

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.’S MEMORANDUM IN OPPOSITION TO  
COMPLAINANT JEFFREY PITZER’S THIRD MOTION TO COMPEL**

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**I. Introduction**

Complainant Jeffrey Pitzer once again comes before the Public Utilities Commission of Ohio (Commission) with a motion to compel that is not supported by fact or law. Duke Energy Ohio, Inc. (Duke Energy Ohio or Company) has **never** refused to produce a corporate designee for deposition, as Complainant falsely claims. Instead, the Company clearly confirmed that it will produce the necessary person(s) once Complainant designates “with reasonable particularity the matters on which the examination is requested,” as required by O.A.C. 4901-1-21(F). Complainant will not do so. Similarly, Complainant seeks to compel a response to a document request that goes far beyond the scope of the narrow and limited issues and claims in this case. Duke Energy Ohio justifiably objected to that discovery request, and Complainant refused to narrow its scope to the facts and issues at hand in this case. Accordingly, the Commission should deny Complainant’s third motion to compel in its entirety.

## **II. Factual Background of Complainant's Claim<sup>1</sup> and Discovery**

Duke Energy Ohio previously provided background information to put Complainant's discovery requests in their proper context in light of the issues and underlying facts relevant to this complaint proceeding.<sup>2</sup> Since then, the Company deposed Complainant, his wife Gail Lykins (the former Complainant), and her brother Jack Easterling<sup>3</sup> about their knowledge of facts and circumstances surrounding the claim and 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). As Duke Energy Ohio further explained in another filing in this case,<sup>4</sup> those depositions conclusively established that Complainant, his wife, and her brother do not have any admissible knowledge about the issues relevant to this case. Indeed, the extent of the Complainant's knowledge, which was obtained from Duke Energy Ohio, is that the electric service to the Account was disconnected on November 4, 2011.

Admittedly having no evidence to support his claims, Complainant continues his fishing expedition against Duke Energy Ohio. Complainant now acknowledges that "this matter involves Duke's disconnection of electrical service at the" Property.<sup>5</sup> The gas service was never disconnected, as the Company explained in its Answer and is reflected in an attachment to the

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<sup>1</sup> Just as the Company did in response to the OCC's motion to intervene, Duke Energy Ohio provides this background information to put Complainant's discovery requests in their proper context in light of the issues and underlying facts relevant to this complaint proceeding.

<sup>2</sup> See, Duke Energy Ohio, Inc.'s Memorandum in Opposition to Complainant Jeffrey Pitzer's Second Motion to Compel, at 2-5 (August 27, 2015).

<sup>3</sup> Duke Energy Ohio filed all three deposition transcripts in this case on October 16, 2015.

<sup>4</sup> See, Duke Energy Ohio, Inc.'s Memorandum in Opposition to Complainant Jeffrey Pitzer's Motion to Amend Complaint, at 3-4 (October 23, 2015).

<sup>5</sup> See, Complainant's Third Motion to Compel, at 1. Complainant's associate in this case, namely the OCC, refuses to acknowledge that seminal fact and falsely insists there is contradictory evidence about whether the gas service to the Account was disconnected. See, Duke Energy Ohio, Inc.'s Motion to Compel Discovery Responses by the Office of the Ohio Consumers' Counsel, at 11 (November 3, 2015) (regarding the OCC's absurd response to Interrogatory No. 6 that "it is unclear whether Duke unlawfully disconnected gas service to the account in November 2011.")

Complaint.<sup>6</sup> Despite that acknowledgement, Complainant seeks discovery that goes way above and beyond the discrete, narrow issue in this case, namely the disconnection of electric service to the Account on November 4, 2011.

Finally, in order to better understand the triviality of Complainant's motion to compel the Company's corporate designee, it is important to note that Complainant unilaterally canceled the depositions of two Company employees (Mitch Carmosino and Josh Danzinger) with relevant knowledge in this case. Duke Energy Ohio identified those employees in response to Interrogatory No. 2 of Complainant's First Set of Interrogatories (served on 7/2/15) as people with "information or knowledge that is relevant to the subject matter of the Complaint." The Company further agreed to make those employees available for deposition on September 18, 2015, well before Complainant moved to compel their depositions and falsely accused Duke Energy Ohio of refusing to make those witnesses available.<sup>7</sup> After filing the baseless Second Motion to Compel those very depositions, Complainant turned around and, on September 14, "adjourned" those depositions, claiming that he needed the Company's documents subject to the parties' confidentiality agreement. Duke Energy Ohio produced those documents the following day<sup>8</sup> and reaffirmed its willingness to make both employees available for deposition on September 18, as scheduled. Complainant declined to proceed and then re-noticed the depositions for October 1 without consulting the Company's attorneys. Duke Energy Ohio promptly offered two alternative dates when the employees and counsel were available, but Complainant again declined to go forward.

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<sup>6</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.

<sup>7</sup> See, Duke Energy Ohio, Inc.'s Memorandum in Opposition to Complainant Jeffrey Pitzer's Second Motion to Compel, at 13-14 (August 27, 2015).

<sup>8</sup> Complainant inaccurately claims in his motion that Duke Energy Ohio "produced the entirety of documents relating to the Account" on September 16, 2015. In fact, the Company produced electronic versions of those documents on September 15 and hard copies on September 16.

Instead, Complainant “decided that such a designee deposition would be more expedient,”<sup>9</sup> which is not remotely true.

Complainant has the prerogative to conduct discovery as he deems appropriate, provided he complies with all applicable rules. But the Commission should reject Complainant’s unwarranted attacks on the Company for supposedly not producing one or more corporate designees in response to ridiculously overbroad notices when Duke Energy Ohio has stood ready and willing to make two employees with actual knowledge available for deposition for two months.

### **III. Complainant’s Discovery Requests and Duke Energy Ohio’s Answers/Objections**

Having the proper context about what this case and the discovery requests are really about, Duke Energy Ohio turns its attention to the discovery requests at issue here.

Complainant moves to compel Duke Energy Ohio “to produce a witness to testify about the documents” attached to its Amended Notice of Corporate Designee Deposition Directed to Duke Energy Ohio, Inc.<sup>10</sup> and the Company’s response to Request No. 1 of Complainant’s Second Set of Interrogatories and Requests for Production of Documents to Duke Energy Ohio, Inc.<sup>11</sup>

#### Amended Notice of Corporate Designee Deposition

The record firmly establishes that Duke Energy Ohio properly objected to Complainant’s original and amended notices, and that Complainant has yet to serve a proper notice for a the deposition of one or more corporate designees. O.A.C. 4901-1-21(F) provides:

A party may in the notice and in a subpoena name a corporation, partnership, association, government agency, or municipal corporation **and designate with reasonable particularity the matters on which examination is requested.** The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each

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<sup>9</sup> See, Complainant’s motion at fn2

<sup>10</sup> Copy attached as Exhibit B to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer’s Third Motion to Compel.

<sup>11</sup> Copy attached as Exhibit D to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer’s Third Motion to Compel.

person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. (Emphasis added)

Once a party receives a proper notice in compliance with that rule—including the list of particular issues or matters on which the examination is requested—the responding party is able to identify the persons to be deposed and the matters on which each person will testify. In the absence of the required particularity, a responding party is forced to engage in a great deal of speculation about what the issuing party has in mind, what issues they seek to question during a deposition, etc. The rule specifically is designed to avoid guesswork on the part of the responding party to decipher what, exactly, the issuing party has in mind. That is especially appropriate when dealing with a corporate entity who is served with such a notice—the initial onus is on the issuing party to identify the details for examination so that the corporate entity may reasonably identify the appropriate representatives and make them available for deposition.

Notwithstanding the clear requirement in the rule, Complainant served his original Notice of Corporate Designee Deposition Directed to Duke Energy Ohio, Inc. and asked the Company to “designate one or more persons to testify concerning all the documents it has produced in this matter and pursuant to the October 16, 2013 subpoena served on Duke by Gail Lykins, concerning the gas and electric utility account for” the Property.<sup>12</sup> Given the incredibly overbroad scope of that notice, Duke Energy Ohio promptly objected, reminded Complainant of the requirements of O.A.C. 4901-1-22(F), and agreed to identify the correct corporate designees once Complainant served a proper notice.<sup>13</sup>

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<sup>12</sup> See, Jeffrey Pitzer’s Notice of Corporate Designee Deposition Directed to Duke Energy Ohio, Inc. (October 8, 2015).

<sup>13</sup> See counsel’s letter attached as Exhibit A to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer’s Third Motion to Compel.

Rather than comply with the cited rule and Duke Energy Ohio's reasonable request, Complainant chose instead to serve an amended notice that mimics the identical problems with the original notice. In the amended notice,<sup>14</sup> Complainant expects that the Company somehow "designate one or more persons to testify concerning the documents attached to this notice and related account activities concerning the gas and electric utility account for" the Property. Given Complainant's failure to identify any issues with particularity, Duke Energy Ohio again properly and promptly objected to this notice and explained that it cannot possibly begin to identify appropriate representatives to testify about unidentified subjects. The Company further explained that some of the documents attached to the amended notice were dated months later than the pertinent facts and circumstances in this case and, therefore, are not relevant. That said, Duke Energy Ohio invited Complainant to serve a proper notice and identify, with requisite particularity, the matters for deposition, at which time the Company would identify the correct person(s) for deposition.<sup>15</sup>

Complainant ignored the Company's legitimate requests for the particular matters about which the deposition would proceed and instead chose to file a motion to compel, thereby demonstrating his failure to conduct discovery in reasonable manner, much less his efforts to exhaust "all other reasonable means of resolving any differences with the party or person from whom discovery is sought," as required by O.A.C. 4901-1-23(C). At this point, and without more, Duke Energy Ohio is susceptible to having to identify an inordinate number of corporate representatives to appear for deposition about unknown subjects. For example, and even after engaging in a great deal of speculation, the Company could be forced to produce one person on

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<sup>14</sup> Copy attached as Exhibit B to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer's Third Motion to Compel.

<sup>15</sup> See counsel's letter attached as Exhibit C to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer's Third Motion to Compel.

usage, one person on the content of bill messages, perhaps another person on the process for changing those bill messages, another person on what the price to compare is and in what circumstance it is important, etc. Of course, none of these topics are relevant to the issues in this case, which apparently does not matter to Complainant.

It is not Duke Energy Ohio's responsibility under O.A.C. 4901-1-22(F) to guess what Complainant may have in mind. Through the amended notice and motion to compel, Complainant seeks to impose an unreasonable and inefficient burden on Duke Energy Ohio to engage in speculation and guesswork, and unfairly subjects the Company and its employees to a burdensome deposition process on topics that are clearly irrelevant and well outside the scope of this proceeding.

#### Complainant's Interrogatory and Document Request

Although Complainant misrepresents both the scope of his discovery request and his halfhearted efforts to resolve the parties' dispute, at least he correctly quotes that request in his motion:

Produce for inspection any and all internal) procedures used by Duke relating to the following that were in effect during calendar year 2011:

- (a) billing of customers
- (b) collection of customer bills and accounts
- (c) disconnection procedures
- (d) compliance with OAC Chapter 4901:1-18

Considering that this case involves only the disconnection of electric service to the Account on November 4, 2011, Duke Energy Ohio properly objected and explained the grounds for its objections, including, for example, the fact that this case does not have anything to do with disconnection procedures relating to fraud or tamper or for safety reasons, or the entirety of O.A.C. 4901:1-18.<sup>16</sup>

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<sup>16</sup> See Duke Energy Ohio's response to Request No. 1 of Complainant's Second Set of Interrogatories and Requests for Production of Documents, attached as the first page of Exhibit E to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer's Third Motion to Compel.

Thereafter, at no point in time did Complainant agree “to narrow the request to policies that are directly related to the type of account and service at issue here and to the time frame that is relevant to this dispute.”<sup>17</sup> In fact, Duke Energy Ohio called Complainant on his misstatements and mischaracterizations before he even filed the present motion to compel and reaffirmed the Company’s willingness “to engage in reasonable and relevant discovery in accordance with applicable rules.”<sup>18</sup> Complainant did not accept Duke Energy Ohio’s invitation to conduct reasonable and relevant discovery and, instead, filed his third motion to compel one week later.

#### **IV. The Commission should deny Complainant’s third motion to compel.**

The record before the Commission firmly establishes that Complainant’s motion should be denied.

Complainant’s failure to comply with O.A.C. 4901-1-21(F) and his premature filing of yet another motion to compel are self-evident. It is patently unreasonable for a party to serve a notice of corporate designee deposition on a public utility and ask that company to identify people to testify “about documents” and “related account activities.” What about those documents? Does Complainant want someone to authenticate the Account records and other documents produced by Duke Energy Ohio? Is there something in particular that Complainant wants to ask of a Company representative? Does Complainant want to depose fact witnesses about relevant, but unidentified, subject matters? Or is Complainant trying to engage in impermissible opinion and expert discovery from employees whom the Company does not intend to present as witnesses in this case?<sup>19</sup> What “account activities” is Complainant referring to in the amended notice? Duke Energy

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<sup>17</sup> Complainant’s motion at 3.

<sup>18</sup> See counsel’s letter attached as Exhibit G to the Affidavit of Donald A. Lane in Support of Jeffrey Pitzer’s Third Motion to Compel.

<sup>19</sup> See, e.g., *In the Matter of the Application of FirstEnergy Corp., for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, Entry (April 28, 2000) (denying a motion to compel corporate designee depositions and finding that respondents were only required to provide information if



Ohio cannot be expected to read the tea leaves and decipher what Complainant seeks and what corporate representatives are capable of answering Complainant's questions. Instead, O.A.C. 4901-1-21(F) firmly places the burden on Complainant, not the Company, to identify the subject matters with reasonable particularity so that a corporation like Duke Energy Ohio may identify and present the proper personnel for deposition. Complainant has not come close to satisfying this requirement.

Additionally, Complainant has wrongly accused the Company of not conducting discovery in a reasonable manner. The record of the discovery requests and communications between the parties' counsel shows otherwise. Duke Energy Ohio remains ready, willing, and able to identify and make its representatives available for deposition once Complainant takes the time to identify the subject matters with the requisite level of particularity. Unless and until that happens, however, it is impossible for the Company to designate any corporate representatives to answer questions about unidentified subject matters in response to Complainant's deficient amended notice, nor should the Commission compel any such thing.

As for the interrogatory and document request, parties to cases before the Commission are entitled to conduct discovery that is "relevant to the subject matter of the proceeding . . . [or] if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>20</sup> Here, the **only** issue before the Commission is whether Duke Energy Ohio unlawfully disconnected the electric service to the Account on November 4, 2011. There are no other issues. Contrary to Complainant's accusations, Duke Energy Ohio remains willing to produce relevant documents provided Complainant serves a discovery request that complies with the rules.

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their experts relied upon it). The notices of corporate designee depositions served in that case were far more detailed than the notices served by Complainant here.

<sup>20</sup> See, O.A.C. 4901-1-16(B).

Unfortunately Complainant would prefer to waste valuable resources filing baseless motions with the Commission, all in an effort to disparage Duke Energy Ohio and paint the Company as being unreasonable and unwilling to conduct discovery. Fortunately, the record before the Commission proves otherwise – the Company is willing to comply with reasonable discovery requests limited to the facts and circumstances of this case, but it will not engage in frivolous and unreasonable discovery in violation of the applicable rules, nor is it required to do so.

Accordingly, Complainant's third motion to compel must be denied.

WHEREFORE, Respondent Duke Energy Ohio, Inc., requests that the Commission deny the third motion to compel filed by Complainant Jeffrey Pitzer in its entirety; and enter an appropriate protective order under O.A.C. 4901-1-23(D) providing that Complainant is not entitled to the depositions and requested information and documents beyond that already provided by Duke Energy Ohio, Inc.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served via email on this 5<sup>th</sup> day of November, 2015, upon the following counsel of record:

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