

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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In this case, the Public Utilities Commission of Ohio (“PUCO”) determined that Duke Energy Ohio, Inc. (“Duke”) unlawfully disconnected electric service at the home of Dorothy Easterling and Estill Easterling III during November 2011.<sup>1</sup> Tragically, the Easterlings died from hypothermia a few days later.<sup>2</sup> The PUCO’s ruling in this case may help bring justice for the Easterlings’ family.

Nonetheless, the Office of the Ohio Consumers’ Counsel (“OCC”) is concerned with some aspects of the Order that were in error and that may adversely affect all consumers in Duke’s service territory. In granting OCC’s intervention in this case, the PUCO noted that OCC stated that “it represents Duke’s residential utility customers and that this case may adversely affect the interests of such customers, given that OCC

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<sup>1</sup> Finding and Order (August 30, 2017) (“Order”), ¶¶58-60.

<sup>2</sup> See *id.*, ¶4.

believes that the Company may have violated rules or orders of the Commission that are intended to protect customers from the harm resulting from winter disconnections.”<sup>3</sup>

Upon consideration of OCC’s motion to intervene, the PUCO found that OCC had satisfied the statutory criteria for intervention.<sup>4</sup> Thus, it is proper to extend the effect of the Order in this case to other customers.

To rectify these flaws in the Order, OCC seeks rehearing on the following three issues:

1. It was unlawful and unreasonable for the PUCO to not order Duke to discontinue disconnection practices that are unlawful or otherwise contrary to PUCO regulations and Duke’s tariff, and thus are harmful to consumers.
2. It was unreasonable for the PUCO to not assess forfeitures against Duke after finding that Duke had unlawfully disconnected the Easterlings’ electric service.
3. It was unlawful and unreasonable for the PUCO to determine that Duke did not violate the 2011 Winter Reconnection Order’s requirement that utilities “err on the side of maintaining electric service” to the Easterlings, which can adversely affect other consumers.

The PUCO should modify the Order as recommended herein. The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support.

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<sup>3</sup> Entry (July 10, 2015), ¶7.

<sup>4</sup> *Id.*, ¶10.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In this case, the PUCO correctly found that Duke unlawfully disconnected electric service at the Easterlings' home in November 2011. Tragically, the Easterlings died after their service was disconnected.

Although the finding in this case was specific to the Easterlings, this may not be an isolated instance. As discussed below, the record in this case shows that Duke has a propensity to misapply and misinterpret the PUCO's disconnection rules to the detriment of the customers it serves. The record also shows that its practices are overly rigid and its interpretations of the PUCO's rules are often wrong. The PUCO should improve its ruling to prevent Duke's disconnection practices from harming other consumers who are in a situation similar to the Easterlings.

While the PUCO did order an independent auditor to review Duke's disconnection policies and practices,<sup>5</sup> it stopped short of immediately resolving the issue for consumers. The PUCO's Order did not go far enough to protect all consumers, particularly in light of the upcoming winter heating season.

The Order left in effect several of Duke's policies that may continue to harm consumers, even as the PUCO conducts its review. And it is uncertain whether the review will seek forfeitures for Duke's current unlawful activities or only be prospective in nature. The PUCO should modify the Order *now*, as discussed herein, to prevent more Ohioans from having their utility service unlawfully disconnected.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC is an intervenor in this proceeding,<sup>6</sup> and, among other things, participated in the hearing in this case and filed a post-hearing brief.

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed,

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<sup>5</sup> Order, ¶¶83.

<sup>6</sup> OCC's motion to intervene was granted in the Entry dated July 10, 2015, ¶10.

the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard to abrogate the Order is met.

### III. RECOMMENDATIONS

**A. It was unlawful and unreasonable for the PUCO to not order Duke to discontinue disconnection practices that are unlawful or otherwise contrary to PUCO regulations and Duke’s tariff, and thus are harmful to consumers.**

In the Order, the PUCO determined that several of Duke’s disconnection practices were unlawful or otherwise contrary to PUCO regulations.<sup>7</sup> But the PUCO did not order Duke to change any of its inappropriate practices, even though consumers likely are being harmed by them. Most notable of the Order’s rulings was the holding that Duke unlawfully disconnected the Easterlings’ electric service in November 2011 because it did not wait an additional ten days before disconnecting service, as required under Ohio Adm. Code 4901:1-18-06(B)(1) (“Rule 6(B)(1)”).<sup>8</sup> The rule requires that, during the winter heating season, customers receive ten days’ notice of disconnection in addition to the 14 days required under Rule 6(A). The rule specifies that the 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.”

Duke circumvented Rule 6(B)(1). Duke claimed that its ordinary business practice for disconnection gives customers the original 14 days required under Rule 6(A) plus the ten additional days required under Rule 6(B)(1) in the same disconnection notice.<sup>9</sup> Hence, the disconnection date listed on the notice is 24 days from date of the

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<sup>7</sup> Order, ¶59.

<sup>8</sup> *Id.*

<sup>9</sup> *See id.*, ¶53.



notice. But the PUCO ruled that such “front loading” of the required notice periods is contrary to the PUCO’s rules.<sup>10</sup>

Specifically, the PUCO stated: “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.”<sup>11</sup> The PUCO held that Duke failed to provide the additional ten days (plus three days for mailing) for disconnection during winter months required by Rule 6(B)(1) before disconnecting the Easterlings’ electric service. This made Duke’s disconnection of the Easterlings’ electric service unlawful.

Duke’s failure to provide the additional ten days under Rule 6(B)(1) may not be limited to the Easterlings’ disconnection. Duke’s business practice is to “front load” the additional ten days required under the rules. This practice has very likely led to other unlawful disconnections. Duke’s practice harms consumers and should be stopped now, not after the conclusion of an investigation that has no set time frame for disposition. The PUCO’s Order should have required Duke on a going forward basis to give all residential customers an additional ten days before disconnecting utility service during the winter heating season, no matter how many days were provided on the disconnection notice. But it did not. Without a PUCO order directing Duke to cease its unlawful practices, Duke may be continuing its “front loading” practice with other customers. As

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<sup>10</sup> *Id.*, ¶59.

<sup>11</sup> *Id.* (citation omitted).

such, the Order is unlawful and unreasonable. The PUCO should modify the Order, and order Duke to cease and desist from its unlawful practice.

Another of Duke's unreasonable practices involves those situations where the disconnection date on the disconnection notice is close to the beginning of the winter heating season. Rule 6(B)(1) clearly states that the additional ten days must be given on disconnections occurring between November 1 and April 15 of each year. Duke, however, interprets the rule to mean that customers are not eligible for the additional ten days if the disconnection date on the last disconnection notice sent to them is outside the winter heating season.<sup>12</sup> In the instant case, the disconnection date on the last disconnection notice sent to the Easterlings was October 28,<sup>13</sup> but Duke disconnected service on November 4 – seven days later.

Duke disconnects thousands of residential customers for nonpayment each year. Hundreds of them likely have disconnection dates in late October, and some of them might not have been disconnected before November 1. Hence, Duke's erroneous interpretation of the rule has likely been applied to other consumers, both before and since the disconnection of the Easterlings' electric service in 2011. With another winter heating season approaching, the PUCO should make sure that more consumers are not harmed by Duke's misinterpretation or misapplication of Rule 6(B)(1). The PUCO should not wait until after a review is conducted of Duke's disconnection practices. Time is of the essence for preventing harm to Duke's Ohio consumers

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<sup>12</sup> See *id.*, ¶53.

<sup>13</sup> See *id.*

The Order did not require Duke to discontinue its unlawful practice of not giving residential customers an additional ten days before disconnecting utility service during the winter heating season, even if the disconnection date on the final notice is outside the winter heating season. The PUCO should modify the Order, and order Duke to cease and desist from this unlawful practice.

In addition, other Duke misapplications of the rules demonstrate that Duke have been wrongfully applying other rules and its tariff. For example, in arguing that the Complainant had no standing to file a complaint in this case, Duke claimed that Mrs. Easterling was not the customer of record on the account.<sup>14</sup> Instead, Duke argued that her husband's name was on the account and that *he* was the customer of record – even though he had died more than 20 years before. But Mrs. Easterling had made payments on the account, and Duke had accepted those payments, in the years since her husband's death.<sup>15</sup> The PUCO rejected Duke's claim and held that Mrs. Easterling *was* a Duke utility customer by rule and by Duke's tariff.<sup>16</sup> However, the PUCO did not order Duke to cease and desist in interpreting and applying this practice to other residential consumers.

Duke's misapplication of the PUCO's rules regarding who may be a "customer" carries great significance beyond this case. A "customer" has particular rights regarding such matters as making payment arrangements under the winter reconnection orders. If Duke does not consider someone to be a "customer" because their name is not on the account (even though that person made payments on the account for years and Duke accepted them), Duke likely would refuse to discuss payment arrangements with that

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<sup>14</sup> See *id.*, ¶40.

<sup>15</sup> See *id.*, ¶38.

<sup>16</sup> *Id.*, ¶41.

person. This can jeopardize the health and safety of all consumers in the household, especially during the winter heating season.

Being a “customer” has relevance to other rules as well. Only a customer may designate a third party to receive notices of pending disconnection of the customer’s utility service,<sup>17</sup> which was an issue in this case.<sup>18</sup> Only a customer may request that service be disconnected for reasons other than nonpayment.<sup>19</sup> In addition, only a customer may use a guarantor to reestablish service, and the guarantor must be a customer of the utility.<sup>20</sup>

The Order did not require Duke to discontinue its unlawful misinterpretation of its own tariff provisions and PUCO rules concerning who is a “customer.” Instead this will likely be an issue looked at when the PUCO reviews Duke's disconnection practices. That may be too late for some consumers.

The Order was unlawful and unreasonable. The PUCO should modify the Order, and order Duke to cease and desist from its unlawful practice.

**B. It was unreasonable for the PUCO to not assess forfeitures against Duke after finding that Duke had unlawfully disconnected the Easterlings’ electric service.**

Although the Order found that Duke had unlawfully disconnected the Easterlings’ electric service, it did not assess forfeitures against Duke. It should have.

Duke violated Rule 6(B). Duke did not extend the date for disconnecting the Easterlings’ electric service by ten additional days, even though the plain language of

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<sup>17</sup> Ohio Adm. Code 4901:1-18-06(A)(3).

<sup>18</sup> See Order, ¶¶77-79.

<sup>19</sup> Ohio Adm. Code 4901:1-18-03(G).

<sup>20</sup> Ohio Adm. Code 4901:1-18-07(D).

Rule 6(B)(1) required the disconnection date to be extended by ten days. Duke's violation of the rule and disregard for the proper disconnection procedures makes it subject to a statutory forfeiture of up to \$10,000 per day that the violation occurred.<sup>21</sup> Duke disconnected the Easterlings' electric service on November 4, 2011, at least six days before it should have under Rule 6(B)(1).<sup>22</sup> Thus, the PUCO should have ordered a forfeiture of at least \$60,000 against Duke.

The PUCO had the discretion to do so, but chose not to. Especially given the loss of life associated with Duke's actions, it was unreasonable for the PUCO not to assess forfeitures. The PUCO should modify the Order and assess a forfeiture of at least \$60,000 against Duke.

**C. It was unlawful and unreasonable for the PUCO to determine that Duke did not violate the 2011 Winter Reconnection Order's requirement that utilities "err on the side of maintaining electric service" to the Easterlings, which can adversely affect other consumers.**

**1. The timing of the disconnection in this case created doubt as to the validity of Duke's interpretation of the PUCO's disconnection rules, and thus Duke should have "erred on the side of maintaining" the Easterlings' utility service.**

The 2011 Winter Reconnection Order made clear that if there is doubt regarding a utility's interpretation of a rule, the utility should err on the side of maintaining the customer's service. In the Winter Reconnection Order, the PUCO stated: "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.* We expect the utilities to advertise as much as practical the

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<sup>21</sup> R.C. 4905.54.

<sup>22</sup> See Order, ¶59.

availability of the PIPP Plus programs, as well as other standard payment plans provided by Commission rule. 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.*<sup>23</sup>

As discussed above, the PUCO found that Duke's interpretation of Rule 6(B)(1) is erroneous, and thus the disconnection of the Easterlings' electric service was unlawful. But the PUCO found that nothing in the record supports the notion that there was doubt regarding Duke's interpretation of the rule.<sup>24</sup> The PUCO's determination is flawed, and could adversely affect other consumers who are in a situation similar to the Easterlings.

Duke claimed that Rule 6(B)(1) did not apply to disconnection of the Easterlings' service because the disconnection date on the last disconnection notice sent to them was October 28, three days before the start of the winter heating season under the rule.<sup>25</sup> But the disconnection did not occur until November 4, three days *after* the winter heating season began.

The plain language of Rule 6(B) states: "*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*

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<sup>23</sup> See *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) ("2011 Winter Reconnection Order") at 2 (emphasis added). The Order in this case downplays the significance of this passage by stating that it involves "expectations, not requirements." Order, ¶76. Given the seriousness of the facts in this case, the PUCO should not so easily dismiss expectations that utilities do all they can to maintain customers' service during winter months.

<sup>24</sup> Order, ¶76.

<sup>25</sup> See *id.*, ¶53.

*nonpayment unless the utility company completes each of the following...*” (emphasis added). Rule 6(B)(1) requires utilities to give customers an additional ten-day notice, which “shall extend the date of disconnection, as stated on the fourteen-day notice required by paragraph (A) of this rule, by ten additional days.” There is no exception to Rule 6(B)(1) for 14-day disconnection notices whose disconnection date is before November 1. Duke’s interpretation carved an exception that does not exist for Rule 6(B)(1).

No reasonable interpretation of the plain language of these rules could lead to the conclusion that the required ten-day extension of the disconnection date does not apply if the disconnection date on the 14-day notice is before November 1. Thus, there *was* doubt concerning Duke’s interpretation of Rule 6(B)(1), contrary to the PUCO finding otherwise. Duke should have “erred on the side of maintaining” the Easterlings’ electric service, but didn’t. It violated the 2011 Winter Reconnection Order.

Duke did not err on the side of maintaining the Easterlings’ service. The PUCO unreasonably found that Duke did not violate the 2011 Winter Reconnection Order. It should modify the Order in this case and rule that Duke violated the 2011 Winter Reconnection Order. Duke may also be disconnecting other customers in early November even though the disconnection date on the 14-day notice is before November 1. The PUCO should order Duke to provide an additional ten days before disconnecting the utility service of such customers.

**2. Because of Duke's overly rigid interpretation of its policy for disconnecting residential service, it did not err on the side of maintaining the Easterlings' electric service as directed by the 2011 Winter Reconnection Order.**

Duke's minimum requirements for disconnection include a 30-day arrearage and a balance of more than \$100.<sup>26</sup> As OCC Witness Williams testified, the October 4, 2011 bill (which included a disconnection notice) stated that the Easterlings needed to pay \$242.82 for combined gas and electric utility service by October 28, 2011 to avoid disconnection.<sup>27</sup> The Easterlings made a payment of \$143.49 on October 11, 2011, leaving a balance of \$105.48 for both gas and electric service.<sup>28</sup> Further, as Mr. Williams testified, of the \$105.33, only \$67.91 was for electric service. Arguably, Duke disconnected the Easterlings' electric service for less than \$100, in violation of its policy.<sup>29</sup>

Because of its overly rigid application of its disconnection policy, Duke did not err on the side of maintaining the Easterlings' electric service as directed by the 2011 Winter Reconnection Order. Duke should have taken into account the partial payment made by the Easterlings. This payment demonstrated that the Easterlings were attempting to get their account up to date. Although the payment was just a few days before the October 17 effective date of the 2011 Winter Reconnection Order,<sup>30</sup> Duke was well aware that the winter order – which was issued on September 14 of that year – was

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<sup>26</sup> See Tr. Vol. II at 482, 487.

<sup>27</sup> See OCC Ex. A (Williams Testimony) at 6-7.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.*

<sup>30</sup> 2011 Winter Reconnection Order at 6-7.



about to become effective. Duke should have erred on the side of maintaining the Easterlings' electric service, especially because winter was approaching.

The PUCO's Order allows Duke to continue with an overly rigid application of its disconnection policy. Consumers may be harmed. The PUCO should modify its Order and direct Duke to consider the effect of customer payments made shortly before utility service is to be disconnected for nonpayment.

#### **IV. CONCLUSION**

The Order in this case correctly determined that Duke unlawfully disconnected the Easterlings' electric service in November 2011. But the Order left intact Duke's unlawful policies and practices that led to the Easterlings' disconnection. The PUCO's upcoming review of Duke's disconnection practices may cure some of the problems, but will not do so immediately. In the meantime, other consumers who are in a situation similar to the Easterlings may be harmed by Duke's misapplication and misinterpretation of the PUCO's disconnection rules and the utility's own policies. To protect Ohioans from unlawful disconnection of their utility service, the PUCO should modify the Order as OCC recommends.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Application for Rehearing was served by electronic mail to the persons listed below, on this 29<sup>th</sup> day of September 2017.

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Terry L. Etter

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.