

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

NANCY S. TOLIVER
614 Kenilworth Ave.
Dayton, Ohio 45405

Complainant,

v.

THE DAYTON POWER AND LIGHT
COMPANY, INC.
1065 Woodman Dr.
Dayton, Ohio 45432

Respondent.

Case No. 15-642-EL-CSS

**REPLY IN SUPPORT OF
THE DAYTON POWER AND LIGHT COMPANY'S
MOTION TO DISMISS**

On January 22, 2016, Plaintiff filed a document entitled “Complainant Objection to Respondents Motion to Dismiss Per Civil Rule 12(B)(6),” which The Dayton Power and Light Company (“DP&L”) will assume is a Memorandum Contra filed pursuant to Ohio Adm. Code 490-1-12(B)(1). While much of her Memorandum Contra is unclear and not on point,¹ Plaintiff clearly admits that she pays the lesser of either the PIPP installment or the actual usage charges.² As set forth in DP&L’s Motion to Dismiss, the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) and the Supreme Court of Ohio have already held that Plaintiff cannot abuse the PIPP system by choosing to avail herself of the benefits of the PIPP program on certain

¹ While courts “will construe pro se filings generously,” they “cannot construct legal arguments for [a pro se party].” *Angus v. Angus*, 2015-Ohio-2538, 2015 Ohio App. LEXIS 2438 (Ohio Ct. App., Franklin County June 25, 2015), citing *Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio- 4592, ¶ 24; *Miller v. Johnson & Angelo*, 10th Dist. No. 01AP-1210, 2002-Ohio-3681, ¶ 2.

² Complainant Objection to Respondents Motion to Dismiss Per Civil Rule 12(B)(6) (“Memorandum Contra”) at 5 (Jan. 22, 2016).

months and then paying the actual costs in other months.³ Plaintiff appears to confuse those rulings, arguing on multiple occasions that the Supreme Court of Ohio contradicted the PUCO decision ruling in favor of Vectren.⁴ To the contrary, however, the Supreme Court of Ohio clearly affirmed the PUCO's ruling.⁵

Plaintiff also argues that the Supreme Court of Ohio did not order her to pay Vectren her past due PIPP payments.⁶ The Supreme Court did not expressly state that Ms. Tolliver was required to pay her past due PIPP amount because that was not at issue in the complaint, nor is it in this case. Rather, the issue in the *Vectren* case, as in this case, is whether Ms. Toliver's complaint for "threatening her with disconnection" was a violation of Ohio law. Both the PUCO and the Supreme Court of Ohio held that it was not. Moreover, the Supreme Court did acknowledge and affirm the underlying PUCO decision, which ordered Ms. Toliver to inform Vectren whether she wished to stay on the PIPP payment plan and upon failing to do so, she was removed from the PIPP program.⁷

Finally, Plaintiff attempts to distinguish the *Vectren* decision by claiming that it was based upon different facts.⁸ Specifically, Plaintiff points to the fact that the *Toliver v. Vectren* case involved gas utility service.⁹ However, the policy and rationale behind the PIPP programs,

³ *In Re Nancy S. Toliver v. Vectren Energy Delivery of Ohio, Inc.*, PUCO Case No. 12-3234-GA-CSS, Opinion and Order at 14-17; *Toliver v. Vectren energy Delivery of Ohio, Inc.*, 2015-Ohio-5055 at ¶ 6 (December 8, 2015).

⁴ Memorandum Contra at 3, 4.

⁵ *Toliver v. Vectren*, 2015-Ohio-5055 at ¶ 38.

⁶ Memorandum Contra at 4.

⁷ *Toliver v. Vectren*, 2015-Ohio-5055 at ¶¶ 11-12.

⁸ Plaintiff asserts that she was disconnected in August 2015 based on missed PIPP payments. Memorandum Contra at 3. DP&L admits that Complainant's electric service was inadvertently terminated on August 24, 2015 under a good faith, yet mistaken, belief that disconnection should take place. DP&L further states that Complainant's electric service was promptly reconnected on August 25, 2015, without requiring any further payment or reconnection fee. Moreover, this was not the basis of Plaintiff's Complaint and does not change the fact that Plaintiff's complaint is meritless.

⁹ Memorandum Contra at 4.

irrespective of which industry, remains the same. Moreover, the PIPP provisions for electric utilities, set forth in Ohio Adm. Code 122:5-3-02, are substantially similar to the PIPP provisions of gas utilities, set forth in Ohio Adm. Code 4901:1-18-12. An electric “PIPP plus customer’s failure to pay monthly PIPP plus installment amounts” is a default “causing the PIPP plus customer’s electric service to be subject to disconnection by a utility for nonpayment or actually disconnected for nonpayment.”¹⁰ Similarly, a gas “customer’s failure to make any payment under . . . PIPP plus shall entitle the utility company to disconnection service in accordance with the procedures set forth in rule 4901:1-18-06 of the Administrative code.”¹¹

Aside from arguing the merits of her Complaint, Plaintiff cryptically argues that DP&L’s Motion to Dismiss is procedurally improper.¹² While Plaintiff’s procedural argument is unclear, it appears as though it is based upon the notion that DP&L’s Motion to Dismiss was improper because it relied upon “matters outside the pleadings.”¹³ Plaintiff’s complaint was extremely limited and could have been dismissed for failure to state a claim because she did not allege facts sufficient to put DP&L on notice of her claims.¹⁴ Rather than seek a dismissal on those grounds, however, DP&L gave Plaintiff the benefit of the doubt by referencing her informal complaint, which is a part of the complaint process before the PUCO. As a result, DP&L’s Motion to Dismiss is procedurally proper.

To the extent the PUCO finds that a motion to dismiss, pursuant to Civ.R. 12, was not the proper avenue for disposing of this case, the PUCO should convert DP&L’s Motion to Dismiss

¹⁰ Ohio Adm. Code 122:5-3-01(A).

¹¹ Ohio Adm. Code 4901:1-189-05(F),

¹² Memo Contra at 3.

¹³ Memorandum Contra at 3.

¹⁴ See, Civ. R. 8(A); see e.g., *Helfrich v. City of Pataskala*, 2003-Ohio-847, 2003 Ohio App. LEXIS 787, at ¶¶ 15, 29 (Feb. 19, 2003) (upholding lower court decision “dismissing appellant’s state claims based upon immunity and failure to sufficiently state or plead a claim in the complaint”).

to a Motion for Summary Judgment. The Supreme Court of Ohio has found that when a Civ.R. 12 motion to dismiss relies on documents outside the pleadings, the court should convert the motion into a motion for summary judgment.¹⁵ Even assuming all facts in favor of Plaintiff, the precedent set in *In Re Nancy S. Toliver v. Vectren Energy Delivery of Ohio, Inc.*, PUCO Case No. 12-3234-GA-CSS and *Toliver v. Vectren*, 2015-Ohio-5055, warrant a summary judgment in DP&L's favor.

DP&L respectfully requests that the Commission should dismiss or grant summary judgment thereby disposing of Plaintiff's complaint as meritless.

Respectfully submitted,

/s/ Michael J. Schuler

Christine A. Hammer (0082394)

*Counsel of Record

Michael J. Schuler (0082390)

THE DAYTON POWER AND
LIGHT COMPANY

1065 Woodman Drive

Dayton, OH 45432

(937) 259-7231 (Hammer)

(937) 259-7358 (Schuler)

(937) 259-7178 (fax)

christine.hammer@aes.com

michael.schuler@aes.com

*Attorneys for The Dayton Power
and Light Company*

(willing to accept service via email)

¹⁵ See, e.g., *Jefferson v. Bunting*, 140 Ohio St. 3d 62, 64, 2014-Ohio-3074, 14 N.E.3d 1036 (2014); see also, *Cardwell v. Williams*, 8th Dist. No. 53694, 1988 Ohio App. LEXIS 1620 at *5 (April 28, 1988).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Motion to Dismiss, has been served via ordinary U.S. mail, postage prepaid, upon the following, this 29th day of January, 2016:

Nancy S. Toliver
614 Kenilworth Ave.
Dayton, Ohio 45405

/s/ Michael J. Schuler
Michael J. Schuler (0082390)

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Summary: Motion Reply in support of The Dayton Power and Light Company's Motion to Dismiss. electronically filed by Ms. Jenna C. Johnson on behalf of The Dayton Power and Light Company