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Dear Clerk –

Please accept the attached Post Hearing Brief of Claimant, Jeffrey Pitzer for fax filing with the Public Utilities Commission of Ohio. Thank you in advance for your assistance with this. Please do not hesitate to contact me should you have any questions or concerns.

Thank you.

Julie Denzler
Droder & Miller

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Jeffrey Pitzer)	
)	
Complainant,)	Case No. 15-298-GE-CSS
)	
v.)	
)	
Duke Energy Ohio, Inc.)	
)	
Respondent.)	

POST HEARING BRIEF OF CLAIMANT, JEFFREY PITZER

In compliance with the Attorney Examiner's request, Complainant, Jeffrey Pitzer, submits this post hearing brief to address the issues that arose during hearing of this matter on February 1 and February 2, 2016.

Mr. Pitzer respectfully requests that the Public Utilities Commission of Ohio ("the Commission") find that Respondent, Duke Energy Ohio, Inc. ("Duke"), violated certain provisions of Ohio Administrative Code ("OAC") Section 4901:1-18-06 in disconnecting electrical service to the residence at issue in this matter. As the Commission is aware, this disconnection led to the deaths of Dorothy Easterling and Estill Easterling III, from hypothermia, in November, 2011.

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I. Statement of Issues

Pursuant to OAC 4901:1-31(B)¹, Mr. Pitzer identifies the following issues² that he requests the Commission to address in its opinion and order:

1. whether Mrs. Easterling was considered Duke's "customer" and was, thus, entitled to the notices prescribed in OAC 4901:1-18-06³;
2. whether Duke failed to comply with the "winter heating season" requirements imposed by OAC 4901:1-18-06(B) in performing the disconnection at issue here;
3. whether Duke, through its on-site technician, Joshua Danzinger, failed to comply with the disconnection procedures set out at OAC 4901:1-18-06(A)(2);
4. whether Duke failed to comply with the requirements of the Commission's September 14, 2011 order in case number 11-4913-GE-UNC, entitled "Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2011- 2012 Winter Heating Season" ("the 2011 Winter Order") in connection with the disconnection at issue here; and
5. whether Duke failed to provide the third party notifications required by OAC 4901:1-18-06(A)(3)(a).

II. Factual Background

Estill Easterling "Junior" and Dorothy Easterling were husband and wife who occupied the property at issue in this dispute, 11312 Orchard Street, Cincinnati, Ohio ("the Residence"), at the time of Mr. Easterling's death approximately 25 years ago. Tr., p. 10, line 24 – p. 11, line 2. The

¹ The Attorney Examiner has not specifically asked the parties to include a "statement of issues" in this Brief. However, Mr. Pitzer believes such statement will be of assistance in a determination of the issues.

² In his Amended Complaint, Mr. Pitzer also asserts that Duke failed to provide the notice required by OAC 4901:1-18-06(A), with the contents required by OAC 4901:1-18-06(A)(5). Mr. Pitzer does not address that issue in this Brief and defers to the arguments he believes will be raised by Intervening Plaintiff, the Office of the Ohio Consumers' Counsel ("the OCC"). The OCC has a substantial interest in addressing the content of this type of notice used by Duke.

³ References to OAC 4901:1-18-06 in this Brief and in the proceedings before the Commission are to the current regulations. However, the substance of this regulations, and the requirements imposed on Duke by it, is the same as it was in 2011, at the time the disconnection at issue occurred. Transcript ("Tr."), p. 390, lines 7-12.

Residence is a frame dwelling with four doors, plus an additional screen door at the rear entrance and steps to the front porch. Tr., p. 20, line 16 – p. 24, line 7; Pitzer Ex A; OCC Ex. C; Duke Ex. A.

At the time of his death, Mr. Easterling had an account with Duke or its predecessor, along with various other utility accounts and the like. Tr., p. 11, lines 3 – 9. When Mr. Easterling passed, Mrs. Easterling did not formally change the accounts to her name because she was widowed and did not want people knowing that she lived at the Residence with only her son, Estill Easterling III (“Estill”). Tr., p. 11, lines 10 – 24. Despite this fact, Mrs. Easterling continued to maintain a Duke account (“the Account”) at the Residence and made payments on it until she passed in November, 2011.

In 2011, Mrs. Easterling was in her 80s. Tr., p. 9, lines 15 – 18. She shared the Residence with Estill, who was in his 40s and had Down’s Syndrome. Id. As a result of his condition, Estill had the mental and physical function of a three year old. Tr., p. 10, lines 1 – 2.

Gail Lykins, who testified at hearing, was Dorothy Easterling’s daughter, Tr., p. 9, lines 1 – 5, and Estill’s sister, Tr., p. 9, lines 8 - 10.

Before Mrs. Easterling passed, Ms. Lykins and others assisted her with various household duties, including paying bills, and visited the Residence frequently as a result. Tr., p. 11, lines 21 – 24; p. 13, line 21 – p. 15, line 6. Ms. Lykins is aware that Mrs. Easterling would keep paperwork concerning her bills on the top of her refrigerator. Tr., p. 15, lines 7 – 11. Ms. Lykins did not see any Duke disconnection notices with any of Mrs. Easterling’s paperwork in the months before Mrs. Easterling passed, Tr., p. 17, lines 7 – 13, and Mrs. Easterling did not bring any such notifications to Ms. Lykins’ attention during this same period of time. Tr., p. 17, lines 17 – 22.

In the summer before her mother passed, Ms. Lykins had occasion to be at the Residence when a Duke employee was performing service there. Ms. Lykins requested of this employee that she be given duplicates of the gas and electric bills and any notifications that Duke might issue on the Account. The employee made note of this fact and affirmatively agreed to Ms. Lykins' request. Tr., p. 15, line 16 – p. 16, line 15. Ms. Lykins never received any of the documentation she had requested of Duke, including any notifications concerning the disconnection of service to the Residence that eventually occurred in November, 2011. Tr., p. 16, lines 16 – 24.

From August, 2011 through November, 2011, Mrs. Easterling did carry a past due balance on the Account. On October 4, 2011, Duke prepared a bill, containing what it purports to be a "disconnection notice", and stating that service to the Residence *may* be disconnected if Mrs. Easterling did not make a payment before October 28. Duke Ex. C. Mrs. Easterling did make a payment of \$143.49 after she received that bill. Williams Direct Testimony, Att. JDW-5.

Duke has not produced any additional and actual notifications that it provided to Mrs. Easterling or at the Residence before it terminated her service, though its expert and employee, Mitchell A. Carmosino, and other witnesses, claim that Duke did provide certain notifications. As Duke's employee, Marion Byndon, has testified, Duke maintains a data base of customer information, referred to as "CMS", which would be expected to contain this type of information. Tr., p. 71, lines 5 – 23. What the CMS does contain is a notification that Mrs. Easterling was elderly, that someone visiting the Residence on behalf of Duke was to try to reach her through her side door and that she was to be given time to respond to an attempted contact. Pitzer Ex. D.

Duke claims that its technician, Joshua Danzinger, went to the Residence on November 4, 2011 to disconnect electrical service. Mr. Danzinger does not have personal recollection of performing these services, Danzinger Direct Testimony, p. 7, lines 19 – 22, and is not aware of

anyone who does. Tr., p. 266, lines 8 – 20. Despite this fact, Mr. Danzinger claims that he followed his “standard procedure” of attempting to notify Mrs. Easterling of the disconnection and leaving a “door hanger” when he did not get a response to his attempts. Danzinger Direct Testimony, p. 8. The CMS records indicate that Mr. Danzinger spent 4 minutes at the Residence on the day of the disconnect. Tr., conf., p. 132, line 18 – p. 133, line 13.

Ms. Lykins and her family discovered that Mrs. Easterling and Estill had passed on November 20, 2011⁴. Tr., p. 17, line 23 – p. 19, line 1. At that time, Ms. Lykins did not see any door hangers or disconnect notices at the Residence. Tr., p. 19, line 17 – p. 20, line 2.

III. Discussion

A. Mrs. Easterling Was A “Customer” of Duke

OAC 4901:1-18-06 contains several safeguards for utility customers before their gas or electric utilities can be disconnected, especially during winter months. OAC 4901:1-18-01(G) defines a “customer” as:

any person who enters into an agreement, whether by contract, or under a tariff, to purchase: electric, gas or natural gas utility service.

The term “contract” is not defined by the Commission’s regulations, so, as counsel for Duke directs:

...where a word is not specifically defined that that (sic) word is given its plain and ordinary meaning.

⁴ As the Commission has been made aware, Mrs. Easterling and Estill died of hypothermia. This particular fact is at issue in the ongoing dispute between their family and Duke but is not relevant at this stage of the proceedings. Likewise, the contacts, or lack thereof, that Mrs. Easterling’s family may have had at the Residence between November 4 and November 20 are not relevant to Duke’s disconnection practices in this case.

Tr., p. 201, lines 11 – 12. The Ohio Supreme Court has recognized that the plain and ordinary meaning of the term “contract” is ascertained by looking at the elements of a contract, which include:

an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration

Williams v. Ormsby (2012), 131 Ohio St.3d 427, 429-430.

Upon information and belief, Duke does not dispute the fact that Mr. Easterling was its “customer.” As such, Mr. Easterling clearly had a contract with Duke, whereby Duke offered to provide combined utility services at the Residence, and Mr. Easterling accepted the offer by paying for such services. Further, Duke cannot dispute the fact that this agreement did not lack for consideration or mutual assent or that it had an illegal purpose.

When Mr. Easterling passed, his contractual obligations with Duke were assigned to Mrs. Easterling. Ohio recognizes the fact that all contract rights may be assigned, so long as the contract, itself, does not prohibit assignment and so long as the basic bargain between the parties does not change. *Pilkington North American, Inc. v. Travelers Cas. & Sur. Co.* (2006), 112 Ohio St.3d 482, 488. Here, Duke has not produced any documents that would indicate that its utility services agreement with Mr. Easterling could not be assigned to his spouse when he passed. Further, the basic agreement between Duke and Mr. Easterling did not change, simply because his widow took over payment of the utility services at the Residence. In fact, Duke consented to the assignment, by implication, when it accepted payments from Mrs. Easterling for a period of over 20 years. Certainly, the “plain and ordinary” meaning of the term “contract” cannot hinge on the fact that Mrs. Easterling did not want to take her husband’s name off the Account, in order that she feel safer having it on.

Duke has not disputed that the term “contract” should be interpreted as such. In both his filed expert testimony and his hearing testimony, Expert Carmosino admits that he does not know what is meant by the regulation’s use of the term “contract” and holds by the principal that “customer” means the person in whose formal name an account may be placed, without any basis whatsoever. Carmosino Direct Testimony, pp. 4 – 5; Tr., p. 393, line 9 – p. 394, line 3.

Finally, Duke’s contention that Mrs. Easterling was not entitled to receive notice is simply a red herring. Duke and its predecessors supplied utility service to the Residence for a number of years. Regardless of whether or not Mr. Easterling had passed, Duke would still have been required to mail the notices to the address it had on file. As such, Mrs. Easterling would have seen them, regardless of the fact that they were addressed to Mr. Easterling. As such, despite Duke’s contention that it may not have been obligated to send notices to Mrs. Easterling, personally, Duke cannot be heard to argue that it was not required to issue any notices to the Residence at all.

B. Duke Failed To Comply With OAC 4901:1-18-06(B)

OAC 4901:1-18-06(B)(1) requires Duke to have provided Mrs. Easterling with a ten day notice before disconnecting her electric service, with such notice containing the information set forth at OAC 4901:1-18-06(B)(2)⁵. This is so because Duke’s disconnection of service to the Residence occurred during the “winter season” identified in the regulation, being the period of time between November 1 and April 15. Further, upon the service of such notice, Duke must extend the date for disconnection of service by an additional ten days, over and above the disconnection date set forth in the billing containing the initial disconnection notice. The record shows that Duke failed to comply with both of these requirements.

⁵ OAC4901:1-18-06(B)(1) permits Duke to provide this notice, *inter alia*, by regular mail. Duke contends that it chose the option of using regular mail, Carmosino Direct Testimony, p.10, lines 5-7, in which case the notice period would have been extended by three days.

Duke admits that it is unable to provide a copy of the specific ten day notice served on Mrs. Easterling or at the Residence. Pitzer Ex. I, p. 4. This is so, despite the fact that Duke has produced a document in this proceeding, being a ten day notice from the same year as the disconnection here and showing specific customer information. Pitzer Ex. E; Tr., p. 498, line 8 – p. 501, line 2. In fact, the CMS would be expected to contain a copy of the ten day notice at issue here, as it is a record relating to the Account. Tr., p. 71, lines 18 – 23; Tr. p. 72, lines 8 – 14; Tr., conf., p. 126, lines 3 – 7.

As respects Pitzer Ex. E, Duke cannot adequately explain why a ten day notice letter for one customer, from the same time period, might exist, while the one at issue here does not. In his testimony on the subject, when asked by counsel for Duke, Expert Carmosino simply states the following:

Q: Can you explain to the Attorney Examiner why we have a copy of that document here with us today?

A: I *would believe* it was a quality check that *somebody might have* requested.

Tr., p. 503, lines 7 – 11 [emphasis added]. Expert Carmosino's answer is full of conjecture, in that he states he "would believe" why Pitzer Exhibit E exists, in the absence of the actual notice on the Account. Further, he states that an undefined "somebody" "might have" requested the document in connection with an undefined "quality check." Duke's counsel did not seek to elicit the details of such "quality check" or to have Expert Carmosino identify the "somebody" who requested the document. The fact remains that a ten day notice letter exists for some customer in Middletown, Ohio but does not for the Account. As such, one must conclude that Duke did not issue the notice to Mrs. Easterling or at the Residence.

In addition to the foregoing, as stated above, Ms. Lykins confirms that she did not see a ten day notice at the Residence on the date Mrs. and Estill Easterling's bodies were discovered.

Even had Duke issued the notice letter, it further violated OAC 4901:1-18-06(B) by disconnecting electrical service to the Residence prematurely. OAC 4901:1-18-06(B)(1) states that issuance of a ten day notice:

shall extend the date of disconnection, as stated on the fourteen-day notice required by paragraph (A) of this rule, by ten additional days.

Insofar as the “disconnection date”⁶ is alleged to have been October 28, 2011, the issuance of the ten day notice letter would have extended that date an additional ten days, or until November 7, 2011. See Williams Direct Testimony, p. 17, lines 1 – 11. As such, Duke further violated OAC 4901:1-18-06(B) by disconnecting electrical service to the Residence prematurely.

In response, Duke claims that its practice is to “front load” the 24 day notice period at the outset of the billing period upon which a disconnection notice appears. Tr., p. 496, lines 6 – 9. In other words, here, the 14 day original disconnection period under OAC 4901:1-18-06(A) and the 10 day notice period under OAC 4901:1-18-06(B) would have begun to run on October 4, when that particular bill was generated. However, the regulation contains no language which would permit Duke to calculate the “disconnection period” as such and fail to give Mrs. Easterling the additional ten days prescribed by OAC 4901:1-18-06(B)(1). In fact, Expert Carmosino, who testified on such issues for Duke, could not identify anything in the regulation that permits such conduct. Tr., p. 497, line 4 – p. 498, line 5.

C. Duke Failed To Comply With The Disconnection Procedures In OAC 4901:1-18-06(A)(2)

OAC 4901:1-18-06(A)(2) provides a final “fire wall” between a customer, such as Mrs. Easterling, and a disconnection of service. This section states:

On the day of disconnection of service, the utility company shall provide the customer with personal notice. If the customer *is not at home*, the utility company shall provide personal

⁶ By accepting that the “disconnect date” in the October 4 bill is referenced as being October 28, 2011, Mr. Pitzer does not waive the fact that Duke failed to specifically identify a date by which it would disconnect the electrical service at the Residence.

notice to an adult consumer. If neither the customer nor an adult consumer is *at home*, the utility company shall attach written notice to the Residence in a conspicuous location prior to disconnecting service.

[emphasis added]. Duke has failed to produce evidence that its technician, Mr. Danzinger, complied with this regulation. In fact, as stated above, he has no personal recollection of the disconnection. Further, the evidence that is in the record demonstrates that Mr. Danzinger most likely did not comply with the regulation and safeguard Mrs. and Estill Easterling from the disastrous results of his failure to do so.

The fact that Duke has no detailed records of Mr. Danzinger's alleged visit to the Residence is of particular concern. According to Mr. Danzinger's testimony, he would have "record[ed] the details of [the] assignment in [his] laptop..." Danzinger Direct Testimony, p. 4, lines 3-4. Further, Duke maintains a data base of work orders, like that at issue here, Tr., p. 74, line 24 – p. 75, line 25, but has failed to produce any "work order" records relating to this disconnection. As such, the record is devoid of any information which would tend to indicate what activities Mr. Danzinger took, in compliance with OAC 4901:1-18-06(A)(2), while he was allegedly at the Residence that day.

What we do know is that Mr. Danzinger spent four minutes at the Residence. These four minutes constitute an insufficient period of time for Mr. Danzinger to have ascertained that neither Mrs. Easterling nor an adult was *at home*.

In his testimony, Mr. Danzinger describes the fact that he would generally have had many activities to perform before he completed a disconnection such as the one at issue here, including verifying his location, accessing customer account information, attempting to make contact with a customer, entering notes into his laptop and performing specific disconnection activities. Danzinger Direct Testimony, p. 3, line 12 – p. 7, line 18; Tr., p. 273, line 5 – p. 294, line 2. Clearly,

Mr. Danzinger could not have completed these activities in the four minutes the records show he spent at the Residence.

As stated above, the Residence contains four outside doors. Originally, Mr. Danzinger testified that he would normally have tried to make contact by using all available doors at any given location. Danzinger Direct Testimony, p. 4, lines 15 – 16. However, perhaps realizing that the four minutes that he spent at the Residence would not have been sufficient to access all four of the doors and wait for a response, Mr. Danzinger abruptly changed his testimony at the hearing and said that he would normally try only one door, which he described as being the “best looking” door. Tr., p. 279, lines 1 – 16.

The foregoing is especially concerning, in light of the CMS note, identified above, that admonished Duke employees to use the side door of the Residence and to give the owner plenty of time to respond to a service call because she was elderly. Mr. Danzinger would have had access to these details because he would have pulled up account information on his company issued laptop when he arrived to perform a disconnection. Tr., p. 274, lines 22 – 25. In fact, this note is part of the CMS and would have been available to anyone who has access to the CMS. Tr., conf., p. 129, lines 4 – 7. Further, Ms. Byndon admits that the information would have been important for anyone visiting the Residence on behalf of Duke to have known about. Tr., conf., p. 129, lines 18 – 22⁷.

D. Duke Failed To Comply With The Terms Of The 2011 Winter Order

Paragraph 5 of the 2011 Winter Order states as follows:

For the 2011 – 2012 winter heating season, the Commission expects that the utility companies under our jurisdiction will assist customers in every way possible to maintain their service for heating purposes...the Commission expects the utilities to err on the side

⁷ Duke takes the rather ridiculous position that Pitzer Ex D applies only to the activities of meter readers. Therefore, Duke believes it more important that one of its employees who is simply reading a meter have access to this critical information, while one who is disconnecting service, and causing two people to freeze to death, should not.

of maintaining service when there is a doubt as to the applicability or the interpretation of a rule.

As explained fully in Mr. Williams' Direct Testimony, Duke violated this provision of the 2011 Winter Order by disconnecting electrical service at the Residence, despite the payment it received from Mrs. Easterling.

Further, as discussed fully above, although Duke disconnected the service, it cannot now reconstruct from its records the fact that proper notices were provided. Therefore, not only did Duke not err on the side of maintaining service, but it grossly violated the spirit of the 2011 Winter Order by performing a disconnection without following proper, required and necessary protocol.

E. Duke Failed To Comply With The "Third Party Notice" Requirements Of OAC 4901:1-18-06(A)(3)(a)

As stated above, Ms. Lykins specifically requested of a Duke employee that she be notified of any activity relating to the Account. She has also confirmed that she did not receive any notifications concerning the disconnection. As such, Duke has likewise violated OAC 4901:1-18-06(A)(3)(a) through its failure to give notice to Ms. Lykins of the disconnection⁸.

Again, Duke attempts to add language to the regulation by implying that a customer must formally "add" someone to an account in order to trigger the requirements of this Paragraph. Tr., p. 501, line 3 -- p. 502, line 5. However, Duke cannot hide from the fact that the technician with whom Ms. Lykins spoke may have neglected to make the notation in the CMS or elsewhere or that the record is now missing, as so many others are⁹.

⁸ OCC Ex F, p.2, does contain a notation listing Ms. Lykins as the daughter of the account holder. As such, Duke appears to have had some sort of record of her involvement.

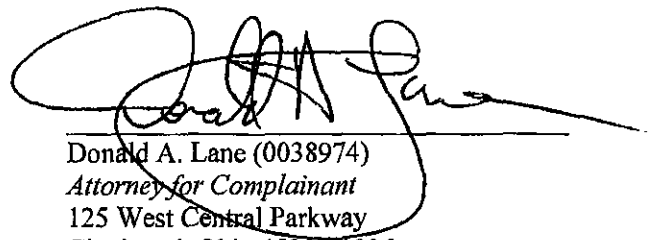
⁹ This particular violation is well within the scope of Mr. Pitzer's Amended Complaint. Pursuant to the requirements of OAC 4901-9-01(B), Mr. Pitzer has identified the basis of his complaints against Duked concerning the lack of notification, and this third party issue is fairly construed as being included therein.

IV. Conclusion

For the above stated reasons, Mr. Pitzer respectfully requests that the Commission find that Duke violated the disconnection procedures, contained at OAC 4901:1-18-06, and the terms of the 2011 Winter Order in disconnecting electrical service at the Residence.

Respectfully submitted,

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



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CERTIFICATE OF SERVICE

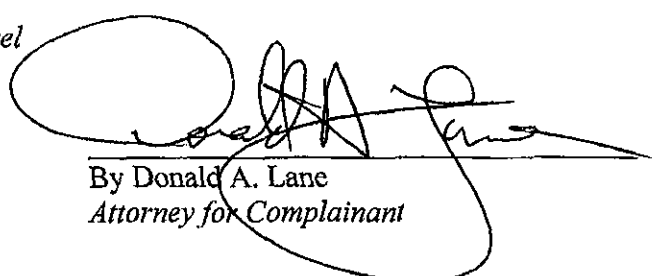
I hereby certify that a copy of the foregoing has been served upon the following by electronic mail this 11th day of February, 2016:

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