

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Samantha Shively)	
)	
Complainant,)	
)	Case No. 21-0054-EL-CSS
v.)	
Ohio Edison Company)	
)	
Respondent.)	
)	
)	

ANSWER AND MOTION TO DISMISS OF OHIO EDISON COMPANY

Ohio Edison Company (“OE”) is a public utility company as defined by §4905.03(C) of the Ohio Revised Code and is duly organized and existing under the laws of the State of Ohio. In accordance with Rule 4901-9-01(D) of the Ohio Administrative Code, OE for its answer to the Complaint of Samantha Shively (the “Complainant”) states:

Complainant’s Complaint consists of various assertions in one handwritten and unnumbered paragraph. Complainant redacted her address and account number from the Complaint. OE therefore lacks knowledge or information sufficient to determine whether Complainant is a customer of OE. To the extent OE does not respond to a specific allegation, OE denies any such allegation. OE reserves the right to supplement or amend this Answer.

1. OE lacks knowledge or information sufficient to address Complainant’s claims regarding her health and therefore denies the same.
2. OE denies that the Opt-out charge authorized in PUCO Case No. 20-0385-EL-ATA for Opt-out customers as that term is defined therein constitutes a violation of the Americans with Disabilities Act.
3. OE denies that it is discriminating against Complainant.

AFFIRMATIVE DEFENSES

1. The Complaint fails to set forth reasonable grounds for Complaint, as required by Section 4905.26, Revised Code.
2. The Complaint fails to state a claim upon which relief can be granted.
3. The Complaint is an improper collateral attack on the OE tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA.
4. The Commission lacks subject matter jurisdiction over some or all of Complainant's claims.
5. CEI reserves the right to raise other defenses as warranted by discovery in this matter.

MOTION TO DISMISS

The Complaint filed in this matter contains three fatal flaws:

- *First*, the Complaint does not contain adequate information to demonstrate that Complainant is an OE customer to whom OE owes a duty of adequate service;
- *Second*, the Complaint alleges a violation of the Americans with Disabilities Act, and the Commission lacks subject matter jurisdiction over such claims; and
- *Third*, it is an improper collateral attack on the OE tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA.

For each of these reasons, the Complaint must be dismissed.

Under Ohio law, the Commission's jurisdiction under Ohio Revised Code ("R.C.") §4905.04 and §4905.05 is limited to supervising activities of "public utilities."¹ The Commission lacks jurisdiction over a customer complaint where with respect to the complainant, the utility was

¹ See *In re Complaint of Direct Energy Business, L.L.C. v. Duke Energy Ohio, Inc.*, Slip Opinion No. 2020-Ohio-4429, at ¶¶ 11-17 (Sept. 17, 2020).

not acting as a public utility under the facts of the case as it did not fit the definition of an “electric light company” in R.C. 4905.03(C) and was not engaged in the business of supplying electricity for light, heat, or power purposes to the complainant.² The Complaint lacks any identifying information about the Complainant that would tend to corroborate that she is in fact a customer receiving electricity for light, heat, or power from OE. For that reason alone, the Complaint should be dismissed.

Beyond the lack of information regarding the customer status of the Complainant, the Commission also lacks subject matter jurisdiction over the Complaint, because the Complaint sounds in violation of a federal statute – the Americans with Disabilities Act (“ADA”). The Commission may only exercise the jurisdiction conferred upon it by statute.³ The Commission is not a court and has no power to ascertain and determine legal rights and liabilities.⁴ Pursuant to R.C. 4905.26, the Commission has exclusive jurisdiction over claims pertaining to service related matters.⁵

The Commission has held that it does not have subject matter jurisdiction over customer complaints sounding in violations of the Fair Debt Collection Practices Act (“FDCPA”).⁶ In granting the respondent’s motion to dismiss, the Commission made the following observation:

Generally, the Commission’s jurisdiction relates to services and rates provided by public utilities. The FDCPA is a federal law relating to debt collection practices. As such, the FDCPA falls outside the scope of the Commission's jurisdiction. Thus, even if it were true that Toledo Edison violated the FDCPA, this would not be a proper forum to adjudicate the claim.⁷

² *Id.*

³ *Lucas County Commissioners v. Pub. Util. Commission of Ohio* (1997), 80 Ohio St.3d 344, 347.

⁴ *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144 (2012).

⁵ *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, ¶ 16.

⁶ *In the Matter of the Complaint of Marcena Upp v. The Toledo Edison Company*, PUCO Case No. 11-5427-EL-CSS, 2012 Ohio PUC LECIS 6 (Jan. 4, 2012) (dismissing FDCPA claim for lack of subject matter jurisdiction).

⁷ *Id.*

The same logic applies to Complainant's ADA claim here. The Complaint should be dismissed for lack of subject matter jurisdiction.

Finally, the Complaint amounts to a redundant and inefficient collateral attack on prior Commission orders. In Commission Case No. 20-0385-EL-ATA, OE filed proposed tariff pages reflecting changes to the Automated Meter Opt-out Rider ("Rider AMO").⁸ This filing was made in accordance with Rules 4901:1-10-05(J)(1), (J)(5)(a) and (J)(5)(b) of the Ohio Administrative Code, and in response to the Commission Opinion and Order in Case Nos. 16-481-EL-UNC and 17-2436-EL-UNC, et al., dated July 17, 2019, and was intended, in pertinent part, to "provide any customer taking service under the Residential Service rate schedule (Rate RS) with the option . . . to decline installation of an advanced meter and retain a traditional meter, through a cost-based, tariffed optout service."⁹ This option is outlined in the revised tariff pages, and provides that the monthly customer charge for Opt-out customers is \$28.29 (the "Opt-out Customer Charge").¹⁰ The tariff also provides the cost of removing a smart meter from an Opt-out customer's residence.¹¹

OE's application was docketed at the Commission and made available for review by all interested parties, including Commission Staff. Commission Staff filed its Review and Recommendations regarding the application and determined that the modified charges were cost-based, in accordance with the applicable rules.¹² The Commission approved the Opt-out Customer Charge on July 29, 2020,¹³ holding that "the provisions of Ohio Adm.Code 4901:1-10-5 contain

⁸ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Application at 1 (Feb. 18, 2020).

⁹ *Id.*, Ex. C-1.

¹⁰ *Id.*, Ex. B.

¹¹ *Id.*

¹² *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Finding and Order at ¶8 (July 29, 2020)..

¹³ *Id.*

all of the necessary and appropriate consumer protections for customers who participate in Rider AMO.”¹⁴ OE filed its revised tariff pages reflecting the Opt-out Customer Charge on August 14, 2020.¹⁵

The Commission may, “in the interest of judicial economy and efficiency, dismiss a complaint against a Commission approved tariff, where the Commission has recently and thoroughly considered the provisions of the tariff and the Complainant alleges nothing new or different for the Commission’s consideration.”¹⁶ It is clear, here, that the Commission has recently and thoroughly considered the provisions of Rider AMO and that Complainant alleges nothing new or different for the Commission’s consideration. The Complaint should be dismissed as an improper collateral attack on Rider AMO, in the interest of judicial economy and efficiency.

WHEREFORE, OE respectfully requests an Order dismissing the Complaint with prejudice and granting OE all other necessary and proper relief.

Respectfully submitted

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¹⁴ *Id.* at ¶10.

¹⁵ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Revised Tariff Update pages of Rider AMO for PUCO Electric Tariff No. 11 (Aug. 14, 2020).

¹⁶ *See In the Matter of the Complaint of Mark R. Weiss v. The Cleveland Electric Illuminating Company*, PUCO Case No. 97-876-EL-CSS, 1997 Ohio PUC LEXIS 845 at *7 (Nov. 6, 1997) (citing cases)

CERTIFICATE OF SERVICE

On February 8, 2021, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record in this proceeding. Complainant did not provide an address or account number on her Complaint, but a service copy has been sent to the address included in the Complaint Response Letter and brochure docketed in this case on January 15, 2021, as follows:

Samantha Shively
5392 Riddle Rd.
Ravenna, OH 43266

/s/ Emily V. Danford
Attorney for Ohio Edison Company

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

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in

Case No(s). 21-0054-EL-CSS

Summary: Answer and Motion to Dismiss of Ohio Edison Company electronically filed by Ms. Emily V Danford on behalf of Ohio Edison Company