FirstEnergy's proposed protective agreement to its motion which divides protected materials into two categories: (1) confidential materials, and (2) "confidential—attorneys' eyes only" materials, which precludes disclosure of designated information to CMSD employees engaged in the proceeding and CMSD's expert and/or consultants. CMSD argues that its expert witnesses must be able to analyze discovery produced by CEI and testify regarding CEI's treatment of other secondary customers' requests to convert to primary service for CMSD to meet its burden of proof. Counsel for CMSD attached a copy of its proposed protective agreement, consisting of two-tiers. First, information designated as confidential may be shared with its client and experts and/or consultants, but those receiving the information must execute a non-disclosure agreement. As to why this agreement is insufficient for CEI, CMSD asserts that CEI believes CMSD may be working with numerous people and entities who may be designated experts and is concerned that such broad array of people or entities may breach the non-disclosure agreement. CMSD claims that such rationale is baseless speculation and not legitimate. Further, CMSD argues that CEI has failed to cite to any Commission case supporting such a restrictive provision. CMSD argues that it is common practice for information that potentially qualifies as "confidential" or as a "trade secret" to be provided to opposing

parties and their experts so long as a reasonable protective agreement is executed. CMSD requests that the Commission compel CEI to modify its protective agreement such that CMSD's counsel can share all purportedly confidential information with CMSD and CMSD's experts who execute a non-disclosure certificate or compel CEI to execute CMSD's proposed protective agreement attached to the motion.

{¶ 17} On September 23, 2020, CEI filed its memorandum contra CMSD's motion to compel, motion for prehearing conference, and request for expedited treatment. CEI notes that the parties have not yet agreed on whether the information marked "attorneys' eyes only" may be provided to experts and/or consultants. Despite their current lack of agreement, CMSD argues that the motion to compel is both unreasonable and unnecessary. CEI notes that Ohio Adm.Code 4901-1-23(C) requires parties seeking discovery to exhaust all other reasonable means of resolving any differences between the parties before a motion to compel is filed, and CEI argues that the parties have not exhausted all other reasonable means. In fact, as evidenced by the email chain between each party's counsel attached to CMSD's motion, CEI asserts that, in its September 9, 2020 email, it indicated to CMSD that CEI intends to designate the two interrogatories sought after by CMSD, CMSD INT 2-21 and 2-22, as confidential but not as "attorneys' eyes only" materials.

{¶ 18} Further, CEI highlights the timeline of discovery between the parties, arguing that CMSD has imposed unreasonable and artificial deadlines and threatened to involve attorney examiners in discovery. CEI states that its counsel of record provided CMSD with the initial protective agreement on August 23, 2019, 13 months ago, to execute as a precondition to providing the above-sought information and that CMSD did not contact CEI regarding such agreement until June 12, 2020, nearly 10 months later. CEI also notes that CEI's counsel of record has been on maternity leave since July 2020 and that all parties were aware of this impending leave since it was discussed during the March 17, 2020 prehearing status conference. As shown in the email chain attached to CMSD's motion, CEI asserts that counsel for CMSD did not reach out to CEI's co-counsel until August 6, 2020, at which point co-counsel indicated that she would diligently review the voluminous record. Between

August 6, 2020, and the filing of the motion to compel, multiple emails were exchanged between the parties regarding the protective agreement and revisions proposed by each side, yet it was by phone late afternoon on September 10, 2020 when counsel for CMSD suggested deferring “attorneys’ eyes only” issues such that they could be addressed if and when a party determined it needed to designate confidential information as such, a suggestion CEI agreed to in principle. In the ensuing days, CMSD and CEI exchanged proposed revisions to the protective agreement, with CEI’s revisions focusing on clarifying the above proposed process. CEI claims that counsel for CMSD demanded unreasonably quick responses to its proposed revisions, with the last correspondence between the parties occurring on September 13, 2020, and then the filing of the motion to compel three days later while CEI’s co-counsel was on a five-day leave from the office. CEI argues that, while discovery deadlines are approaching, they are not imminent and do not constitute a reasonable basis for CMSD to file its motion to compel or its request for expedited treatment, a request that resulted in fewer days for CEI to respond to CMSD’s motion.

{¶ 19} CEI also expresses concern regarding CMSD’s insistence that it be allowed to disclose “attorneys’ eyes only” information to experts and consultants, noting that CEI seeks such protection given the numerous people and entities identified through discovery who are involved with CMSD in this proceeding. Specifically, CEI claims that discovery has revealed the names of at least eight outside entities who may or may not be involved in the case on behalf of CMSD and whose potentially numerous employees or agents may or may not be fact witnesses, expert witnesses, and/or consultants for CMSD in this proceeding. CEI suggests that CMSD could have offered, but did not, to clarify who its experts and consultants are, or to provide CEI a list of persons to whom it intends to provide any “attorneys’ eyes only” information that CEI may designate, to help allay CEI’s concerns. Further, CEI argues that its distrust of potential recipients of the information is not unfounded, considering the concerning communications attached to CEI’s motion between potential CMSD experts and/or consultants.

{¶ 20} The attorney examiner finds that the issues raised in CMSD’s motion to

compel are not ripe for a decision at this time. The attorney examiner believes the parties can address CEI's concern of needing more specifics regarding with whom CMSD will share CEI's purportedly confidential information while also facilitating the exchange of information to those beyond just the attorneys by the wording of a reasonable protective agreement and/or by other means. As CEI represented in the email chain attached to CMSD's motion and in CEI's memorandum contra, it is potentially amenable to providing the information requested by CMSD without the restrictive "attorneys' eyes only" designation or at least agreeable to including a more defined process detailing how the requested information may be handled. Given the timing of counsel's parental leave, CEI's willingness to continue to negotiate, and the approaching but not necessarily imminent deadline for discovery (except as to notices of deposition) of October 16, 2020, the attorney examiner requests that the parties expeditiously engage in further negotiations regarding the above issues and the execution of a reasonable protective agreement. The attorney examiner orders the parties to contact him by email by close of business October 6, 2020, regarding the resolution of the issues. If the parties indicate to the attorney examiner that the issues raised in the motion to compel and memorandum contra are resolved, then CMSD's motion to compel and motion for a prehearing conference will be considered moot and no further ruling will be issued. Although the attorney examiner expects that the parties can resolve this situation between themselves without further Commission intervention, if the parties have not reached a resolution by the above date, further action by the attorney examiner will be taken at that time.

{¶ 21} It is, therefore,

{¶ 22} ORDERED, That the parties continue to engage in negotiations regarding the issues raised in CMSD's motion to compel and that the parties contact the attorney examiner by email by close of business October 6, 2020 as set forth in Paragraph 20. It is, further,

{¶ 23} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Matthew J. Sandor

By: Matthew J. Sandor  
Attorney Examiner

JRJ/kck



**This foregoing document was electronically filed with the Public Utilities**

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Summary: Attorney Examiner Entry ordering the parties continue to engage in negotiations regarding the issues raised in CMSD's motion to compel and that the parties contact the attorney examiner by email by close of business 10.6.20. electronically filed by Kelli C. King on behalf of Matthew Sandor, Attorney Examiner, Public Utilities Commission of Ohio