BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF RESPONDENT DUKE ENERGY OHIO, INC.

September 29, 2017

INTRODUCTION

On February 11, 2015, Gail Lykins, acting as the personal representative of her mother Dorothy Easterling and brother Estill Easterling, III (collectively, the Easterlings), filed a Complaint against Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) with the Public Utilities Commission of Ohio (Commission). By Entry dated July 10, 2015, the attorney examiner allowed Ms. Lykins' husband, Jeffrey Pitzer (Complainant) to substitute as the Complainant in these proceedings because he had replaced his wife as the personal representative of the Easterlings. In the same Entry, the Office of the Ohio Consumers' Counsel (the OCC) was allowed to intervene in the case. The OCC never filed any affirmative claims against Duke Energy Ohio. On February 11, 2015, Complainant filed an Amended Complaint against the Company, claiming that Duke Energy Ohio disconnected the Easterlings' electric service in violation of the notice requirements set forth in Ohio Adm.Code 4901:1-18-06(A), (A)(2), and (A)(5); the special winter heating season procedures in Ohio Adm.Code 4901:1-18-06(B); and the 2011 *Winter Reconnect Order*.[1] On August 30, 2017, the Commission issued its Opinion and Order (Order), finding that Complainant sustained his burden of proof only with respect to his claim that Duke Energy Ohio failed to comply with the disconnection requirements of Ohio Adm.Code 4901:1-18-06(B) and further finding Complainant did not sustain his burden of proof with respect to all other claims.

Ohio law, in R.C. 4903.10, allows any party that has entered an appearance in a Commission proceeding to apply for rehearing in respect to any matters determined in the proceeding, within thirty days after the issuance of the order. Duke Energy Ohio is hereby filing

[1] *In the Matter of the 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, Finding and Order (September 14, 2011).

its Application for Rehearing of the Order, pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-35.

Duke Energy Ohio asserts that the Order is unlawful and/or unreasonable in the following respects:

1. The Commission incorrectly found that Ohio Adm.Code 4901:1-18-06(B) is applicable based on the actual date of disconnection, as opposed to the disconnection date stated on the fourteen-day notice, as expressly provided in the rule.

   a. The Commission violated well-established rules of statutory interpretation by not applying the plain and unambiguous language of Ohio Adm.Code 4901:1-18-06(B).

   b. The Commission's Order runs afoul of the doctrine of *in pari materia* and creates an irreconcilable conflict between Ohio Adm.Code 4901-1-18-06(A)(5) and Ohio Adm.Code 4901-18-01-06(B).

   c. The Commission incorrectly found that Duke Energy Ohio violated Ohio Adm.Code 4901:1-18-06(B) notwithstanding the undisputed evidence that the Company provided all notices, including the extra ten days' of notice, required by the rule.

   (Assignment of Error 1)

2. The Commission incorrectly found that Dorothy Easterling was Duke Energy Ohio's customer.

   (Assignment of Error 2)

3. The Commission failed to clarify that its Order is effective only to a claim filed by Complainant on behalf Dorothy Easterling as opposed to Estill Easterling, III, whom the Commission did not find was a customer of the Company.

   (Assignment of Error 3)

Duke Energy Ohio respectfully requests that the Commission modify its Order, as discussed herein.

Respectfully submitted,

Amy B. Spiller (0047277)
Deputy General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P. O. Box 960
Cincinnati, Ohio 45202-0960
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com (e-mail)

Robert A. McMahon (0064319)
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, Ohio 45206
(513) 533-3441 (telephone)
(513) 533-3554 (facsimile)
bmcmahon@emclawyers.com (e-mail)

Attorneys for Respondent Duke Energy Ohio, Inc.

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Respondent.	)	

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF RESPONDENT DUKE ENERGY OHIO, INC.

As outlined above, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) submits the following memorandum to the Public Utilities Commission of Ohio (Commission) in support of its Application for Rehearing. The Company alleges three errors for the Commission's consideration and urges the Commission to reverse the conclusions referenced herein in its entry on rehearing.

1. The Commission incorrectly found that Ohio Adm.Code 4901:1-18-06(B) is applicable based on the actual date of disconnection, as opposed to the disconnection date stated on the fourteen-day notice, as expressly provided in the rule.

    a. The Commission violated well-established rules of statutory interpretation by not applying the plain and unambiguous language of Ohio Adm.Code 4901:1-18-06(B).

    b. The Commission's Order runs afoul of the doctrine of *in pari materia* and creates an irreconcilable conflict between Ohio Adm.Code 4901-1-18-06(A)(5) and Ohio Adm.Code 4901-18-01-06(B).

c. The Commission incorrectly found that Duke Energy Ohio violated Ohio Adm.Code 4901:1-18-06(B) notwithstanding the undisputed evidence that the Company provided all notices, including the extra ten days' of notice, required by the rule.

(Assignment of Error 1)

2. The Commission incorrectly found that Dorothy Easterling was Duke Energy Ohio's customer.

(Assignment of Error 2)

3. The Commission failed to clarify that its Order is effective only to a claim filed by Complainant on behalf Dorothy Easterling as opposed to Estill Easterling, III, whom the Commission did not find was a customer of the Company.

(Assignment of Error 3)

DISCUSSION

Assignment of Error 1:

The Commission incorrectly found that Ohio Adm.Code 4901:1-18-06(B) is applicable based on the actual date of disconnection, as opposed to the disconnection date stated on the fourteen-day notice, as expressly provided in the rule.

a. The Commission violated well-established rules of statutory interpretation by not applying the plain and unambiguous language of Ohio Adm.Code 4901:1-18-06(B).

b. The Commission's Order runs afoul of the doctrine of *in pari materia* and creates an irreconcilable conflict between Ohio Adm.Code 4901-1-18-06(A)(5) and Ohio Adm.Code 4901-18-01-06(B).

c. The Commission incorrectly found that Duke Energy Ohio violated Ohio Adm.Code 4901:1-18-06(B) notwithstanding the undisputed evidence that the Company provided all notices, including the extra ten days' of notice, required by the rule.

In finding that Complainant "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)"[1] the Commission disregarded the plain and unambiguous language of that rule, well-established principles of statutory interpretation, and the uncontroverted evidence that Duke Energy Ohio had provided the extra ten days' notice required by the rule.

Ohio law prescribes the manner in which statutes and rules are to be interpreted. R.C. 1.41 through 1.59 cover rules of construction and their applicability. Importantly, words and phrases are to be read in context and construed according to the rules of grammar and common usage;[2] and the words should be read to give effect to the entirety of the statute, with a just and reasonable result, and with execution feasible.[3] Furthermore, the General Assembly specifically stated that legislative intent is only to be considered where a statute is otherwise ambiguous.[4] And, for purposes of the present proceeding, it is critical to recognize that the sections addressing construction are specifically made applicable to administrative rules, as well as statutes.[5]

The Commission has previously recognized the applicability of these provisions to Commission decision-making.[6] It has acted on the basis that "all words are to be understood on the basis of their ordinary, everyday meaning, except where those words are shown to have come to have a special meaning on the basis of statutory definition or technical usage."[7] It has recognized that, where the intended meaning of a passage is "discernable from the face of [a] statute, using the words either based on their ordinary meaning or based on their technical or statutory meaning, we need go no farther."[8]

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[1] Order, at ¶96
[2] R.C. 1.42.
[3] R.C. 1.47.
[4] R.C. 1.49.
[5] R.C. 1.41.
[6] *In the Matter of the Complaint of WorldCom, Inc.; AT&T Corp.; KMC Telecom III, LLC; and LDMI Telecommunications, Inc. v. City of Toledo*, Case No. 02-3207-AU-PWC.
[7] Id. at pg. 11.
[8] Id.

In addition to the statutory provisions, case precedent similarly establishes ordinary rules of construction. These rules provide, in part, that "[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation."[9] Importantly, "[i]n the absence of clear legislative intent to the contrary, words and phrases in a statute shall be read in context and construed according to their plain, ordinary meaning."[10] Only if a rule or statute is ambiguous might the need for interpretation arise. When that happens, modifying words only apply to the words or phrases immediately preceding or subsequent to the word unless the intent of the legislature clearly required otherwise.[11] And courts "may not delete words used or insert words not used."[12] "There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of a statute to meet a situation not provided for."[13] Additionally, the well-established rules of statutory construction include the rule of *in pari materia*, which requires a court to "read all statutes relating to the same general subject matter together to give proper force and effect to each one."[14] And "[a]dministrative rules which have the effect of legislative enactments are subject to the ordinary rules of statutory construction."[15]

As discussed herein, the Commission's Order cannot be reconciled with these rules of construction and, instead, creates irreconcilable conflict between its own regulations governing the disconnection of utility service for nonpayment.

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[9] *Cline v. Ohio Bureau of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991) (internal citations omitted).
[10] *Kunkler v. Goodyear Tire & Rubber Co.*, (1988), 36 Ohio St.3d 135, 137, 522 N.E.2d 477.
[11] *In re Shaffer*, 228 B.R. 892, 894 (Bankr. N.D. Ohio 1998); *see also Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, 846 N.E.2d 16, ¶ 24 ("referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent").
[12] *Cline v. Ohio Bureau of Motor Vehicles*, (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.
[13] *Vought Industries, Inc. v. Tracy, Tax Comm'r.*, (1995), 72 Ohio St.3d 261, 265, 648 N.E.2d 1364.
[14] *In re Duke Energy Ohio, Inc.*, 2017-Ohio-5536, ¶ 27.
[15] *Ohio Edison Company v. Ohio Power Siting Commission*, (1978), 56 Ohio St.2d 212, footnote 3 (internal citations omitted).

The starting point of this analysis necessarily is the rule itself. Ohio Adm.Code 4901:1-18-06(B) provides:

> 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 other hand-delivered written notice. Utility companies may send the 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 by, as stated on the fourteen-day notice required by paragraph (a) of this rule, by ten additional days.
> (2) Informs the customer or adult consumer that sources of federal, state, and local government aid for payment of utility bills and for home weatherization are available at the time the utility company delivers the notice required in paragraph (B)(1) of this rule, and provides sufficient information to allow the customer to further pursue available assistance.
> (3) Informs the customer of the right to enter into any of the payment plans set forth in paragraph (B) of the rule 4901:1-18-05 of the Administrative Code, or to enroll in PIPP plus. If the customer does not respond to the notice described in paragraph (B)(1) of this rule, or refuses to accept a payment plan or fails to make the initial payment on a payment plan referenced in this paragraph, the utility company may disconnect service after the ten-day notice expires.[16]

There is nothing ambiguous about the language of this rule, nor did the Commission find in its Order that certain language within the rule is ambiguous, thereby requiring further interpretation or explanation by the Commission in accordance with Ohio law. Instead, the Commission effectively re-wrote Ohio Adm.Code 4901:1-18-06(B) in violation of Ohio law.

The Commission's error began when it mistakenly focused on the date on which services are disconnected. But that date is *not* the dispositive date under the clear and unambiguous language of Ohio Adm.Code 4901:1-18-06(B). In fact, the rule expressly provides that it applies *only* where the date of disconnection *as stated on the disconnection notice* falls

[16] Ohio Adm.Code 4901:1-18-06(B).

between November 1 and April 15. In other words, contrary to the Commission's reading of this rule, the rule is not triggered by the date on which a utility company actually disconnects a customer's utility service. Rather, the requirements of Ohio Adm.Code 4901:1-18-06(B) apply only where the disconnection date – as stated on the disconnection notice required under Ohio Adm.Code 4901:1-18-06(A)(5) – falls within the winter heating season, or between November 1 and April 15.

Here, the Commission correctly found that "[t]he date of disconnection on the 14-day notice [sent by Duke Energy Ohio pursuant to Ohio Adm.Code 4901:1-18-06(A)(5)] was October 28, 2011."[17] Having established that fact based on the uncontroverted evidence, the Commission should have concluded that the disconnection of the Easterling account was not subject to Ohio Adm.Code 4901:1-18-06(B) and the requirements for the winter heating season and that Duke Energy Ohio was not required to send a final notice. After all, October 28, 2011, does not fall between November 1 and April 15. Instead, the Commission summarily decided that Ohio Adm.Code 4901:1-18-06(B) applies to this case because the actual date of disconnection was November 4, 2011, "which clearly falls within the designated period."[18] That conclusion is not supported by a plain reading of Ohio Adm.Code 4901:1-18-06(B), nor is it consistent with well-established rules of statutory interpretation.

Notwithstanding the Commission's focus on the actual date of disconnection, the language in Ohio Adm.Code 4901:1-18-06(B) clearly and unambiguously invokes the provisions of the winter heating season only where the date of disconnection on the fourteen-day notice provided under Ohio Admin.Code 4901:1-18-06(A) falls between November 1 and April 15.

[17] Order, at ¶59.
[18] Id, at ¶57.

There is thus no need to engage in statutory interpretation.[19] But, if such an exercise were undertaken, it follows that the words in this provision must be given their plain and ordinary meaning and words cannot be deleted or added. But, here, the Commission only could have reached its conclusion by ignoring a critical phrase in the rule, namely: "if payment or payment arrangements are not made to prevent disconnection before the disconnection date stated on the fourteen-day disconnection notice. ..." Under basic rules of statutory interpretation noted above, this clause is modified by the introductory language of rule, thereby confirming that the triggering point for deciding whether Ohio Adm.Code 4901:1-18-06(B) applies is the disconnection date on the disconnection notice provided under Ohio Adm.Code 4901:1-18-06(A)(5), not the actual date when electric service ultimately gets disconnected.

Significantly, had the Commission actually intended that the requirements of Ohio Adm.Code 4901:1-18-06(B) apply to *any* disconnection occurring between November 1 and April 15, regardless of the date provided on the fourteen-day notice, it could have drafted the rule to reflect such an intent. It could have omitted, as irrelevant, the reference to the fourteen-day notice and the disconnection date provided therein. Further, the Commission easily could have drafted Ohio Adm.Code. 4901:1-18-06(B) to clearly provide for the following: "A utility company shall not disconnect utility service for nonpayment during the period of November first through April fifteenth without first completing the following steps prior to disconnecting service to residential customers for nonpayment. . ." At least then Duke Energy Ohio and other utilities, as well as their customers, would know that the critical date is the scheduled or actual date of disconnection, as opposed to the disconnection date stated on the fourteen-day notice, as actually set forth in the rule. If that truly was the Commission's intent, there would have been no need to

[19] *In the Matter of the Complaint of WorldCom, Inc.; AT&T Corp.; KMC Telecom III, LLC; and LDMI Telecommunications, Inc.*, Case No. 02-3207-AU-PWC, Opinion and Order, at pp. 11-13 (May 14, 2003)(adopting rules of statutory construction).

refer to the disconnection date on the notice, which, by Commission regulation, reflects the earliest date on which disconnection may occur. But this is not what the Commission did when promulgating or reviewing its regulations. Thus, all of the words in Ohio Adm.Code 4901:1-18-06(B) must be given effect. Words cannot be added or deleted to enable a different outcome, as was done here. In that instance, it follows that Duke Energy Ohio did not violate any of the Commission's regulations governing the disconnection of service for nonpayment.

Duke Energy Ohio further observes that it is unduly prejudicial to deprive all parties affected by this rule of their due process by arbitrarily altering the language of the rule through an Order in a complaint case. Accordingly, based on the clear and unambiguous language of Ohio Adm.Code. 4901:1-18-06(B), the only possible conclusion is as follows: a utility is not required to give the additional ten days' notice provided under the rule when the date of disconnection on the fourteen-day notice does not fall between November 1 and April 15.

No other conclusion is possible when Ohio Adm.Code 4901:1-18-06(B) is read in conjunction with Ohio Adm.Code 4901:1-18-06(A), which must occur as neither rule may be read in isolation. Under Ohio Adm.Code 4901:1-18-06(A), a utility must give its customer at least fourteen days' notice before disconnecting residential service. Further, that notice must identify, among other things, the earliest date when disconnection may occur. And it is that date – the earliest date when disconnection may occur – which is expressly referenced in Ohio Adm.Code 4901:1-18-06(B). As the Commission correctly concluded, Duke Energy Ohio did not violate Ohio Adm.Code 4901:1-18-06(A) in any respects. And, because the Commission found that "[t]he date of disconnection on the 14-day notice [sent by Duke Energy Ohio] was

October 28, 2011,"[20] which does not fall within the winter heating season, the Commission cannot conclude that Duke Energy Ohio somehow violated Ohio Adm.Code 4901:1-18-06(B).

The practical effects of the Commission's decision cannot be overstated – and these effects will be felt by all electric, gas, and natural gas companies subject to Chapter 4901:1-18. If the provisions of Ohio Adm.Code 4901:1-18-06(B) are triggered whenever a disconnection physically occurs between the dates of November 1 and April 15, a public utility is necessarily and unfairly poised to violate Ohio Adm.Code 4901:1-18-06(A)(5), which requires that the fourteen-day notice include the earliest date on which disconnection may occur.

A few examples confirm this undeniable conclusion. Assume an electric utility issues a fourteen-day notice on October 16 and, consistent with Ohio Adm.Code 4901:1-18-06(A)(5), identifies October 30 as the earliest date on which disconnection may occur. No additional notice under the plain language in Ohio Adm.Code 4901:1-18-06(B) is required in this instance. But assume further that, because of weather-related moratoriums on disconnection, emergency response efforts, or mutual assistance obligations, disconnection of service is delayed. If the disconnection is delayed just one day, to October 31, no additional notices would be required and the disconnection could be completed. However, if the disconnection were delayed a mere two days, under the Commission's Order, the electric utility would be required to send a notice under Ohio Adm.Code 4901:1-18-06(B), extending the disconnection date by another ten days, to November 9 (or November 12, if the notice is mailed). The latter scenario injects unnecessary administrative burden and expense as systems would need to be programmed to ensure issued work orders were timely retrieved from the field and reissued for a future date, which would likely to be well after the November 9 date used in this example as the account would first need

[20] Order, at ¶59.

to be updated, the ten-day disconnection notice processed, and the ten-day disconnection notice provided.

Next assume that a fourteen-day notice as required under Ohio Adm.Code 4901-1:18-06(A) is issued on October 18 and contains a disconnection date fourteen days hence, or November 1. Because of the Commission's Order in this case, the November 1 date is *not* the earliest date on which disconnection may occur. Rather, that date is November 11. Accordingly, to comply with the clear and unambiguous language of Ohio Adm.Code 4901-1:18-06(A) and the Commission's directive here, the utility company must identify the date of November 11 on the fourteen-day notice. This result, however, begs the question of whether *another* ten days must be provided, as the physical act of disconnection will occur during the winter heating season. Under the only logical reading of the Commission's Order, the answer is "yes." After all, the Commission found that the purpose of Ohio Adm.Code 4901:1-18-06(B) is to extend the date of disconnection as stated on the notice provided under Ohio Adm.Code 4901:1-18-06(A) by ten additional days. But in this instance, a residential customer would be afforded thirty-four days to either make payment arrangements to avoid disconnection or accrue utility charges. Importantly, in this instance, the objective of the Commission to provide twenty-four days' notice prior to disconnection during the winter heating season is not achieved.

Next assume that the date of disconnection on the disconnection notice under Ohio Adm.Code 4901:1-18-06(A)(5) is April 15. As the customer would have until the close of business on April 15 to make arrangements to avoid a disconnection of service, the physical act of disconnection could not occur before April 16. Under the plain language of Ohio Adm.Code 4901:1-18-06(B), the utility would be required to provide the additional ten days' notice, thereby extending the disconnection date to April 25. But under the Commission's Order here, Ohio

Adm.Code 4901-1:1-18-06(B) does not apply because the actual date of disconnection falls outside of the winter heating season.

In addition to the uncertainty, confusion, and administrative burden resulting from the Commission's Order that apparently redefines the obligations related to disconnection of utility service for nonpayment, it is important to note that Duke Energy Ohio did, in fact, provide the additional ten days' notice to the Easterling property before disconnecting the service. As the evidence in this proceeding confirmed, the Company provided its customers, year-round, with twenty-four days' notice of the earliest date on which services may be disconnected for nonpayment.[21] This policy and procedure necessarily includes both the fourteen days prescribed by Ohio Adm.Code 4901:1-18-06(A) and the additional ten days allotted by Ohio Adm.Code 4901:1-18-06(B)(1), and was designed for the benefit of customers.[22] Duke Energy Ohio provided more notice and time than are required, which is consistent with the Commission's stated purpose of the rule: "The point of the rule is clearly to prolong the date of disconnection."[23] The Company's interpretation and application of the rule was far more advantageous to its residential customers than the interpretation of the rule now adopted by the Commission.

By focusing on the date of disconnection and not the disconnection date on the fourteen-day notice, the Commission essentially has decided that utilities may not disconnect residential electric service during the first ten days of November, even though that is not what Ohio Adm.Code 4901:1-18-06(B) provides.

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[21] Tr. II, at pp. 455-457.
[22] Id, at pg. 457.
[23] Order, at ¶59.

Assignment of Error 2:

The Commission incorrectly found that Dorothy Easterling was Duke Energy Ohio's customer.

The Commission's regulations on disconnection of service as set forth in Ohio Adm.Code Chapter 4901:1-18 concern the interaction between an electric, gas, or natural gas utility company and its residential customer. Indeed, as the Commission has unequivocally stated: "Electric, gas, or natural gas utility companies under the jurisdiction of the commission may disconnect service to residential customers... ."[24] And, further, "if a residential customer is delinquent,...the utility company may...disconnect the customer's service... ."[25] Thus, before a violation of these rules can found, there must first be established the existence of a utility company-customer relationship. In its Order, the Commission unreasonably, unlawfully, and without regard to the evidence of record found Dorothy Easterling to be a customer of Duke Energy Ohio.

There is no dispute in this proceeding that the named customer on the utility account at issue was Estill Easterling, Dorothy Easterling's husband and Estill Easterling, III's father. Mr. Easterling had preceded his wife and son in death, having passed decades before the circumstances giving rise to this proceeding. After Mr. Easterling's passing, Mrs. Easterling did not have the service at the property changed into her name. Notably, the record is devoid of any evidence that she requested any alteration to the account's status or sought to otherwise establish service in her name. Rather, the record confirms that the account remained in Estill Easterling's name.[26] The Commission, however, disregarded this uncontroverted evidentiary record and concluded that a contractual arrangement existed between Duke Energy Ohio and Dorothy

[24] Ohio Adm.Code 4901:1-18-03.
[25] Ohio Adm.Code 4901:1-18-06(A).
[26] Tr. I, at pg. 38.

Easterling merely because she had continued to pay the utility bills.[27] The Commission further rationalized that the Company's tariff supported this conclusion, as did certain of its prior decisions. But the Commission's decision is not consistent with established precedent or its own regulations.

As an initial matter, the Commission appears to have found the existence of both an express contract and an implied contract between Duke Energy Ohio and Dorothy Easterling relative to the supply of utility service, the former arising under a tariff and the latter because of certain acts. But this conclusion runs afoul of Ohio law as "an express contract and an implied contract cannot coexist with reference to the same subject matter."[28] And it further conflicts with the Commission's own regulations, which contemplate more than merely paying utility bills before a utility-customer relationship may be created. Indeed, the definitions contained in Ohio Adm.Code 4901:1-18-01 require an "applicant" for service to proactively request or make an application to the utility company and identifies a "customer" as "one who enters into an agreement, by contract or under a tariff, to purchase: electric, gas, or natural gas utility service." The regulations do not provide the creation of a utility company-customer relationship via the mere act of paying a utility bill or by implication. And this makes sense. If a service contract were to be inferred from the sole act of paying a utility bill, then the utility company-customer relationship could not reasonably be identified. Indeed, that relationship – and the mutual rights and obligations owing thereunder – would extend to every parent, child, friend, and social services agency to make payment on another's utility bill.

Perhaps recognizing that there cannot be both an express and implied contract for the same matter, the Commission opined that the Company's service regulations created an express

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[27] Order, at ¶41.
[28] *Weber v. Billman*, (1956), 165 Ohio St. 431, 437, 135 N.E.2d 866 (internal citations omitted).

contract.[29] In doing so, the Commission focused only on certain language, excluding other language. But the tariff must be read and interpreted in its entirety. And when all of the language is considered, it is clear that any assignment of the relationship borne out of an application for service cannot occur without express Company consent. As the relevant paragraph provides:

> The benefits and obligations of the application for service shall inure to and be binding upon the successors and assigns, survivors and executors or administrators, as the case may be, of the original parties thereto, for the full term thereof, to the extent permitted by applicable law, provided that no assignment hereof shall be made by the customer without first obtaining the Company's written consent.[30]

The record in this proceeding is devoid of any evidence that the Company provided written consent of the assignment of the service contract to Dorothy Easterling. As such, the referenced tariff provision cannot support the conclusion that Mrs. Easterling is a customer of Duke Energy Ohio.

As a final justification for its decision, the Commission referenced prior decisions in which it rejected the affirmative defense related to standing given a spousal relationship. But those cases are factually inapposite. In *Keller v. The Ohio Utilities Company*,[31] the Commission commented that it allows spouses of the named customer to take part in complaint proceedings.[32] But in that instance, the customer of record was an active participant in the proceeding and asserted the claims against the respondent company. Critically, the Commission did not find that the spouse was also a customer. The issues in this proceeding are materially different. The disputed claims concern the obligations of Duke Energy Ohio to provide notice to its residential customer of a pending disconnection and *Keller* provides no controlling precedent on that issue.

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[29] Order, at ¶41.
[30] P.U.C.O. Electric No. 19, Sheet No. 20.2.
[31] 1988 Ohio PUC LEXIS 710
[32] Id, Opinion at *6 (August 2, 1988).

Similarly, *Dintino v. Eastern Natural Gas Company*[33] is unavailing. In that complaint case, the company had treated the complainant as the customer of record. The account identified the complainant as the account holder and the company informed the complainant that she was responsible for the utility charges under a landlord agreement. Further, the company accepted, and fulfilled, instructions from the complainant relative to service disconnections. As the Commission found, the company could not, on the one hand, treat the complainant as the customer of record and, on the other, claim she lacked standing to assert a service-related complaint. Here, however, there were no agreements binding Dorothy Easterling to the account. Duke Energy Ohio did not inform her that she was responsible for the bills and, importantly, given the lack of communication from Mrs. Easterling, Duke Energy Ohio could not – and did not – affirmatively respond to requests from Mrs. Easterling that would have prevented a disconnection of service.

The Commission unreasonably and unlawfully concluded that Dorothy Easterling was a customer, as defined under Ohio Adm.Code 4901:1-18-01(G), of Duke Energy Ohio and an individual to whom obligations were owed prior to a disconnection of service for nonpayment. The Commission's decision in this regard should be revised on rehearing.

Assignment of Error 3:

The Commission failed to clarify that its Order is effective only to a claim filed by Complainant on behalf Dorothy Easterling as opposed to Estill Easterling, III, whom the Commission did not find was a customer of the Company.

The Commission's Order addresses the arguments raised by the parties to this proceeding in respect of the status of Dorothy Easterling as a customer and, in that capacity, an individual to whom notice of disconnection may have been required. But the Commission's Order did not similarly resolve the disputed status of Estill Easterling, III. Notably, the Commission did not

[33] Case No. 05-51-GA-CSS.

determine that Estill Easterling, III was a customer of Duke Energy Ohio such that the Company owed him any express obligations prior to disconnecting utility service for nonpayment. The record evidence does not support such a determination and the Commission should clarify its Order to confirm that Estill Easterling, III was not a customer.[34]

CONCLUSION

Duke Energy Ohio respectfully requests that the Commission reconsider its Opinion and Order and grant rehearing, as outlined in its Assignments of Error above.

Respectfully submitted,

Amy B. Spiller (0047277)
Deputy General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P. O. Box 960
Cincinnati, Ohio 45202-0960
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com (e-mail)

Robert A. McMahon (0064319)
Eberly McMahon Copetas LLC
2321 Kemper Lane, Suite 100
Cincinnati, Ohio 45206
(513) 533-3441 (telephone)
(513) 533-3554 (facsimile)
bmcmahon@emclawyers.com (e-mail)

Attorneys for Respondent Duke Energy Ohio, Inc.

[34] Tr. I, at pg. 14.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 29th day of September 2017, to the parties listed below.

Donald A. Lane
Droder & Miller Co., LPA
125 West Central Parkway
Cincinnati, Ohio 45202-1006
dlane@drodermiller.com

Kimberly W. Bojko
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com

Terry L. Etter
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
terry.etter@occ.ohio.gov

Amy Spiller/mra
Amy B. Spiller

Summary: Application Application for Rehearing of Respondent Duke Energy Ohio, Inc. electronically filed by Mrs. Adele M. Frisch on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B and Robert A. McMahon