

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

DIRECT ENERGY BUSINESS, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. 17-791-EL-CSS
)	
OHIO EDISON COMPANY AND THE CLEVELAND)	
ELECTRIC ILLUMINATING COMPANY,)	
)	
Respondents.)	
)	

OHIO EDISON COMPANY AND THE CLEVELAND		
ELECTRIC ILLUMINGATING COMPANY,)	
)	
Complainants,)	
)	
v.)	
)	Case No. 17-1967-EL-CSS
DIRECT ENERGY BUSINESS, LLC)	
)	
Respondent.)	
)	
)	

SUPPLEMENTAL BRIEF OF DIRECT ENERGY BUSINESS, LLC

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I. INTRODUCTION

A November 19, 2020 Entry in these consolidated cases offers the parties “an opportunity to argue whether and, if so, how the Commission should consider the Supreme Court’s ruling in the *Duke Resettlement Case* for purposes of these proceedings.”¹ *Duke* does not support dismissal of these proceedings for “lack of jurisdiction.” Contrary to challenging the Commission’s jurisdiction, ***both parties*** in these proceeding have invoked it.

Duke involved a Commission order finding that Duke violated its Supplier Tariff and therefore failed to render adequate service. The Court found that Duke’s services under the Supplier Tariff did not fit those of “electric light company,” so Duke could not be a “public utility” under R.C. 4905.04, 4905.05 and 4905.26. The Court reversed the order finding Duke had violated R.C. 4905.22 and ordered the case dismissed.²

These consolidated cases arise from Direct Energy Business, LLC’s (Direct) original Complaint, the Companies’ Complaint, and Direct’s Counterclaim to that Complaint.³ Each of these pleadings alleges similar causes of action. Count I of each party’s pleadings alleges violations of the Supplier Tariff.⁴ Direct’s Count II alleges breach of the underlying supplier

¹ Case No. 17-0791-EL-CSS, Entry at ¶ 11. The *Duke Resettlement Case* refers to the Slip Opinion in *Direct Energy Bus., L.L.C. v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, 160 Ohio St. 3d 1462, 157 N.E.3d 796 (Sept. 17, 2020). This brief will refer to the Slip Opinion as *Duke*.

² *Duke* at ¶ 2.

³ Case No. 17-0791-EL-CSS, Entry at ¶ 8 (Nov. 19, 2020).

⁴ Case No. 17-0791-EL-CSS, Complaint at ¶¶ 24-28 (March 30, 2017); Case No. 17-1967-EL-CSS, Complaint at ¶¶ 44-47 (September 11, 2017) and Answer and Counterclaim at ¶¶ 29-33 (October 2, 2017).

agreements. Direct's Count III and the Companies' Count II allege violations of various provisions of R.C. Chapters 4905 and 4928.⁵

Duke does not control the parties' claims for violation of the Supplier Tariff or agreements (Direct Counts I and II and the Companies' Count I.) The *Duke* Court found that the Commission had no jurisdiction under R.C. Chapter 4905.⁶ The Court did **not** address or acknowledge the Commission's jurisdiction under R.C. Chapter 4928. The Companies' Supplier Tariff was filed and approved under R.C. 4928.15, so the Commission has jurisdiction to enforce the tariff under R.C. 4928.16. Nor does *Duke* control Direct's claims for violations of R.C. 4928.17, which are subject to Commission jurisdiction under R.C. 4928.18.

This leaves the claims alleging violations of R.C. Chapter 4905—specifically, R.C. 4905.22, 4905.26, 4905.30, 4905.32, and 4905.35. The Companies admit they are “public utilities” for purposes of these statutes.⁷ *Duke* does not require the Commission to ignore these admissions. In any event, R.C. Chapter 4928 permits claims against an “electric utility” for violations of R.C. Chapter 4905, so whether the Companies are also deemed “public utilities” is irrelevant.

If the *Duke* Court had addressed R.C. Chapter 4928, the outcome of the case would almost certainly have been different. *Duke* is not an authoritative or persuasive decision on the **complete** scope of Commission jurisdiction. The anomalous outcome in *Duke* is a result of the

⁵ Case No. 17-0791-EL-CSS, Complaint at ¶¶ 34-37 (March 30, 2017); Case No. 17-1967-EL-CSS, Complaint at ¶¶ 49-51 (September 11, 2017) and Counterclaim at ¶¶ 38-45 (October 2, 2017).

⁶ *Duke* at ¶ 25.

⁷ Case No. 17-0791-EL-CSS, Answer at ¶¶ 2-4 (April 10, 2017); Case No. 17-1967-EL-CSS, Complaint at ¶¶ 1-2 (September 11, 2017).

manner in which the “jurisdictional” issue was raised and argued. That result may be avoided here by citing the jurisdictional provisions of R.C. Chapter 4928 in the final order in these proceedings.

II. DISCUSSION

Both parties in these cases have invoked the Commission’s subject matter jurisdiction. The Commission may decide the parties’ claims on the merits without running afoul of *Duke*.

A. The *Duke* Court limited its jurisdictional analysis to R.C. Chapter 4905.

Duke was decided on a stipulated record.⁸ “In 2013, Duke Energy failed to calculate usage data for a monetarily-large customer of Direct, which resulted in Direct being overbilled. Seeking redress, Direct filed a complaint against Duke Energy with appellee, the PUCO. The PUCO ruled in favor of Direct, determining that Direct had established by a preponderance of the evidence that Duke Energy’s failure to provide accurate readings of the customer’s generation usage constituted ‘inadequate service.’”⁹

On appeal, “Duke Energy argues that the duty of ‘adequate service’ does not apply to it here because it was not acting as a public utility when it rendered meter data management services to Direct. We agree.”¹⁰

⁸ Case No. 14-1277-EL-CSS, Opinion and Order at ¶ 7 (April 10, 2019) (“At the hearing, the parties stipulated to the submission of all exhibits, including prefiled testimony, and waived all cross examination.”).

⁹ *Duke* at ¶ 2.

¹⁰ *Id.* at ¶ 11.

The Court found that Duke was not acting as an “electric light company” under R.C. 4905.03(C) (and thus a public utility under R.C. 4905.02) because “the parties have provided no evidence to support a claim that Duke Energy was ‘engaged in the business of supplying electricity for light, heat, or power purposes’ to Direct.”¹¹ “We likewise see no evidence that Direct was a ‘consumer’ of electricity supplied by Duke Energy, as the record does not establish that Direct paid for and received electric energy furnished by Duke Energy.”¹² Thus, Duke Energy did not act as a public utility under the facts of this case.”¹³

Direct does not agree with the Court’s statutory analysis for reasons explained below.¹⁴ The more important point for now is that the Court specifically limited its jurisdictional analysis to R.C. Chapter 4905. The Court did not consider the jurisdictional provisions of R.C. Chapter 4928.

B. R.C. Chapter 4928 provides independent grounds for jurisdiction in complaints involving “electric utilities” and “electric service companies.”

¹¹ *Id.* at ¶ 15.

¹² *Id.* at ¶ 17.

¹³ *Id.* at ¶ 25.

¹⁴ Direct filed a motion for reconsideration to point out that even if Duke isn’t a “public utility” under R.C. Chapter 4905, it is an “electric utility” under R.C. Chapter 4928. The Court denied this motion without an explanation or opinion. *See In re Complaint of Direct Energy Bus., L.L.C. v. Duke Energy Ohio, Inc.*, Ohio S.C. Case No. 2019-1058, Motion for Reconsideration at 4-7 (Sept. 28, 2020).

Duke did not address Commission jurisdiction under R.C. Chapter 4928. That Chapter, however, is key. Direct and the Companies have each relied on Chapter 4928 as grounds for jurisdiction here.¹⁵

R.C. 4928.16(A) directs the Commission to exercise its R.C. 4905.26 complaint jurisdiction in claims against an “electric services company” and “electric utility” (among others) arising from both competitive and noncompetitive services described in R.C. Chapter 4928. Under R.C. 4928.16(A)(1):

The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, regarding the provision by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code of any service for which it is subject to certification.

And under Subsection (A)(2):

The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections; or whether an electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply with any provision of sections 4928.01 to 4928.10 of the Revised Code regarding a competitive retail electric service for which it is subject to

¹⁵Case No. 17-0791-EL-CSS, Complaint at ¶ 4 (March 30, 2017) (citing R.C. 4928.16 and R.C. 4928.18); Case No. 17-1967-EL-CSS, Complaint at ¶ 4 (September 11, 2017) (citing R.C. 4928.16) and Counterclaim at ¶ 4 (October 2, 2017) (citing R.C. 4928.16 and R.C. 4928.18).

certification or any rule or order adopted or issued under those sections.

The Companies are “electric utilities” as defined in R.C. 4928.01(A)(11).¹⁶ R.C. 4928.15 requires an electric utility to file tariffs not only for noncompetitive retail electric distribution service, but also “any transmission service or ancillary service component of noncompetitive retail electric service.” An “ancillary service” means “**any** function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to” a laundry list of examples.¹⁷ The functions performed by the Companies under their Supplier Tariff fall within the universe of “ancillary services”—hence the reason for filing the tariff in the first place.¹⁸ The Companies must provide these services “**to any supplier . . .** on a nondiscriminatory and comparable basis.”¹⁹

Direct’s complaint against Duke arose from Duke’s failure to provide accurate load information to PJM. Here, Direct is not complaining about the Companies’ negligence in providing load information to PJM. The nub of Direct’s Complaint and Counterclaim is that the Companies acted as a heavy-handed bill collector on behalf of their affiliate, FirstEnergy

¹⁶ “‘Electric utility’ means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. ‘Electric utility’ excludes a municipal electric utility or a billing and collection agent.” R.C. 4928.01(A)(11).

¹⁷ R.C. 4928.01(A)(1) (emphasis added).

¹⁸ The version of the Supplier Tariff applicable here was approved in Case No. 14-1297-EL-SSO. *See In the Matter of the Application of Ohio Edison Company, et al. for Authority to Provide for a Standard Service Offer*, 14-1297-EL SSO, Opinion and Order at 98 (March 16, 2016).

¹⁹ R.C. 4928.15(B) (emphasis added).

Solutions, thereby violating their Supplier Tariff and supplier agreements. *Duke* does not prevent the Commission from deciding these claims.

Count III of Direct's Complaint and Counterclaim allege violations of R.C. 4928.17.²⁰

Under R.C. 4928.18(B), "[t]he commission has jurisdiction under section 4905.26 of the Revised Code . . . to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section."

The Commission's jurisdiction to hear and decide Direct's R.C. 4928.17 claims is clear.

Nothing in *Duke* speaks to Commission jurisdiction under R.C. Chapter 4928.

C. There are alternative grounds to maintain jurisdiction over the Chapter 4905 claims.

Duke hinged on the Court's interpretation of R.C. 4905.03(C). Because "the parties have provided no evidence to support a claim that Duke Energy was 'engaged in the business of supplying electricity for light, heat, or power purposes' to Direct,"²¹ *Duke* could not be an "electric light company" or "public utility."

Direct recognizes that in light of *Duke*, the Commission is probably inclined to dismiss the R.C. Chapter 4905 claims. Here, as in *Duke*, the Companies did not provide electric service "to Direct." But there are alternative grounds for jurisdiction over alleged violations of R.C. Chapter 4905—regardless of whether "public utility" service is involved—that the Court did not consider.

²⁰ Case No. 17-0791-EL-CSS, Complaint at ¶ 36 (March 30, 2017); Case No. 17-1967-EL-CSS, Counterclaim at ¶ 44 (October 2, 2017).

²¹ *Duke* at ¶ 15.

“Public utilities” include “[a]n electric light company, when engaged in the business of electricity for light, heat, or power purposes to consumers in this state[.]”²² The Companies fit this definition. The operative and controlling fact is that the Companies provide electric service “to consumers.” Whether or not Direct is a “consumer” has no bearing on the Commission’s jurisdiction to regulate the Companies.²³ The Commission may take administrative notice of decades upon decades of filings by the Companies (not to mention their current tariffs) acknowledging their status as Commission-regulated public utilities. The Companies have not only admitted their public utility status; they have affirmatively alleged it.²⁴ Neither law nor reason stand in the way of the Companies being both “public utilities” and “electric utilities.”

Even if the Commission finds that the Companies did not render “public utility” service to Direct, that finding does not foreclose jurisdiction over the R.C. Chapter 4905 claims. “All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously.”²⁵ R.C. 4928.16(A)(2) gives the Commission “jurisdiction under section **4905.26** of the Revised Code *** to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15 *** or any rule or order adopted or

²² R.C. 4905.03(C).

²³ If public utility status depended on whether the complaining party received electricity service from the responding party, then the Commission would have no “jurisdiction” in matters prosecuted by the scores of groups and associations that routinely intervene in electric proceedings. The Companies do not provide service “to” the groups and associations headquartered in Columbus, Cincinnati, and other areas outside their service territory.

²⁴ Case No. 17-1967-EL-CSS, Complaint at ¶¶ 1-2 (September 11, 2017).

²⁵ *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 35, 567 N.E.2d 1018, 1025 (1991).

issued under those sections [.]” (Emphasis added.) And, “after reasonable notice and opportunity for hearing in accordance with section **4905.26** of the Revised Code,” the Commission may (among other things) “order any remedy provided under section **4905.22**, 4905.37, or 4905.38 of the Revised Code[.]”²⁶

In addition, under R.C. 4928.18(A), “[n]othing in this chapter prevents the public utilities commission from exercising its authority under Title XLIX of the Revised Code to protect customers of retail electric service supplied by an electric utility from **any adverse effect of the utility's provision of a product or service other than retail electric service.**” (Emphasis added.) Also, under R.C. 4928.16(D), “Section 4905.61 of the Revised Code [the treble damages statute] applies to a violation by an electric utility of, or to a failure of an electric utility to comply with, any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections.”²⁷

“[I]n reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes.”²⁸ The overlap between R.C. Chapters 4905 and 4928 reflect the legislature’s intent for the Commission to remain the exclusive authority in matters involving “public utilities” who also happen to function as “electric utilities.” R.C. Chapter 4928 patently and

²⁶ R.C. 4928.16(B)(2) (emphasis added).

²⁷ The Court has consistently held that a successful action under R.C. 4905.26 is necessary to perfect a civil damages claim under R.C. 4905.61. *See e.g., Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 194, 383 N.E.2d 575, 577 (1978) (“Bringing suit for treble damages against a utility, therefore, is dependent upon a finding that there was a violation of a specific statute or an order of the commission.”)

²⁸ *United Tel. Co. of Ohio v. Limbach*, 1994-Ohio-209, 71 Ohio St. 3d 369, 372, 643 N.E.2d 1129, 1131 (1994).

expressly extends the Commission’s jurisdiction to hear complaints that an “electric utility” has violated R.C. Chapter 4905. The *Duke* decision does not hold otherwise. It cannot hold otherwise because the Court failed to construe Chapters 4905 and 4928 together.

D. The Final Order in these cases should cite R.C. 4928 as additional or alternative grounds for jurisdiction.

The anomalous decision in *Duke* is largely attributable to an incomplete record. Direct sued Duke under R.C. 4905.26 and 4928.16. The final order, however, relied only on R.C. 4905.26 as the basis for jurisdiction. Not wishing to look a gift horse in the mouth, Direct did not seek rehearing of the Commission’s jurisdictional finding. The Court limited its jurisdictional analysis to R.C. Chapter 4905 because that is what the final order relied on. The teachable moment from *Duke* is that Commission final orders should contain more robust jurisdictional findings than the Commission has historically offered.

“The general term ‘jurisdiction’ can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. * * * The often unspecified use of this polysemic word can lead to confusion and has repeatedly required clarification as to which type of ‘jurisdiction’ is applicable in various legal analyses.”²⁹

²⁹ *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18. As one Justice recently noted, “Our public-utilities cases have propagated the confusion we have so often sought to clarify between the existence of subject-matter jurisdiction and the exercise of that subject-matter jurisdiction.” *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan of Ohio Edison Co.*, Slip Opinion No. 2020-Ohio-5450, ¶ 101 (Kennedy, J., concurring in part and dissenting in part).

*“Subject-matter jurisdiction is a court's power over a type of case.”*³⁰ The Commission has subject matter jurisdiction “[w]here it is apparent from the allegations that the matter alleged is within the class of cases [the Commission] has been empowered to act [.]”³¹ The Commission is empowered to act on Direct’s claims by virtue of R.C. 4905.26, R.C. 4928.16 and R.C. 4928.18. The Companies are “public utilities” and “electric utilities” under these statutes. The final order in these cases should acknowledge these conclusions.

III. CONCLUSION

The *Duke* decision has limited applicability here. The Commission may, and should, continue to exercise jurisdiction and issue an Opinion and Order finding that the Companies violated their Supplier Tariff, the supplier agreements, R.C. 4928.17, R.C. 4905.22, R.C. 4905.30, R.C. 4905.32 and R.C. 4905.35.

³⁰*Pratts v. Hurley*, 2004-Ohio-1980, ¶ 34, 102 Ohio St. 3d 81, 88, 806 N.E.2d 992, 1000.

³¹*Id.* at 86 quoting *State v. Filiaggi*, 1999-Ohio-99, 86 Ohio St. 3d 230, 240, 714 N.E.2d 867, 876.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Brief was served to the following by e-mail this 21st day of December 2020:

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