

In the Matter of Cleveland Metropolitan School District,)
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)
) Complainant,)
)
)
) vs.)
)
)
) The Cleveland Electric Illuminating Company,)
)
)
) Respondent.)

Case No.: 18-1815-EL-CSS

**MOTION TO QUASH SUBPOENAS
AND FOR PROTECTIVE ORDER
WITH MEMORANDUM IN
SUPPORT**

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Alternatively, if the Subpoenas are not quashed in their entirety, Toledo Edison requests that a Protective Order be issued so that the sensitive, proprietary information of Toledo Edison's customers will not be revealed. The Motion is supported by the Memorandum below.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 16, 2020, CMSD moved for Subpoenas to be issued for the depositions of Randall Swope, Supervisor Engineering Services for Toledo Edison and Bradley Ruetz, Estimating and Design Representative for Toledo Edison, on October 30, 2020. (Collectively Randall Swope and Bradley Ruetz will sometimes be referred to as “Subpoena Parties”.) As this Commission is well aware, Toledo Edison is a separately incorporated utility from CEI, with its own customers, employees and tariffs. Toledo Edison is not a party to this proceeding. The Subpoenas identified Toledo Edison as the employer for Randall Swope and Bradley Ruetz, listing Toledo Edison’s business address on Angola Road in Holland, Ohio. The Subpoenas were signed and returned by cover letter to attorney, Devin Parram on October 20, 2020. They were served on October 26, 2020 at the deponents’ business address.

The Subpoenas must be quashed for the following reasons. First, the persons identified in the Subpoenas have no information that is relevant to this CMSD conversion or the claims against CEI as required under 4901-1-16, O.A.C. As Toledo Edison employees, Randall Swope and Bradley Ruetz have no first-hand, relevant knowledge for estimating or planning the CMSD conversion for CEI. Likewise, the Complaint makes no allegations that either individual acted as an employee or agent for CEI during operative times or had any involvement in the CMSD conversion at issue.

Second, the Subpoenas must be quashed because their purpose is to improperly elicit testimony and obtain documents containing sensitive, proprietary customer information concerning three of Toledo Edison’s customers. As none of these Toledo Edison customers were ever served by CEI, their costs and project information should be protected from disclosure.

Third, CMSD failed to properly serve the Subpoenas under 4901-1-25(B), O.A.C. If persons who are not parties or employees of a party to the case are served by mail, they must be served by mailing the Subpoenas via United States mail as certified or express mail, (return receipt requested) to their place of residence with the required instructions for delivery. Here, the Subpoenas were served to their business address rather than their place of residence. Also, as of this date, the return has not been filed with the docketing division as required.

Alternatively, if the Subpoenas are not quashed in their entirety, a Protective Order should be issued so that the Subpoena Parties are relieved from any obligation to produce these records or testify regarding this information.

II. OVERVIEW AND RELEVANT FACTS

CMSD filed this Complaint with the PUCO on December 7, 2018. The Complaint alleges that in 2017, CMSD initiated a process to attempt to reduce its electric costs by installing its own transformation facilities at 30 to 35 of its schools. (Compl., ¶ 6). The installations were set to occur in several phases. Consistent with this intent, CMSD alleges that it issued a request for bids to install transformers at eleven Phase 1 locations. CMSD assumed that CEI's cost for this phase would be about \$220,000. This assumption was based upon charges it believed were assessed for a similar project undertaken by customers of another public utility, Toledo Edison. (*Id.* at ¶ 7). The estimated cost from CEI was \$314,000. (*Id.* at ¶ 8). Because CEI's initial estimate was higher than what it believed Toledo Edison charged its customers for similar projects, CMSD alleges that CEI's charges were unjust, unreasonable and discriminatory.

Notably, the Complaint fails to assert any allegations that similarly situated customers of CEI were charged differing costs. Nor does it allege that Randall Swope or Bradley Ruetz, or any

other Toledo Edison employees or agents were involved in estimating or converting CMSD from secondary to sub-transmission service and/or primary service.

In its Answer filed on December 19, 2018, CEI denied all allegations, noting in response to several references to Toledo Edison within the Complaint that CEI and Toledo Edison are separate legal entities and that Toledo Edison was not a party to the proceeding. (Answer ¶¶ 7-9, 12-13 and 26). CMSD has already conducted depositions of two CEI representatives familiar with the matters at issue in the Complaint – J H Fisk, Manager of Engineering Services and Jason Duale, Supervisor of Compliance and Industry Engagement on September 18, 2019. Further, the record indicates that CMSD has also served upon CEI and received responses to at least three sets of paper discovery to uncover facts and information related to CMSD’s allegations. (CEI’s Mem. Contra Mot. to Compel (9/23/2020) at 9.)

Complainant filed a Motion in Support of Issuance of non-party Subpoena on October 16, 2020 seeking to take depositions and obtain documents from Toledo Edison’s employees on October 30, 2020. The subpoenas were signed on October 20, 2020 and returned to Complainant’s counsel. The Subpoenas were served on October 26, 2020 at the deponents’ place of business.

The Memorandum in support of issuance of the subpoenas explained that CMSD seeks to depose the Subpoena Parties because they purportedly “have relevant information regarding the clear discrepancy in how CEI and TE interpret identical tariff provisions” in order to “prove that CEI’s action (sic) were unreasonable, unlawful and unjust.” (Mem. In Support, p. 2-3). A duces tecum accompanying the Subpoenas requested information over the past five years for three of Toledo Edison’s commercial customers. Complainants assert that “good cause” exists to issue the Subpoenas and obtain these records, because the persons “have information related to how TE

(Toledo Edison) treats conversions...” and “direct knowledge of the relevant TE tariff provisions due to previous communication between one of CMSD’s consultants and Messrs. Swope and Ruetz.” (Id., p. 3).

Significantly missing from this alleged basis of “good cause” is any explanation as to why knowledge of Toledo Edison tariffs is relevant to CMSD’s project since all of the allegations in the Complaint are asserted against CEI and not Toledo Edison. Toledo Edison’s interpretation of its tariff would have had no bearing upon CMSD’s project. Nor does Complainant assert that Messrs. Swope or Ruetz have any factual knowledge of CMSD’s specific project, cost estimates or CEI’s interpretation of its tariffs that cannot be learned from other sources. Accordingly, there is no relevant basis, much less “good cause” to permit these depositions to proceed.

III. ARGUMENT

A. The Subpoenas do not Seek Relevant Information

According to 4901-1-16, O.A.C., any party to a Commission proceeding may obtain discovery of any matter, not privileged “which is relevant to the subject matter of the proceeding.” Randall Swope and Bradley Ruetz should not be deposed because they do not possess any relevant information to the subject matter of CMSD’s transformation, how CEI’s tariffs were applied or the estimated costs assessed to the project. While CMSD maintains in their Motion for Issuance of Subpoena that they have knowledge of Toledo Edison’s comparable practices and tariffs supporting those practices, such argument is not persuasive because only CEI’s tariffs and conduct are relevant here.

In order to prevail on these claims, CMSD must demonstrate by factual or expert evidence that CEI’s practices were unjust, unreasonable or discriminatory. Information from Toledo Edison does not advance this inquiry. Even if two utilities deal with the same issue in a different manner, this does not lead to a rational conclusion that either of the two practices are improper or that only

one of the practices is proper or just. They may just be different. Simply put, information about how Toledo Edison applies its tariffs to three customer transactions is not relevant to advance CMSD's claims that CEI's specific practices were unreasonable, unjust or discriminatory.

Here, the Subpoena Parties have no relevant information to offer. They are not expert witnesses on CEI's practices and were not involved in the CMSD transformation at all. Such facts are admitted by CMSD in their Memorandum in Support as it explained that the witnesses "have information related to how *TE* treats conversions..." and "that CMSD is aware of Messrs. Swope's and Ruetz have *direct knowledge of the relevant TE tariff provisions* due to previous communication between one of CMSD's consultants and Messrs. Swope and Ruetz." (Emphasis added, Memorandum in Support of Issuance of Subpoena, p. 3) Clearly, having direct knowledge of another utility's practices and tariffs is not relevant to prove allegations of improper or unjust practices by CEI.

The testimony sought to be elicited from the Subpoena Parties is no more relevant because Toledo Edison and CEI have the same parent company, FirstEnergy Corp. This issue was addressed in *In the Matter of the Complaint of Brenda Fitzgerald & Gerard Fitzgerald, Complainant*, 2011 WL 1682213 in which Duke Energy Ohio, Inc. was the party Respondent. In that proceeding, the Complainant filed a Motion to issue a subpoena to the CEO of Duke Energy Corporation – the parent company of Duke Energy Ohio, Inc. Duke Energy Ohio, Inc. filed a Motion to Quash the Subpoena on several grounds, including that the CEO of the parent company of Duke Energy Ohio, Inc. was not directly employed by Duke Energy Ohio, Inc. As in this case, there was no evidence that the parent company's CEO had any personal knowledge of relevant facts or information concerning the Complainant's account, or that he even knew who they were.

The Commission quashed the subpoena under these facts, agreeing that there was no indication in the filings that the CEO had any involvement in or knowledge of the events surrounding the complaint proceeding, or that he could contribute input of value by his appearance. Therefore, the Commission determined that it would be unreasonable and undue burden to compel his appearance.

If deposition discovery is allowed to occur only to show that a non-party utility's policies may differ, then an endless floodgate of subpoenas and discovery may be served upon representatives of disinterested, non-party utilities, wasting time and resources of representatives who have no relevant evidence about the practices or facts at issue in the case. Such discovery only serves to harass and oppress the responding utility without leading to any beneficial, relevant evidence to advance the claims.

Apparently recognizing that the testimony of the Toledo Edison employees will not reveal any meaningful factual information on the claims asserted against CEI, CMSD argues that the depositions are necessary to demonstrate that CEI's practices are discriminatory because it treated its customers differently than Toledo Edison. However, the only valid comparison relative to a discriminatory practice claim is whether CEI treated similarly situated customers differently when applying its tariffs, not Toledo Edison.

Finally, testimony from Messrs. Swope and Ruetz is not relevant because their testimony as employees and representatives of Toledo Edison cannot be used as admissions against the interests of CEI under Ohio R. Evid. 801(D) (2).¹ This hearsay rule applies only to admissions by

¹ The rules of evidence in actions and proceedings under Chapter 4901 shall be the same as in civil actions. R.C. 4903.22.

a “party-opponent.” As neither Messrs. Swope nor Ruetz are employees or agents of CEI, their statements cannot be used as admissions against the interests of Respondent, CEI.

B. Testimony and Production of Documents Relating to Toledo Edison’s Customer Information should not be Disclosed Absent Customer Consent

The *duces tecum* requests at issue direct the following to be produced one day before the October 30, 2020 depositions:

1. Documents regarding the City of Maumee’s conversion of any of its facilities from secondary service (Rate “GS”) to primary service (Rate “GP”) or subtransmission (Rate “GSU”) within the past five (5) years.
2. Documents regarding any and all Toledo Public School District schools that converted from secondary service (Rate “GS”) to primary service (Rate “GP”) or subtransmission (Rate “GSU”) with the years 2013 to 2015.
3. Documents regarding Central Catholic High School’s conversion from secondary service (Rate “GS”) to primary service (Rate “GP”) subtransmission (Rate “GSU”) which occurred within the past five (5) years.

If the Subpoenas are not quashed in their entirety, then alternatively, a Protective Order or Order quashing these specific document requests concerning records of Toledo Edison’s customers and testimony regarding the customers’ information must be issued.

The type of customer-specific information sought here cannot be disseminated on residential accounts pursuant to 4901:1-10-24(E), O.A.C., without the customer’s consent. Although these requests refer to commercial rather than residential customers, the same public policy considerations should apply, especially where there is no showing of good cause as to how this private, sensitive and proprietary customer information can be relevant to any of CMSD’s claims. If CMSD can demonstrate that this customer information is somehow relevant, which the Subpoena Parties deny, its requests for such information can be directed through subpoena to each of these customers rather than to Toledo Edison. Alternatively, CMSD should obtain written consent from each of these customers to eliminate Toledo Edison’s valid privacy concerns.

C. The Subpoenas Were Not Properly Issued or Served

Once a subpoena is signed and docketed, responsibility for arranging service is the responsibility of the person requesting the subpoena. 4901-1-25(B), O.A.C. Here, the mandatory service requirements were not properly observed.

Service can be accomplished in a variety of methods, including mail. If service is accomplished by mail, the subpoena may only be served at a business address if issued to a party or an employee of a party. 4901-1-25(B), O.A.C. Since Randall Swope and Bradley Ruetz are not parties or employees of parties, they must be served by mailing the Subpoenas to their *place of residence* via United States mail as certified or express mail, return receipt request with instructions to show to whom delivered, date and addressed. Thereafter, the person serving the subpoenas must file a return with the docketing division, which includes the signed receipt with the return. (*Id.*)

These mandatory service requirements were not met here. Subpoenas were served at the business addresses of Subpoena Parties' employer, Toledo Edison on Angola Road in Holland, Ohio rather than at their place of residence on October 26, 2020. This is a mere four days before the depositions were scheduled to occur and three days before the requested documents under the *duces tecum* had to be produced. Timing issues aside, this service was improper because these witnesses had to be served at their place of residence.

In order to complete the service process, the person serving the subpoena must also file a return thereof with the docketing division. If returned by mail, the person filing the return must likewise file a return of service and also include the signed receipt with the return. (*Id.*) This mandatory procedure was likewise not completed. As a result of these substantial defects, the Subpoenas were not properly served and must be quashed.

IV. CONCLUSION

For the foregoing reasons, the Subpoenas Duces Tecum to Randall Swope and Bradley Ruetz should be quashed in their entirety. Alternatively, it is requested that a Protective Order be issued directing that no information concerning Toledo Edison customers: The City of Maumee, Toledo Public School District or Central Catholic High School shall be produced or testified to if the depositions proceed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Quash was electronically filed with the Public Utilities Commission of Ohio and served via email upon the following parties of record on this 27th day of October, 2020.

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Case No(s). 18-1815-EL-CSS

Summary: Motion Motion to Quash Subpoenas and for Protective Order with Memorandum in Support electronically filed by Mrs. Denise M. Hasbrook on behalf of The Toledo Edison Company