

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation of the Disconnection)	Case No. 17-2089-GE-COI
Policies and Practices of Duke)	
Energy Ohio, Inc.)	

**REPLY IN SUPPORT OF OCC'S MOTION TO COMPEL DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

This case involves a matter affecting the health, safety, and well-being of Ohioans who are utility consumers of Duke Energy Ohio, Inc. ("Duke"). Here, the Public Utilities Commission of Ohio ("PUCO") is rightly investigating the lawfulness of Duke's policies and procedures regarding the disconnection of consumers' electric and natural gas services. This investigation was ordered because the PUCO found that Duke had unlawfully disconnected the electric service of two consumers, who tragically died afterwards, in November 2011.¹ Another concern is that for at least six years Duke disconnected a far higher percentage of its residential customers for nonpayment than any other electric or natural gas company in Ohio.²

¹ *Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS, Opinion and Order (August 30, 2017) ("Pitzer Order"), ¶¶58-59.

² See *Ohio Consumers' Counsel and Communities United for Action v. Duke*, Case No. 15-1588-GE-CSS, Complaint (September 15, 2015) at 5-8.

As allowed under Ohio law and the PUCO's rules,³ the Ohio Consumers' Counsel ("OCC") served discovery on Duke regarding its disconnection policies and procedures. Such discovery was relevant to the subject matter of this proceeding and was likely to lead to the discovery of admissible evidence. However, without a lawful basis, Duke objected to several of OCC's interrogatories. In response to Duke's objections, OCC rephrased the interrogatories and served them on Duke, but Duke again refused to respond. After exhausting all reasonable efforts to resolve the discovery dispute with Duke, on March 23, 2018, OCC filed a Motion to Compel Duke to respond to its discovery. Thereafter, on April 9, 2018, Duke filed a memorandum contra to OCC's Motion to Compel. OCC files this Reply to Duke's memorandum contra.⁴

Duke's memorandum contra provides no valid or lawful reason for Duke not to respond to OCC's discovery. Importantly, Duke does not even attempt to address the PUCO's reasons for initiating this proceeding. In the *Pitzer* case the PUCO expressed its belief that Duke's disconnection policies and practices had not changed since November 2011.⁵ Accordingly, issues surrounding Duke's disconnection policies and practices and any changes to them since 2011, are directly relevant to the subject matter of the instant proceeding and may lead to admissible evidence. Further, the PUCO invited "Complainants and other interested stakeholders" who have general concerns about Duke's disconnection practices based on statistical data to participate in this proceeding.⁶

³ R.C. 4903.082; Ohio Adm. Code 4901-1-17(A).

⁴ Ohio Adm. Code 4901-1-12(B)(2).

⁵ *Pitzer* Order, ¶83. *See also* Case No. 15-1588-GE-CSS, Entry (October 11, 2017), ¶8.

⁶ Case No. 15-1588-GE-CSS, October 11 Entry, ¶22.

Such concerns are relevant to this proceeding, and discovery regarding these concerns is needed.

The standard for obtaining discovery is whether the information sought is relevant to the subject matter of the proceeding and is reasonably calculated to lead to the discovery of admissible evidence. OCC's interrogatories meet this standard. Therefore, the PUCO should grant OCC's Motion and compel Duke to respond to OCC's discovery.

II. REPLY

A. OCC's discovery meets the standard for obtaining discovery.

The PUCO should grant OCC's Motion to Compel because OCC has met the standard for obtaining discovery. The standard for discovery of information is that the discovery (1) "must be relevant to the subject matter of the proceeding" and (2) "appears reasonably calculated to lead to the discovery of admissible evidence."⁷ Duke asserts the discovery sought by OCC is not relevant. Instead of giving sound reasoning regarding OCC's motion to compel, Duke offers only exaggeration,⁸ insinuation,⁹ and mischaracterization of OCC's motion.¹⁰ Duke's arguments are baseless. The PUCO should stick to the standard of review and not be swayed by Duke's attempts at misdirection.

Duke confuses relevance as a standard of admissibility with the broader standard of "relevant to the subject matter" for purposes of discovery under Ohio Adm. Code

⁷ Ohio Adm. Code 4901-1-16(B). In addition, it is not a ground for objection that the information sought would be inadmissible at the hearing.

⁸ Memorandum Contra at 4 (OCC is trying to justify its "witch hunt").

⁹ *Id.* (OCC's intentions are "nefarious").

¹⁰ *Id.* at 5 ("OCC explains that [asking whether the PUCO Staff has inquired about Duke's disconnection practices since the *Pitzer* decision] goes to the issue of whether the Commission Staff has properly done its job.").

4901-1-16(B). Information sought in discovery does not actually have to be admissible, but only relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence.

The subject matter of this proceeding is Duke's disconnection policies and practices. Thus, the information OCC seeks is relevant to the subject matter and appears reasonably calculated to lead to the discovery of admissible evidence. This is the standard for discovery and OCC has met it. For this reason alone, the PUCO should grant OCC's Motion and compel Duke to respond to OCC's discovery.

B. OCC's discovery addresses issues within the scope of this proceeding.

This proceeding was commenced on the assumption that Duke's disconnection policies and practices are the same now as they were in 2011.¹¹ OCC's discovery is meant to find out if Duke's current policies and practices actually are the same as they were in 2011. Duke claims that information regarding its disconnection policies and practices between the years 2011 and 2017 is not relevant because the PUCO is only reviewing Duke's current policies and practices.¹² But Duke's argument is not only inconsistent with the PUCO's previous orders, it is undermined by items requested by the auditor, NorthStar Consulting.

The auditor requested Duke's responses to all the data requests from intervenors in the *Pitzer* case (Case No. 15-298-EL-CSS) and the disconnection waiver case (Case No. 16-1096-EL-WVR).¹³ Those data requests occurred before the February 2016 hearing in the *Pitzer* case, more than two years ago. The auditor also asked for copies of

¹¹ See *Pitzer* Order, ¶83.

¹² See Memorandum Contra at 3.

¹³ NorthStar DR-01-001 and DR-01-002.

any internal or external audits or reviews of Duke's collections (including payment arrangements) performed within the last five years and management's response to the audits/reviews.¹⁴ In addition, the auditor asked for collections-related best practices or benchmarking studies conducted by Duke in the past three years.¹⁵ Further, the auditor requested any changes to Duke's collection-related procedures in the past three years.¹⁶ The auditor also sought Duke's annual collection performance metrics for the past three years.¹⁷ And the auditor asked for any evaluations of the effectiveness of Duke's various collections methods, without limitations on the age of such evaluations.¹⁸

The information sought by NorthStar shows that the scope of this proceeding is not as limited as Duke contends or wishes it to be. Like NorthStar, OCC should be permitted to obtain discovery on Duke's historic disconnection policies and practices.

The discovery sought by OCC relates to background information regarding Duke's annual disconnection reports. OCC has statistical information from Duke's annual disconnection reports, but that information would be more beneficial to this proceeding with the background information sought by OCC in its discovery.

C. Duke's arguments against OCC's Motion to Compel are baseless.

Duke mischaracterizes OCC's stated purpose behind INT-2-90, which asks about PUCO Staff inquiries concerning Duke's disconnection practices and procedures. Duke contends that OCC is seeking information that "goes to the issue of whether the

¹⁴ NorthStar DR-01-007.

¹⁵ NorthStar DR-01-008.

¹⁶ NorthStar DR-01-010.

¹⁷ NorthStar DR-01-015.

¹⁸ NorthStar DR-01-019.

Commission Staff has properly done its job.”¹⁹ However, Duke does not cite to where OCC made this statement. Because it cannot. OCC did not make this statement.

Rather, OCC explained that the point of the interrogatory is to “gauge the effect any PUCO Staff contact may have had on Duke’s disconnection policies and practices.”²⁰ This is not directed at the PUCO Staff, but rather to determine whether *Duke* has done its job by responding to the PUCO Staff’s concerns. Duke’s mischaracterization of OCC’s Motion to Compel is further proof that Duke’s arguments in its memorandum contra are baseless.

In making its case, Duke has sought to portray OCC as the unreasonable instigator, when it is Duke that has been uncooperative. Duke asserts that it “has worked to provide OCC with information that is relevant to the Commission’s audit” and that “OCC continues to revisit and re-litigate old matters that have already been considered and addressed by the Commission.”²¹ On the contrary, Duke has not provided OCC with the relevant information sought in the interrogatories identified in the Motion to Compel and has been uncooperative. Further, the PUCO did not consider or address the issues raised in Case No. 15-1588-EL-CSS, as Duke asserts. Instead, the PUCO expressly invited parties to raise their concerns in *this* case.²²

The statute is clear that OCC and “[a]ll parties and intervenors shall be granted ample rights of discovery.”²³ OCC is entitled to timely and complete responses to its discovery. The purpose of the PUCO’s discovery rules is to “encourage the prompt and

¹⁹ Memorandum Contra at 5.

²⁰ Motion to Compel at 7.

²¹ Memorandum Contra at 2.

²² Case No. 15-1588-GE-CSS, Entry (October 11, 2017), ¶22.

²³ See R.C. 4903.082.

expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.”²⁴ As the PUCO has held, “the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side’s industry or efforts.”²⁵ By refusing to respond to OCC’s discovery, Duke has thwarted the purpose of the PUCO’s discovery rules. Duke has abused the discovery process and stonewalled OCC’s efforts to prepare its case for protecting consumers.

The PUCO’s discovery rules also are “intended to minimize commission intervention in the discovery process.”²⁶ They are not designed to “create an additional field of combat to delay trials or to appropriate the Commission’s time and resources; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”²⁷ OCC attempted keep the PUCO out of this discovery dispute by going so far as to rephrase its interrogatories in response to Duke’s objections. Yet Duke persists in impeding the discovery process by refusing to respond. By rejecting OCC’s reasonable efforts to obtain discovery in this case, Duke has required the PUCO to expend its time and resources to settle this discovery dispute.

The PUCO should not allow Duke to circumvent the rules of discovery. The PUCO should grant OCC’s Motion to Compel.

²⁴ Ohio Adm. Code 4901-1-16(A).

²⁵ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry (March 17, 1987) (“Perry Entry”) at 23.

²⁶ Ohio Adm. Code 4901-1-16(A).

²⁷ *Perry Entry* at 23, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76.

III. CONCLUSION.

OCC's discovery is relevant to the subject matter of this proceeding for purposes of discovery and appears reasonably calculated to lead to the discovery of admissible evidence. For that reason alone, OCC's Motion to Compel should be granted. To protect consumers in this important case concerning Duke's disconnection policies and practices, the PUCO should grant OCC's motion and compel Duke to respond to OCC's discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below
via electronic transmission this 16th day of April 2018.

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4/16/2018 4:26:38 PM

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Case No(s). 17-2089-GE-COI

Summary: Reply Reply in Support of OCC's Motion to Compel Discovery by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Etter, Terry Mr.