

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
GREGORY PECK,**

**COMPLAINANT,**

**v.**

**CASE NO. 16-2338-EL-CSS**

**DUKE ENERGY OHIO, INC.,**

**RESPONDENT.**

**OPINION AND ORDER**

Entered in the Journal on May 22, 2019

**I. SUMMARY**

{¶ 1} The Commission finds that the Complainant, Gregory Peck, has not carried his burden of proving that Respondent, Duke Energy Ohio, Inc., has breached any legal obligation that it holds as a public utility subject to the Commission's jurisdiction.

**II. FACTS AND PROCEDURAL BACKGROUND**

{¶ 2} On December 8, 2016, Gregory Peck (Complainant or Mr. Peck) filed a complaint against Duke Energy Ohio, Inc. (Respondent or Duke). The complaint alleges that, in 2014, Complainant contacted Duke regarding the placement of an advanced meter at his home.<sup>1</sup> A Duke employee, Brian R. Maynard,<sup>2</sup> attempted to address Mr. Peck's customer concerns about smart meters, including those related to privacy. (Duke Ex. 2, at 3; Complaint at 1.) Further responding, Mr. Maynard supplied Mr. Peck with certain written information that Mr. Peck describes as "marketing material." According to the complaint, the provided information indicates that Duke would use the smart meter to

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<sup>1</sup> In this case, the Commission will use the terms "advanced meter" and "smart meter" interchangeably.

<sup>2</sup> Mr. Maynard is employed by Duke as a Strategic Business Specialist. His duties include assisting customers with understanding the smart meters Duke installs and their options if they choose not to have such a smart meter (Duke Ex. 2, at 1).

“pull down monthly meter readings and have better control of the grid with power outages.” As a condition to his allowing Duke to install a smart meter on his premises, Mr. Peck requested that Duke provide him with a letter stipulating that the smart meter would be used specifically and exclusively for the purposes stated in the marketing material. Duke has refused to provide him with such a letter. Mr. Peck claims that as a result, he is being “damaged” by Duke’s practice of charging him “a \$30.00 per month fee for not having the smart meter installed.” (Complaint at 1.)

{¶ 3} On December 21, 2016, Duke filed its answer. Duke’s answer generally denies the allegations of the complaint. It specifically denies the allegation that its actions were unjust, unreasonable, or otherwise in violation of any applicable law, regulation, Commission order, or Commission-approved tariff. It also sets forth several affirmative defenses.

{¶ 4} A settlement conference was held on April 18, 2017; however, the parties were unable to resolve this matter. A hearing originally scheduled for October 4, 2017, was rescheduled for, and held, on November 2, 2017. At the hearing, Mr. Peck testified on his own behalf and Duke presented the testimony of its witness, Mr. Brian R. Maynard, including adoption of his written testimony, pre-filed on October 26, 2017.

{¶ 5} Each party timely filed a post hearing brief, pursuant to the briefing schedule established at the November 2, 2017 hearing.

### **III. APPLICABLE LAW**

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

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

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

{¶ 9} The topic of advanced meter opt-out service is specifically addressed in Ohio Adm.Code 4901:1-10-05(J). That rule provision directs that an electric utility shall provide customers with the option to decline installation of an advanced meter and retain a traditional meter, including a cost-based, tariffed, opt-out service. Further, it provides that the utility must give at least one business day's notice before its installation of an advanced meter and, if the customer expresses interest in using a traditional meter instead, the utility shall: (a) notify the customer of the requirement to pay the amount of the approved tariff charge; (b) explain the facts concerning advanced meters and attempt to address any customer concerns prior to signing up a customer for advanced meter opt-out service; and (c) to the extent that multiple options are offered (to obtain or retain either an advanced meter or a traditional meter), the utility must explain each option and associated costs and give the customer choice over the option selection. Finally, the rule provision authorizes the electric utility to refuse to provide advanced meter opt-out service if either: (a) such service creates a safety hazard of the type described in the rule; or (b) the customer denies the company access to the meter at the customer's premises.

{¶ 10} According to the tariffs currently filed with the Commission, an advanced meter is the Company's standard meter for Ohio residential electric customers, but that any such customer has the option to request a traditional meter rather than an advanced meter. Under Duke's Advanced Meter Opt-Out Rider, those who make such a request shall pay a one-time fee of \$100.00 and a recurring monthly fee of \$30.00. However, the one-time fee does not apply to customers already using a traditional meter. (PUCO No. 19, Sheet No. 127.)

#### IV. DISCUSSION

##### A. *Complainant's Arguments*

{¶ 11} Mr. Peck makes two main arguments. First, he contends that Duke should never have enrolled him in its smart meter opt-out service, nor imposed the \$30 monthly service charge associated with it. Mr. Peck insists that he has neither refused installation of a smart meter, nor opted-out of smart meter service. Rather, he claims, he has always been willing to allow installation of a smart meter on his premises, but under one condition of his own. He would insist that Duke stipulate in writing that his smart meter would serve only the same uses and purposes as does his traditional meter. (Tr. at 10, 52.) Second, Mr. Peck contends that the Commission approved Duke's smart meter service without a full consideration of all of the privacy ramifications of smart meters (Tr. at 9, 11-12, 15, 17, 20, 22-23, 38, 52, 71, 81).

{¶ 12} Mr. Peck testified that when he first agreed to the installation of a traditional meter at his home, he understood its sole purpose was to measure and record monthly use of electricity. Complainant contends that Duke's installation of a smart meter, now, if intended to serve other purposes, raises invasion-of-privacy concerns. Complainant submits that he has his own "limitations in terms of what the smart meter should be used for." With those limitations in mind, he has "demanded a letter stipulating exactly what a smart meter will be used for." (Tr. at 10, 52, 83.) Complainant claims that, rather than refusing the installation of a smart meter on his premises, he has simply requested as a pre-condition some written statement from Duke that provides the smart meter will only be used to accumulate and retrieve monthly electric service use (Tr. at 10-11, 54).

{¶ 13} Mr. Peck argues that Respondent has refused to provide sufficient documentation regarding the limitations on the use of Mr. Peck's private information collected through a smart meter at his home. Complainant's position is that Respondent has an obligation, but ultimately has failed, to provide any reasonable explanation why it is necessary, through a smart meter, to collect private information on a granular basis

that could be used, disseminated and/or be susceptible beyond Complainant's control. (Tr. at 17, 51, 63, 73.)

**B. Respondent's Arguments**

{¶ 14} Duke avers that this case is about a customer who is concerned about having a smart meter on his premises. Duke witness Maynard testified that he provided company literature to Mr. Peck that addressed his concerns regarding the dissemination of private information to third parties (Duke Ex. 2 at 3, Attach. BRM-1(a)-1(d)). Despite providing this information, on January 29, 2014, Duke states that Mr. Peck refused to have his SmartMeter installed and chose to retain his existing meter (Duke Ex. 2 at 3). Duke notes that the Commission, acknowledging that some customers share Mr. Peck's concerns, has made provision to allow them to opt-out of using a smart meter. In fact, Duke has a Commission-approved tariff for such customers, its Advanced Meter Opt-Out Rider (PUCO No. 19, Sheet No. 127). Duke claims the tariff provides a mechanism for customers to elect to keep their traditional meter and to pay a monthly fee instead of agreeing to have a smart meter installed at their premises. According to Duke, Complainant even acknowledged that he understood he would be subject to an additional \$30 charge for using a traditional meter. Duke began billing Mr. Peck for service under that tariff once it became effective. (Tr. at 53-54.)

{¶ 15} Duke asserts Mr. Peck has brought this case for two reasons: (1) because he does not wish to pay, pursuant to tariff, for the non-conforming smart meter opt-out service he is demanding; and (2) because he wishes to bring his privacy concerns to the Commission's attention. It is Duke's position that the Commission should dismiss this case because, at no time, has Mr. Peck stated that Duke has violated any regulation or law pertaining to a public utility in Ohio.

**V. CONCLUSION**

{¶ 16} Complainant has not demonstrated that Duke has breached any legal obligation that it holds as a public utility subject to the Commission's jurisdiction. For

this reason, upon review of the record as a whole, we hold that Complainant has failed to meet his burden of proof in this case.

**A. *The record fails to establish that Duke has breached any legal obligation it holds as a public utility subject to the Commission's jurisdiction***

{¶ 17} Ohio Adm.Code 4901:1-10-05(J) governs the manner in which an electric utility shall provide advanced meter opt-out service. The record supports a finding that by enrolling Mr. Peck as a customer in its smart meter opt-out service, and imposing on him the tariffed, cost-based charges associated with such service, Duke has met every legal obligation required of it under Ohio Adm.Code 4901:1-10-05(J). Specifically, the Commission notes that Ohio Adm.Code 4901:1-10-05(J)(2) requires that, prior to installation of an advanced meter, the utility shall give notice to the customer at least one business day in advance. The record shows that Duke complied with this rule provision by providing Complainant notice on January 6, 2014, the date he first contacted Duke to discuss the matter, of its intention to install a smart meter on his premises (Complaint at 1; Duke Ex. 2 at 2).

{¶ 18} Moreover, we find that Duke has provided Mr. Peck with the option to decline installation of an advanced meter and retain a traditional meter through enrollment in a cost-based, tariffed opt-out service, and notified Mr. Peck of the accompanying service charge, in accordance with Ohio Adm.Code 4901:1-10-05(J)(1) and (J)(3)(a). The record shows that on January 29, 2014, when Duke's service technicians attempted to install a smart meter on his premises, Mr. Peck declined the installation (Duke Ex. 2 at 3). At no time during the evidentiary hearing did Mr. Peck dispute this fact. Mr. Peck's deliberate decision to decline installation of the smart meter effectively signaled his intention to opt-out of the default service, i.e., smart meter service. As such, it provided sufficient reason for Duke to take the action it did – to enroll him in its non-conforming, smart meter opt-out service. Duke is authorized to bill Complainant for that service under the Commission-approved tariff provisions that apply to that service, including the \$30 monthly charge being contested by Complainant. In his testimony,

Complainant acknowledged receiving from Duke a letter advising him of the \$30 monthly opt-out charge associated with his non-conforming use of a traditional meter (Tr. at 53-54). The Commission has previously found that the \$30 charge serves to enable Duke to recover costs specifically associated with providing traditional metered service to its traditional metered customers. *In re Duke Energy Ohio, Inc.*, Case No. 14-1160-EL-UNC (*Duke Advanced Meter Opt-Out Case*), Entry on Rehearing (Feb. 1, 2017) at 8-9. Mr. Peck falls into this category. Upon consideration of the record as a whole, we find that Mr. Peck has not shown that Duke, in applying the \$30 monthly charge to him, has acted in any unreasonable, unlawful, or discriminatory manner, nor imposed the charge for any purpose other than that which formed the basis for its approval by the Commission.

{¶ 19} Finally, we agree that Duke acted reasonably when attempting to address Mr. Peck's concerns. As to this point, Ohio Adm.Code 4901:1-10-05(J)(3)(b) requires a utility, as a condition precedent to enrolling a customer in its tariffed, cost-based advance meter opt-out service, to both "explain the facts concerning advanced meters" and to "attempt to address any customer concerns." The record shows that Duke has complied with this portion of the rule provision, as demonstrated by Mr. Maynard's attempts to provide Mr. Peck with sufficient information to make an informed decision regarding his meter choice and address his concerns by assuring him that customer information collected by a smart meter would not be provided to third parties (Duke Ex. 2 at 3, Attach. BRM-1(a)-1(d)).

***B. Appropriateness to Challenge Prior Commission Decision Approving Duke's Smart Meter Service Offering in a Complaint Case***

{¶ 20} Mr. Peck has attempted to argue that the Commission approved Duke's smart meter service without a full consideration of all of the privacy ramifications of smart meters, resulting in the ability of Respondent to invade the privacy of Ohio citizens through its smart meter service offering (Tr. at 9-13, 17-18, 20, 22-23, 38, 42, 51, 67, 69, 70, 72). However, it would have been much more appropriate to present such arguments in

prior cases in which the Commission considered and authorized Duke's deployment of smart meters within the context of the provision of its standard service offering, such as the *Duke Advanced Meter Opt-Out Case*. In fact, the Commission notes that we have addressed customer privacy concerns relating to smart meter deployment in various other general cases and investigations. See, e.g., *In re the Review of the Consumer Privacy Protection and Customer Data Access Issues Associated with Distribution Utility Advanced Metering and Smart Grid Programs*, Case No. 11-277-GE-UNC; *In re the Commission Review of Cyber Security Issues Related to Entities Regulated by the Commission*, Case No. 11-5474-AU-UNC; *In re Commission-Ordered Workshop Regarding Smart Metering Deployment*, Case No. 07-646-EL-UNC. Furthermore, Mr. Peck has presented no evidence that an actual violation of privacy has occurred or could occur, indicating his claims are more general concerns with Duke's smart meter deployment. A complaint proceeding is not the appropriate forum to consider these types of arguments. *In re the Complaint of Charles S. Federle v. The Dayton Power & Light Co.*, Case No. 92-1542-EL-CSS, Entry (Oct. 15, 1992).

{¶ 21} On a similar note, at one point in his testimony, Mr. Peck expressed his own personal dissatisfaction with the limited degree to which "the regulations of Commission" address "the whole concept of invasion of privacy" (Tr. at 22). Mr. Peck should be made aware that each of the Commission's rules periodically becomes the subject of a formal rule review process that occurs regularly, on a five-year cycle of review. Such proceedings would be more appropriate for discussing what improvements, if any, should be made to the Commission's rules regarding customer privacy concerns. However, we would quickly note that customer privacy concerns regarding smart meters have been discussed at length in our prior rules proceedings and will continue to be a focus in future rules proceedings. See, e.g., *In re the Commission's Review of Ohio Adm.Code Chapter 4901:1-10, Regarding Electric Companies*, Case No. 12-2050-EL-ORD, Finding and Order (Jan. 15, 2014); *In re the Commission's Review of its Rules for Competitive Retail Electric Service Contained in Ohio Adm.Code Chapters 4901:1-21 and 4901:1-24*, Case No. 12-1924-EL-ORD, Finding and Order (Dec. 18, 2013).



{¶ 22} Moreover, the record does not show that Mr. Peck has ever enrolled in Duke's smart meter service offering. Instead, the record supports the conclusion that Mr. Peck refused installation of Duke's smart meter and, as a result, Duke properly enrolled him in another service entirely, namely, Duke's smart meter opt-out service (Duke Ex. 2 at 2-3). Thus, to the extent that he seeks to use his complaint in the above-captioned case as a means to raise the question of whether Duke's smart meter service affects the privacy interests of Ohio citizens who are subscribers to that service, Mr. Peck has failed to show that he is a real party of interest in the matter he seeks to litigate. As someone who has never subscribed to the smart meter service, Mr. Peck's own privacy rights are not at stake and would remain unaffected. Accordingly, Mr. Peck lacks standing to proceed in litigation of the very question he has attempted to raise in the above-captioned case. *In re Complaint of Randall G. Beyer v. Cincinnati Bell Telephone Company, The Cincinnati Gas & Electric Company, and Cinergy Corp.*, Case No. 04-384-AU-CSS, Entry (Feb. 23, 2005) at 3.

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 23} On December 8, 2016, Mr. Peck filed a complaint against Duke alleging that he has been damaged: (1) by Duke's refusal to install a smart meter on his premises, and thereafter, to provide him smart meter service subject to certain terms and conditions that, by stipulation, Mr. Peck would seek to impose on Duke; and (2) by being charged Commission-approved tariffed monthly service charges associated with Duke's smart meter opt-out service.

{¶ 24} On December 21, 2016, CEI filed an answer in which it generally denied all of the allegations of the complaint and set forth affirmative defenses.

{¶ 25} A settlement conference was held on April 18, 2017, and a hearing was held on November 2, 2017.

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

{¶ 27} There is insufficient evidence to support a finding that Duke has breached any legal obligation it holds as a public utility subject to the Commission's jurisdiction.

## VII. ORDER

{¶ 28} It is, therefore,

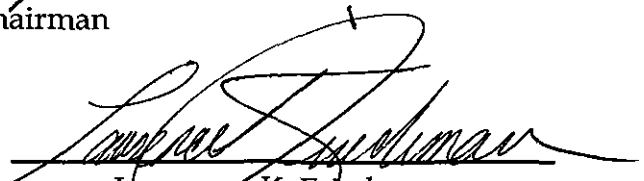
{¶ 29} ORDERED, That this matter be decided in favor of Duke as the Complainant has failed to sustain his burden of proof. It is, further,

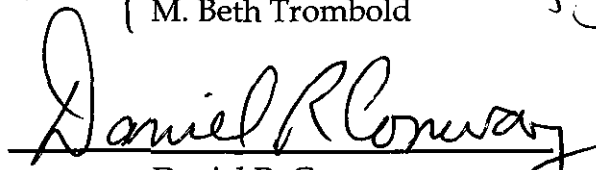
{¶ 30} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.


### THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Sam Randazzo, Chairman

  
M. Beth Trombold

  
Lawrence K. Friedeman


  
Daniel R. Conway

  
Dennis P. Deters

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Entered in the Journal  
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MAY 22 2019

  
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