

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
ROGER LESH,**

COMPLAINANT,

v.

CASE NO. 18-1519-EL-CSS

**THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY,**

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on January 26, 2022

I. SUMMARY

{¶ 1} The Commission finds that Complainant, Roger Lesh, has not carried his evidentiary burden of proving that Respondent, The Cleveland Electric Illuminating Company, (1) has breached any legal obligation that it holds as a public utility subject to the Commission's jurisdiction or (2) is liable for damages Complainant claims to have incurred as a result of an alleged power surge.

II. PROCEDURAL BACKGROUND

{¶ 2} 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.

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

{¶ 4} On October 5, 2018, Roger Lesh (Complainant) filed a complaint against CEI, alleging that CEI failed to replace a faulty transformer at 7712 Hillside Road, Independence,

Ohio 44131 (Service Address), which caused a pole fire and subsequent power outage on August 22, 2018. Complainant requests financial compensation for his damaged belongings as a result of the power outage.

{¶ 5} CEI filed its answer on October 25, 2018. In its answer, CEI admits some allegations in the complaint. However, CEI denies that: the transformer supplying electric power to the Service Address prior to August 22, 2018, was “faulty;” that the transformer in question caused the pole fire or power failure; and, that Complainant lost several items in his household due to a power failure at the Service Address on August 22, 2018. Additionally, CEI raises several affirmative defenses.

{¶ 6} Complainant filed letters on December 7, 2018, and December 24, 2018, indicating that he cannot travel far from his residence such that his hearing should be scheduled locally.

{¶ 7} A settlement conference was held by telephone on December 19, 2018. The parties were unable to resolve the matter at that time.

{¶ 8} On January 16, 2019, CEI filed a motion to dismiss this case for failure to state a claim upon which relief can be granted. The attorney examiner denied the motion to dismiss pursuant to an Entry dated December 10, 2019.

{¶ 9} On December 3, 2020, and March 3, 2021, the attorney examiner scheduled this matter for prehearing conferences on January 19, 2021, and March 31, 2021, respectively. During the prehearing conferences, the parties discussed the plan for conducting the evidentiary hearing in this case by telephone due to Complainant’s travel and technology limitations, and the procedures for testifying and presenting evidence at the telephonic evidentiary hearing.

{¶ 10} As scheduled on April 6, 2021, the attorney examiner held an evidentiary hearing via telephone on July 12, 2021. At the hearing, Mr. Lesh testified on his own behalf.

CEI presented the testimony of customer service compliance specialist Marilyn Cottrill, who adopted, with modification, her written testimony that was pre-filed on July 2, 2021.

{¶ 11} At the close of the evidentiary hearing, the attorney examiner established a briefing schedule. In accordance with that schedule, CEI filed its initial brief on September 1, 2021. No other post-hearing briefs were filed.

III. DISCUSSION

A. *Applicable Law*

{¶ 12} R.C. 4905.26 requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any rate, charged or demanded is in any respect unjust, unreasonable, or in violation of law, or that any practice affecting or relating to any service furnished is unjust or unreasonable.

{¶ 13} In complaint proceedings, the complainant has the burden of proving the allegations in the complaint by a preponderance of the evidence. *Grossman v. Public Util. Comm.*, 5 Ohio St.2d 189, 214 N.E. 2d 666 (1966).

{¶ 14} Further, where a complainant seeks damages as a result of a power surge, the complainant's right of recovery against an electric distribution utility (EDU) is determined based on a four-factor test involving: (1) whether the cause of the power surge or outage was within the company's control; (2) whether the company failed to comply with any statutes or regulations regarding the operation of its system that could have caused the problem; (3) whether the company's actions amounted to unreasonable service; and, (4) whether the company corrected the problem responsibly. *In re the Complaint of Gregory B. Forgach v. The Cleveland Elec. Illum. Co.*, Case No. 09-646-EL-CSS (*Forgach*), Opinion and Order (May 13, 2010), citing *In re the Complaint of Edward F. Santos v. The Dayton Power and Light Com.*, Case No. 03-1965-EL-CSS (*Santos*), Opinion and Order (Mar. 2, 2005).

{¶ 15} R.C. 4928.16(B)(1) provides, in pertinent part, that, in addition to any other remedies provided by law, upon a hearing held pursuant to R.C. 4905.26, the Commission

may order restitution to customers, including damages due to electrical power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of R.C. 4928.16.

B. Complainant's Testimony and Arguments

{¶ 16} According to Complainant, the issues in this case began on June 28, 2017, when he first telephoned CEI to report that the transformer that supplied his electricity needed to be replaced.¹ Mr. Lesh described that, in response to his call, CEI technicians twice inspected the transformer prior to its failure on August 22, 2018. Further, he described that in response to his call on June 28, 2017, that he was informed that the transformer would be replaced within seven to nine months. (Tr. at 9.)

{¶ 17} Mr. Lesh further alleged that on August 22, 2018, prior to the transformer being replaced, it failed causing the pole upon which it was mounted to catch fire and collapse (Tr. at 9). Mr. Lesh admitted that there was adverse weather on the day of the transformer failure. But he maintained that the weather was merely a rain event, rather than a considerable storm that could have caused the transformer to fail. (Tr. at 11.) According to Mr. Lesh, the transformer failure resulted from CEI's inattention to his requests for its replacement such that CEI should be responsible for the consequences of its failure (Tr. at 10-11).

{¶ 18} Further, Mr. Lesh testified that the transformer failure caused a power surge that resulted in damage to several of his household items, including his electric cooktop, television surround sound, a motion detector light in his garage, a CO2 alarm, a surge protector, an electric chime clock, and an electric door bell (Tr. at 10; Lesh Ex.1 at 2).

¹ Mr. Lesh provided additional testimony regarding CEI's response to what he described as "blown fuse" events involving the transformer at issue that disrupted his power prior to June 2017. Though his testimony ultimately focuses on the call on June 28, 2017, as the one in which he initially expressed his concerns as to the visible nature of the transformer, including evidence of discoloration to the pole below where the transformer was mounted. (Tr. at 19-22.)

C. *Respondent's Testimony and Arguments*

{¶ 19} CEI maintained that it is not responsible for damages that are alleged to have resulted from the transformer failure because the failure resulted from a sudden and unforeseen storm event that occurred on August 21, 2018. CEI claimed that it had no advance notice that the transformer was at risk of failure such that it could not reasonably have been expected to expedite the replacement of the transformer. (Tr. at 53; CEI Ex. 1 at 4, 6.)

{¶ 20} In support of its position, CEI presented the testimony of Marilyn Cottrill, who is a customer service compliance specialist with the Company. Ms. Cottrill's position involves investigating consumer complaints such as those raised in this case. According to Ms. Cottrill's investigation, there were three calls from Complainant during the period between June 28, 2017, and the date of the transformer failure on August 21, 2018. As to each of these communications, CEI arranged for an inspection of the equipment that was servicing Mr. Lesh's property, and in each circumstance there was no evidence of any acute safety or reliability concern for the customer.

- (1) June 28, 2017 - Complainant first called CEI to report his concerns about the condition of the transformer. In response to this initial call, CEI inspected the transformer and agreed to replace it with a larger model. CEI's records reflect that the transformer was not defective such that its replacement related to its cosmetic appearance, rather than any issue impacting its safety and reliability. As a result, the replacement was not deemed urgent.
- (2) July 13, 2017 - Complainant called seeking a status update as to the transformer replacement. Again, CEI inspected the transformer to confirm that its replacement was merely cosmetic, and not related to any safety and reliability concerns. As a result, the replacement remained pending as a courtesy, non-urgent matter.
- (3) August 6, 2018 - Complainant called CEI to report the need for tree trimming near the power lines on his property. Again, CEI arranged for an on-site inspection of the issue, which resulted in CEI arranging for tree trimming to occur by September 7, 2018.

(Tr. at 16, 51-53; CEI Ex. 1 at 4; CEI Br. at 2-4.)

{¶ 21} In addition to her testimony that the transformer was not defective prior to its failure, Ms. Cottrill testified as to the circumstances surrounding its failure on August 21, 2018. Her investigation revealed that the pole upon which the transformer was mounted caught fire due to a storm event. According to the CEI's records, there was no evidence that the transformer failed for reasons other than the storm event on that date. (CEI Ex. 1 at 4.)

D. Commission Conclusion

{¶ 22} In cases where a complainant seeks to recover property damage alleged as a result of a power surge attributable to an EDU's equipment failure, the Commission considers the four-factor test articulated in *Santos* to determine whether the utility can be held responsible for the damage:

- (1) Was the cause of the problem within the electric utility's control?
- (2) Did the electric utility fail to comply with any statutory or regulatory requirements regarding the operation of its system that could have caused the outage or surge?
- (3) Did the electric utility's actions or inactions constitute unreasonable service?
- (4) Did the electric utility act responsibly in correcting the problem?

{¶ 23} Upon review of the record, we find that Complainant has failed to prove that (1) a power surge occurred as a result of the failure of the transformer that serviced his property, and (2) even if such a power surge did occur, that (a) it was the cause of Mr. Lesh's alleged property damage, or (b) it was the result of any action or inaction as to CEI's maintenance or operation of the transformer. As a result, we conclude that (1) CEI has not failed in its duty to provide safe and reliable service, and (2) Complainant is not entitled to recover for the property damage that allegedly resulted from the transformer failure at issue in this case.

{¶ 24} Initially, we note that we are sympathetic to Mr. Lesh's concerns in this case. His testimony credibly described damage to his property following the storm event on

August 21, 2018. But while we accept his credibility as to this circumstance, we nevertheless conclude that he fails to prove the causal connection between the damage to the transformer that occurred on that date and any damage to his personal property. Further, even if we were to find that property damage occurred as a result of the transformer failure, we cannot attribute the transformer's failure to any action or inaction by CEI as to its equipment maintenance, as is required by the test in *Santos*.

{¶ 25} In applying the first *Santos* factor, whether the cause of the problem was within CEI's control, we conclude that there is insufficient record evidence to support this finding. Initially, we note that Mr. Lesh failed to provide (1) evidence of any operational problems with CEI's equipment prior to its failure, and (2) evidence that the alleged equipment problem caused his property damage. While it is true that the transformer that serviced Mr. Lesh failed on August 21, 2018, we cannot find that the failure caused any problem, other than a temporary service disruption, to Mr. Lesh's property. Mr. Lesh's claim that the transformer failure occurred without regard to the storm event is based on his observation that the transformer's external appearance was tarnished during the period between June 2017 and August 2018 (Tr. at 16-17). As Ms. Cottrill testified, CEI's post-incident investigation attributed the transformer failure to the storm event on August 21, 2018 (Tr. at 53; CEI Ex. 1 at 4, 6). Ms. Cottrill's testimony is uncontroverted, as Mr. Lesh provided no evidence as to the cause of the transformer failure. Accordingly, we cannot conclude that Mr. Lesh has proven his allegation as to the cause of the transformer failure. In reaching this conclusion, we stress that (1) CEI's records reflect that the transformer was inspected on two occasions during the 14 months prior to the failure, and neither inspection found any deficiency as to its operation, (2) there were no customer complaints regarding the delivery of electricity during the 14 months prior to the transformer's failure, and (3) there was a storm event on the night of the power failure, which provides an alternate explanation regarding the cause of the alleged power surge. Based on these factors, we conclude that CEI's equipment was properly functioning at the time of the storm event and that the described power surge has not been proven to result from the Company's equipment

maintenance. In reaching this conclusion, we emphasize our prior rulings that have concluded that, where an EDU demonstrates adequate equipment maintenance measures, power surges that result from events such as lightning strikes or extraordinary climactic conditions are outside of the utility's control such that the utility is not responsible for damages from these events. *Santos*, Opinion and Order (Mar. 2, 2005) at 9-10.

{¶ 26} In applying the second *Santos* factor, whether CEI failed to comply with any statutory or regulatory requirements as to the operation of its system that could have caused the alleged outage or surge, we again find that there is insufficient record evidence to support this finding. We note that Mr. Lesh does not allege that CEI violated any statutory or regulatory requirements. Instead, he merely correlates the provision of electric service with the alleged power surge without regard to the cause of the surge, or evidence that it resulted from CEI's inadequate system management. Accordingly, we conclude, based on the record in the case, that CEI did not fail to comply with statutory or regulatory requirements as to the operation of its system.

{¶ 27} In applying the third *Santos* factor, we conclude that CEI's actions or inactions did not constitute unreasonable service. As described by Ms. Cottrill, the Company responded to customer complaints as to both the appearance of the transformer and the need for tree trimming during the 14 months prior to the transformer's failure. In response to all three of Mr. Lesh's calls between June 2017 and August 2018, the Company arranged for field inspections to confirm the safe operation and maintenance of its equipment. Moreover, Ms. Cottrill testified that there was no evidence of service disruption during this 14-month period that one could associate with progressive equipment failure. Accordingly, we find that the Company's actions in responding Mr. Lesh's complaints, including arranging for equipment replacement on a non-priority, courtesy basis, were reasonable. (Tr. at 16, 51-53, 59-60; CEI Ex. 1 at 4-7; CEI Br. at 2-4.)

{¶ 28} As to the fourth *Santos* factor, whether CEI acted responsibly in correcting the problem, we again find in favor of the Company. While there is discrepancy between the

parties as to the severity of the storm on August 21, 2018, it is uncontroverted that a storm did occur and that CEI's equipment that serviced Mr. Lesh was damaged on that date. In response to the damage, CEI made necessary repairs and restored Mr. Lesh's service on the day that he called to report his power outage, August 22, 2018. We find that the Company's response to making timely repairs and restoring service was reasonable.

{¶ 29} In summary, we find that CEI is not responsible for the damages that Mr. Lesh alleges in this case. As we have previously noted, in complaint proceedings such as this one, the complainant has the burden of proof. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Based on the evidence of record in this case, the Commission finds that Complainant has not sustained his burden of proof, as (1) there is no evidence that CEI's equipment caused Mr. Lesh's alleged property damage, and (2) even assuming that the damage did result from CEI's equipment failure, there is no evidence that CEI's actions, as determined pursuant to the *Santos* test, were inconsistent with its obligation to properly maintain the equipment.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 30} CEI is a public utility as defined in R.C. 4905.02 and 4905.03 and, as such, is subject to the jurisdiction of the Commission.

{¶ 31} On October 5, 2018, Complainant filed a complaint against CEI.

{¶ 32} On October 25, 2018, CEI filed its answer to the complaint in which it denied Complainant's allegations pertaining to the safe operation and maintenance of its equipment.

{¶ 33} A settlement conference was held by telephone on December 19, 2018. The parties were unable to resolve the matter at that time.

{¶ 34} On January 16, 2019, CEI filed a motion to dismiss this case for failure to state a claim upon which relief can be granted. The attorney examiner denied the motion to dismiss pursuant to an Entry dated December 10, 2019.

{¶ 35} An evidentiary hearing was held via telephone on July 12, 2021.

{¶ 36} In a complaint case, the burden of proof is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 37} Complainant failed to sustain his burden of proof for this Commission to conclude that CEI violated its duty as to the safe operation and maintenance of its equipment.

V. ORDER

{¶ 38} It is, therefore,

{¶ 39} ORDERED, That this matter be decided in favor of CEI for failure of Mr. Lesh to sustain his burden of proof. It is, further,

{¶ 40} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis Deters

MLW/hac

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Case No(s). 18-1519-EL-CSS

Summary: Opinion & Order finding that Complainant, Roger Lesh, has not carried his evidentiary burden of proving that Respondent, The Cleveland Electric Illuminating Company, (1) has breached any legal obligation that it holds as a public utility subject to the Commission's jurisdiction or (2) is liable for damages Complainant claims to have incurred as a result of an alleged power surge. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio