

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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2011 APR 18 PM 3:00

PUCO

Brenda Fitzgerald
61 Hunters Court
Amelia, OH 45102

Complainant,

v.

Duke Energy Ohio, Inc.

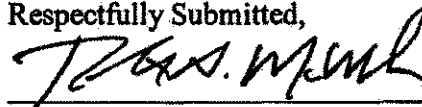
Respondent

Case No. 10-791-EL-CSS

**DUKE ENERGY OHIO, INC.'S MOTION TO QUASH
COMPLAINANT'S NINE SUBPOENAS AND
REQUEST FOR EXPEDITED TREATMENT**

Pursuant to Rule 4901-1-25(C), Ohio Administrative Code (O.A.C), Duke Energy Ohio, Inc. ("DE-Ohio") moves this Commission to quash the nine subpoenas issued on April 12, 2011, pursuant to the motion by Complainant. The subpoenas are improper for reasons set forth more fully in the memorandum accompanying this motion. While the subpoenas have not yet been served, DE-Ohio does not want to waste time and, therefore, also requests expedited treatment of this motion to quash, pursuant to Rule 4901-1-12(C), O. A.C., because the hearing in this matter is scheduled for April 27, 2011.

Respectfully Submitted,



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MEMORANDUM IN SUPPORT

INTRODUCTION AND FACTS

On June 8, 2010, Complainant Brenda Fitzgerald¹ filed a complaint against DE-Ohio and, to the best of the company's ability to decipher the complaint, accused DE-Ohio of unfair billing practices relating to the "Winter Rule." DE-Ohio filed its answer on June 28, 2010. Throughout the case DE-Ohio has acknowledged that the company did not advise either Complainant or her husband of Complainant's eligibility for the Winter Rule during a telephone call on April 14, 2010; however, DE-Ohio further explained that the company did explain the rule to Complainant at the end of March 2010 and that Complainant never advised DE-Ohio that she wanted to pursue that payment program. Those facts are not in dispute.

The parties have conducted written discovery, and DE-Ohio has produced all relevant and responsive information to Complainant in response to her discovery requests. Complainant filed a baseless motion to compel which the Commission, by Entry dated April 4, 2011, denied virtually in its entirety. The only information that the Commission ordered DE-Ohio to produce related to the names, job titles and job descriptions of the company's employees who spoke to Complainant or her husband concerning the utility account. DE-Ohio produced that information on April 14th.

Notwithstanding the uncontested facts and extremely narrow scope of the issues (if any) in this case and the Commission's Entry dated April 4th, Complainant filed a motion and was permitted to serve nine (9!) subpoenas for witnesses to appear at the April 27th hearing. For the reasons set forth below, the Commission should quash 8 of those subpoenas in their

¹ Complainant routinely files documents with the Commission which are either signed by her husband Gerard Fitzgerald or which identify Mr. Fitzgerald as a complainant in this case. Mr. Fitzgerald is not and was not DE-Ohio's customer on the subject account and, therefore, has no standing in these proceedings.

entirety and partially as to the 9th subpoena—the subpoena to DE-Ohio’s employee Cindy Givens—because those subpoenas are unreasonable and oppressive, and designed to harass DE-Ohio’s agents and representatives, or seek the testimony of individuals who do not even live or work in the State of Ohio.

DISCUSSION

To accuse Complainant of being on a “fishing expedition” would be an insult to actual fishermen throughout Ohio who have a rational basis to pursue fish (food, sport) and appropriately use limited tools (rods and reels) to catch what they seek. Here, Complainant and DE-Ohio already agree to the facts surrounding the events leading up to Complainant’s disconnection of services in April 2010 and the resulting payment to restore services, as well as the company’s inadvertent failure to advise Complainant or her husband for a second time about the eligibility for the Winter Rule. Those uncontested facts are set forth in the testimony of Cindy Givens, which DE-Ohio filed on October 27, 2010, in preparation for the originally scheduled hearing. Rather than focus on what is actually at issue in this case and the Commission’s limited jurisdiction over service-related complaints, Complainant wants to turn the hearing into a 3-ring circus about ludicrous and unsubstantiated conspiracy theories about extortion and so-called criminal behavior that have no basis or business being in a complaint before the Commission, and which are not supported by a shred of evidence.

In addition, Complainant mistakenly thinks that the Commission’s powers go outside the State of Ohio, which is simply not true. The Commission does not have any power over individuals living and working outside Ohio, and cannot compel their attendance at a hearing in Columbus on April 27th via a subpoena. The Commission derives its powers from the Ohio legislature, and nothing in the Ohio Revised Code or Ohio Administrative Code extends the Commission’s reach beyond the state borders. In fact, the opposite is true, as reflected in

ORC 4903.04. That statute provides that a witness under subpoena from the Commission may only be compelled to testify by courts of common pleas, which lack the power to subpoena witnesses outside of this state. See also, ORC 2319.09, the Ohio version of Uniform Foreign Depositions Act (proscribing the procedures by which state courts in Ohio may compel the jurisdiction of residents in Ohio to testify in cases outside Ohio). Therefore, and as explained further below, each of Complainant's subpoenas directed to individuals located outside Ohio must be quashed for that simple reason.

Finally, before getting into the specifics as to each subpoena, it is important to note the impact of any attempt by the Commission to overstep its jurisdictional limits. If the Commission were to try to force any of these non-employee and out-of-state witnesses to attend the hearing, that action would only increase the ultimate costs borne by ratepayers. Not only would the subpoenas ultimately be quashed or the witness testimony found to be inadmissible and irrelevant, but DE-Ohio may be forced to take an interlocutory appeal of any related orders. Neither DE-Ohio nor the company's ratepayers should be forced to take those unnecessary procedural steps and waste legal fees and costs in the process in a case of this nature where the underlying, relevant facts are not in dispute.

The Commission should quash Complainant's subpoenas, as follows:

- Cindy Mack: Ms. Mack works for the Commission. While the Attorney General's office may separately move to quash this subpoena, the Commission need not wait for that motion because the subpoena is inappropriate on its face under Rule 4901-1-25(D), which prohibits parties from issuing subpoenas to the Commission's staff.
- Jim Rogers: Mr. Rogers is the Chairman, President and CEO of Duke Energy Corporation in Charlotte, North Carolina, the parent company of DE-Ohio. Mr. Rogers is not directly employed by DE-Ohio. Moreover, Mr. Rogers lives and works

outside Ohio, meaning he is outside the jurisdictional limits of the Commission's power to subpoena him. Finally, as confirmed by the account records already produced by DE-Ohio to Complainant, there is no evidence that Mr. Rogers has personal knowledge of any relevant facts or information concerning Complainant's account—or even knows who Complainant is. The subpoena to Mr. Rogers is unreasonable and oppressive, and simply designed to harass him and the company. Even if the Commission had jurisdiction over him, which it does not, the Commission still should quash that subpoena.

- **Cindy Laycock and Pam Ball:** both Ms. Laycock and Ms. Ball are customer service representatives employed by Duke Energy Indiana, Inc., an affiliated company based in Plainfield, Indiana. For the same reasons stated above with respect to the subpoena directed to Mr. Rogers, the Commission lacks jurisdiction over both individuals and, therefore, must quash both subpoenas. In addition, neither individual would add anything to the equation during the hearing as DE-Ohio already acknowledged the underlying facts via Cindy Givens' testimony. Therefore, any testimony by Ms. Laycock and/or Ms. Ball would be cumulative and irrelevant.
- **La'Tasha Savage, Jonathan Green and Veronica Cage:** none of these individuals works for DE-Ohio or even an affiliate of the company. They are **former employees** of a contract company, ER Solutions, Inc., and previously worked out of that company's offices in either Montgomery, Alabama or Atlanta, Georgia. None of those individuals resides or works in Ohio and, therefore, the Commission lacks jurisdiction over them. And, since neither person works for DE-Ohio, attempting to serve the subpoenas on them via service on DE-Ohio's attorney is not proper. Therefore, these subpoenas must be quashed.

- **Vel Mitchell:** Ms. Mitchell is a customer relations representative in Cincinnati, who now handles routine back office work. DE-Ohio does not understand why Complainant issued a subpoena for Ms. Mitchell's appearance at the hearing as DE-Ohio cannot locate any record that Ms. Mitchell ever did *anything* in connection with Complainant's utility account; DE-Ohio could not locate any records of calls between her and Complainant (or Mr. Fitzgerald), no data entries by her, etc. Requiring Ms. Mitchell to appear at the hearing is both unreasonable and oppressive. Therefore, the Commission should quash the subpoena to Vel Mitchell.
- **Cindy Givens:** Complainant's request to have Ms. Givens appear and testify is, quite literally, the only reasonable request submitted by Complainant. Since Ms. Givens is already scheduled to appear and her testimony has already been filed of record in this case, DE-Ohio does not contest that aspect of the subpoena. However, the document request portion of the subpoena is way too broad and unduly burdensome. DE-Ohio has already produced all account records, utility bills and recorded phone call relating to Complainant and which remain in the company's possession. There is no need for Ms. Givens to bring with her "Any notes or material written or recorded, relevant to this case." Complainant already has that information. Asking DE-Ohio to bring to the hearing that which the company already produced is unreasonable and oppressive. Moreover, the scope of this request impacts confidential information protected by the attorney-client privilege. Therefore, the Commission should quash the document production portion of this subpoena.

REQUEST FOR EXPEDITED TREATMENT

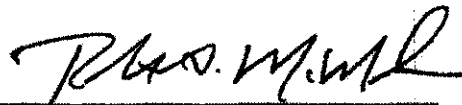
Rule 4901-1-12(C), O.A.C. provides that a moving party may request expedited treatment of a motion. DE-Ohio requests such expedited treatment because the hearing in

this proceeding is scheduled for April 27, 2011, less than 2 weeks from now. The Commission must resolve this issue well in advance of the hearing so that DE-Ohio may proceed accordingly. DE-Ohio must know, prior to the hearing date, whether or not it must provide additional witnesses and have them available in Columbus on that date and what documents and information must be produced at the hearing. Alternatively, DE-Ohio must decide whether to take an interlocutory appeal of any order issued by the Commission which oversteps the Commission's jurisdiction over out-of-state witnesses. Therefore, given the time frame involved, the Commission should handle this motion on an expedited basis.

CONCLUSION

The subpoenas issued pursuant to Complainant's motion on April 12, 2011, seek to compel the appearance of individuals who are far beyond the scope of the Commission's jurisdiction and who otherwise have nothing relevant or admissible about which to testify at the hearing. In short, these subpoenas are unreasonable and oppressive, and designed to harass DE-Ohio and employees of out-of-state affiliated companies and third-party contractors. Therefore, DE-Ohio respectfully requests that the Commission quash 8 of the subpoenas in their entirety and partially quash the subpoena directed to Cindy Givens with respect to the production of documents at the hearing, and do so in an expedited manner.

Respectfully Submitted,



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Duke Energy Ohio, Inc

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing on Complainant by first class U.S. Mail, postage prepaid, on this 15th day of April, 2011.

Brenda Fitzgerald
Gerard Fitzgerald
61 Hunters Court
Amelia, OH 45102


Robert A. McMahon