

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
JEFFREY PITZER,**

COMPLAINANT,

v.

CASE NO. 15-298-GE-CSS

DUKE ENERGY OHIO, INC.,

RESPONDENT.

OPINION AND ORDER

Entered in the Journal on August 30, 2017

I. SUMMARY

{¶ 1} The Commission finds that the Complainant, Jeffrey Pitzer, has sustained his burden of proof with respect to his claim that Duke Energy Ohio, Inc. failed to comply with the disconnection requirements of Ohio Adm.Code 4901:1-18-06(B) and, with respect to all other claims, finds that the Complainant has not sustained his burden of proof.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric light company and a natural gas company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 4} On February 11, 2015, Gail Lykins, acting as the personal representative of Dorothy Easterling and her son, Estill Easterling III (jointly, Easterlings), who are deceased, filed a complaint against Duke. Ms. Lykins, who is the daughter of Dorothy Easterling and

the sister of Estill Easterling III, asserted that, on November 4, 2011, Duke disconnected the Easterlings' gas and electric services at 11312 Orchard Street, Cincinnati, Ohio (Easterlings' property). Ms. Lykins further asserted that, as a result of the disconnection, the Easterlings died of hypothermia. Ms. Lykins alleged that Duke's disconnection of the Easterlings' gas and electric services, due to nonpayment, was improper under the special procedures that apply during the winter heating season. According to Ms. Lykins, the Easterlings had made a payment, prior to the disconnection, greater than one-third of their previous account balance. Ms. Lykins requested that the Commission determine whether Duke's disconnection of the utility services at the Easterlings' property failed to comply with the disconnection procedures and requirements set forth in Ohio Adm.Code 4901:1-18-06 and the winter heating season plan defined in Ohio Adm.Code 4901:1-18-05 and award compensation in light of the Company's actions.¹

{¶ 5} On February 27, 2015, Duke filed an answer to the complaint, generally denying the material allegations of the complaint and asserting a number of affirmative defenses. In its answer, Duke denied that it ever disconnected the gas service at the Easterlings' property. Duke further denied that it improperly disconnected the electric service at the Easterlings' property. Duke admitted that it properly disconnected the electric service at the Easterlings' property on November 4, 2011, for nonpayment of consumed utility services, after providing all required and additional, voluntary notices to Estill Easterling, the customer of record. Duke denied that the ten-day notice requirement of Ohio Adm.Code 4901:1-18-06(B) applied to the disconnection of electric service at the Easterlings' property, because the electric service was disconnected only for the nonpayment of utility services incurred during August, September, and October 2011, as well as relevant late fees, and not for the nonpayment of charges incurred during the winter heating season. Duke noted that, although Ohio Adm.Code 4901:1-18-06(B) did not apply, Duke sent a final ten-day disconnection notice to Estill Easterling on October 19, 2011, and did not disconnect the electric service at the Easterlings' property until 16 days later. Duke also denied that Ohio

¹ Throughout this Opinion and Order, references to the Commission's rules are to the rules in effect at the time of the disconnection at issue in this proceeding.

Adm.Code 4901:1-18-05(B)(3) applied to the disconnection of the electric service at the Easterlings' property on November 4, 2011, because Duke did not disconnect the electric service for any unpaid bills that included usage occurring during the period of November 1 to April 15; the partial payment that Duke received on October 12, 2011, was made prior to the winter heating season; the disconnection notice included with the bill prepared by Duke on October 4, 2011, explained all payment plans, including those applicable during the winter heating season; and neither Estill Easterling nor any other authorized person on his account contacted Duke to enter into any payment plan. Finally, Duke asserted a number of affirmative defenses, including that Complainant lacks standing, failed to state a claim upon which relief may be granted, and failed to state reasonable grounds for complaint, as required by R.C. 4905.26. Duke contended that it has complied with all applicable statutes, rules, regulations, and tariffs and that the complaint should, therefore, be dismissed.

{¶ 6} A settlement conference was held on April 16, 2015. However, the parties were unable to resolve this matter.

{¶ 7} By Entry dated April 29, 2015, a hearing in this matter was scheduled to commence on August 25, 2015. Subsequently, in order to afford the parties additional time to complete the discovery process, the hearing was rescheduled on numerous occasions.

{¶ 8} On July 10, 2015, the attorney examiner granted a motion to amend the complaint to substitute Ms. Lykins' husband, Jeffrey Pitzer (Complainant), as the Complainant in this matter, given that Mr. Pitzer had been substituted as fiduciary of the Easterlings' estates in the Probate Court of Hamilton County, Ohio. Further, the attorney examiner granted a motion to intervene in this proceeding filed by the Ohio Consumers' Counsel (OCC).

{¶ 9} A prehearing discovery conference was held on November 10, 2015, in order to resolve a number of discovery disputes among the parties. During the prehearing conference, the attorney examiner granted Complainant's second motion to amend the complaint, which was filed on October 22, 2015, and directed Duke to file an answer to the

amended complaint within 20 days. In accordance with the attorney examiner's ruling, Complainant filed the amended complaint on November 12, 2015, and Duke filed its answer to the amended complaint on November 20, 2015.

{¶ 10} In the amended complaint, which supersedes the original complaint filed on February 11, 2015, Complainant, in his capacity as the personal representative of the estates of the Easterlings, alleges that, at all relevant times, Dorothy Easterling was Duke's customer with respect to the utility service provided at the Easterlings' property, because, consistent with Ohio Adm.Code 4901:1-18-01(G), the Company accepted her utility payments for several years after her husband, Estill Easterling II, died, which constituted a contract with the Company to purchase gas and electric service at the Easterlings' property. Complainant further alleges that, prior to September 2011, Dorothy Easterling had made timely payments to Duke for utility service at the Easterlings' property. According to Complainant, Duke disconnected the electric service at the Easterlings' property in November 2011, in violation of the Commission's disconnection notice requirements set forth in Ohio Adm.Code 4901:1-18-06(A), (A)(2), and (A)(5), as well as the special winter heating procedures in Ohio Adm.Code 4901:1-18-06(B). Complainant asserts that Duke also failed to comply with a number of directives ordered by the Commission for the 2011-2012 winter heating season. *In re 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 (2011 Winter Reconnect Order), Finding and Order (Sept. 14, 2011). Specifically, Complainant alleges that Duke violated the 2011 Winter Reconnect Order by failing to err on the side of maintaining service to the Easterlings' property, when there was a doubt as to whether the Company gave proper notification to Dorothy Easterling, and permitting disconnection under Ohio Adm.Code 4901:1-18-03; by disconnecting service, despite the fact that Dorothy Easterling had made a payment toward the past due balance; by failing to provide Dorothy Easterling with special notice of reconnection rights; and by failing to provide Dorothy Easterling with the availability of payment plan options. Complainant concludes that, as a result of Duke's actions in disconnecting service at the Easterlings' property, the Easterlings died of hypothermia.

{¶ 11} In its answer to the amended complaint, Duke generally denies Complainant's allegations and asserts a number of affirmative defenses. With respect to the allegations at issue, Duke denies that Dorothy Easterling was the Company's customer on any gas or electric account at the Easterlings' property or that the Company had a contract with Dorothy Easterling. Duke admits that the Company properly disconnected the electric service at the Easterlings' property on November 4, 2011, after timely providing all required notices. Duke also admits that the *2011 Winter Reconnect Order* applied to the Company.

{¶ 12} By Entry dated November 30, 2015, the attorney examiner directed that all expert testimony be filed by December 30, 2015. On that date, Duke filed the direct testimony of Joshua W. Danzinger (Co. Ex. J), Melissa Porter (Co. Ex. K), and Mitchell A. Carmosino (Co. Ex. L). OCC filed the direct testimony of James D. Williams (OCC Ex. A).

{¶ 13} A second prehearing discovery conference was held on January 14, 2016, in order to resolve a number of discovery disputes among the parties.

{¶ 14} The hearing in this matter commenced, as rescheduled on February 1, 2016, and concluded on February 2, 2016.

{¶ 15} Briefs were filed by the parties on February 11, 2016.

III. MOTIONS FOR PROTECTIVE ORDER

A. *Direct Testimony of Mitchell A. Carmosino*

{¶ 16} On December 30, 2015, Duke filed a motion for protective order, seeking to protect information contained in the confidential version of the direct testimony of Mitchell A. Carmosino (Co. Ex. M) that relates to the processes and procedures of the Company's customer service center. Specifically, Duke asserts that the Commission should find that the redacted information in Mr. Carmosino's testimony constitutes confidential, sensitive, and proprietary trade secret information, as defined in R.C. 1333.61(D), and as recognized by Ohio Adm.Code 4901-1-24. Duke explains that the proprietary information, if disclosed, could invite a comparison of procedures, release proprietary third-party

information into the public domain, and prejudice the Company in the conduct of its business.

{¶ 17} On January 13, 2016, OCC filed a memorandum contra Duke's motion for protective order. OCC argues that Duke offered only general statements in its motion and failed to show that the redacted information in Mr. Carmosino's testimony meets the definition of a trade secret set forth in R.C. 1333.61(D). OCC adds that Duke seeks to protect information pertaining to its processes and procedures for disconnecting the utility service of residential customers due to nonpayment, which, according to OCC, is information that the Commission, in denying a motion for protective order filed by Duke in another case, has previously determined should be publicly disclosed. *In re Five-Year Review of Natural Gas Company Uncollectible Riders*, Case No. 08-1229-GA-COI (*Five-Year Review Case*), Entry (Nov. 3, 2010) at 4. OCC asserts that the Commission should likewise find, in the present case, that Duke's disconnection policies and procedures should be disclosed to the public. In response to Duke's reference to proprietary third-party information, OCC notes that the only third-party information in Mr. Carmosino's testimony consists of general statements regarding the Easterling account, which should not be deemed trade secret information.

{¶ 18} On January 20, 2016, Duke filed a reply to OCC's memorandum contra. According to Duke, OCC mischaracterizes current Commission practice and improperly relies on outdated decisions. Duke contends that the *Five-Year Review Case* cited by OCC should not be determinative with respect to the Company's present motion for protective order, because the prior case does not address the issue of whether the Company's current policies and procedures should be afforded confidential treatment in this complaint proceeding. Further, Duke asserts that the redacted information in Mr. Carmosino's testimony constitutes trade secret information. Duke explains that the redacted information concerns the criteria used to determine whether a residential customer is eligible to be disconnected due to nonpayment. Duke asserts that, if customers are given access to the specific criteria, they would be able to avoid them, thus depriving the Company of full payment for the services that it has provided and potentially resulting in more rate cases to

account for the lost revenue. Duke adds that its policies and procedures detail the inner workings of the Company and, if disclosed, other entities would unfairly benefit from the resources expended by the Company to develop them. Finally, Duke explains that the third-party information referenced by the Company in its motion relates to specific customer information that the Company believes it has an obligation to protect.

B. Deposition Transcript of Marion Byndon

{¶ 19} On December 31, 2015, Complainant filed a motion for protective order, seeking confidential treatment with respect to the transcript of the deposition of Duke employee Marion Byndon. Complainant states that, at Duke's request, the transcript was filed under seal. Complainant notes that he agrees with Duke's request.

{¶ 20} On January 13, 2016, OCC filed a memorandum contra Complainant's motion for a protective order. OCC argues that Complainant did not show that the deposition transcript meets the definition of a trade secret set forth in R.C. 1333.61(D). OCC further argues that Duke has not sought to protect the deposition transcript in any way, despite the fact that the sole basis for Complainant's motion is that the Company requested that the entire transcript be kept confidential. Additionally, OCC notes that no attempt was made to redact the transcript as required by Ohio Adm.Code 4901-1-24(D)(1). OCC concludes that Complainant's motion should be denied or, alternatively, the Commission should require that a redacted transcript be filed.

{¶ 21} On January 20, 2016, Duke filed a reply to OCC's memorandum contra. Duke notes that OCC's concerns are moot, given the attorney examiner's instruction to the Company, during the prehearing conference on January 14, 2016, to file a motion for protective order with respect to the deposition transcript. Duke further notes that the motion would be filed with proposed redactions.

{¶ 22} On January 22, 2016, Duke filed a motion for protective order with respect to Ms. Byndon's deposition transcript, along with a redacted transcript. Duke notes that the deposition concerned internal processes and procedures, specifically the Company's

internal customer account system, with questions extending to printouts from the system, as well as specific customer transactions and account detail. Duke further notes that its internal customer account system serves as a database for customer information, including information related to credit, billing histories, and usage, which the Company steadfastly guards from public disclosure. Duke states that its processes and procedures, as reflected in its internal customer account system, were not developed for public dissemination, are not shared externally, and have been developed through the Company's resources. Duke emphasizes that, consistent with prior cases finding that internal policies and procedures should be protected as trade secrets, entries in the customer account system likewise merit protection. *In re Northeast Ohio Natural Gas Corp., Orwell Natural Gas Co., and Brainard Gas Corp.*, Case No. 14-205-GA-COI (*Brainard Gas Case*), Entry (Aug. 4, 2015) at 4. Duke adds that the Ohio Supreme Court has found that processes that are continuously used in the operation of a company's business constitute trade secrets. *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 526, 687 N.E.2d 661 (1997). Duke concludes that the redacted information constitutes trade secret information that should be protected.

{¶ 23} On February 8, 2016, OCC filed a memorandum contra Duke's motion. OCC contends that the redacted information in the deposition transcript fails to meet the definition of a trade secret under R.C. 1333.61(D). Specifically, OCC argues that Duke failed to assert that it derives independent economic value from keeping the redacted information from public disclosure. OCC further argues that Duke failed to adequately explain its efforts to maintain the secrecy of the information. With respect to the *Brainard Gas Case*, OCC notes that the Entry in that case makes no mention of internal policies and procedures, as Duke contends. OCC notes that the information protected in that case was specific customer information, such as customer identification numbers, account numbers, and usage data, as well as bank account numbers, copies of checks and invoices, and gas procurement strategy. *Brainard Gas Case*, Entry (Aug. 4, 2015). According to OCC, general process and procedure information or information related to a company's internal workings does not constitute trade secret information.

{¶ 24} On February 11, 2016, Duke filed a reply to OCC's memorandum contra. Duke argues that OCC failed to substantiate its position with reference to recent Commission precedent and ignores the current practice under the Commission's rules. According to Duke, OCC attempts to reframe the Commission's issuance of protective orders into a method by which information can be made public, whereas the actual function of protective orders is to facilitate the Commission's use of information that is the proprietary property of an entity under the Commission's jurisdiction. Arguing that the redacted information in Ms. Byndon's deposition transcript derives economic value from its confidentiality, Duke reiterates that, if the Company's criteria for disconnection for nonpayment are disclosed, residential customers would be able to avoid them, which could result in additional rate cases and changes to the Company's internal policies and procedures that could result in more residential customers being placed in a disconnection queue. In response to OCC's argument that Duke failed to adequately demonstrate its efforts to maintain the secrecy of the redacted information, the Company argues that OCC proposes a higher showing than is required under the Commission's precedent or rules. Duke adds that the Commission regularly grants protective orders based upon the movant's statement that it maintains internal safeguards against disclosure of the proprietary information.

C. *Deposition Transcript of Mitchell A. Carmosino*

{¶ 25} On January 11, 2016, OCC filed a motion for protective order with respect to the confidential portion of the deposition transcript of Mitchell A. Carmosino. OCC notes that, although OCC does not concede that the redacted information in the deposition transcript constitutes trade secret information, Duke believes that the information should be treated as such. OCC further notes that it obtained the information from Duke pursuant to a protective agreement reached with the Company.

{¶ 26} On January 22, 2016, Duke filed a motion for protective order, seeking to protect the confidential portion of the deposition transcript of Mr. Carmosino. Duke explains that the deposition of Mr. Carmosino extended to confidential information

pertaining to the Company's internal policies and procedures. Duke notes that, in other Commission proceedings, internal policies and procedures have been protected as trade secrets. *Brainard Gas Case*, Entry (Aug. 4, 2015) at 4. Duke also explains that its processes and procedures, as reflected in its internal customer account system, were not developed for public dissemination, are not shared externally, and have been developed through the Company's resources. Duke concludes that, if the information is disclosed, others would unfairly benefit from the Company's efforts.

D. *Hearing Transcript and Duke's Brief*

{¶ 27} On February 11, 2016, Duke filed two motions for protective order, seeking to protect certain information included in the hearing transcript and in its brief. In the motions, Duke notes that both its brief and the hearing transcript contain information concerning the Company's internal customer account system, specific customer transactions, and account detail, as well as references to the Company's processes for customer mailings, payments, notices, and termination of service. Duke further notes that it seeks confidential treatment of internal records that memorialize events specific to one internal business unit and that reflect interaction with counterparties. Duke contends that disclosure of these records would compromise the Company's internal procedures, existing and future contractual undertakings, and status as an entity that procures competitive contracts, which would adversely affect its customers. Duke argues that these processes and procedures are subject to the Company's continuous, internal use and are, therefore, trade secrets. Additionally, Duke reiterates the arguments raised in its earlier pleadings.

{¶ 28} On February 26, 2016, OCC filed a memorandum contra Duke's motions. OCC maintains that Ohio law sets forth specific requirements that must be satisfied before information can be considered a trade secret and eligible for protection from public disclosure. OCC emphasizes that general processes and procedures or a company's internal workings do not constitute trade secrets under Ohio law. OCC also reiterates the arguments raised in its earlier pleadings.

{¶ 29} On March 4, 2016, Duke filed a reply to OCC's memorandum contra. Initially, Duke notes that Complainant has not opposed the Company's motions. Duke also incorporates the arguments raised in its earlier pleadings and briefly reiterates some of those prior arguments.

E. Ruling on Motions for Protective Order

{¶ 30} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

{¶ 31} Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code."

{¶ 32} Ohio law defines a trade secret as "information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

{¶ 33} The Commission has reviewed the information that is the subject of the parties' motions for protective order, as well as the assertions set forth in the supportive memoranda. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C.

1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court,² the Commission finds that the information filed under seal in this proceeding does not constitute trade secret information. The Commission has previously determined that the utility companies' practices and procedures regarding termination of service and payment arrangements does not constitute trade secret information. *Five-Year Review Case*, Entry (Nov. 3, 2010) at 4. Further, although Duke relies on the *Brainard Gas Case* in support of its request for protection of certain internal policies and procedures and customer account information, we note that the information found by the attorney examiner to constitute trade secret information in that case related to bank account numbers, copies of checks, gas procurement strategies, and other information that is not comparable to the present case. *Brainard Gas Case*, Entry (Aug. 4, 2015) at 2-3. We also note that, over the course of this proceeding, Duke itself has disclosed some of the information regarding its disconnection policies and procedures that it seeks to protect from public disclosure. For these reasons, the Commission finds that the parties' motions for protective order should be denied. Accordingly, the Commission's docketing division should release, no earlier than 45 days from the date of this Opinion and Order, the information filed under seal in this docket.

IV. DISCUSSION

A. *Applicable Law*

{¶ 34} The complaint in this proceeding was filed pursuant to R.C. 4905.26, which provides, in pertinent part, that the Commission will hear a case:

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is

² See *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained.

The statute requires the Commission to fix a time for hearing, if it appears that reasonable grounds for complaint are stated.

{¶ 35} In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966). Therefore, in order to prevail in this matter, Complainant must prove the allegations in his complaint by a preponderance of the evidence.

B. Background

{¶ 36} The evidence in this case reflects that Estill Easterling II was a longstanding customer of Duke receiving gas and electric service at his residence at 11312 Orchard Street in Cincinnati, Ohio, for many years. Following the death of Estill Easterling II in 1991, his wife, Dorothy Easterling, and son, Estill Easterling III, continued to reside in the home and to receive gas and electric service from Duke. However, the account remained in the name of Estill Easterling II until 2013, when Ms. Lykins moved into the residence. (Tr. I at 9-11, 38; Co. Ex. L at 10-11.)

{¶ 37} In August 2011, Duke mailed a utility bill addressed to Estill Easterling II at the residence on Orchard Street. The bill dated August 4, 2011, with an amount due of \$143.49, was not paid and, therefore, the account became subject to Duke's disconnection procedures, with a reminder notice included on the next bill dated September 2, 2011. That bill, with a total amount due of \$248.82, which included the amount for the prior period plus a late payment charge, also was not paid. Consequently, the bill dated October 4, 2011,

included a disconnection notice with a pink disconnection bill insert. The bill stated that service may be disconnected if the past due amount of \$248.82 was not paid before October 28, 2011. The bill dated November 2, 2011, reflected that, although a payment of \$143.49 was received and credited to the account, the remainder of the past due balance was not paid. Duke disconnected the electric service to the residence on Orchard Street on November 4, 2011. (Co. Ex. L at 11-13, 16, Attach. MAC-1, MAC-2, MAC-5; OCC Ex. A at Attach. JDW-2 to JDW-5.)

C. Summary of the Arguments and Commission Conclusions

1. CUSTOMER OF RECORD

a. Parties' Arguments

{¶ 38} In his brief, Complainant identifies several issues for resolution in this proceeding. Initially, Complainant argues that Dorothy Easterling was Duke's customer within the meaning set forth in Ohio Adm.Code 4901:1-18-01, which defines a customer as any person who enters into an agreement, whether by contract or under a tariff, to purchase electric or natural gas service. Complainant asserts that, when Estill Easterling II died, his contractual obligations as a customer of Duke were assigned to Dorothy Easterling and that the Company consented to the assignment, by implication, when it accepted payments from Dorothy Easterling over a period of more than 20 years. Complainant adds that Duke's assertion that it was not required to send notices to Dorothy Easterling, personally, is a distraction, because the Company was required to send notices to the Easterlings' property, which was the address in the Company's account records, regardless of the death of Estill Easterling II. (Complainant Br. at 6-8.)

{¶ 39} OCC asserts that, in 2011, Dorothy Easterling was a customer of Duke under the Commission's rules and, therefore, was entitled to the full protection of the rules. OCC notes that Ohio Adm.Code 4901:1-18-01 defines "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." OCC points out that, consistent with this definition, Dorothy Easterling paid Duke's tariffed charges for electric and natural gas service for many years after her

husband's death. OCC adds that Duke provided service and accepted Dorothy Easterling's payments for this period. Further, OCC maintains that, under section 1.5 of Duke's tariff, Dorothy Easterling, as the surviving spouse, received both the benefits and obligations of her husband's application for service. Finally, OCC notes that the protections afforded to a residential customer under the Commission's disconnection rules also apply to consumers residing at the customer's premises. (OCC Br. at 7-8.)

{¶ 40} In its answer to the amended complaint, Duke asserts, as an affirmative defense, that Complainant lacks standing to assert any claims against the Company on behalf of the Easterlings, because neither of the Easterlings was the customer of record on the account in question.

b. Commission Conclusion

{¶ 41} As an initial matter, the Commission finds that Dorothy Easterling was Duke's customer. Under Ohio Adm.Code 4901:1-18-01(G), a "customer" is defined as "any person who enters into an agreement, whether by contract or under a tariff, to purchase: electric, gas, or natural gas utility service." Although Duke witness Carmosino testified that Estill Easterling II was the customer on the account in question, Ms. Lykins testified that her father, Estill Easterling II, died 25 years ago and, at the time of his death, was living with her mother, Dorothy Easterling, at the Easterlings' property (Co. Ex. L at 10; Tr. I at 10-11). Ms. Lykins acknowledged that, following her father's death, the account remained in his name until 2013 (Tr. I at 11, 38). However, Ms. Lykins also testified that her mother received and paid the bills for the account by cash or check and that, at times, the bills were paid by Ms. Lykins on her mother's behalf at a pay station (Tr. I at 48-50, 59). We find that Dorothy Easterling's payment of the bills and Duke's acceptance of the payments, over a period of more than 20 years, constituted a contractual arrangement for gas and electric service. Additionally, consistent with Duke's tariff, the benefits and obligations associated with Estill Easterling II's application for service inured to, and were binding on, Dorothy Easterling as the surviving spouse. Finally, we note that the Commission has previously rejected lack of standing arguments in cases involving spouses. *See, e.g., In re*

Complaint of Robert A. Keller v. The Ohio Util. Co., Case No. 86-1629-WW-CSS, Opinion and Order (Aug. 2, 1988); *In re Complaint of Anita Dintino v. Eastern Natural Gas Co.*, Case No. 05-51-GA-CSS, Opinion and Order (Oct. 25, 2006).

{¶ 42} The Commission also finds that Complainant has standing to bring the complaint. At the hearing, Ms. Lykins testified that she was originally appointed as the administrator of Dorothy Easterling's estate and that, subsequently, her husband, Jeffrey Pitzer, was substituted as the administrator (Tr. I at 12-13). The Commission, therefore, rejects Duke's argument that Complainant lacks standing. We will proceed to address the claims asserted in the amended complaint.

2. DISCONNECTION NOTICES

a. Parties' Arguments

{¶ 43} Although the allegations are not addressed in the Complainant's brief, the amended complaint alleges that Duke failed to provide the requisite 14-day notice required by Ohio Adm.Code 4901:1-18-06(A) and failed to provide a notice including the contents required by Ohio Adm.Code 4901:18-06(A)(5).

{¶ 44} In his brief, Complainant also contends that Duke failed to comply with Ohio Adm.Code 4901:1-18-06(B). The rule requires:

During the period of November first through April fifteenth, if payment or payment arrangements are not made to prevent disconnection before the disconnection date stated on the fourteen-day disconnection notice, the utility company shall not disconnect service to residential customers for nonpayment unless the utility company completes each of the following: (1) Makes contact with the customer or other adult consumer at the premises ten days prior to disconnection of service by personal contact, telephone, or hand-delivered written notice. Utility companies may send this notice by regular, U.S. mail; however, such notice must allow three calendar days for mailing. This

additional 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.

Specifically, Complainant asserts that Duke failed to provide Dorothy Easterling with the required ten-day notice before disconnecting her electric service. Complainant notes that Duke is unable to provide a copy of the ten-day notice that it alleges was mailed to the Easterlings' property, despite the fact that the Company's customer management system (CMS) would be expected to contain a copy of the notice at issue and, in fact, the Company produced a ten-day notice from 2011 for a different customer account. Complainant also notes that Ms. Lykins testified that she did not find any disconnection notices at the Easterlings' property. (Complainant Br. at 8-9.)

{¶ 45} Additionally, Complainant asserts that, even if it is assumed that Duke issued the ten-day notice, the Company failed to extend the date for disconnection by the required additional ten days beyond the date set forth in the bill containing the initial disconnection notice. Complainant notes that, because Duke alleges that the disconnection date stated on the 14-day disconnection notice was October 28, 2011, the Company should have extended the disconnection by an additional ten days, or until November 7, 2011. Because Duke's disconnection of the electric service occurred prior to that date, Complainant concludes that the disconnection was contrary to Ohio Adm.Code 4901:1-18-06(B). (Complainant Br. at 10.)

{¶ 46} OCC contends that Duke's disconnection of the Easterlings' electric service violated several of the Commission's rules and, therefore, the Company furnished inadequate service. As an initial matter, OCC argues that, because the disconnection occurred on November 4, 2011, after the start of the winter heating season on November 1, 2011, Duke should have followed the special disconnection procedures set forth in Ohio Adm.Code 4901:1-18-06(B). With respect to the disconnection notice requirements, OCC argues that the disconnection notice on the October 4, 2011 bill did not include all of the information required by Ohio Adm.Code 4901:1-18-06(A)(5). Although OCC acknowledges

Duke's contention that the information was provided on a generic disconnection bill insert on pink paper, OCC asserts that Ms. Lykins testified that no such document was found among Dorothy Easterling's utility bills. OCC adds that Duke failed to produce a copy of the actual bill insert addressed to the Easterlings. Further, OCC maintains that, because the bill does not reference the bill insert, the bill would not have alerted Dorothy Easterling that further information regarding disconnection was included among the several other bill inserts that were included with the October 4, 2011 bill. OCC concludes that the disconnection information was not "clearly displayed," as required by Ohio Adm.Code 4901:1-18-06(A)(5), and that the generic disconnection bill insert may have been regarded by Dorothy Easterling as just another advertisement or educational pamphlet. (OCC Br. at 8-12.)

{¶ 47} With respect to the ten-day notice requirement in Ohio Adm.Code 4901:1-18-06(B)(1), OCC emphasizes that Duke failed to produce a copy of the ten-day disconnection notice addressed to the Easterlings. OCC adds that Ms. Lykins testified that she found no disconnection notices among Dorothy Easterling's utility bills or elsewhere at the Orchard Street residence on November 20, 2011. OCC also argues that the generic ten-day disconnection notice provided by Duke in this proceeding would not have informed customers that, in the event of a disconnection, they have the option to maintain either gas or electric service. OCC asserts that Duke's generic ten-day disconnection notice was, therefore, contrary to the separation-of-service requirements that apply to the Company as a combination utility under Ohio Adm.Code 4901:1-18-09(A). (OCC Br. at 13-14.)

{¶ 48} OCC contends that Duke prematurely disconnected the Easterlings' electric service on November 4, 2011, in violation of Ohio Adm.Code 4901:1-18-06(B)(1). Specifically, OCC alleges that Duke's ten-day disconnection notice failed to extend, by ten additional days, plus three days for mailing, the date of disconnection designated on the Easterlings' 14-day disconnection notice provided on the October 4, 2011 bill. OCC notes that the date of disconnection was stated as October 28, 2011, and, therefore, the earliest that Duke could have disconnected the Easterlings' electric service was November 7, 2011, or

November 10, 2011, if the ten-day disconnection notice was mailed. OCC adds that, even if Duke is correct that the rule allows the Company to account for the ten-day period at the outset of the disconnection process, the Company nevertheless failed to provide the additional three days required for mailing. (OCC Br. at 14-16.)

{¶ 49} Additionally, OCC alleges that Duke's ten-day disconnection notice sought a larger payment to maintain the Easterlings' service than is permitted under Ohio Adm.Code 4901:1-18-04(B), which provides that the minimum payment necessary to avoid disconnection must not be greater than the delinquent amount. OCC notes that Duke's generic ten-day disconnection notice instructed customers to pay the amount on the last bill received, which, for Dorothy Easterling, was the October 4, 2011 bill, with a stated amount of \$248.82 to avoid disconnection. OCC further notes that Dorothy Easterling made a payment of \$143.49 on or about October 11, 2011, more than a week prior to Duke's alleged mailing of the ten-day disconnection notice on October 19, 2011. OCC concludes that the amount due for regulated services, in order to avoid disconnection, was \$103.18,³ which is not consistent with the amount stated on the ten-day disconnection notice. (OCC Br. at 16-17.)

{¶ 50} In its brief, Duke argues that the Complainant has failed to sustain his burden of proof and that his complaint should, therefore, be denied. Specifically, Duke notes that Complainant admitted, through his sole witness, Ms. Lykins, that the account in question was past due; did not contest the Company's position that no one contacted the Company regarding either the pending or completed disconnection; and failed to provide any evidence indicating that the required notifications were not received or that the disconnection for nonpayment was otherwise improperly carried out by the Company. (Co. Br. at 8.)

{¶ 51} Duke argues that it provided the requisite notices prior to disconnecting the electric service for nonpayment as authorized by Ohio Adm.Code 4901:1-18-04(A). In

³ OCC excludes the late payment charge of \$2.15, as it is not a regulated service.

support of its contention that the required disconnection notice was provided to the customer of record, Duke asserts that the Company has provided for the record a copy of the October 2011 bill that was mailed to the customer. Further, Duke argues that the evidence reflects that the Company's CMS records confirm that the bill included the requisite disconnection notice; that it was the practice of the Company's print vendor to include a pink-colored disconnection bill insert for any residential account subject to disconnection for nonpayment; and that exact payments were made to the account in question on or about October 12, 2011, and November 21, 2011, which indicates that bills were regularly received at the residence on Orchard Street. (Co. Br. at 13-15.)

{¶ 52} Duke further argues that the October 2011 bill and the pink disconnection bill insert, in tandem, provided all of the information required by Ohio Adm.Code 4901:1-18-06(A)(5). Duke emphasizes that the rule allows the requisite information to be included either on the disconnection notice or in documents accompanying the disconnection notice. (Co. Br. at 17-19.)

{¶ 53} Additionally, Duke argues that the winter heating season requirements in Ohio Adm.Code 4901:1-18-06(B) are not applicable to this proceeding and, in any event, the Company provided a final disconnection notice to Estill Easterling II. Duke notes that the winter heating season requirements are only triggered if the date of disconnection, as stated on the disconnection notice, falls during the period of November 1 through April 15. According to Duke, because the date of disconnection on the October 4, 2011 bill was October 28, 2011, and, therefore, outside of the defined winter heating season, the Easterling account was not subject to the rule's requirements and the Company was not obligated to send a final notice. Duke adds that, regardless, its CMS records indicate that a final notice was generated and mailed on October 19, 2011, consistent with the Company's practice of sending a final notice even when it is not required. Duke explains that, under its disconnection practices, customers are afforded, on a year-round basis, 24 days' notice of the earliest date on which service may be disconnected for nonpayment, which includes both the 14-day notice prescribed by Ohio Adm.Code 4901:1-18-06(A) and the additional

ten-day notice allotted under Ohio Adm.Code 4901:18-06(B)(1). Duke further explains that its practices are intended to clearly inform customers, at the outset of the disconnection process, of the earliest date on which their service may be disconnected and to provide them with every opportunity to avoid disconnection. (Co. Br. at 26-31.)

{¶ 54} Duke argues that, contrary to OCC's assertion, the Company did not violate the separation-of-service provisions under Ohio Adm.Code 4901:1-18-09. Initially, Duke notes that OCC's allegation is beyond the scope of this proceeding, because OCC has not asserted any affirmative claims against the Company by filing a complaint in this case. In any event, Duke contends that, in conformance with the rule, the Company provided notice of the right to retain either gas or electric service with the disconnection notice on the October 4, 2011 bill. (Co. Br. at 3-4, 40-42.)

b. Commission Conclusion

{¶ 55} The Commission finds that Complainant has not sustained his burden of proof with respect to the alleged violation of Ohio Adm.Code 4901:1-18-06(A). The rule permits a utility company to disconnect a delinquent residential customer's service for nonpayment after at least 14 days' notice. Ms. Lykins testified that, during the period of August through November 2011, she found no disconnection notices among Dorothy Easterling's papers (Tr. I at 17, 19-20). Ms. Lykins, however, did not live at the Easterlings' property in 2011 (Tr. I at 8, 13, 44-45). As a result, Ms. Lykins was unable to offer testimony addressing whether her mother received the 14-day disconnection notice from Duke. Duke, for its part, presented sufficient evidence to refute the testimony of Ms. Lykins. Duke offered the testimony of Mr. Carmosino, which reflects that the Company provided the required 14-day disconnection notice on the bill dated October 4, 2011, which also included a pink-colored disconnection notice bill insert (Co. Ex. D; Co. Ex. L at Attach. MAC-2, MAC-3). Together, the October 4, 2011 bill and the pink disconnection notice bill insert provided the information required by Ohio Adm.Code 4901:1-18-06(A)(5). We also find that the information was clearly displayed as required by the rule. The disconnection bill insert was pink in color and prominently titled "Ohio Residential Disconnection Notice"

in large, all-capital letters (Co. Ex. D; Co. Ex. L at Attach. MAC-3). The first page of the bill states, at the top, middle, and bottom of the page, "Disconnect Notice," in all-capital letters, which also appears at the top of the second and third pages of the bill. The middle portion of the first page of the bill consists of information about the potential disconnection, which is set off from the other information on the page by a surrounding border. (Co. Ex. L at Attach. MAC-2.)

{¶ 56} Turning to the winter heating season requirements of Ohio Adm.Code 4901:1-18-06(B), we note that the rule requires the utility company, during the period of November 1 through April 15, to provide the customer or other adult consumer at the premises with additional notice. Under Ohio Adm.Code 4901:1-18-06(B)(1), the utility company shall not disconnect service to residential customers for nonpayment unless the company makes contact with the customer or other adult consumer at the premises ten days prior to disconnection of service by personal contact, telephone, hand-delivered written notice, or notice by regular, U.S. mail, in which case such notice must allow three calendar days for mailing. As the rule explains, the effect of this additional notice is to extend the date of disconnection, as stated on the 14-day notice required under Ohio Adm.Code 4901:1-18-06(A), by ten additional days.

{¶ 57} The Commission rejects, as an initial matter, Duke's argument that the rule is inapplicable to this proceeding. Specifically, Duke claims that, because the date of disconnection on the October 4, 2011 bill was October 28, 2011, the rule's requirements were not triggered, given that the date of disconnection was not within the period of November 1 through April 15. The actual date of disconnection, however, was November 4, 2011, which clearly falls within the designated period.

{¶ 58} Next, the Commission finds that Complainant has sustained his burden of proof regarding Duke's violation of Ohio Adm.Code 4901:1-18-06(B). Ms. Lykins testified that she found no disconnection notices among Dorothy Easterling's papers on November 20, 2011, or shortly thereafter (Tr. I at 19-20). Ms. Lykins also testified that she did not see any disconnection notices from Duke at any time that she was at the Easterlings' property

from August through November 2011 (Tr. I at 17). Although Complainant bears the burden of proof in this case, Duke must refute this testimony offered on behalf of Complainant with sufficient evidence of its own. *Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 49 Ohio St.3d 123, 551 N.E.2d 145 (1990).

{¶ 59} The record reflects that Duke failed to comply with the winter heating season requirements set forth in the rule by prematurely disconnecting the Easterlings' electric service on November 4, 2011. Although the record indicates that Duke mailed the ten-day disconnection notice to the Easterlings' property, the notice did not extend, by ten additional days, plus another three days for mailing, the date of disconnection identified on the 14-day disconnection notice provided on the October 4, 2011 bill. The date of disconnection on the 14-day notice was October 28, 2011. (Co. Ex. L at 2, 14-15, Attach. MAC-2, MAC-4, MAC-6; Tr. II at 455-458, 464-465, 495-498.) Accordingly, the earliest date on which Duke could have disconnected the electric service was November 10, 2011, given that the ten-day disconnection notice was sent by U.S. mail. Contrary to Duke's position, the rule does not permit the Company to account for the ten-day period at the outset of the disconnection process. Again, Ohio Adm.Code 4901:1-18-06(B)(1) expressly provides that the 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." The point of the rule is clearly to prolong the date of disconnection, not to allow the utility company to "front load," as Duke witness Carmosino described it, the entire notice period by using 24 days to calculate the date of disconnection identified on the 14-day disconnection notice (Tr. II at 465, 497, 498). Based on the evidence of record, we find that Duke's premature disconnection of the electric service on November 4, 2011, was contrary to Ohio Adm.Code 4901:1-18-06(B).

{¶ 60} The Commission notes that there would have been no violation of Ohio Adm.Code 4901:1-18-06(B), if Duke had completed the disconnection of service outside of the winter heating period of November 1 through April 15. Specifically, if Duke had disconnected the electric service to the Easterlings' property during the October 28 through October 31, 2011 period (or during the period of October 18 through October 31, 2011, if the

Company had specified the earliest possible disconnection date in the bill dated October 4, 2011), there would not have been an improper disconnection of service. Because Duke completed the disconnection on November 4, 2011, the requirements of Ohio Adm.Code 4901:1-18-06(B) were triggered, and what may have otherwise been a lawful disconnection of service was rendered an unlawful one. The Commission intends, during the next five-year review of Ohio Adm.Code Chapter 4901:1-18, to consider whether the rules properly balance the interests of utility companies and consumers with respect to the timing of disconnections for nonpayment, particularly during the winter heating season, and any other related disconnection procedures.

{¶ 61} Finally, in response to OCC's argument that Duke violated the separation-of-service provisions of Ohio Adm.Code 4901:1-18-09(A), as well as the minimum payment requirement of Ohio Adm.Code 4901:1-18-04(B), we find that the alleged violations are beyond the scope of this proceeding, as they were not raised by Complainant in the amended complaint. *See, e.g., In re Complaint of Northeast Ohio Public Energy Council v. Green Mountain Energy Co.*, Case No. 06-453-EL-CSS, et al., Finding and Order (Aug. 9, 2006) at 9. Although OCC has been granted party status, OCC has not filed a complaint in this case. In any event, the evidence does not support OCC's arguments on these issues. Regarding the separation-of-service requirements in Ohio Adm.Code 4901:1-18-09(A), OCC contends that the ten-day disconnection notice did not inform the Easterlings that they had the option to maintain either their gas or electric service. The pertinent part of the rule provides that "[i]n the event of disconnection or pending disconnection of both gas and electric services, a residential customer of a combination utility company has the right to choose to retain or have reconnected both utility services or one service, either gas or electric." Contrary to OCC's assertion, nothing in Ohio Adm.Code 4901:1-18-09(A) required Duke to include, on the ten-day disconnection notice, a statement regarding the right to retain either the gas or electric service. Further, the record reflects that Duke provided notice of this right on the October 4, 2011 bill (Co. Ex. L at Attach. MAC-2).

{¶ 62} With respect to the minimum payment requirement, Ohio Adm.Code 4901:1-18-04(B) provides that “[t]he minimum payment necessary in order to avoid the disconnection procedures shall not be greater than the delinquent amount, i.e., that portion of the bill that represents a previous balance for regulated services provided by the utility company.” In its brief, OCC argues that the ten-day disconnection notice failed to provide an accurate minimum payment amount, because the notice did not account for the payment made by Dorothy Easterling on or about October 11, 2011. The ten-day disconnection notice did not state a specific amount required to be paid to avoid disconnection; rather, it instructed that the customer should pay the amount noted on the last bill received, pay the required amount to set up an extended payment plan, or provide a medical certificate (Co. Ex. L at Attach. MAC-4). We find that Duke’s ten-day disconnection notice was not counter to the rule. Nothing in Ohio Adm.Code 4901:1-18-04(B) required Duke to provide a specific amount on the ten-day disconnection notice. Further, the record reflects that, although a partial payment was applied to the Easterling account on October 12, 2011, the full amount necessary to avoid disconnection was not paid prior to the date of disconnection (Co. Ex. L at 12-13).

{¶ 63} Although the evidence in this case does not support OCC’s position that Duke violated Ohio Adm.Code 4901:1-18-09(A) and 4901:1-18-04(B), the Commission notes that the Company’s policies and practices with respect to the separation-of-service and minimum payment requirements should be subject to an audit. While Duke may have complied with the minimum requirements of the rules, we believe that a comprehensive review of the Company’s policies and procedures should be conducted at this time, as addressed further below. The Commission intends to select a consultant to audit and evaluate Duke’s disconnection practices, and to recommend any steps that the Company should take to improve its performance in this area.

3. DAY OF DISCONNECTION

a. Parties' Arguments

{¶ 64} Complainant asserts that Duke failed to comply with the day of disconnection procedures in Ohio Adm.Code 4901:1-18-06(A)(2). The rule requires:

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 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 premises in a conspicuous location prior to disconnecting service.

Specifically, Complainant contends that Duke failed to produce evidence that its technician, Mr. Danzinger, complied with the rule, while the evidence that is in the record shows that Mr. Danzinger spent only four minutes at the Easterlings' residence on the day of disconnection, which, according to Complainant, was an insufficient period of time in which to ascertain whether an adult was at home and, therefore, means that Mr. Danzinger most likely did not comply with the rule. In support of this conclusion, Complainant emphasizes that there are four outside doors at the Orchard Street residence; Duke's CMS records indicate that employees were instructed to allow plenty of time for Dorothy Easterling to respond to service calls, because she was elderly; and Mr. Danzinger testified that there are many activities to perform prior to completing a disconnection. (Complainant Br. at 10-12.)

{¶ 65} OCC contends that, having completed the many steps necessary to disconnect the Easterlings' electric service in only four minutes, it is not plausible that Mr. Danzinger complied with the personal notice requirements of Ohio Adm.Code 4901:1-18-06(A)(2). OCC argues that the testimony of Mr. Danzinger should be afforded little weight, because it was not based on his personal recollection of the disconnection at the Easterlings' home and it was inconsistent with respect to his usual disconnection practices. OCC adds that Mr. Danzinger admitted that, at times, he would slip the disconnection

notice under the door, which, according to OCC, is a clear violation of the rule. OCC also asserts that Mr. Danzinger testified that he unilaterally chose to disconnect the Easterlings' electric service rather than their gas service, in violation of the separation-of-service requirements in Ohio Adm.Code 4901:1-18-09(A), which permit the customer to determine which service is maintained in the event of a disconnection. In addition to raising these arguments, OCC reiterates that Ms. Lykins testified that no disconnection notice was posted at the residence or found among Dorothy Easterling's bills, aside from the notice included on the October 4, 2011 bill. (OCC Br. at 17-23.)

{¶ 66} Duke maintains that it provided notice of disconnection on the day of disconnection, as required by Ohio Adm.Code 4901:1-18-06(A)(2). Duke notes that the rule allows for notice to be left in a conspicuous location if neither the customer nor an adult consumer is at the premises. Although Duke acknowledges that Mr. Danzinger does not recall the disconnection that he completed at the residence on Orchard Street on November 4, 2011, the Company emphasizes that Mr. Danzinger testified that he would have followed the Company's usual disconnection procedures, including knocking on the door and waiting a sufficient period of time for a response, before affixing the day-of-disconnection notice to the property. Duke adds that its records confirm that Mr. Danzinger appeared at the residence on November 4, 2011, and completed the disconnection work order within a period of four minutes. (Co. Br. at 20-22.)

b. Commission Conclusion

{¶ 67} The Commission finds that Complainant has not sustained his burden of proof regarding the alleged violation of Ohio Adm.Code 4901:1-18-06(A)(2). Ms. Lykins testified that, on November 20, 2011, she found no disconnection notices on any of the doors to the Easterlings' property or among Dorothy Easterling's paperwork (Tr. I at 17, 19-20). Ms. Lykins also testified that, although she lived nearby and visited the Easterlings regularly, she did not live at the Easterlings' property in 2011 (Tr. I at 8, 13, 44-45). There is no evidence in the record that Ms. Lykins was present at the Easterlings' property on November 4, 2011, the day of disconnection, and, therefore, she was unable to offer

testimony regarding Duke's compliance with the rule. Further, Ms. Lykins did not indicate whether the Easterlings were at home on that date.

{¶ 68} Turning to Duke's testimony, we find that the Company offered sufficient evidence to rebut the testimony of Ms. Lykins. Duke witness Danzinger, a disconnection for nonpayment worker with the Company from May 3, 2010, to December 5, 2011, testified that, although he does not recall the disconnection at issue in this case, he always followed the same procedures in disconnecting service. Specifically, Mr. Danzinger testified that, in every case, he would attempt to make contact with the customer or another adult at the premises, in order to identify himself and the reason for his visit, provide the notice of disconnection, and inquire whether payment would be made to avoid the disconnection. Mr. Danzinger further testified that, if personal contact could not be made, he would securely post the day of disconnection notice at the premises in a visible location. Finally, Mr. Danzinger explained that he is certain that he would have left the notice entitled "Disconnection of Service Ohio Winter Notice" at the Easterlings' property, which, according to Mr. Danzinger, was left at every customer's premises following a disconnection during the period of October 15 through April 15. (Co. Ex. J at 1, 8-9, Attach. JWD-1; Tr. II at 255.)

{¶ 69} Although Mr. Danzinger readily admitted that he has no personal recollection of the disconnection of service at the Easterlings' property, he unequivocally stated that "I did it every time - either I gave the notice to the customer or other person living at the property or I securely attached the notice in a visible location" (Co. Ex. J at 9). We find that Mr. Danzinger's general disconnection practice was consistent with the rule. Although Mr. Danzinger contradicted himself at times with respect to whether he would knock on more than one door or just what he perceived to be the "best door," and whether he would check a customer's account notes for indication of a specific door to use, the inconsistencies in his testimony do not change the fact that Mr. Danzinger, as a matter of general practice, complied with the requirements of Ohio Adm.Code 4901:1-18-06(A)(2) by providing personal notice, on the day of disconnection of service, to the customer or an adult

consumer at home, or otherwise by attaching written notice to the premises in a conspicuous location. Duke's business records confirm that Mr. Danzinger completed the disconnection work order at the Easterlings' property within a period of four minutes (Complainant Ex. C). Contrary to Complainant's and OCC's position, we do not find that the four-minute timeframe is conclusive. Although the four-minute period may indicate that Mr. Danzinger quickly carried out the steps necessary to complete the disconnection, it is not determinative of whether he fully complied with the rule.

{¶ 70} In short, no witness in this case was able to address whether either of the Easterlings received personal notice if they were at home on November 4, 2011, or whether a disconnection notice was left in a conspicuous location at the premises, if they were not at home that day. Neither did any witness offer specific details regarding the disconnection that occurred at the Easterlings' property. Accordingly, based on the record, we find that Complainant has failed to establish that Duke did not comply with the requirements of Ohio Adm.Code 4901:1-18-06(A)(2).

4. WINTER RECONNECT ORDER

a. Parties' Arguments

{¶ 71} In his brief, Complainant argues that Duke failed to comply with certain terms of the Commission's *2011 Winter Reconnect Order*, which set forth special disconnection procedures for the period of October 17, 2011, through April 13, 2012, and provided, in pertinent part, 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. * * * Moreover, the Commission expects the utilities to err on the side of maintaining service when there is a doubt as to the applicability or the interpretation of a rule.

2011 Winter Reconnect Order, Finding and Order (Sept. 14, 2011) at 2. In support of this claim, Complainant asserts that Duke violated this provision of the *2011 Winter Reconnect Order* by disconnecting the electric service at the Easterlings' residence, despite the partial payment that the Company received from Dorothy Easterling. Further, Complainant notes that Duke cannot reconstruct from its records any evidence that proper notices were provided. Complainant concludes that Duke failed "to err on the side of maintaining service" as required by the *2011 Winter Reconnect Order*, as well as violated its spirit by performing a disconnection without following the proper and necessary protocol. (Complainant Br. at 12-13.)

{¶ 72} In the amended complaint, Complainant specifically alleges that Duke violated the *2011 Winter Reconnect Order* by failing to err on the side of maintaining service to the residence, when there was a doubt as to whether the Company provided proper notification to Dorothy Easterling so as to permit disconnection; by disconnecting service, despite the fact that Dorothy Easterling had made a payment toward the past due balance; by failing to provide Dorothy Easterling with special notice of reconnection rights; and by failing to provide Dorothy Easterling with the availability of payment plan options.

{¶ 73} OCC also asserts that Duke violated the *2011 Winter Reconnect Order*. In particular, OCC contends that Duke failed to assist the Easterlings in every way possible to maintain their service for heating purposes; ignored Dorothy Easterling's substantial payment on October 11, 2011, which should have alerted the Company that she was trying to reduce the past due amount; and failed to err on the side of maintaining the Easterlings' service when there was a doubt as to the applicability or interpretation of a rule. OCC

argues that Duke should have doubted its interpretation of the applicability of the winter rules, because nothing in the rules or the *2011 Winter Reconnect Order* requires that the unpaid usage prompting the disconnection procedures must have occurred during the winter heating season, as the Company contends. (OCC Br. at 23-25.)

{¶ 74} Duke maintains that the *2011 Winter Reconnect Order* has no relevance to this case, because there is no evidence that Dorothy Easterling or anyone else contacted the Company to invoke its provisions and undertake the necessary steps to avoid disconnection. Duke adds that the *2011 Winter Reconnect Order* is also inapplicable here, because it prescribes the rights and responsibilities of customers, and Dorothy Easterling was not the Company's customer. In any event, Duke argues that it complied with the provisions of the *2011 Winter Reconnect Order*, given that there was no uncertainty that the account was in arrears and subject to disconnection. Duke further argues that no provision of the *2011 Winter Reconnect Order* required the Company to suspend the disconnection of service due to the partial payment of \$143.49 received on October 12, 2011. Duke emphasizes that the full amount needed to avoid disconnection was not paid by October 28, 2011, and that a partial payment made before the period subject to the *2011 Winter Reconnect Order* does not implicate its provisions. Finally, Duke contends that it provided notice of the *2011 Winter Reconnect Order*, including information about reconnection rights and the availability of payment plan options, on three separate occasions, namely on the pink bill insert included with the October 4, 2011 bill, the final notice generated on October 19, 2011, and the day-of-disconnection notice left at the property on November 4, 2011. (Co. Br. at 31-38.)

b. Commission Conclusion

{¶ 75} The Commission finds that Complainant has failed to show that Duke violated the *2011 Winter Reconnect Order*. There is no evidence in the record that Dorothy Easterling contacted Duke to avoid the disconnection of her service under the special maintenance procedures set forth in the *2011 Winter Reconnect Order* or took the other steps necessary to invoke its provisions. *2011 Winter Reconnect Order*, Finding and Order (Sept. 14, 2011) at 3-6. The Commission has previously determined that a customer electing

to invoke the special winter maintenance or reconnection of service procedures must inform the utility company of that fact, and, if eligible, must apply for the regular Home Energy Assistance Program and enroll in the Percentage of Income Payment Plan or a standard extended payment plan. *In re Complaint of Brenda and Gerard Fitzgerald v. Duke Energy Ohio, Inc.*, Case No. 10-791-EL-CSS, Opinion and Order (Sept. 14, 2011) at 7-8. Further, the record reflects that Duke provided notice of the special winter heating season procedures on the pink bill insert included with the October 4, 2011 bill, the final notice generated on October 19, 2011, and the day-of-disconnection notice left at the property on November 4, 2011 (Co. Ex. D; Co. Ex. L at Attach. MAC-3, MAC-4; Co. Ex. J at Attach. JWD-1).

{¶ 76} As Complainant and OCC emphasize, we stated, in the 2011 *Winter Reconnect Order*, that it was our expectation that “the utility companies under our jurisdiction will assist customers in every way possible to maintain their service for heating purposes” and will “err on the side of maintaining service when there is a doubt as to the applicability or the interpretation of a rule.” Initially, we note that these are expectations, not requirements. Although we expect that the utility companies will take extra steps to ensure that service is maintained during the winter heating season, we are unable to find that Duke violated the 2011 *Winter Reconnect Order* based on an expectation alone. As Duke notes, nothing in the 2011 *Winter Reconnect Order* required the Company to suspend the disconnection of service due to the partial payment of \$143.49 received on October 12, 2011. Further, there is nothing in the record that indicates that the Easterlings, Ms. Lykins, or anyone within the Company itself questioned the Company’s interpretation of the Commission’s rules in the months leading up to the disconnection and, therefore, we disagree that there was a doubt as to the application or interpretation of a rule, such that Duke should not have proceeded with the disconnection for nonpayment.

5. THIRD-PARTY NOTICE

a. Parties’ Arguments

{¶ 77} Complainant contends that Duke failed to comply with the third-party notice requirements of Ohio Adm.Code 4901:1-18-06(A)(3)(a). The rule provides:

Each utility company shall permit a residential customer to designate a third party to receive notice of the pending disconnection of the customer's service and any other credit notices sent to the customer. If the customer has a guarantor, the guarantor shall receive notice of the pending disconnection of the guaranteed customer's service and any other credit notices sent to the guaranteed customer, pursuant to rule 4901:1-17-03 of the Administrative Code. The utility company shall notify the third party or the guarantor at least fourteen days prior to disconnecting the customer's service.

Complainant notes that, although Ms. Lykins had requested that she receive notification of any activity involving the Easterling account, Ms. Lykins received no notice regarding the disconnection of the Easterlings' electric service. Complainant concludes that Duke violated Ohio Adm.Code 4901:1-18-06(A)(3)(a) by failing to notify Ms. Lykins of the disconnection. (Complainant Br. at 13.)

{¶ 78} Duke asserts that it did not violate the third-party notification requirements of Ohio Adm.Code 4901:1-18-06(A)(3). Duke notes that there is no evidence to support Complainant's contention that Ms. Lykins should have received copies of the bills for the Easterling account. Although Duke acknowledges that Ms. Lykins testified that she made such request to a service technician working on the gas meter at the Orchard Street residence a few months prior to the disconnection, the Company notes that its CMS records do not reflect a service visit during that period. Further, Duke emphasizes that Ms. Lykins admitted that she did not provide her social security number to the Company or have Dorothy Easterling contact the Company to add her as a third party on the account, which is confirmed by the Company's CMS records. Duke again notes that Dorothy Easterling was not the customer of record and, therefore, could not have designated a third party under the Company's procedures. Duke also notes that the rule pertains specifically to disconnection notices, not utility bills, and that this claim is outside the scope of this proceeding, because it was not raised in the amended complaint. (Co. Br. at 3-4, 38-40.)

b. Commission Conclusion

{¶ 79} We find that Duke's alleged failure to comply with the third-party notice requirements of Ohio Adm.Code 4901:1-18-06(A)(3)(a) is not an issue that is properly before the Commission in this case, because it was not raised in the amended complaint. *See, e.g., In re Complaint of Northeast Ohio Public Energy Council v. Green Mountain Energy Co., Case No. 06-453-EL-CSS, et al., Finding and Order (Aug. 9, 2006) at 9.* In any event, Complainant has not sustained his burden of proof on this issue. At the hearing, Ms. Lykins testified that, in the summer of 2011, she spoke with a Duke employee working at the Easterlings' property and requested that copies of the bills be mailed to her (Tr. I at 15-16, 39-40). However, there is no evidence in the record that Dorothy Easterling contacted Duke to request that Ms. Lykins be designated as a third party to receive notice of pending disconnections or any other credit notices. Ohio Adm.Code 4901:1-18-06(A)(3)(a) pertains to disconnection notices, not bills, and requires the customer, not the third party, to contact the utility company to request the third-party designation. Complainant, therefore, has failed to establish that Duke violated the rule.

6. DUKE'S DISCONNECTION POLICY

a. Parties' Arguments

{¶ 80} OCC argues that Duke's disconnection of the Easterlings' electric service based on the Company's application of its disconnection policy was unjust and unreasonable, in violation of R.C. 4905.22. OCC notes that, in 2011, Duke's disconnection policy specified that there must be a 60-day arrearage and a balance of more than \$100. According to OCC, Duke disconnected the Easterlings' electric service, despite the fact that the account was only 30 days in arrears due to Dorothy Easterling's payment of \$143.49 on October 11, 2011. OCC adds that the only amount that could have been considered as 60 days in arrears was the unpaid late payment charge of \$2.15, which, as a nonregulated service, should not have triggered a disconnection. (OCC Br. at 25-27.)

{¶ 81} Duke notes that it has implemented disconnection policies and procedures applicable to residential customers that have been subject to audit and that, as a result of a

Commission-appointed auditor's recommendation in 2010, the Company accelerated the disconnection process, such that a disconnection notice would be sent to any residential customer with arrears in excess of \$100 and past due for a period of 30 days (rather than 60 days under the prior policy). Duke emphasizes that the new policy took effect in August 2011 and, therefore, was applicable to the disconnection at issue in this case. Consequently, Duke contends that the Easterling account was delinquent as of the day after the due date on the August 2011 bill. Duke notes that, consistent with its disconnection procedures, the Company issued a reminder notice on the September 2, 2011 bill, which stated that a payment had not been made on the account. Duke emphasizes that the reminder notice is not required, but is used to provide customers with another opportunity to cure the account's delinquent status. Duke adds that, despite the reminder notice, the bill was not paid by the due date and, therefore, the following bill included the disconnection notice required by Ohio Adm.Code 4901:1-18-06(A). (Co. Br. at 8-12.)

b. Commission Conclusion

{¶ 82} The Commission again notes that OCC has not filed a complaint against Duke in this matter. OCC's argument regarding the application of Duke's disconnection policy with respect to the Easterling account was not raised by Complainant in the amended complaint and is, therefore, beyond the scope of this proceeding. *See, e.g., In re Complaint of Northeast Ohio Public Energy Council v. Green Mountain Energy Co.*, Case No. 06-453-EL-CSS, et al., Finding and Order (Aug. 9, 2006) at 9. In any event, we find that the record reflects that, since August 2011, Duke's disconnection policy has provided that a residential account with a 30-day arrears of \$100 or more would be eligible for disconnection. The record also reflects that the Easterling account was subject to disconnection under Duke's policy. (Co. Ex. L at 5, 11-13; Tr. II at 482.)

{¶ 83} Nevertheless, in light of our finding above that Duke violated Ohio Adm.Code 4901:1-18-06(B), and the fact that the Company's disconnection procedures have remained the same since 2011 (Tr. II at 482), we find that Duke's disconnection practices and policies should, at this time, be subject to review by the Commission. The Commission,

therefore, intends, by subsequent entry, to issue a request for proposals, in order to select an auditor to undertake an investigation of Duke's current disconnection practices and policies for both its gas and electric service, which will include, but not be limited to, issues raised in this case, such as the separation-of-service and minimum payment requirements. We note that considerable time has passed since our prior review of Duke's disconnection policies and procedures, which encompassed only gas service and did not address the separation-of-service requirements. *Five-Year Review Case*, Finding and Order (Dec. 14, 2011). Additionally, since that time, Duke has fully deployed its SmartGrid program, including advanced metering infrastructure that enables remote disconnection of service. *In re Duke Energy Ohio, Inc.*, Case No. 10-2326-GE-RDR, Entry (Nov. 30, 2016). The Commission, therefore, finds that it is necessary and appropriate to conduct a comprehensive review of Duke's disconnection policies and procedures at this time. We also intend to thoroughly evaluate the current disconnection requirements, as part of our upcoming five-year review of Ohio Adm.Code Chapter 4901:1-18.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 84} Duke is an electric light company and a natural gas company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 85} On February 11, 2015, a complaint was filed against Duke by Gail Lykins, acting as the personal representative of Dorothy Easterling and Estill Easterling III. The complaint alleged that Duke improperly disconnected the Easterlings' electric service at 11312 Orchard Street, Cincinnati, Ohio.

{¶ 86} Duke filed its answer to the complaint on February 27, 2015, denying the allegations contained in the complaint.

{¶ 87} A settlement conference was held on April 16, 2015; however, the parties were unable to resolve this matter.

{¶ 88} On July 10, 2015, Jeffrey Pitzer was substituted for Ms. Lykins as the Complainant in this case.

{¶ 89} A prehearing discovery conference was held on November 10, 2015.

{¶ 90} On November 12, 2015, Complainant filed an amended complaint that superseded the original complaint.

{¶ 91} Duke filed its answer to the amended complaint on November 20, 2015.

{¶ 92} A second prehearing discovery conference was held on January 14, 2016.

{¶ 93} A hearing in this matter commenced on February 1, 2016, and concluded on February 2, 2016.

{¶ 94} Briefs were filed by the parties on February 11, 2016.

{¶ 95} The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 96} Complainant has sustained his burden of proof with respect to his claim that Duke failed to comply with the disconnection requirements of Ohio Adm.Code 4901:1-18-06(B).

{¶ 97} Complainant has not sustained his burden of proof with respect to all other claims raised in the amended complaint.

VI. ORDER

{¶ 98} It is, therefore,

{¶ 99} ORDERED, That this matter be decided in favor of Complainant to the extent set forth herein. It is, further,

{¶ 100} ORDERED, That the parties' motions for protective order be denied. It is, further,

{¶ 101} ORDERED, That the Commission's docketing division release, no earlier than 45 days from the date of this Opinion and Order, the information filed under seal in this docket. It is, further,

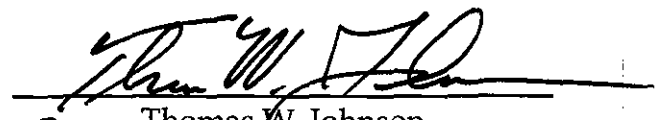
{¶ 102} ORDERED, That nothing in this Opinion and Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

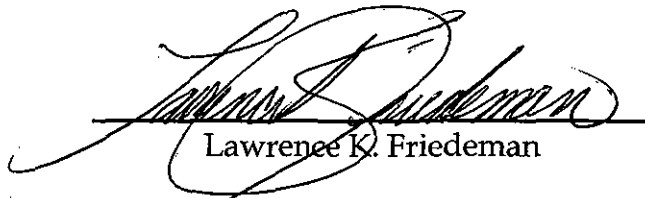
{¶ 103} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

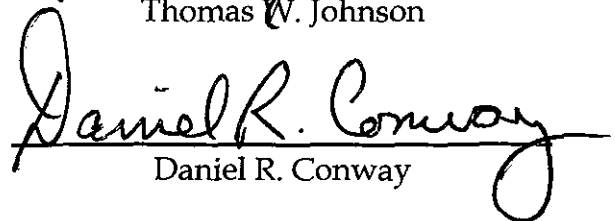
THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman


M. Beth Trombold


Thomas W. Johnson


Lawrence K. Friedeman


Daniel R. Conway

SJP/sc

Entered in the Journal

AUG 30 2017



Barcy F. McNeal

Barcy F. McNeal
Secretary