

**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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**MEMORANDUM CONTRA DUKE'S APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

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 two consumers during November 2011.<sup>1</sup> Tragically, the consumers – Dorothy Easterling and her son, Estill Easterling III – died from hypothermia a few days later.<sup>2</sup> The PUCO’s ruling that Duke had violated Ohio Adm. Code 4901:1-18-6(B)(1) (“Rule 6(B)(1)”) in disconnecting the Easterlings’ service was correct.

But out of concern that the PUCO did not do all it should to protect all consumers in Duke’s service territory, the Office of the Ohio Consumers’ Counsel (“OCC”) filed an application for rehearing of the Order on September 29, 2017. OCC’s application for

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

<sup>2</sup> See *id.*, ¶4.

rehearing asked the PUCO to stop Duke from continuing its disconnection practices that are unlawful or otherwise contrary to PUCO rules and orders that are meant to protect consumers.

Duke also filed an application for rehearing. Duke claims that the PUCO erred in finding that the disconnection of the Easterlings' electric service in November 2011 was unlawful. Duke contends that the PUCO's decision violated the rules of statutory construction, created a conflict with another rule, and was against the evidence.<sup>3</sup> Duke also asserts that the PUCO wrongly found that Mrs. Easterling was a Duke customer, and that the PUCO failed to address Duke's obligations to Estill Easterling III.<sup>4</sup> As discussed below, Duke's arguments are flawed and in some respects do not meet the statutory standard for applications for rehearing in R.C. 4903.10.<sup>5</sup> Accordingly, the PUCO should deny Duke's application for rehearing in its entirety.

Duke's persistent arguments highlight the need for the PUCO to take immediate action to avoid Duke harming other customers with its unlawful disconnection policies. To this end, the PUCO should grant OCC's application for rehearing.

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<sup>3</sup> Duke's Application for Rehearing (September 29, 2017) at 5-11.

<sup>4</sup> *Id.* at 12-16.

<sup>5</sup> R.C. 4903.10 requires an application for rehearing to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."

## II. RECOMMENDATIONS

**A. The PUCO properly interpreted Rule 6(B)(1) in its Order, but Duke’s misapplication of the Rule could continue to harm customers and should be stopped.**

**1. The plain language of Ohio Adm. Code 4901:1-18-06(B) (“Rule 6(B)”) supports the PUCO’s decision that Duke unlawfully disconnected the Easterlings’ electric service.**

Rule 6(B) states, in relevant part:

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.

In the Order, the PUCO correctly determined that Duke did not give the Easterlings extra time before disconnecting their service as this rule requires.<sup>6</sup> Because the Easterlings’ service was disconnected on November 4, 2011 – within the timeframe set forth in Rule 6(B) – the PUCO ruled that the disconnection of the Easterlings’ service was premature. Disconnection should not have occurred until at least 13 days after the October 28, 2011 date on the disconnection notice.<sup>7</sup> Because Duke disconnected the

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<sup>6</sup> Order, ¶59.

<sup>7</sup> *Id.* The disconnection date should have been extended by 10 additional days plus three days for mailing.

Easterlings' electric service before the additional 13 days had passed, the PUCO held that Duke's disconnection of the Easterlings' electric service was unlawful.<sup>8</sup>

But Duke asserts that the Order violates the rules of statutory construction because it does not apply the plain and unambiguous language of Rule 6(B).<sup>9</sup> Duke claims that the plain language of Rule 6(B) focuses on the disconnection date listed on the disconnection notice sent to customers. Thus, Duke alleges that the PUCO's Order is unlawful. Duke is mistaken.

The plain language of the rule does not focus on the disconnection date on the disconnection notice, as Duke asserts. Instead, the rule concentrates on the date utility service is *actually disconnected*. Rule 6(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..." (emphasis added). The disconnection date on the 14-day disconnection notice is only relevant as the deadline for the customer to take action to avoid disconnection.

In this proceeding, the earliest disconnection date listed on the disconnection notice to the Easterlings was October 28, 2011.<sup>10</sup> The Easterlings apparently did not make a full payment or payment arrangements on the account by that date and were thus subject to disconnection on October 28, 2011.<sup>11</sup> But Duke did not disconnect the

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<sup>8</sup> *Id.*, ¶60.

<sup>9</sup> Duke's Application for Rehearing at 5-8.

<sup>10</sup> See OCC Ex. A (Williams Testimony), Attachment JDW-4.

<sup>11</sup> Duke allegedly sent a ten-day disconnection notice to the Easterlings on October 19, 2011. See Order, ¶49.

Easterlings’ electric service until November 4, 2011 – seven days after the stated disconnected date. As the PUCO noted, the date Duke disconnected the Easterlings’ service “clearly falls within” the period designated in Rule 6(B).<sup>12</sup> Thus, because Duke waited until after the winter heating season started to disconnect the Easterlings’ utility service, Duke’s disconnection was unlawful.<sup>13</sup>

Under Rule 6(B)(1), utility service can be disconnected between November 1 and April 15<sup>14</sup> *only if* the utility does the following: “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*” (emphasis added).

The plain language of this rule does not contain an exception for service disconnections occurring between November 1 and April 15 with disconnection notices and disconnection dates outside that timeframe. To create such an exception would violate the rules of statutory construction. The plain language of Rule 6(B)(1) show that the PUCO’s finding that Duke unlawfully disconnected the Easterlings’ electric service on November 4, 2011 is correct.

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<sup>12</sup> *Id.*, ¶57.

<sup>13</sup> The information regarding assistance programs and payment plans that utilities are required to provide customers under Ohio Adm. Code 4901:1-18-06(B)(2) and (3) were apparently provided to the Easterlings with the October 4 disconnection notice. *See* Order, ¶5.

<sup>14</sup> This timeframe is also known as the “winter heating season.” *See* Ohio Adm. Code 4901:1-18-01(V).

Further, Rule 6(B) explicitly envisions an additional notice that extends the date of disconnection that was stated on the fourteen-day notice. Therefore, by the rule's plain language, Duke was required to extend whatever date was listed on the disconnection notice by an additional ten days, plus three additional days for mailing.

Duke's interpretation of Rule 6(B)(1) is contrary to the plain meaning of the language of the rule and violates the rules of statutory construction. Therefore, the PUCO should reject Duke's argument and deny its application for rehearing.

Further, it is apparent that Duke misapplies Rule 6(B)(1) to all customers whose scheduled October disconnection of utility service disconnection is delayed until the winter heating season begins. To protect consumers, the PUCO should order Duke to discontinue applying its unlawful interpretation of Rule 6(B)(1) to all customers.

**2. The PUCO's ruling does not create an irreconcilable conflict between Rule 6(B) and Rule 6(A)(5), as Duke contends.**

Duke asserts that the PUCO's Order creates an "irreconcilable conflict" between Rule 6(B) and Ohio Adm. Code 4901:1-18-06(A)(5) ("Rule 6(A)(5)").<sup>15</sup> Duke's claim, however, is without merit.

Under Rule 6(A)(5)(b), the 14-day disconnection notice must include the *earliest* possible date of disconnection. The rule does not require the notice to include the *actual* date service is to be disconnected, as Duke has argued. Outside the winter heating season, utility service may be disconnected on any day on or after the date listed on the 14-day disconnection notice. Within the winter heating season, extending the disconnection date by the time required under Rule 6(B)(1) has no effect on the earliest

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<sup>15</sup> Duke's Application for Rehearing at 8-11.



disconnection date identified on the 14-day notice. The two rules may coincide, without conflict.

In fact, Duke extended the Easterlings' disconnection date seven days without running afoul of Rule 6(A)(5). Instead, Duke should have given the Easterlings at least another six days in order to comply with Rule 6(B)(1), given that the scheduled disconnection date fell within the winter heating season.

To prove its point, Duke provided three scenarios in its application for rehearing. But none of the scenarios match the facts in this case,<sup>16</sup> and the scenarios nothing more than an attempt to draw the PUCO's attention away from the real issues in this case. The scenarios have no bearing on the PUCO's decision.

The key point that seems to be escaping Duke is that 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 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*

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<sup>16</sup> The closest may be the first scenario, where the disconnection date is delayed until after the start of the winter heating season due to a moratorium on disconnections, emergency response efforts, or mutual aid obligations. But Duke has offered no reason for delaying disconnection of the Easterlings' service, so the scenario apparently is irrelevant. In addition, the second scenario – where the disconnection notice is issued on October 18 and contains a disconnection date on November 1 – is exactly the type of situation where, Duke has argued, the winter heating rules should apply. *See, e.g.*, Order, ¶53. This undercuts Duke's argument that the PUCO has created a conflict between the rules.

*when there is a doubt as to the applicability or the interpretation of a rule.”*<sup>17</sup> OCC showed that the timing of the disconnection in this case created doubt regarding Duke’s application or interpretation of the disconnection rules.<sup>18</sup>

Contrary to Duke’s contention, the PUCO’s Order does not create an irreconcilable conflict between Rule 6(B) and Rule 6(A)(5). The PUCO should reject Duke’s arguments and deny its application for rehearing. Further, because Duke appears to be misapplying Rule 6(B)(1) and may be unlawfully disconnecting other customers’ utility service, the PUCO should direct Duke to apply the rule consistent with the Order.

**3. The PUCO did not err in finding that Duke violated Rule 6(B)(1).**

Duke contends that the Order incorrectly ruled that the disconnection of the Easterlings’ electric service was unlawful, because the PUCO found that Duke provided all notices the PUCO requires.<sup>19</sup> Duke bases this assertion on the PUCO’s determination that the Complainant did not meet his burden of proof to show that Duke did not actually provide all the notices required by the PUCO’s disconnection rules.<sup>20</sup> Although Duke first argued that Rule 6(B)(1) did not apply in the Easterlings’ situation, Duke then contends that it did meet the requirements of Rule 6(B)(1) through its faulty business

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<sup>17</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>18</sup> OCC Application for Rehearing at 8-10.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.*

practice of combining the 14 and ten-day time periods into one notice. Once again Duke misinterprets and misapplies the rule.

Duke claims that the PUCO should overturn its Order because Duke gives customers 24 days' notice of disconnection year-round.<sup>21</sup> By doing so, according to Duke, it meets the requirements of Rule 6(B)(1). With this interpretation, Duke is now asking the PUCO to ignore the rules of statutory construction that it previously argued the PUCO should follow (as discussed above). Rule 6(B)(1) plainly states that before disconnecting utility service between November 1 and April 15, a utility must give the customer notice that extends the date of disconnection *as stated on the fourteen-day notice* by ten additional days.

In addition, 14 days is the minimum notice a customer may receive before disconnection. Rule 6(A) provides that a utility may disconnect a residential customer's service after giving "*at least* fourteen days' notice..." (emphasis added). Whether a utility provides more than 14 days before disconnection is irrelevant for purposes of applying Rules 6(A) and 6(B)(1).

Requiring the PUCO to follow the rules of statutory construction should not be determined by whether or not it suits Duke's purposes. The PUCO must always construe statutes and its rules as required by Ohio law. The Order in this case correctly interpreted Rule 6(B)(1) in declaring Duke's disconnection of the Easterlings' electric service to be unlawful. The PUCO should deny Duke's application for rehearing and order Duke to abide by the interpretation of Rule 6(B)(1) explained in the Order when considering disconnecting the utility service of other residential consumers.

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<sup>21</sup> *Id.*

**B. Duke's continued view that Mrs. Easterling was not a "customer" shows its propensity to misapply rules and its own tariff provisions, and should be stopped.**

Ohio Adm. Code 4901:1-18-01(G) defines a "customer" as "any person who enters into an agreement, whether by contract or under a tariff, to purchase: electric, gas, or natural gas utility service." Section 1.5 of Duke's retail electric service tariff states: "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."<sup>22</sup> Duke asserts that the PUCO's determination that Mrs. Easterling was a customer under its rules and Duke's tariff was unreasonable, unlawful, and without regard to the record evidence.<sup>23</sup> Again, Duke is incorrect.

The record shows that when Mrs. Easterling's husband passed away, she did not change the name on the account for her and her son's personal safety.<sup>24</sup> Instead, Mrs. Easterling took over payment of the account as her husband's survivor.<sup>25</sup> Duke accepted the payments made by her on the account, and continued to accept them from her for more than 20 years.<sup>26</sup> Thus, Duke knew or should have known that Mrs. Easterling was making the payments, because at least some of the payments were by check which

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<sup>22</sup> Duke tariff P.U.C.O. No. 19, Sheet No. 20.2.

<sup>23</sup> Duke's Application for Rehearing at 12.

<sup>24</sup> See Tr. Vol. 1 at 11, where Ms. Lykins testified that Mrs. Easterling "didn't want people to know she was living there by herself, you know. She just had my brother with her."

<sup>25</sup> *Id.*

<sup>26</sup> See Order, ¶38.

contained her signature.<sup>27</sup> But Duke did nothing to require Mrs. Easterling to transfer the account to her name.

Therefore, per Duke's tariff, Mrs. Easterling was deemed a customer for account and payment purposes given that "the benefits and obligations of the application for service" at the Easterling residence "inure[d] to and [were] binding upon" Mrs. Easterling as the successor.<sup>28</sup> Furthermore, at a minimum, the facts demonstrate that Mrs. Easterling entered into an implied contract with Duke to purchase electric and natural gas service from Duke. Given these facts, the PUCO correctly determined that Mrs. Easterling was a Duke customer. Therefore, the PUCO should deny Duke's second assignment of error.

Duke's application for rehearing demonstrates that it may be misapplying the definition of "customer" to others in its service territory to the detriment of those customers. Conveniently, Duke seems to consider consumers to be "customers" under the rules and its tariff only when it is financially advantageous to Duke. On the one hand, Duke will accept payments from consumers and consider such consumers to be "customers" when demanding payment for services. But on the other hand, when the rules and tariff require Duke to afford customers certain protections, those consumers that have been paying the bills are no longer "customers" in Duke's eyes.

As OCC noted in its application for rehearing, being a "customer" has great significance under the PUCO's disconnection rules. Duke should not be allowed to harm other consumers by arbitrarily considering them as "customers" only when it is

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<sup>27</sup> See Tr. Vol. 1 at 48-49.

<sup>28</sup> Duke tariff P.U.C.O. No. 19, Sheet No. 20.2.

advantageous to Duke. Accordingly, the PUCO should order Duke to discontinue its unlawful misinterpretation of its own tariff provisions and PUCO rules concerning who is a “customer.”

**C. Duke unlawfully and unreasonably requests the PUCO to address Duke’s obligations concerning Estill Easterling III, an issue improperly raised for the first time on rehearing.**

In its application for rehearing, Duke for the first time raises the issue of the so-called “disputed status” of Mrs. Easterling’s son, Estill Easterling III who resided at the residence with her, as a Duke customer.<sup>29</sup> Duke alleges that the PUCO erred because it did not determine that Mr. Easterling was not a Duke customer so that Duke did not owe him “any express obligation prior to disconnecting service.”<sup>30</sup> Duke asks the PUCO to confirm that Mr. Easterling was not a Duke customer.<sup>31</sup> The PUCO should reject Duke’s request.

This issue is raised for the first time in Duke’s application for rehearing. The transcript page cited by Duke does not discuss Mr. Easterling at all, and Duke does not point to anything else in the record that addresses the issue. It is improper to raise the issue now.

R.C. 4903.09 requires the PUCO to make its decisions based on the record of the case. It is not appropriate for the PUCO to adopt a recommendation that is presented for the first time in an application for rehearing.<sup>32</sup>

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<sup>29</sup> Duke Application for Rehearing at 15-16.

<sup>30</sup> *Id.* at 16.

<sup>31</sup> *Id.*, citing Tr. Vol. I at 14.

<sup>32</sup> See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases and for a New Alternative Regulation Plan*, Case No. 96-899-TP-ALT, Second Entry on Rehearing (January 20, 2000) at 11.

In addition, Duke did not explain how the PUCO's Order was unlawful or unreasonable regarding this issue. Thus, Duke's application for rehearing does not meet the statutory standard set forth in R.C. 4903.10.<sup>33</sup> The PUCO should deny rehearing on this issue.

### III. CONCLUSION

Duke's arguments for rehearing are without merit. The PUCO should deny Duke's application for rehearing in its entirety. However, Duke's arguments illustrate how its unlawful practices and misapplication of the PUCO's rules and its own tariffs are likely to continue and are likely harming other consumers. To protect Ohioans from unlawful disconnection of their utility service, the PUCO should grant OCC's application for rehearing and direct Duke to discontinue its unlawful practices.

Respectfully submitted,

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<sup>33</sup> See, e.g., *In the Matter of the Commission's Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season*, Case No. 15-1460-GE-UNC, Entry on Rehearing (October 28, 2015), ¶13.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra was served by electronic mail to the persons listed below, on this 10<sup>th</sup> day of October 2017.

/s/ Terry L. Etter

Terry L. Etter

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