**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
| --- | --- | --- |
| In the Matter of the Complaint of Jeffrey Pitzer,Complainant,v.Duke Energy Ohio, Inc.,Respondent. | ) ) ))))))) | Case No. 15-298-GE-CSS |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**REPLY TO DUKE’S MEMORANDUM IN OPPOSITION TO COMPLAINANT’S SECOND MOTION TO AMEND**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**I. INTRODUCTION**

Ohio utilities must adhere to the intent and requirements of the PUCO’s winter reconnect orders.[[1]](#footnote-1) This case is about whether Duke Energy Ohio, Inc. (“Duke”) unlawfully disconnected electrical service at a residence in November 2011, and two Ohioans died.

The original Complaint asserted that Duke violated rules of the Public Utilities Commission of Ohio (“Commission” or “PUCO”) regarding disconnection of electrical service during the winter heating season.[[2]](#footnote-2) On October 22, 2015, the Complainant filed a motion seeking PUCO permission to amend the Complaint to include alleged violations of the PUCO’s 2011 Winter Reconnect Order.[[3]](#footnote-3)

On October 23, 2015, Duke filed an opposition to Complainant’s motion. Duke contends that there is no evidence to support the new claims in the proposed amended Complaint.[[4]](#footnote-4) Duke also asserts that it would be prejudiced if the Complaint were amended because it has based its defense on the allegations in the original Complaint and has begun writing testimony addressing those allegations.[[5]](#footnote-5)

The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor in this proceeding,[[6]](#footnote-6) replies to Duke’s opposition. Duke’s arguments are flawed. The Complainant in this case has shown good cause for amending the Complaint, and has thus satisfied Ohio Adm. Code 4901-1-06. Further, leave to file an amended complaint should be freely given “when justice so requires.”[[7]](#footnote-7) Justice in this case requires that Complainant’s Second Motion to Amend should be granted.

**II. STANDARD OF REVIEW**

Ohio Adm. Code 4901-1-06 allows the commission, the legal director, the deputy legal director, or an attorney examiner, upon their own motion or upon motion of any party, to amend a complaint for good cause shown. As discussed below, there is good cause for amending the Complaint.

**III. DISCUSSION**

**A. Rule 4901-1-06 permits a party to amend a complaint for good cause and good cause has been shown in this case.**

The PUCO should find that there is good cause for amending the Complaint. The additional issue in the proposed amended complaint regarding the 2011 Winter Reconnect Order is related to the issue surrounding Duke’s misapplication of the PUCO’s winter heating rules. Both the winter heating rules and the 2011 Winter Reconnect Order were in effect when Duke disconnected service to the Easterlings. Hence whether Duke complied with the 2011 Winter Reconnect Order in disconnecting service to the Easterlings is relevant to this case.

The PUCO has found good cause for amending a complaint where the complainant seeks to raise additional issues that are relevant to the case. In *Republic Engineered Products v. American Electric Power*,[[8]](#footnote-8) for example, the PUCO allowed the complainant to add claims that had not been raised in the original complaint. There, Republic was facing disconnection of service and had filed its complaint hurriedly.[[9]](#footnote-9) After further review of the facts and potential claims in the matter, Republic sought to amend its complaint “in order to present all facts, claims, and defenses necessary to resolve this dispute justly and fairly.”[[10]](#footnote-10) Over the utility’s objections, the PUCO found good cause for amending the complaint.[[11]](#footnote-11)

How long a case has been pending is not always dispositive to a finding of good cause for amending a complaint. The PUCO has found good cause for amending a complaint to exist many months after the complaint is filed. For example, in *Rite Rug v. Ohio Bell Telephone Co.*, Rite Rug filed its complaint in April 1993.[[12]](#footnote-12) Thirteen months later, in May 1994, Rite Rug filed its amended complaint, then filed a motion for leave to amend approximately six weeks after that.[[13]](#footnote-13) Rite Rug added two paragraphs to the complaint “based on information gained through the discovery activities in this case.”[[14]](#footnote-14) The additional paragraphs alleged that Ohio Bell’s record retention policies prevented Rite Rug from presenting the strongest evidence in favor of its case.[[15]](#footnote-15) The PUCO found good cause to amend the complaint.[[16]](#footnote-16)

In this proceeding, the Complainant seeks to amend the Complaint in order to include another, but related, legal theory, i.e., that Duke’s actions also violated the PUCO’s 2011 Winter Reconnect Order. The PUCO’s winter heating rules and the 2011 Winter Reconnect Order are related in that both set out procedures that utilities must follow before disconnecting customers during the winter months. And both were in effect at the time Duke disconnected electric service to the Easterlings. The Complainant is not alleging new facts or adding new, unrelated counts to the Complaint.[[17]](#footnote-17) Instead, the Complainant merely seeks to include a second legal theory that Duke was already aware of as an issue in this case.

There is good cause for amending the Complaint as requested in the Complainant’s Motion. The PUCO should grant the Second Motion to Amend.

**B. Ohio Civ. R. 15(A) favors a liberal policy of amending complaints “when justice so requires.”**

Ohio’s Rules of Civil Procedure provide for a liberal policy of amending complaints. Ohio Civ. R. 15(A) mandates that courts “shall freely give leave when justice so requires.” In this case, justice requires that the PUCO grant Complainant’s Second Motion to Amend.

Complainant originally filed suit in the Hamilton County Court of Common Pleas. In the court case, the complaint noted that Duke disconnected service to the Easterlings on November 4, 2011.[[18]](#footnote-18) The complaint there also noted that “[t]his discontinuation of service remained in effect until November 21, 2011, in violation of Ohio Revised Code Section 4933.121, regulations promulgated by the Public Utilities Commission of Ohio and Duke’s own internal policies and procedures, all relating to the discontinuation of natural gas and electrical service to residential customers during expected cold weather seasons.”[[19]](#footnote-19) The court ruled that the PUCO has exclusive jurisdiction over the matter “because the claim is for Defendant’s termination of utilities”[[20]](#footnote-20) and dismissed the case. In the Complaint in this proceeding, the Complainant specifically mentioned PUCO rules applicable to disconnections of service during the winter months, i.e., Ohio Adm. Code 4901:1-18-06(B) and 4901:1-18-05.[[21]](#footnote-21)

But in its Answer to the Complaint, Duke asserted as an affirmative defense that “at all times relevant to Complainant’s claims the Company has provided reasonable and adequate service and billed its customer Estill Easterling according to all applicable provisions of Title 49 of the Ohio Revised Code and regulations promulgated thereunder….”[[22]](#footnote-22) Duke itself brought into the case more than just the two provisions of the PUCO’s rules cited in the Complaint.

Among the applicable provisions of Title 49 of the Ohio Revised Code is R.C. 4905.54. This requires that “[e]very public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force.” The 2011 Winter Reconnect Order was issued under R.C. 4909.16.[[23]](#footnote-23) Hence a determination regarding Duke’s alleged compliance with the 2011 Winter Reconnect Order is pertinent to Duke’s claim that it provided reasonable and adequate service to the Easterlings, whose electric service Duke disconnected during the 2011 winter heating season.

Moreover, granting the Second Motion to Amend is necessary for justice in this case. Duke would have the PUCO ignore the fact that the 2011 Winter Reconnect Order extended the winter heating season into the latter part of October. Duke would also have the PUCO ignore that the 2011 Winter Reconnect Order included directives beyond the process contained in the winter heating rules. One directive is that the PUCO “expects that the utility companies under our jurisdiction will assist customers in every way possible to maintain their service for heating purposes.”[[24]](#footnote-24) Another is that the PUCO “expects the utilities to err on the side of maintaining service when there is a doubt as to the applicability or the interpretation of a rule.”[[25]](#footnote-25) Duke would also have the PUCO ignore its declaration that “[i]f the Commission determines that a utility is not following these procedures, we will take those steps we deem appropriate to protect the customers served by that utility.”[[26]](#footnote-26)

For justice to be served in this case, the PUCO needs to look beyond the requirements in the winter heating rules. The PUCO should also consider the special procedures that were in effect during November 2011 through the Winter Reconnect Order. The PUCO should grant Complainant’s Motion.

**C. The evidence in the record supports granting the Complainant’s Motion.**

Duke contends that there is no evidence to support the new claims in the proposed amended Complaint.[[27]](#footnote-27) Duke is wrong.

Duke’s own statements in the record of this proceeding and elsewhere point to Duke’s misapplication of the winter heating rules and the 2011 Winter Reconnect Order. In this case, Duke has repeatedly contended that the special procedures contained in the winter rules apply only if the customer incurred the charges leading to disconnection during the winter heating season.[[28]](#footnote-28)

Duke ignores the fact that both the winter heating rules and the 2011 Winter Reconnect Order provide otherwise. Both Ohio Adm. Code 4901:1-18-06(B) and the 2011 Winter Reconnect Order makes no distinction as to when arrearages arise. Rather, both the rule and the 2011 Winter Reconnect Order focus on the fact that customers need special protection during the winter heating season, regardless of when the usage occurred.

The language contained in the 2011 Winter Reconnect Order bears this out. For instance, in the 2011 Winter Reconnect Order the PUCO found a “continuing emergency” under R.C. 4901.16 based on “a number of Ohio citizens [who] will enter the winter season without utility service for heating purposes.”[[29]](#footnote-29) This finding can only make sense if the Winter Reconnect Order applies to customers who are disconnected for arrearages that exist prior to the winter heating season.

 Consistent with this application, the 2011 Winter Reconnect Order contained special reconnection procedures for those who have had their service disconnected. For reconnection, there is no requirement for the disconnection to have occurred during the winter heating season or relate to charges for service during the winter heating season.[[30]](#footnote-30) The PUCO also addressed special reconnection procedures for customers when they make a payment of less than $175 which cures “any default previously owed to the utility in order to maintain service, or requests reconnection of service.”[[31]](#footnote-31) Again there was no requirement in the 2011 Winter Reconnect Order, for purposes of reconnecting customers, that the service or disconnection have occurred during the winter season.

Moreover, accepting Duke’s viewpoint would contravene the PUCO’s directive in the 2011 Winter Reconnect Order and the PUCO’s instruction to “err on the side of maintaining service when there is a doubt as to the applicability or the interpretation of a rule.”[[32]](#footnote-32) Duke’s belief is also inconsistent with the PUCO’s expectation that, for the 2011-2012 winter heating season, “utility companies under our jurisdiction will assist customers in every way possible to maintain their service for heating purposes.”[[33]](#footnote-33)

Duke’s own statements expressing its misapplication of the winter heating rules provide ample evidence that Duke also misapplied the 2011 Winter Reconnect Order. The PUCO should grant Complainant’s Motion.

**D. Granting the Motion would not prejudice Duke because Duke has been aware that issues surrounding the 2011 Winter Reconnect Order would be a part of this case.**

Duke also asserts that it would be prejudiced if the Complaint were amended because it has based its defense on the allegations in the original Complaint and has begun writing testimony addressing those allegations.[[34]](#footnote-34) But the Complainant’s proposed amendment to the Complaint does not allege any new facts or add any new, unrelated counts to the Complaint. Instead, the proposed amendment merely adds another legal theory that is related to the counts already in the Complaint. This should not unduly affect Duke’s legal strategy, especially with the hearing being more than a month away.

Moreover, Duke itself noted that OCC raised issues surrounding the 2011 Winter Reconnect Order in our Motion to Intervene.[[35]](#footnote-35) Hence, Duke’s claims that its defense strategy and the preparation of witness testimony are based solely on the allegations in the original Complaint ring hollow.

Duke has not shown that it would be prejudiced by the PUCO granting the Complainant’s Motion. The PUCO should reject Duke’s argument.

**IV. CONCLUSION**

Granting the Complainant’s Motion to amend the Complaint is required for justice in this case. Duke’s arguments against the Motion are flawed. The PUCO should grant the Motion.

Respectfully submitted,

BRUCE J. WESTON (0016973)

OHIO CONSUMERS’ COUNSEL

*/s/ Terry L. Etter*

Kimberly W. Bojko (0069402), Counsel of Record Carpenter Lipps & Leland LLP 280 Plaza, Suite 1300 280 N. High Street Columbus, Ohio 43215 Telephone: (614) 365-4124 bojko@carpenterlipps.com (willing to accept email service)

*Outside Counsel for the Office of the Ohio Consumers’ Counsel*

Terry L Etter (0067445) Assistant Consumers’ Counsel **Office of the Ohio Consumers’ Counsel** 10 West Broad Street, Suite 1800 Columbus, Ohio 43215-3485 Telephone [Etter Direct]: (614) 466-7964 terry.etter@occ.ohio.gov (willing to accept email service)

**CERTIFICATE OF SERVICE**

 I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on October 30, 2015.

*/s/ Terry L. Etter*

 Terry L. Etter

Assistant Consumers’ Counsel

|  |  |
| --- | --- |
| Robert A. McMahonEberly McMahon Copetas LLC2321 Kemper Lane, Suite 100Cincinnati, Ohio 45206Bmcmahon@emclawyers.comDonald A. LaneDroder & Miller Co., LPA125 West Central ParkwayCincinnati, Ohio 45202-1006dlane@drodermiller.com  | Amy B. SpillerElizabeth H. Watts139 East Broad StreetCincinnati, Ohio 45202Amy.spiller@duke-energy.comElizabeth.watts@duke-energy.com |

1. See *In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season*, Case No. 15-1460-GE-UNC, Entry on Rehearing (October 28, 2015) at 5. [↑](#footnote-ref-1)
2. See Complaint at 2-3. [↑](#footnote-ref-2)
3. See Second Motion to Amend Complaint, proposed amended Complaint at 2-3. The 2011 Winter Reconnect Order is *In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season*, Case No. 11-4913-GE-UNC, Finding and Order (September 14, 2011). [↑](#footnote-ref-3)
4. Duke Opposition at 3-4. [↑](#footnote-ref-4)
5. Id. at 5. [↑](#footnote-ref-5)
6. OCC’s Motion to Intervene was granted in an Entry dated July 10, 2015. [↑](#footnote-ref-6)
7. See Ohio Civ. R. 15(A). [↑](#footnote-ref-7)
8. Case No. 10-984-EL-CSS. [↑](#footnote-ref-8)
9. Id., Entry (July 30, 2010), ¶ 3. [↑](#footnote-ref-9)
10. Id. Republic also argued that the proceeding had been pending only a short time, and that discovery had not yet begun. Id. [↑](#footnote-ref-10)
11. Id., ¶ 5. See also *Marc G. Moscarillo, d.b.a. Ohio Call Advantage v. Western Reserve Telephone Co.*, Case No. 95-1099-TP-CSS, Entry (April 16, 1996), ¶ 9 (allowing respondent to amend its answer to raise an additional relevant issue based on respondent’s new understanding of the issues in the case). [↑](#footnote-ref-11)
12. Case No. 93-692-TP-CSS. [↑](#footnote-ref-12)
13. See id., Entry (July 22, 1994), ¶¶ 1-3. [↑](#footnote-ref-13)
14. Id., ¶ 5. The information had been difficult to obtain. Further, the respondent in the case did not oppose the motion to amend. Id., ¶ 3. [↑](#footnote-ref-14)
15. Id., ¶ 5. [↑](#footnote-ref-15)
16. Id., ¶ 6. [↑](#footnote-ref-16)
17. See *Virgil Cochran v. Ohio Edison Company*, Case No. 91-900-EL-CSS, Entry (March 31, 1992). [↑](#footnote-ref-17)
18. Complaint for Damages with Jury Demand filed in Hamilton County Common Pleas Court on November 15, 2013 (attached to the Complaint in this case). [↑](#footnote-ref-18)
19. Id., ¶ 9 [↑](#footnote-ref-19)
20. Hamilton County Common Pleas Court decision attached to the Complaint. [↑](#footnote-ref-20)
21. See Complaint at 2-3. [↑](#footnote-ref-21)
22. Answer (February 27, 2015), ¶ 14 (emphasis added). [↑](#footnote-ref-22)
23. 2011 Winter Reconnect Order at 1. [↑](#footnote-ref-23)
24. Id. at 2. [↑](#footnote-ref-24)
25. Id. [↑](#footnote-ref-25)
26. Id. at 7. [↑](#footnote-ref-26)
27. Duke Opposition at 3-4. [↑](#footnote-ref-27)
28. See Duke’s Answer at 4 (“Duke Energy Ohio denies that the 10-day notice requirement under O.A.C. 4901:1-18-06(B) applied to the subject disconnection of electric service at the Property because the electric service was disconnected only for the non-payment of utility services incurred during August, September and October 2011, and relevant late fees, and *not* for the nonpayment of charges incurred during the winter heating season”) (emphasis in original); id. at 5 (“Duke Energy Ohio denies that O.A.C. 4901:1-18-06(B)(3) applies to the Company’s disconnection of the electric service at the Property on November 4, 2011, because (a) the Company did not disconnect Estill Easterling’s electric service for any unpaid bills which included usage occurring during November first to April fifteenth of each year,….”); id. at 7 (“the customer’s services were not subject to disconnection for nonpayment of charges incurred during the winter heating season”); Duke’s Memorandum Contra OCC’s Motion to Intervene (May 22, 2015) at 4 (“The Duke Energy Ohio bills for the Account attached to the Complaint demonstrate that the Company disconnected the electric service to the Account for the non-payment of electric services provided to the Account from August 3 through September 1, 2011. … Therefore, the allegations *in* the Complaint are contradicted by the utility bills attached *to* the Complaint because the Account was not disconnected for the non-payment of any bills including usage during the winter heating season”) (emphasis in original); id. at 8 (“the Account was not disconnected for unpaid bills including electric charges incurred during the winter heating season”); Duke’s Memorandum in Opposition to Complainant Jeffrey Pitzer’s Second Motion to Compel (August 27, 2015) at 4 (“Moreover, the Duke Energy Ohio bills for the Account attached to the Complaint demonstrate that the Company disconnected the electric service to the Account for the non-payment of electric services provided to the Account from August 3 through September 1, 2011. … Therefore, the allegations *in* the Complaint are contradicted by the utility bills attached *to* the Complaint because the Account was not disconnected for the non-payment of any bills including usage during the winter heating season.”) (emphasis in original). [↑](#footnote-ref-28)
29. 2011 Winter Reconnect Order at 2 (emphasis added). [↑](#footnote-ref-29)
30. Id. at 3-6. [↑](#footnote-ref-30)
31. Id. at 7. Even if the Easterlings did not make the $175 payment to cure “any default previously owed to the utility,” the Easterlings did make a $143 payment on October 12, 2011, which shows that they were at least attempting to pay the arrearages on the account. [↑](#footnote-ref-31)
32. Id. at 2. [↑](#footnote-ref-32)
33. Id. [↑](#footnote-ref-33)
34. Opposition at 5. [↑](#footnote-ref-34)
35. Id. [↑](#footnote-ref-35)