

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

Gail Lykins, Personal Representative of	)	
Dorothy Easterling and Estill Easterling	)	
11312 Orchard Street	)	
Cincinnati, OH 45241	)	
	)	
Complainant,	)	Case No. 15-298-GE-CSS
	)	
v.	)	
	)	
Duke Energy Ohio, Inc.	)	
	)	
Respondent.	)	

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**DUKE ENERGY OHIO, INC.’ MEMORANDUM IN OPPOSITION TO  
MOTION TO INTERVENE BY THE OFFICE OF THE  
OHIO CONSUMERS’ COUNSEL**

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**I. Introduction**

The Public Utilities Commission of Ohio (“Commission”) should deny the motion to intervene filed by the Office of the Ohio Consumers’ Counsel (“OCC”) because the OCC does not satisfy the statutory and regulatory criteria for intervention. The factual and legal issues in this case concern dates and events only in 2011. At issue here is a single customer’s account and the notices given and procedures taken by Duke Energy Ohio, Inc. (“Duke Energy Ohio” or “Company”) leading up to and surrounding the disconnection of the electric service to that account for non-payment. Neither current regulations nor today’s practices are at issue in this case, meaning no one but the named Complainant has any interest in this case. Moreover, Complainant has counsel and, therefore, does not need the statutory representation of the OCC, who inevitably will want to expand the focus of the case beyond the narrow, relevant facts and legal issues.

## **II. Factual Background of the Account and Complainant's Claim**

To fully appreciate the impropriety of the OCC's motion, its request must be considered in respect of the issues and underlying facts relevant to this complaint proceeding. Duke Energy Ohio provides the proper context below.

This case is about the limited history from 2011 of one of Duke Energy Ohio's customer accounts, namely the 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"). When Duke Energy Ohio originally filed its Answer to the Complaint, the Company was under the impression that the named customer on the account (Estill Easterling) was one of the decedents, whose interests, along with those of his mother Dorothy Easterling, are represented by Complainant, the Personal Representative of the Estates of Dorothy Easterling and Estill Easterling, and Complainant's counsel. Duke Energy Ohio later learned that its customer on this Account was Estill Easterling III, the deceased husband and father of Dorothy Easterling and Estill Easterling IV, respectively, and that the Easterlings continued to receive gas and electric service to the Property for years after the death of Estill Easterling III. That fact is and will be important with respect to the application of certain regulatory provisions relating to the disconnection of services to the Account for non-payment.

The fact that the Account had past due charges and, therefore, was subject to disconnection for non-payment after October 28, 2011, is not contested. In her Complaint, Complainant admits that, "[a]t the time Duke disconnected the services at the property, the account had a balance of \$381.25, with \$233.01 of the balance being comprised of past due charges."<sup>1</sup> Complainant also attached to her Complaint select Duke Energy Ohio bills for the Account. The bill issued by Duke

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<sup>1</sup> Complaint at 2.

Energy Ohio in October 2011 identifies the past due charges and is clearly labeled as a “DISCONNECT NOTICE.”<sup>2</sup> Moreover, as more fully explained in Duke Energy Ohio’s Answer, the Company included a bill insert<sup>3</sup> with the October 2011 bill. That insert fully explains the various issues, rights, payment plans and contact information relating to the Account and all of Duke Energy Ohio’s consumer accounts.

Despite the required notices of disconnection having been made by Duke Energy Ohio, the Complainant alleges that the Company failed to comply with O.A.C. 4901:1-18-05(B), which concerns the winter heating season.<sup>4</sup> That season is defined under Commission regulation as the “time period from November first through April fifteenth.”<sup>5</sup> Significantly, the winter heating season is not synonymous with the Winter Rule. Notwithstanding this undeniable fact and the specific allegations in the Complaint, the OCC apparently wants to litigate here the application of the Winter Rule<sup>6</sup> with respect to this Account should it be allowed to intervene.

But such an attempt is improper, given the facts at issue in this case. Indeed, the Complainant has not alleged that the Company’s customer (Estill Easterling III), Dorothy Easterling, Estill Easterling IV, or anyone acting on any of their behalves contacted Duke Energy Ohio during the period relevant to the Winter Rule, made a payment of \$175 to Duke Energy Ohio, or entered into a payment plan with the Company, all of which are required under the Winter Rule.<sup>7</sup> The history of the Account at issue in this action firmly establishes that the Winter Rule

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<sup>2</sup> See the Duke Energy Ohio monthly bill for the Account generated on October 4, 2011, attached to the Complaint.

<sup>3</sup> “Ohio Residential Disconnection Notice” dated October 2011.

<sup>4</sup> Complaint, at 3.

<sup>5</sup> O.A.C. 4901:1-18-01(U).

<sup>6</sup> See, OCC motion at footnote 4 and reference to the 2011 winter reconnection order (Case No. 11-4913-GE-UNC, Finding and Order (September 14, 2011)), meaning the “Winter Rule.” See also, OCC Motion at 2 (“This case involves a possible violation of...the PUCO’s emergency orders... ”)(Emphasis added).

<sup>7</sup> *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; see also Complaint, at 2, which references a payment of \$143.49 in October 2011.

has no bearing whatsoever on Complainant's claims. The only regulatory provisions at issue in the Complaint in this action are OAC 4901:1-18-05 and 4901:1-18-06, and Duke Energy Ohio fully complied with both provisions.

The OCC also fails to recognize that Complainant's Complaint, which necessarily includes all attachments thereto, actually does not support a viable claim under O.A.C. 4901:1-18-05. 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. On its face, the additional one-third payment plan available to a customer under O.A.C. 4901:1-18-05(B)(3) is only "for any bills that include any usage occurring from November first to April fifteenth of each year."<sup>8</sup> 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.

Moreover, Duke Energy Ohio is only required to offer the payment plans identified in O.A.C. 4901:1-18-05 to the customer once the customer contacts the Company.<sup>9</sup> As explained in Duke Energy Ohio's Answer, no one ever contacted the Company to avoid a delinquency or propose a payment plan. Nothing in O.A.C. 4901:1-18-05 remotely indicates that any of the identified payment plans are automatically triggered when a utility receives a partial payment, as Complainant, and apparently the OCC, seem to believe. That is especially true when, as in this instance, Duke Energy Ohio received a partial payment on October 12, 2011 – twenty days *before* the winter heating season even started on November 1<sup>st</sup> under O.A.C. 4901:1-18-05(B)(3).

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<sup>8</sup> See, OAC 4901:1-18-05(B)(3).

<sup>9</sup> See, OAC 4901:1-18-05(A).

Further, Duke Energy Ohio fully advised its customer of all rights available under all payment plans identified in O.A.C. 4901:1-18-05 (and even the Winter Rule) when it mailed the Ohio Residential Disconnection Notice to the Property with the October 4, 2011, bill. The Company further advised its customer and any consumers living at the Property of their rights when the electric service was disconnected for non-payment on November 4, 2011, and the Company's technician left the required notice at the Property. Complainant will not be able to dispute these facts.

As further explained in Duke Energy Ohio's Answer, Complainant cannot prevail on her claim under O.A.C. 4901:1-18-06(B) because it is simply not true that "Duke has been unable to provide documentation or evidence that it complied with the ten-day notice requirement under O.A.C. 4901:1-18-06(B)."<sup>10</sup> Duke Energy Ohio has the form 10-day notice that the Company used in October 2011, and the Company's records for the subject Account reflect that Duke Energy Ohio mailed the 10-day notice to the Property on October 19, 2011. Yes, by that time someone had made a *partial* payment of \$143.49 to Duke Energy Ohio on October 12, 2011, but that payment was less than the amount required to be paid to avoid disconnection, as reflected in the bill generated by Duke Energy Ohio on October 4, 2011, and attached to the Complaint.

Finally, as Duke Energy Ohio further explained in its Answer and is reflected in an attachment to the Complaint, Duke Energy Ohio did not disconnect the gas service at the Property on November 4, 2011. The Company only disconnected the electric service at that time for non-payment.<sup>11</sup>

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<sup>10</sup> Complaint at 3.

<sup>11</sup> See Multiple Service Request, a copy of which is attached to the Complaint. As this document confirms, the disconnect for non-pay order for gas service was canceled on November 4, 2011.

Duke Energy Ohio provides this detailed history to demonstrate that the factual and legal issues in this action are very limited and specific only to the Account, the payment history on the Account, and Duke Energy Ohio's procedures and actions leading up to disconnection of only the electric service on November 4, 2011, for non-payment. The OCC may represent the interests of all residential utility consumers, but those consumers are not impacted by this action. The interests of the only two consumers in this case, namely Dorothy Easterling and Estill Easterling IV – neither of whom was Duke Energy Ohio's customer on the Account – are fully protected by Complainant and her attorney. The OCC cannot manufacture a basis for intervention by asserting allegations that are not relevant to this proceeding.

### **III. The Commission should not allow the OCC to intervene in this action.**

The OCC does not have unlimited ability to interject itself in all regulatory proceedings. Indeed, the General Assembly has imposed parameters around the OCC, parameters that preclude its intervention here. Specifically, R.C. 4911.02 provides that the OCC “[m]ay take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission.” But this case is about none of these topics. Complainant's Complaint does not question the quality of service provided to the Property or the amount of charges associated with same, and it certainly does not implicate the manner in which the PUCO operates. The case, instead, concerns allegations made on behalf of the court-appointed representative of two consumers that Duke Energy Ohio did not properly notify these consumers of disconnection for non-payment of utility services in late 2011. Thus, the OCC does not, under controlling law, have a right to intervene here.

Although the Commission has ample authority, under R.C. 4911.02, to deny the OCC's motion, further support exists in case law. As the Ohio Supreme Court has recognized, the

Commission need not allow every intervention and instead must thoughtfully balance intervention with orderly management of its docket:

[T]he commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.

A necessary concomitant of the commission's authority to regulate the manner and mode of its hearings is its discretionary power to permit or deny intervention in its proceedings.<sup>12</sup>

As reflected in the OCC's motion, it is seeking to enlarge the otherwise specific and limited focus of this case, asserting broad policy statements implicating the Commission's current regulations and Duke Energy Ohio's present practices. The OCC's attempts must be rejected.

The OCC identified the statutory and regulatory criteria<sup>13</sup> for the Commission's consideration of a motion to intervene in most instances. However, the circumstances of this complaint case mandate further examination, as directed by the Ohio Supreme Court. Indeed, as the Court has held:

When the interest of a party and prospective intervenor are virtually identical, we believe that the prospective intervenor, as one prerequisite to intervention, must make a compelling showing that the party already participating in the proceeding cannot, or will not adequately represent the prospective intervenor's interest.<sup>14</sup>

Here, the OCC's interests – to the extent they are properly identified – are identical to those of the Complainant. That is, the focus of both the Complainant and the OCC must be on the events of 2011 as they relate to nonpayment of utility services and the subsequent disconnection thereof. And the OCC has failed to make any showing, let alone a compelling showing, that neither the

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<sup>12</sup> *Toledo Coalition for Safe Energy v. Public Utilities Commission of Ohio* (1982), 69 Ohio St.2d 559, 560-561, 433 N.E.2d 212 (rejecting "concept of an unlimited right of intervention beyond the procedural control of the commission").

<sup>13</sup> See, R.C. 4903.221(B); O.A.C. 4901-1-11(B). The first four criteria are found in both R.C. 4903.221(B) and O.A.C. 4901-1-11(B)(1-4). The last criterion is found at O.A.C. 4901-1-11(B)(5).

<sup>14</sup> *Toledo Coalition for Safe Energy*, 69 Ohio St.2d at 562.

Complainant nor her counsel can adequately protect this identical interest. To the extent the OCC disagrees with this alignment, it must be seen as conceding its improper and irrelevant motivations.

Further, as discussed below, the OCC cannot satisfy the statutory criteria and Commission regulations governing intervention, given the facts and issues in this case.

**A. The nature and extent of the prospective intervenor's interest.**

The OCC does not have any interest, let alone an extensive interest, in a case involving an unpaid and disconnected account dating back to November 2011. After all, if the OCC's logic were correct, the OCC would be entitled to intervene in every single consumer complaint case filed at the Commission. But the General Assembly rejected such an outcome, narrowly defining those residential consumer complaint cases in which the OCC could function as a party. As previously noted, the OCC mistakenly claims in its motion that the Winter Rule is at issue in this case. That is not true: neither Duke Energy Ohio's customer nor any consumer living at the Property contacted the Company during the period relevant to the Winter Rule, agreed to a payment plan for the unpaid utility charges, and paid the required fee of \$175, all of which are required for the Winter Rule to apply. Similarly, the winter disconnection rules set forth in OAC 4901:1-18-05(B)(3) do not apply here because the required prerequisite – namely, the customer contacting Duke Energy Ohio to avoid a delinquency – never happened, and the Account was not disconnected for unpaid bills including electric charges incurred during the winter heating season. The OCC does not have any interest in a case of this nature involving outdated policies, procedures and regulations.

**B. The legal position advanced by the prospective intervenor and its relation to the merits of the case.**

The OCC's stated legal positions are nothing more than generic propositions of law that likely apply to virtually every case before the Commission involving issues of disconnected service

from mid-October through April of the following year: “Ohioans should be protected against unlawful disconnections, especially during the winter heating season” and “public utilities should follow the Ohio law and the PUCO’s rules and orders.”<sup>15</sup> Based on a review of the Complaint, those legal positions also are identical to those of the Complainant. As the undisputed facts will show, Duke Energy Ohio did not unlawfully disconnect the electric service to the Account in this case. The Company provided all required notices in advance of disconnecting the electric service at the Property for non-payment on November 4, 2011. The OCC’s intervention will not aid in the disposition or resolution of the case.

**C. Whether said intervention will unduly prolong or delay the proceedings.**

This matter is already set for hearing on August 25, 2015. Duke Energy Ohio firmly believes that the OCC’s intervention will prolong or delay the proceedings. Whereas the case involves only Duke Energy Ohio’s disconnection of electric services at the Account on November 4, 2011, the OCC likely will use the intervention to conduct discovery about the Company’s current practices and procedures which have no bearing on the claims in the case. Contrary to the OCC’s contention, there is no “public interest” in a case in which the Account admittedly had past due bills for which Duke Energy Ohio had the right to disconnect services for non-payment and the Company gave all disconnection notices required by the regulations before the disconnection.

The OCC attempts to demonstrate compliance with this criteria by suggesting that its involvement “will duly allow for efficient processing of this case with *consideration of the public interest*.”<sup>16</sup> This suggestion confirms the OCC’s unstated intentions here – to engage in irrelevant discovery that concerns Duke Energy Ohio’s current disconnection practices and policies.

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<sup>15</sup> OCC memorandum at 2.

<sup>16</sup> OCC memorandum at 3 (emphasis added).

**D. Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.**

The OCC's participation is hardly necessary to develop and resolve the limited factual issues in this case. Complainant has counsel, who is qualified to investigate and resolve the factual and legal issues relevant to the allegations raised in the Complaint. Again, contrary to the OCC's assertions, there is no "public interest" in this case for which the OCC must "obtain and develop information" before the PUCO would be able to render a decision. Indeed, discovery in this case must be limited to those matters relevant to the events occurring through November 4, 2011.<sup>17</sup> Yet the OCC makes no acknowledgement of such limitations and instead overtly describes its efforts as related to developing information presumably necessary to support its generic legal position that "Ohioans should be protected against unlawful disconnections."<sup>18</sup> These generalized statements, coupled with the OCC's recent efforts, suggest that the OCC intends to use this case as a means to satisfy its unsubstantiated desire for information irrelevant to the issues at hand; information that will have absolutely no bearing on the disputed issues in this case.<sup>19</sup>

**E. The extent to which the person's interest is represented by existing parties.**

As previously noted, the OCC's purported interest is no different than that of Complainant. The Commission does not need to hear from the OCC when Complainant is ably represented by counsel and capable of prosecuting her claim against Duke Energy Ohio. The OCC should not be allowed to intervene in a narrow and limited claim relating only to one Account and Duke Energy Ohio's disconnection of electric service to that Account for non-payment on November 4, 2011.

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<sup>17</sup> O.A.C. 4901-1-16 (scope of discovery limited to non-privileged matters that are relevant to the subject matter of the proceeding).

<sup>18</sup> OCC memorandum at 2-3.

<sup>19</sup> See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs*, Case No. 14-1051-GE-RDR, Entry, at 12 (Jan. 22, 2015) (granting Duke Energy Ohio's motion to strike information and testimony offered by the OCC about the Company's customer disconnections because it was not relevant to that case).

Again, the OCC has not made a compelling showing that its interests will not adequately represented.<sup>20</sup>

The case law cited by the OCC actually does not support its intervention because the facts and legal issues are inapposite to this case. In *Ohio Consumers' Counsel v. PUC*,<sup>21</sup> the OCC wanted to intervene because it believed efforts by FirstEnergy Corporation and its three subsidiary electric companies to change their accounting procedures would violate Ohio law and could lead to rate increases for the companies' customers. Yes, the Ohio Supreme Court may have found that the Commission should have allowed the OCC to intervene in those consolidated cases, but the Court was confronted with a completely different set of facts and legal issues, namely: the OCC's interests were not represented by any other party to the proceedings; no one suggested that intervention would unduly delay the proceedings; and the OCC apparently argued in its memorandum that the requested accounting changes would adversely affect residential customers and violate Ohio law.<sup>22</sup> In other words, the issues in that case apparently extended beyond the scope of the named parties and could impact consumers represented by the OCC. That is hardly the case here, where the factual and legal issues are narrowly confined to the single Account and the events leading up to and surrounding Duke Energy Ohio's disconnection of the electric service for non-payment in late 2011.

This case is more akin to *In re Complaint of the Ohio School Boards Association et al. v. FirstEnergy Solutions Corp.*<sup>23</sup> There, the Ohio Manufacturers Association, sought to intervene

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<sup>20</sup> *Senior Citizen's Coalition v. Public Utilities Commission of Ohio* (1982), 69 Ohio St. 2d 625, 628, 433 N.E.2d 583 (intervention prohibited on issues for which entity did not have an identifiable interest that was not already represented by parties).

<sup>21</sup> *Ohio Consumers' Counsel v. PUC*, 2006 Ohio 5853, 111 Ohio St. 384.

<sup>22</sup> *Id.* at 387

<sup>23</sup> *In re Complaint of the Ohio School Boards Association et al. v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (Sept. 4, 2014).

and claimed that some of its members were similarly overcharged by the utility. In denying the motions to intervene filed by the OMA and others, the Commission found:

At issue in this case is a specific billing dispute between Power4Schools and FES . . . While the Movants may have similar contractual issues with FES, the disposition of this case will not impair their rights to file their own complaints and prosecute them in a manner that they so choose. The Movants may have a legitimate interest in the precedent that this case sets, but the Commission has long held that such an interest is not a sufficient reason for intervention.<sup>24</sup>

The same result is warranted here. The OCC does not use the term “precedent” in its motion but essentially makes the same argument by taking issue with what it claims is Duke Energy Ohio’s incorrect interpretation of certain regulatory proceedings and claiming intervention is necessary to protect consumers’ interests under those regulations.<sup>25</sup> But this case will not have precedential import insofar as the OCC’s reliance on “public interest” is concerned. The decision in this case will be based upon evidence relevant to the factual circumstances supporting the Complaint. Indeed, the scope of this case will be limited to the facts relating to the Account in the fall of 2011, regulations in effect at that time, and the practices and procedures used by Duke Energy Ohio back then. As the PUCO has repeatedly found, the claim of “precedent” is insufficient to warrant intervention.<sup>26</sup> The OCC’s intervention is neither necessary nor appropriate in this case.<sup>27</sup>

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<sup>24</sup> *Id.* at 8.

<sup>25</sup> OCC memorandum at footnote 4.

<sup>26</sup> See, e.g., *In the Matter of the Complaint of Allnet Communication Services, Inc. v. The Ohio Bell Telephone Company*, Case No. 86-771-TP-CSS, Entry, at ¶ 5 (December 12, 1989)(residential customers’ generic issues did not warrant intervention by the OCC in a complaint case); *In the Matter of the Application of FirstEnergy Corp., on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, *et al.*, Entry, at ¶ 4 (March 23, 2000); *In the Matter of the Complaint of WorldCom, Inc., v. City of Toledo*, Case No. 02-3207-AU-PWC, Entry, at ¶ 7 (March 4, 2003).

<sup>27</sup> Finally, while the OCC’s intervention is not warranted at all under both statutory and regulatory authority, if the OCC is allowed to intervene over Duke Energy Ohio’s objection, the intervention should be limited only to the facts and issues in this case. The OCC should not be permitted to intervene in a case relating to events, regulations and policies/procedures dating to the fall of 2011, only to conduct a gigantic fishing expedition for information that is not remotely relevant to the narrow and limited facts and legal issues in this case. See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs*, Case No. 14-1051-GE-RDR, Entry, at 8 (Oct. 16, 2014)(limiting intervention by IGS Energy, Direct Energy, and the Retail Energy Supply

#### IV. Conclusion

WHEREFORE, Respondent Duke Energy Ohio, Inc. requests that the Commission deny the motion to intervene filed by the Office of the Ohio Consumers' Counsel in its entirety.

Respectfully submitted,

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Association to exclude matters related to customer energy usage data and data sharing issues that were previously resolved).

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via regular US Mail, postage prepaid, on this 22<sup>nd</sup> day of May 2015, upon the following counsel of record:

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**Commission of Ohio Docketing Information System on**

**5/22/2015 4:38:00 PM**

**in**

**Case No(s). 15-0298-GE-CSS**

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum In Opposition To Motion To Intervene By The Office Of The Ohio Consumers' Counsel electronically filed by Mr. Robert A. McMahon on behalf of Duke Energy Ohio, Inc.