BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of )

Jeffrey Pitzer )

)

Complainant, ) Case No. 15-298-GE-CSS

)

v. ) )

Duke Energy Ohio, Inc. )

)

Respondent. )

**DUKE ENERGY OHIO, INC.’S MEMORANDUM IN OPPOSITION TO**

**COMPLAINANT JEFFREY PITZER’S MOTION TO AMEND COMPLAINT**

1. **Introduction**

The Public Utilities Commission of Ohio (“Commission”) should deny Complainant’s Motion to Amend Complaint under OAC 4901-1-06 because (a) Complainant does not attempt to explain why an amendment is necessary or appropriate at this late date; (b) Complainant and his attorney did not discover any “new” facts as a result of discovery in the case and could have included the supposed “additional administrative causes of action” in the original Complaint filed on February 11, 2015; and (c) Complainant did not file the present motion until more than five weeks after Duke Energy Ohio, Inc. (“Duke Energy Ohio” or “Company”) deposed the current and former Complainant and their brother, and less than six weeks before the hearing is scheduled to start on December 2, 2015.

1. **The Commission should deny Complainant’s motion.**
2. Procedural History

The original Complaint was filed on February 10, 2015. In that Complaint, counsel for the original Complainant Gail Lykins—who still represents the current Complainant Jeffrey Pitzer—explained, over the course of three pages, the facts and legal grounds for the administrative causes of action, including allegations that Duke Energy Ohio violated OAC 4901:1-18-05 and 4901:1-18-06. Duke Energy Ohio filed its Answer on February 27, 2015, and started conducting discovery in defense of the administrative claims set forth in the Complaint and preparing for the hearing then scheduled for August 25, 2015. That process necessarily included propounding detailed requests for admission, interrogatories and requests for production of documents on both Complainant and the Office of the Ohio Consumers’ Counsel (“OCC”), and later deposing Gail Lykins (the original Complainant), Jeffrey Pitzer (the current Complainant) and their brother Jack Easterling.

When the OCC sought to intervene in this case in May 2015, Duke Energy Ohio highlighted the fact that the Complaint was limited to causes of action based on alleged violations of OAC 4901:1-18-05 and 4901:1-18-06 and that the OCC wanted “to expand the focus of the case beyond the narrow, relevant facts and legal issues” set forth in the Complaint.[[1]](#footnote-1) In particular, Duke Energy Ohio expressly noted in its opposing memorandum that the OCC repeatedly referred to the “Winter Order” in its motion even though the “Winter Order” in effect during the 2011-2012 season had nothing whatsoever to do with the subject account or the allegations of the Complaint pending in this case.[[2]](#footnote-2) Complainant and his attorney certainly knew of the “Winter Order” by late May, if not far sooner, but never sought leave to amend the Complaint.

On June 16, 2015, Complainant moved to continue the August 25 hearing, to which Duke Energy Ohio consented. By Entry dated July 10, 2015, the Commission continued the hearing until October 7. On September 14, Complainant again moved to continue the hearing. By Entry dated September 17, the Commission granted that motion and continued the hearing to December 2-3, 2015. Notably that continuance came one day after Duke Energy Ohio deposed the current and former Complainant and her brother. Again, Complainant still did not seek to amend the Complaint.

Instead, Complainant waited another five weeks before seeking leave to file an Amended Complaint. In his motion, Complainant claims to have “additional administrative causes of action which should be included in the PUCO’s determination of this matter.”[[3]](#footnote-3) Upon review of the proposed Amended Complaint, the only additional cause of action included therein is one based on an alleged violation of the “Winter Order.”[[4]](#footnote-4) As previously noted, the original Complaint already sets forth claims based on OAC 4901:1-18-05 and 4901:1-18-06.

1. No Evidence Supports the So-Called New Administrative Claims.

The Complaintant now wants to prejudice Duke Energy Ohio by filing an Amended Complaint at this late stage when he and his counsel have known of the “Winter Order” for months and the proposed pleading is not supported by any evidence, as confirmed in the deposition testimony of Complainant, his wife, and her brother.[[5]](#footnote-5) Their collective testimony can accurately be described as follows: neither Complainant nor his wife or brother-in-law have personal knowledge of anything regarding the subject gas and electric account (Account #0120-0420-20-6, hereinafter the “Account”) in the name of Estill Easterling at 11312 Orchard Street, Cincinnati, Ohio 45241 (the “Property”). Further, they cannot identify anyone possessing such knowledge. They do not know anything about, and cannot dispute, the fact that Duke Energy Ohio mailed monthly bills to the Property, including bills containing disconnection notices for non-payment; they do not know anything about, and cannot dispute, the fact that the Company mailed a disconnect notice to the Property on October 19, 2011; they have no knowledge of any attempts by their mother, brother or anyone else to contact Duke Energy Ohio regarding their past due account or any requested payment plans; they have no evidence of any payment of $175 to the Company, which is a required condition precedent to a customer’s rights under the Winter Order; they do not know anything about, and cannot dispute, the fact that the Company’s service technician personally visited the Property on November 4, 2011, tried to reach one of the residents by knocking on the door, and delivered the required final, day-of disconnection notice to the Property before disconnecting the electric service; and they do not even know when the electric service was disconnected or what their mother and brother did thereafter. This uncontested evidence is of record in this case.

The complete lack of evidence supporting Complainant’s claims is overwhelming. Clearly, Complainant has no legal or factual grounds whatsoever to accuse Duke Energy Ohio of failing to comply with the “Winter Order” with respect to the Account at issue in this case. Notably absent from the proposed Amended Complaint is an allegation that the customer of record or anyone acting on his behalf made a payment of $175 on the subject Account and agreed to a payment plan for the balance, both of which are expressly mandated by the Winter Order. The deposition testimony filed of record fully demonstrates the futility of the “additional administrative causes of action” that Complainant wants to file in an Amended Complaint. Considering that both Complainant and his attorney know there are no legitimate grounds to pursue that claim, it would be a waste of time and valuable legal and administrative resources to burden the Commission and Duke Energy Ohio with what amounts to an unfounded and untimely administrative cause of action.

1. Amending the Complaint at this Late Stage Would Prejudice Duke Energy Ohio.

Complainant argues that the inclusion of new claims will not “change the tenor of this matter.” This statement is wrong. For more than eight months, Duke Energy Ohio has based its defense on the allegations of the Complaint filed in February 2015. The facts and legal claims set forth in the Complaint necessarily affected the Company’s defense strategy and the contents of the detailed requests for admission, interrogatories and requests for production of documents propounded by the Company on Complainant and the OCC, as well as Duke Energy Ohio’s objections and responses to their discovery requests. Those facts and legal claims also dictated the depositions of Complainant, his wife and her brother, all of which were completed more than five weeks ago. Moreover, the Company has started preparing written testimony for its witnesses, all of which is based on the existing facts and legal claims in the case, not some contrived claim based on the “Winter Order.” Duke Energy Ohio should not be prejudiced by a last-minute change by Complainant to add what is falsely characterized as a “new” administrative cause of action based on the “Winter Order.”

In fact, there is nothing “new” about the “Winter Order,” nor has Complainant identified a single fact which he supposedly learned for the first time during discovery. Complainant also has not explained that he was prevented from including that cause of action in the original Complaint. The reason is clear: nothing new has been learned. The “Winter Order” was referenced in filings by the OCC and Duke Energy Ohio more than five months ago when the OCC first tried to intervene in this case. Moreover, Complainant and his attorney have worked closely with the OCC and its attorneys for months, sharing information and strategy and discussing the case, to the point that Complainant and the OCC recently signed a Joint Defense Agreement.

Contrary to Complainant’s unsubstantiated assertion, “justice” does not require that Complainant be permitted to amend his complaint at this late date. Complainant has not learned any new facts during discovery that would remotely justify amending the complaint now. If anything, discovery has demonstrated conclusively how dubious Complainant’s case was in February 2015 and remains to this day. There is nothing “new” about a potential claim under the “Winter Order”—the OCC has mentioned it repeatedly and Duke Energy Ohio has reminded the OCC, Complainant and the Commission that the “Winter Order” is not applicable to the subject Account given the undeniable fact that Complainant’s mother-in-law and brother-in-law never made the required $175 payment or agreed to a payment plan. As such, there are no reasonable grounds to allow Complainant to add another baseless legal claim at this point when Duke Energy Ohio has spent significant resources already defending what amounts to a baseless claim to begin with.[[6]](#footnote-6)

WHEREFORE, Respondent Duke Energy Ohio, Inc. requests that the Commission deny the Motion to Amend Complaint filed by Complainant Jeffrey Pitzer in its entirety.

Respectfully submitted,

/s/ Robert A. McMahon

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via email on this 23rd day of October, 2015, upon the following counsel of record:

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| --- | --- |
| Donald A. Lane, Esq.  Droder & Miller Co., L.P.A.  125 W. Central Parkway  Cincinnati, OH 45202 | Kimberly W. Bojko, Esq.  Carpenter Lipps & Leland LLP  280 Plaza, Suite 1300  280 N. High Street  Columbus, OH 43215 |
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/s/ Robert A. McMahon

1. See, Duke Energy Ohio, Inc.’s Memorandum in Opposition to Motion to Intervene by the Office of the Ohio Consumers’ Counsel, filed 5/22/15, at 1. [↑](#footnote-ref-1)
2. See, *In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for 2011-2012 Winter Heating Season*, Case No. 11-4913-GE-UNC, Finding and Order. [↑](#footnote-ref-2)
3. Complainant’s motion at 1. [↑](#footnote-ref-3)
4. See, proposed Amended Complaint, at ¶7. [↑](#footnote-ref-4)
5. Duke Energy Ohio filed those deposition transcripts with the Commission on October 6, 2015. [↑](#footnote-ref-5)
6. *In the Matter of the Complaint of the Ohio Consumers’ Counsel et al. v. Interstate Gas Supply, Inc.*, Case No. 10-2395-GA-CSS, Entry, at p.5 (Nov. 2, 2011) (denying motion for leave to amend complaint). [↑](#footnote-ref-6)