

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
JUDY DeFRENCH,**

**COMPLAINANT,**

**CASE NO. 21-950-EL-CSS**

**V.**

**THE CLEVELAND ELECTRIC  
ILLUMINATING COMPANY,**

**RESPONDENT.**

**ENTRY**

Entered in the Journal on July 12, 2023

**I. SUMMARY**

{¶ 1} The Commission grants the motion to dismiss filed by The Cleveland Electric Illuminating Company, with prejudice, as Complainant has failed to state reasonable grounds for complaint.

**II. DISCUSSION**

{¶ 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} Respondent, The Cleveland Electric Illuminating Company (CEI or the Company), is an electric light company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02. As such, CEI is subject to the jurisdiction of this Commission.

{¶ 3} On September 15, 2021, Judy DeFrench (Ms. DeFrench or Complainant) filed a complaint against CEI in which she alleges, among other things, that: (1) she has a rare but recognized medical condition in which exposure to electromagnetic frequencies (EMF) causes her to experience disabling health effects, including head and chest pain, mental

confusion, and physical exhaustion; (2) her disability meets criteria established in the Americans with Disabilities Act (ADA); (3) her home provides a safe refuge, which she needs in order to be able to function, from the debilitating effects of EMF exposure which she experiences during regular weekday employment; (4) in the area where she lives, CEI, her electric service supplier, is currently replacing existing meters with smart meters; (5) a smart meter, if installed at her house, according to Ms. DeFrench, would constantly emit EMF which would cause her home to be medically unsafe and disabling to her; (6) CEI is authorized to provide smart meter opt-out service “to any customer who doesn’t want” a smart meter “for any reason” and any such customer “can keep their existing meter if they pay” a certain monthly surcharge “forever”; (7) the opt-out surcharge, according to Complainant, violates the ADA and, says Ms. DeFrench, “cannot be imposed \* \* \* when opting-out is a reasonable modification required to accommodate my disability so that I can have access to electric service”; (8) the Commission, according to Complainant, has “determined opting-out is not a fundamental alteration” of CEI’s business; and (9) she cannot afford the surcharge. Ms. DeFrench further alleges that, to date, all efforts she has made to have CEI waive the opt-out surcharge in her situation, in light of her disability, have proven futile. By bringing her formal complaint, Ms. DeFrench seeks the Commission’s assistance in achieving such a result.

{¶ 4} On October 4, 2021, CEI filed its answer in which it admits some, and denies others, of the complaint’s allegations and sets forth several affirmative defenses. Among other things, in its answer, CEI admits: (1) that it provides electric service to Complainant; (2) that CEI is replacing traditional meters with smart meters, which emit, though not constantly, low levels of radio waves in short transmission bursts; (3) that the Commission approved CEI’s request to install smart meters with an option to opt-out of the installation with payment of a monthly fee of \$28.29; (4) that, in September 2021, it began charging Complainant its Commission-approved smart meter opt-out fee; and (5) that Complainant is requesting that the Commission approve waiving the \$28.29 monthly smart meter opt-out fee due to her alleged disability. On the other hand, CEI denies: (1) for lack of knowledge

concerning Complainant's alleged medical condition and symptoms, whether such symptoms are a result of exposure to EMFs; and (2) also for lack of knowledge, Complainant's allegations regarding both her employment situation and her financial situation. Further, CEI also denies, among other things: (1) that installing a smart meter would be medically unsafe or disabling; and (2) that Complainant is entitled, under existing Commission jurisprudence and CEI's Commission-approved tariff, to the waiver of surcharge relief she seeks. Further answering, CEI adds that certain of Complainant's allegations constitute legal conclusions which do not require a response, namely: (1) that her medical condition qualifies as a disability under the ADA; (2) that the opt-out provision is a fundamental alteration of CEI's business, and (3) that CEI is misinterpreting the Ohio Revised Code, the Ohio Administrative Code, and its own tariff. Finally, in its answer, CEI asserts, among other things, that: (1) various international government agencies have determined that there are no health risks from exposure to radiofrequency EMF from smart meters; and (2) CEI must follow its tariff as approved by the Commission.

{¶ 5} By Entry issued November 4, 2021, the attorney examiner scheduled a settlement conference for November 19, 2021. The conference occurred as scheduled; however, the parties were unable to reach a settlement.

{¶ 6} On December 22, 2021, Respondent filed a motion to dismiss the case, asserting that Complainant has failed to set forth reasonable grounds for complaint as required by R.C. 4905.26. In its motion, CEI asserts that the Complaint (1) improperly imposes Commission jurisdiction over a claim arising out of the ADA; (2) is an improper collateral attack on the CEI tariff the Commission authorized and approved in *In re the Cleveland Electric Illuminating Co. (AMO Rider Case)*, 20-385-EL-ATA, Finding and Order (July 29, 2020); (3) requests the Commission to act in violation of the filed rate doctrine codified in R.C. 4905.32 and 4903.13; and (4) fails to set forth reasonable grounds for the Complaint. As such, CEI argues that the consideration of an ADA claim goes beyond the statutory grant of authority to the Commission as the public utility regulator of Ohio. Further, the Company notes that the Commission recently and thoroughly considered the

proposed rider provisions in the *AMO Rider Case*, which approved the Company's monthly opt-out fee, as well as the specific allegations related to health effects from smart meters in *In re Complaint of Ned Bushong v. Ohio Power Co. D/B/A AEP Ohio*, 18-1828-EL-CSS, Opinion and Order (Oct. 7, 2020). 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. Second, CEI points out that a utility has no discretion on whether it must collect the rates set by the Commission, and therefore cannot waive fees based on a complainant's specific circumstances unless an aggrieved person secures a stay of such order. Accordingly, CEI contends that the Complainant did not meet their burden of proof and as such, the complaint should be dismissed with prejudice.

{¶ 7} Initially, the Commission has exclusive jurisdiction to hear complaints against public utilities regarding any rate, practice, or service of the utility relating to any service furnished by the utility that is unjust, unreasonable, or unjustly discriminatory. R.C. 4905.26. However, the Commission agrees with CEI that the case should be dismissed, as Complainant has not provided reasonable grounds for the complaint. The Commission may only exercise the jurisdiction conferred upon it by statute. *Lucas County Commissioners v. Pub. Util. Comm. of Ohio* (1997), 80 Ohio St.3d 344, 347. Further, we acknowledge the Commission is not a court and has no power to ascertain and determine legal rights and liabilities. *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144 (2012).

{¶ 8} Pursuant to R.C. 4905.26, the Commission has exclusive jurisdiction over claims pertaining to service-related matters. *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, ¶¶ 11, 16. In *Allstate*, the Supreme Court of Ohio adopted a two-part test to determine whether the issues raised in a complaint are within the exclusive jurisdiction of the Commission or whether they are claims better suited for Ohio courts. The first part of the test asks whether the Commission's administrative expertise is required to resolve the issue in dispute. The second part of the test asks whether the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is

in the negative, the claim is not within the Commission's jurisdiction. *Allstate* at ¶ 12-13. Under this analysis, Complainant's complaint falls outside of the Commission's jurisdiction. First, we find that the Commission's administrative expertise as the public utility regulator of Ohio unnecessary to resolve a claim arising out of the ADA and related state laws. Ms. DeFrench does not claim that any rate or service provided by the Company is unjust, unreasonable, or in violation of utility law, regulation, or Commission order. Instead, the ultimate question raised for determination is whether the Company's opt-out fee constitutes a violation of the ADA and related state law. The Commission notes that there are more appropriate tribunals for claims based on these laws. However, we concede that Complainant's allegation meets the second part of the *Allstate* test, in which the complaint involves CEI's smart meter implementation and smart meter opt-out fee as approved by the Commission. As we have found that we must answer the first question in the negative, the complaint fails the *Allstate* test.

{¶ 9} As such, the Commission determines that the complaint alleges issues beyond the scope of the Commission's jurisdiction rather than implicating matters disputing a public utility's services and rates. See *In re Complaint of Samantha Shively v. Ohio Edison Co.*, Case No. 21-54-EL-CSS, Entry (May 3, 2023)(where the Commission dismissed the complaint alleging that the company's opt-out fee was a violation of the ADA); *In re the Complaint of Edward Porter v. Ohio Power Co. d/b/a AEP Ohio*, Case No. 20-260-EL-CSS, Opinion and Order (June 2, 2021). Moreover, in the *Shively* decision, we were also informed by the Pennsylvania Public Utility Commission's finding that it was not the designated body to make determinations regarding violations of the ADA during complaint case proceedings in which complainants similarly contested the installation of a smart meter. See *In re the Complaint of Jeffery Ulmer v. PPL Electric Utilities Corp.*, Pa.P.U.C. Docket No. C-2018-3003824, Initial Decision (Mar. 5, 2020); *In re the Complaint of Kathleen Anthony v. PPL Electric Utilities*

Corp., Pa.P.U.C. Docket No. C-2018-3000490, Initial Decision (Sept. 15, 2020).<sup>1</sup> As such, we find that we lack subject matter jurisdiction over Complainant's ADA-related claims.

{¶ 10} Further, at bar, CEI raises that the Commission has already approved the revision of the Company's tariff in the *AMO Rider Case* to include a monthly opt-out fee for customers who do not wish to have smart meter technology. As such, we note that in her September 15, 2021 complaint, Ms. DeFrench does not allege that CEI charged her with something other than the *AMO Rider Case* opt-out charge approved in July 2020 and applied in September 2021. For this reason, we also find that Ms. DeFrench's complaint does not set forth reasonable grounds. In previous cases, the Commission has similarly dismissed other complaints that allege that recently approved rates should not be charged in *In re the Complaint of Emil Seketa v. The East Ohio Gas Co., d.b.a. Dominion East Ohio*, Case No. 06-549-GA-CSS, Entry (Aug. 9, 2006); *In re the Complaint of Steve Gannis v. The Cleveland Electric Illuminating Co.*, Case No. 94-154-EL-CSS, Entry (May 11, 1994); *In re the Complaint of David Hughes v. The Cleveland Electric Illuminating Co.*, Case No. 94-969-EL-CSS, Entry (September 1, 1994); and *In re the Complaint of Avery Dennison Co. v. Dominion East Ohio*, Case No. 00-989-GA-CSS, Entry (December 14, 2000). Moreover, as we have previously determined, collateral attacks on prior Commission orders are not improper per se, but the Commission may, in the interest of judicial economy and efficiency, exercise its discretion to dismiss a complaint where the Commission has recently and thoroughly considered the subject matter of the complaint and that the Complainant alleges nothing new or different for the Commission's consideration. See *In re Complaint of Mark R. Weiss v. The Cleveland Electric Co.*, Case No. 97-876-EL-CSS, Entry (Nov. 6, 1997).

---

<sup>1</sup> Interestingly, as noted in those decisions, Pennsylvania state law does not allow a customer to opt-out of an electric utility's smart meter program. Those complainants ultimately sought an ADA accommodation in the form of an opt-out from a smart meter installation, which is precisely what the Company's tariff in this case provides.

{¶ 11} As noted by CEI, we recently considered and dismissed a related concern requesting a waiver of the Rider AMO in *Bushong* and that the intent to implement an opt-out charge was allowable, even when the complainant raised health and safety risk concerns in opposition of the smart meter use. *In re Complaint of Ned Bushong v. Ohio Power Co. D/B/A AEP Ohio*, 18-1828-EL-CSS, Opinion and Order (Oct. 7, 2020) at ¶ 26-27. Moreover, in a recent rulemaking, we noted that “customers’ choice regarding retention of a properly functioning traditional meter should be respected” but found that a customer may only retain the use of a traditional meter in accordance with the procedures outlined in Ohio Adm.Code 4901:1-10-05, including paying the cost-based, tariffed opt-out service. *In re the Commission’s Review of the Rules for Electrical Safety and Service Standards Contained in Ohio Adm.Code Chapter 4901:1-10*, Case No. 17-1842-EL-ORD (*ESSS Rules Case*), Finding and Order (Feb. 26, 2020) at ¶¶ 12, 34, Entry on Rehearing (Jan. 27, 2021). As we have already found the substance of the complaint falls outside of our jurisdiction, we will not address whether the complaint should also be considered an improper collateral attack on the Commission’s prior decisions and, therefore, dismissed on that basis. As a consequence, the attorney examiner’s prior directive to CEI to refrain from terminating service pursuant to Ohio Adm.Code 4901-9-01 will no longer be applicable, and Ms. DeFrench will be responsible for paying her monthly opt-out fee. Entry (Apr. 26, 2022) at ¶ 7.

### III. ORDER

{¶ 12} It is, therefore,

{¶ 13} ORDERED, That Respondent’s motion to dismiss be granted and that Case No. 21-950-EL-CSS be dismissed with prejudice and closed of record. It is, further,

{¶ 14} ORDERED, That Complainant resume paying CEI’s monthly smart meter opt out fee, as entailed in the *AMO Rider Case*. It is, further,

{¶ 15} ORDERED, That a copy of this Entry be served upon each party and interested person of record.

**COMMISSIONERS:**

*Approving:*

Jenifer French, Chair  
Daniel R. Conway  
Lawrence K. Friedeman  
Dennis P. Deters  
John D. Williams

IMM/dmh



**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**7/12/2023 2:31:53 PM**

**in**

**Case No(s). 21-0950-EL-CSS**

Summary: Entry granting the motion to dismiss filed by The Cleveland Electric Illuminating Company, with prejudice, as Complainant has failed to state reasonable grounds for complaint electronically filed by Debbie S. Ryan on behalf of Public Utilities Commission of Ohio.