

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Brenda )  
Fitzgerald and Gerard Fitzgerald, )  
 )  
Complainant, )  
 )  
v. ) Case No. 10-791-EL-CSS  
 )  
Duke Energy Ohio, Inc., )  
 )  
Respondent. )

ENTRY

The attorney examiner finds:

- (1) On April 12, 2011, Brenda Fitzgerald and Gerard Fitzgerald (complainants) filed a motion to issue subpoenas in this case. Pursuant to the motion, the attorney examiner issued subpoenas for the following individuals: Cindy Mack, Jim Rogers, Cindy Laycock, Pam Ball, La'tasha Savage, Jonathan Green, Veronica Cage, Vel Mitchell, and Cindy Givens. In the subpoenas, each individual was directed to bring to the hearing any notes or material, written or recorded, that is relevant to this case.
- (2) On April 18, 2011, Duke Energy Ohio, Inc. (Duke Energy or company) filed a motion to quash the subpoenas. In the memorandum in support of the motion, Duke Energy argued that eight of the subpoenas should be quashed in their entirety and the ninth subpoena should be quashed partially. Duke Energy argued that these subpoenas are unreasonable and oppressive, and are designed to harass the company's agents and representatives, or to seek the testimony of individuals who do not live or work in Ohio.

With reference to each individual subpoenaed, Duke Energy argued that the subpoenas should be quashed for the following reasons:

- (a) Cindy Mack is a Commission employee. The subpoena for her should be quashed because it is

inappropriate under Rule 4901-1-25(D), Ohio Administrative Code (O.A.C.), which prohibits parties from issuing subpoenas to Commission staff.

- (b) Jim Rogers is the chairman, president and the chief executive officer (CEO) of Duke Energy Corporation in Charlotte, North Carolina, the parent company of Duke Energy. Mr. Rogers is not directly employed by Duke Energy. Moreover, Mr. Rogers lives and works outside Ohio, meaning he is outside the jurisdictional limits of the Commission's power to subpoena him. Finally, as confirmed by the account records already produced by Duke Energy for complainant, there is no evidence that Mr. Rogers has personal knowledge of any relevant facts or information concerning complainant's account, or even knows who complainants are.
- (c) Cindy Laycock and Pam Ball are customer service representatives employed by Duke Energy Indiana, Inc., an affiliated company based in Plainfield, Indiana. For the same reasons stated with respect to the subpoena for Mr. Rogers, the Commission lacks jurisdiction over both individuals and, therefore, must quash both subpoenas. In addition, neither individual would add anything to the hearing as Duke Energy has already acknowledged the underlying facts via Cindy Givens' testimony. Therefore, any testimony by Ms. Laycock and/or Ms. Ball would be cumulative and irrelevant.
- (d) La'Tasha Savage, Jonathan Green, and Veronica Cage do not work for Duke Energy or even an affiliate of the company. They are former employees of a contract company, ER Solutions, Inc., and previously worked out of that company's offices in either Montgomery, Alabama, or Atlanta, Georgia. None of those individuals resides or works in Ohio; therefore, the Commission lacks jurisdiction over them.

And, since none of those persons works for Duke Energy, attempting to serve subpoenas on them via service on Duke Energy's attorney is not proper.

- (e) Vel Mitchell is a customer relations representative in Cincinnati, who now handles routine back office work. Duke Energy could not locate any record that Ms. Mitchell ever did anything in connection with complainants' utility account. Duke Energy also could not locate any records of calls between her and complainants or any data entries by her, etc. Requiring Ms. Mitchell to appear at the hearing is both unreasonable and oppressive.
  - (f) Cindy Givens is already scheduled to appear at the hearing and her testimony has already been filed of record in this case. Duke Energy does not contest that aspect of the subpoena. Duke Energy does contest the document request portion of the subpoena because it is too broad and unduly burdensome. Duke Energy has already produced all account records, utility bills and recorded phone calls relating to complainants and which remain in the company's possession. There is no need for Ms. Givens to bring with her "any notes or material, written or recorded, relevant to this case." Complainant already has that information. Asking Duke Energy to bring to the hearing that which the company already produced is unreasonable and oppressive. Moreover, the scope of this request impacts confidential information protected by the attorney-client privilege. Therefore, the Commission should quash the document production portion of this subpoena.
- (3) Pursuant to Rule 4901-1-12(C), O.A.C., Duke Energy requested expedited treatment of a ruling on its motion to quash. In support of this request Duke Energy stated that the hearing in this proceeding is scheduled for April 27, 2011, and the company must know in advance whether or not it has to

produce witnesses and documents for the hearing. Alternatively, Duke Energy stated that the company must decide whether to pursue an interlocutory appeal of an adverse ruling on the motion.

- (4) On April 18, 2011, complainants filed a reply to Duke Energy's motion to quash. In the reply, complainants presented the following information in opposition to the motion to quash:
  - (a) In the motion to quash, counsel for Duke Energy seems to claim to be representing both the ratepayers of Ohio and Duke Energy, which would seem to be an inherent conflict of interest. Complainants stated that they are ratepayers and that counsel for Duke Energy does not represent them.
  - (b) Duke has refused to give complainants the name of a common supervisor of all the Duke Energy employees and or agents that have been involved in this matter since April 15, 2010. Since it now appears that the overwhelming majority of the employees/agents involved in this matter did not or do not work for Duke, complainants have no choice but to subpoena Mr. Rogers.
  - (c) When complainants called to have their power restored on April 15, 2010, they called a local phone number and their call was either answered or transferred out of state. Complainants were unaware of this until April 14, 2011.
  - (d) If Duke Energy's argument is allowed to stand in this matter, that will effectively make them immune from this complaint and any other complaints filed against them.

In addition, complainants stated that, should the Commission decide to change the list of those already subpoenaed in this matter, a continuance of the hearing is requested until such a time as the arguments are settled.

- (5) On April 19, 2011, Duke Energy submitted a memorandum in opposition to complainants' third request for a continuance. In

the memorandum, Duke Energy argued that there is no justification to continue the hearing a third time. Duke Energy stated that continuing the hearing will not accomplish anything but further delay and additional costs to the company and its ratepayers. Duke Energy stated that the company has been ready to conduct the hearing since filing its expert testimony on October 10, 2010.

Moreover, Duke Energy stated that the reply to its motion to quash was filed by Mr. Fitzgerald and that he is not a party in this case. Duke Energy stated that the actual complainant, Ms. Fitzgerald, did not sign the request for a continuance, and Mr. Fitzgerald has no standing to make any requests in this action.

- (6) Rule 4901-1-25, Ohio Administrative Code, provides, in part, that:

(A) The commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon their own motion or upon motion of any party. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such person to produce the books, papers, documents, or other tangible things described therein. A copy of the motion for a subpoena and the subpoena itself should first be submitted to the attorney examiner assigned to the case, or to the legal director or deputy legal director, for signature of the subpoena. After the subpoena is signed, a copy of the motion for a subpoena and a copy of the signed subpoena shall then be docketed and served upon the parties to the case. The person seeking the subpoena shall retain the original signed subpoena and make arrangements for its service.

(B) Arranging for service of a signed subpoena is the responsibility of the person requesting the subpoena. A subpoena may be served by a sheriff, deputy sheriff, or any other person who is not less than eighteen years of age. Service of a

subpoena upon a person named therein shall be made by delivering a copy to such person, or by reading it to him or her in person, or by leaving a copy at his or her place of residence. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division.

(C) The commission, the legal director, the deputy legal director, or the an attorney examiner may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive, or condition the denial of such a motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein.

(D) A subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code. Such a subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code as well as paragraph (C) of this rule.

(E) Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than five days prior to the commencement of the hearing.

(F) Any persons subpoenaed to appear at a commission hearing, other than a party or an officer, agent, or employee of a party, shall receive the same witness fees and mileage expenses provided in civil actions in courts of record. For purposes of this paragraph, the term "employee" includes consultants and other persons retained or specially employed by a party

for purposes of the proceeding. If the witness is subpoenaed at the request of one or more parties, the witness fees and mileage expenses shall be paid by such party or parties.... Unless otherwise ordered, a motion for a subpoena requiring the attendance of a witness at a hearing shall be accompanied by a deposit in the form of a check made payable to the person subpoenaed sufficient to cover the required witness fees and mileage expenses for one day's attendance. A separate deposit shall be required for each witness. The deposit shall be tendered to the fiscal officer of the commission, who shall retain it until the hearing is completed, at which time the officer shall tender the check to the witness....

- (7) Upon a review of the arguments raised, the attorney examiner determines that the motion to quash should be granted as it pertains to the subpoena for Jim Rogers. There is no indication in any of the filings in this case that Mr. Rogers has had any involvement in or knowledge of the events surrounding this complaint proceeding or that he could contribute any input of value by his appearance. Without more relevant justification, the attorney examiner finds that it would be unreasonable and an undue burden to compel the appearance.
- (8) The motion to quash should be granted as it pertains to the subpoenas for La'Tasha Savage, Jonathan Green, and Veronica Cage. These individuals are former employees of a contract company that performed work for Duke Energy. Because of their former employee status, service of the subpoenas for these individuals upon Duke Energy's counsel does not provide proper service of the subpoenas. In addition, the contract company is not a party to this case. As nonparty participants under Rule 4901-1-25(F), O.A.C., checks for witness fees and mileage expenses should have been attached to the subpoenas. Because complainants did not include the required checks for witness fees and mileage expenses with the subpoenas, these subpoenas were not properly requested.
- (9) The motion to quash the subpoenas for the appearance of Cindy Laycock and Pam Ball shall be denied. Duke Energy states that these individuals are employees of Duke Energy

Indiana, Inc., and the Commission lacks jurisdiction over them. However, these individuals have apparently been involved in telephone conversations with complainants regarding the matter at issue. Because these employees are handling telephone calls from Ohio customers, the Commission will assume, absent claims to the contrary, that Duke Energy Indiana is billing Duke Energy Ohio for the services provided and that Duke Energy Ohio customers are paying the costs for such services provided. The Commission, therefore, concludes that service of the subpoenas for Cindy Laycock and Pam Ball upon counsel for Duke Energy Ohio is sufficient and that Ms. Laycock and Ms. Ball shall appear at the hearing.

- (10) The motion to quash the subpoena for the appearance of Vel Mitchell shall be denied. Although Duke Energy claims that it could not locate any record, telephone call, or data entry connecting Ms. Mitchell to complainants' account, the Commission cannot find that Duke Energy has provided sufficient reason to quash the subpoena.
- (11) With regard to the subpoena for Cindy Givens, Duke Energy stated that it has no problem with the portion of the subpoena requiring her to appear, since she was previously scheduled to appear and her prefiled testimony has been submitted in this case. Duke Energy, however, does contest the document production portion of the subpoena as being too burdensome. Complainants have requested that Ms. Givens bring to the hearing "any notes or material, written or recorded, relevant to this case." Complainants have conducted discovery in this case and the Commission has granted in part a motion to compel discovery. Discovery is now complete and complainants should now possess all relevant material. Complainants shall be responsible for bringing to hearing the "notes or material" that they intend to introduce or use at hearing. The Commission agrees that the request is burdensome. In addition, it is subjective. The motion to quash insofar as it pertains to the production of documents at hearing is granted.
- (12) Similar requests to bring to hearing "any notes or material, written or recorded, relevant to this case" were included in the subpoenas issued to Ms. Laycock, Ms. Ball, and Ms. Mitchell. For the same reasons as expressed above, the motions to quash

insofar as it pertains to the production of documents is granted with regard to the subpoenas for these individuals.

- (13) With regard to the subpoena for Cindy Mack, the attorney examiner notes that Duke Energy's citation to a prohibition against subpoenas for Commission employees in Rule 4901-1-25(D), O.A.C., applies to subpoenas requested for the appearance of those employees at depositions, not hearings. Therefore, Duke Energy's motion to quash is denied with regard to the appearance portion of Ms. Mack's subpoena. However, the request in the subpoena for Ms. Mack to bring to the hearing "all records, notes and recordings in your possession" is another matter. The request is extremely broad. All documents and recorded calls in the Commission's possession that pertain to this case have previously been remitted to complainants in response to a public records request by complainants. Therefore, Ms. Mack shall have no obligation to bring to the hearing "all records, notes and recordings in your possession."
- (14) There is no reason for another continuance of the hearing in this case. Accordingly, complainants' request that this matter be continued should be denied. The hearing remains scheduled on April 27, 2011, at 10:00 a.m., in the offices of the Commission, Hearing Room 11-C, 180 East Broad Street, Columbus, Ohio.
- (15) In Commission proceedings, the complainant has the burden of proving the allegations in the complaint. Thus, at hearing, it shall be the complainants' responsibility to appear and be prepared to present evidence in support of the complaint.
- (16) When this complaint case was filed on June 8, 2010, the complaint form was signed by Brenda Fitzgerald as the customer of record of Duke Energy. However, in a letter attached to the complaint form, which more fully explained the complaint, the names Brenda Fitzgerald and Gerard Fitzgerald were typed as signatures. Thus, despite the listing of Brenda Fitzgerald in Duke Energy's files as the customer of record in this matter, it is clear that both Brenda Fitzgerald and Gerard Fitzgerald intended to file this complaint. Brenda Fitzgerald and Gerard Fitzgerald, therefore, are listed in the Commission's records as co-complainants in the case.

It is, therefore,

ORDERED, That Duke Energy's motion to quash is granted as it pertains to the subpoenas for Jim Rogers, La'Tasha Savage, Jonathan Green, and Veronica Cage is granted. It is, further,

ORDERED, That Duke Energy's motion to quash the subpoenas for Cindy Laycock, Pam Ball, Vel Mitchell, and Cindy Givens is denied as to the appearance at hearing, but granted as to the production of documents. It is, further,

ORDERED, That Cindy Mack has no obligation to bring any documents or recordings to the hearing. It is, further,

ORDERED, That complainants' request for a continuance is denied and that the hearing in this matter remain scheduled in accordance with Finding (14). It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Kerry K. Sheets <sup>Kerry K. Sheets 5/20</sup>  
Attorney Examiner

/vrm

Entered in the Journal

APR 25 2011

Betty McCauley  
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Secretary