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FILE

June 12, 2015

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

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PUCO

Re: **Motion of Jeffrey Pitzer for Protective Order, to Compel and for Continuance and Affidavit of Donald A. Lane in Support of the Motion of Jeffrey Pitzer**
In the Matter of the Complaint of Jeffrey Pitzer
Case No. 15-298-GE-CSS
11312 Orchard Street
Cincinnati, Ohio 45241
Duke Energy Acct. No.: 0120-0420-20-5

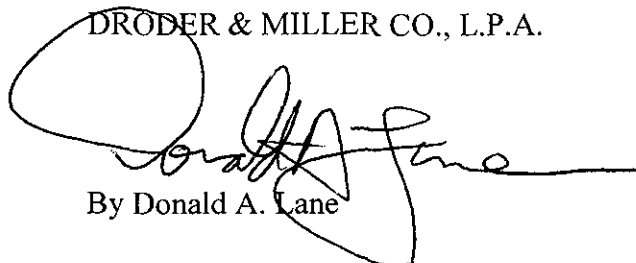
To Whom It May Concern:

Enclosed please find an original and two copies of Motion of Jeffrey Pitzer for Protective Order, to Compel and for Continuance as well as the Affidavit of Donald A. Lane in support of the same to be placed of record with PUCO. Please return a time-stamped copy to my office in the enclosed self-addressed stamped envelope.

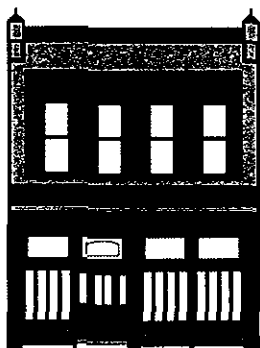
Thank you for your attention to this matter. Please do not hesitate to contact me with any questions or concerns.

Very truly yours,

DRODER & MILLER CO., L.P.A.



By Donald A. Lane



DAL/jed
Enclosures

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Proud Neighbors in Over-the-Rhine

Estill Easterling III (“the Decedents”), were an elderly woman and her mentally and physically disabled son.

Gail Lykins, the daughter and sister of the Decedents, originally filed suit against Duke for wrongful death in the Court of Common Pleas, Hamilton County, Ohio. Eventually, the Court dismissed the action in favor of PUCO jurisdiction on the question of whether Duke violated statutes and regulations in disconnecting utility service at the Premises. Ms. Lykins thereafter filed the administrative complaint that gives rise to this proceeding.

After she filed the PUCO action, Ms. Lykins underwent a bone marrow transplant. As such, she spent a considerable period of time in the hospital and has endured a very long period of recovery that has required continued treatment. As such, she requested that her husband, Mr. Pitzer, assume her duties with respect to the estates of Dorothy and Estill Easterling III and her role as complainant here. Mr. Pitzer became fiduciary of Estill III’s estate on March 3, 2015 and of Dorothy’s estate on March 20, 2015. Mr. Pitzer appeared at the settlement conference in this matter on April 16, 2015 without objection from Duke¹. In addition, as explained in more detail below, Mr. Pitzer also filed a motion to amend the complaint in this case to affirm that he is the proper complainant. PUCO docketed this motion on May 11, 2015.

On May 4, 2015, Mr. Pitzer served Duke with interrogatories and document requests. On May 5, counsel for Duke responded that Duke would refuse to answer the discovery because it had been served by Mr. Pitzer, and not Ms. Lykins, his spouse. Although Mr. Pitzer had been properly substituted as fiduciary for both of the estates and had appeared at the settlement conference in that capacity, as stated above, Mr. Pitzer filed a motion to amend the

¹ Mr. Pitzer is aware that the proceedings in the settlement conference are confidential. However, he is not here disclosing the content of a confidential settlement discussion.

administrative complaint so that no question could exist that he is the proper party representative. Mr. Pitzer's counsel also correspondence with Duke's counsel about this issue, to no avail. To date, Duke has failed to respond to Mr. Pitzer's discovery, at all. This complete failure to respond is somewhat shocking, owing to the fact that Duke has demanded full responses to discovery that it has served on Mr. Pitzer².

As stated above, Duke served its own discovery requests, including interrogatories, document requests and requests for admissions on Mr. Pitzer on May 7, 2014. In the mistaken belief that the OAC permitted a 28 day response time, counsel served responses to the request for admissions on June 5, 2014. Mr. Pitzer has not yet served responses to the interrogatories and document requests, owing to the fact that his prior served discovery requests to Duke remain outstanding. Duke's counsel has written to counsel for Mr. Pitzer and has unilaterally demanded that Mr. Pitzer respond to the outstanding interrogatories and document requests without indicating that Duke intends to do the same. Duke's counsel has also written a letter outlining Duke's supposed dissatisfaction with Mr. Pitzer's responses to Duke's admission requests.

This matter has been set for hearing on August 25, 2015.

Attempt at Extrajudicial Means

Mr. Pitzer is aware that OAC 4901-1-23(C) and 4901-1-24(B) require him to attempt "all reasonable means" to resolve his dispute with Duke before bringing this consolidated motion. As detailed more fully in the Lane Aff. and accompanying exhibits, Mr. Pitzer has made such efforts. Further, since Duke completely refuses to respond to Mr. Pitzer's discovery at all,

² Duke actually served the discovery on Ms. Lykins, despite the fact that Mr. Pitzer was substituted as personal representative for both estates in March, 2015. Despite this fact, Mr. Pitzer has chosen not to exalt form over substance by refusing to respond on these grounds.

while, at the same time making heavy-handed demands on Mr. Pitzer, Mr. Pitzer believes that further attempts at a compromise would be futile.

In addition to the foregoing, since this matter is set for hearing on August 25, and Duke has failed to meaningfully engage in discovery, Mr. Pitzer would be severely prejudiced without the Commission's intervention at this juncture.

Outstanding Discovery

Both OAC 4901-1-23 and 4901-1-24 allow the Attorney Examiner to enter such orders as are just, as respects outstanding discovery. In particular, OAC 4901-1-24(A)(2) recognizes that the Attorney Examiner is permitted to enter an order that "[d]iscovery may be had only on specified terms and conditions."

As stated above, Mr. Pitzer served discovery on Duke prior to the time that Duke served its own discovery on Mr. Pitzer. Nevertheless, Duke has demanded that Mr. Pitzer respond to its discovery without giving any indication that it intends to respond to his. As such, Mr. Pitzer respectfully requests that the Attorney Examiner exercise her discretion in setting a date certain by which both Mr. Pitzer and Duke shall both respond to the outstanding interrogatories and document requests.

Mr. Pitzer's request for such an order is not based merely on a "first in time" reasoning. Should Mr. Pitzer obey the rules and respond to Duke's discovery, without Duke also responding, Duke will gain a completely unfair advantage by having all information to itself.

Duke may not be heard to contend that it need not respond to Mr. Pitzer's discovery because he is not the named complainant. As stated above, before Mr. Pitzer served his discovery, he was the personal representative in both relevant estates, by filings to and orders

made by the Hamilton County, Ohio Probate Court. In addition, as stated above, Duke did not raise any objection to Mr. Pitzer appearing as the complainant at the settlement conference held in this matter on April 16, 2015. Further, Mr. Pitzer timely filed a motion to amend the administrative complaint under OAC 4901-1-06³. Under similar provisions of the Ohio Rules of Civil Procedure, relating to amendments, such an amendment would relate back to the original pleading. See Rule 15(C). As such, Mr. Pitzer's request for an amendment here would relate back to the original February 6, 2015 complaint and certainly would have been *de facto* effective as of the time that Mr. Pitzer served the discovery on Duke.

Request for Admission Responses

Despite the fact that Duke has failed to respond to any of his previously-served discovery, Mr. Pitzer has made a good faith effort to respond to Duke's request for admissions, lest the requests be deemed admitted under OAC 4901-1-22. As stated above, Duke served the requests on May 7, 2015. Mr. Pitzer responded to them on June 3, 2015.

Due to inadvertence on counsel's part, as set forth in the Lane Aff., counsel believed that the responses were due 28 days after Duke served the requests. In addition, as stated above and detailed in the Lane Aff., Ms. Lykins has been facing a severe medical condition that has diminished her capacity to assist in prosecuting this case, including providing information necessary to respond to Duke's voluminous requests. Although Mr. Pitzer has assumed formal responsibility for undertaking Ms. Lykins' role as complainant, Ms. Lykins has important information concerning the facts at issue.

³ The Attorney Examiner has not yet ruled on this motion. However, under the rule, the Attorney Examiner has broad discretion in permitting such amendments.

OAC 4901-1-22 states the following:

The matter is admitted unless, within twenty days after the service of the request, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or any attorney examiner may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection . . .

Under the circumstances enumerated above, Mr. Pitzer asks that the Attorney Examiner permit him the additional time that he used and deem his responses to have been timely filed. Under such language, the Attorney Examiner clearly has discretion to extend the time by which Mr. Pitzer could respond to the requests. See *State ex rel. Davila v. City of Bucyrus* (2011), 194 Ohio App. 3d 325, 332 [citations omitted], which discusses the interplay between Ohio Civil Rules 36, involving requests for admissions, and 6, concerning extensions of time.

Continuance

Owing to the fact that Duke has failed to respond, at all, to Mr. Pitzer's discovery, and such discovery requests critical information about Duke's disconnection practices, generally, and as applied to this matter, Mr. Pitzer does not believe that he will be able to submit his claims for hearing on August 25. Depending on whether Duke responds to the discovery at all, and the nature of its responses, Mr. Pitzer believes he will have substantial additional discovery to conduct. Further, Mr. Pitzer is beginning to believe that Duke will not readily cooperate in such discovery. As a result of the foregoing, Mr. Pitzer believes that a continuance is necessary under OAC 4910-1-13.

Conclusion

For the above stated reasons, Mr. Pitzer respectfully requests that the Attorney Examiner grant the relief he has requested in this motion.

Respectfully submitted,

DRODER & MILLER CO., L.P.A.

A handwritten signature in black ink, appearing to read "Donald A. Lane", is written over a horizontal line.

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CERTIFICATE OF SERVICE

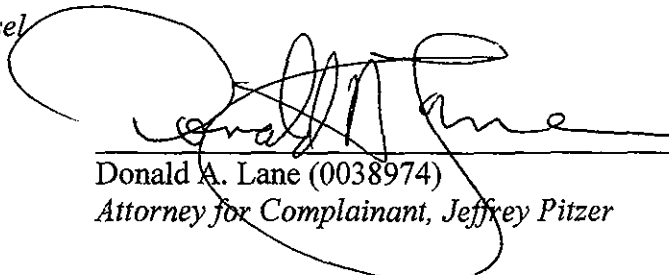
I hereby certify that a copy of the foregoing has been served upon the following by electronic mail on this 17th day of June, 2015:

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