

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Commission, considering the public hearing held on April 27, 2011, issues its opinion and order in this matter.

APPEARANCES:

Brenda and Gerard Fitzgerald, 123 Southern Trace, Apt. B, Cincinnati, Ohio 45225, on their own behalf.

Eberly & McMahon, LLC, by Robert A. McMahon, 2321 Kemper Lane, Suite 100, Cincinnati, Ohio 45206, on behalf of Duke Energy Ohio, Inc..

OPINION:

I. History of the Proceeding:

On June 8, 2010, Brenda and Gerard Fitzgerald (complainants or, individually, Ms. Fitzgerald or Mr. Fitzgerald) filed a complaint alleging that Duke Energy Ohio, Inc. (Duke Energy or company) wrongfully billed them for electric service. In the complaint, complainants stated that the power to their residence was disconnected on April 15, 2010, and they had to pay \$1,762.00 to have their power restored. Complainants stated that, in other telephone calls to Duke Energy, they were told that they owed more money. Also they received a disconnect notice, and had to pay \$478.00 in order to keep their power on. Complainants argued that Duke Energy did not tell them that they could have paid only \$175.00 under the Commission's "Winter Rules" and then negotiated payments on the remaining balance. Complainants stated that Duke Energy discussed the Winter Rules, delinquencies, and other matters concerning their personal business with a third party, that the company lied to them, and that they are victims of extortion.

Duke Energy denied all allegations in the complaint. Duke Energy also asserted that the company has provided reasonable and adequate service and has billed the complainants according to all applicable provisions of Title 49 of the Ohio Revised Code and regulations promulgated thereunder, and in accordance with all of the company's filed tariffs. Moreover, Duke Energy asserted that the company acted in conformance with the Percentage of Income Payment Plan (PIPP), Special Reconnection Procedures/Winter 2009-2010, Special Maintenance of Service Procedures/Winter 2009-2010 (Winter Rules),<sup>1</sup> and other special procedures implemented by the Commission with respect to complainants, and that complainants did not take advantage of such programs even after Duke Energy offered them to complainants.

A settlement conference was convened in this matter on September 7, 2010. The parties, however, were unable to reach a settlement agreement at the conference. A hearing was convened in the matter on April 27, 2011. Thereafter, Duke Energy filed its brief on June 1, 2011, and complainants filed a statement in the case on June 3, 2011.

## II. Applicable Law:

Duke Energy is an electric light company as defined by Section 4905.03(A)(4), Revised Code, and a public utility by virtue of Section 4905.02, Revised Code. CEI is, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code.

Section 4905.22, Revised Code, requires, in part, that a public utility furnish necessary and adequate service and facilities. Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law or that any practice affecting or relating to any service furnished is unjust or unreasonable.

In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189. Therefore, it is the responsibility of a complainant to present evidence in support of the allegations made in a complaint.

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<sup>1</sup> See, *In the Matter of the Investigation into Long-Term Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies*, Case No. 09-782-GE-UNC (Entry dated September 23, 2009). In that entry, the Commission, in part, directed utilities to reconnect the services of those who have had their services disconnected for nonpayment, provided that the person seeking to have service restored does all of the following: (1) pays his/her arrearages, or cures any default under a standard payment plan, or pays \$175.00, whichever is less, (2) applies for the regular Home Energy Assistance Program (HEAP), and (3) enrolls in a standard extended payment plan, or the PIPP program, or a plan offered by the utility.

### III. Hearing:

At the hearing, Mr. Fitzgerald testified for complainants and Cynthia M. Givens, a customer relations supervisor for Duke Energy, testified on behalf of the company. In addition, Cindi Mack of the Commission's staff and Duke Energy representatives Vel Mitchell, Cindy Laycock, and Pam Ball appeared after being subpoenaed by complainants and presented testimony.

#### Mr. Fitzgerald - Complainants

Complainants argued that their power was disconnected without warning on April 15, 2010 (Tr. at 12-13, 27-28). After that, each time complainants spoke to Duke Energy representatives on the telephone, they were informed that they had to pay money to restore or maintain the power to their residence. The first time they contacted Duke Energy, on April 15, 2010, just after the disconnection, Duke Energy representative Jonathan Green told them that the amount they had to pay to get power restored was \$1,762.00. Complainants paid that amount on April 15, 2010. On April 16, 2010, after contacting the company and being informed that they should have had to pay only \$175.00 to have their power reinstated, complainants filed an informal complaint with the Commission. On April 19, 2010, they called the company and learned that the amount they owed included another charge of \$250.00. Later that day, they received a disconnect notice from Duke Energy stating that they had to pay the company \$1,679.86. They called the company and, acting on the information provided by another Duke Energy representative named Crystal, they paid \$478.00 to maintain their power. (Complaint at 1; Tr. at 15-19.)

In a subsequent telephone conversation with Commission staff member Cindi Mack, complainants were told about Duke Energy's position in this matter, i.e., that complainants had been informed about the \$175.00 payment under the Winter Rules, but did not take advantage of it. Complainants, however, argued that they were never told anything about Winter Rules or \$175.00 by Duke Energy before they paid to have their power restored. Moreover, a \$300.00 payment made by complainants to Duke Energy on April 5, 2010, was more than enough to have activated the \$175.00 payment provision under the Winter Rules, and the company should not have disconnected complainant's power on April 15, 2010. Complainants argued that they do not know the amount they owed to Duke Energy, or what became of the money that they paid to the company in April 2010. (Complaint at 1-2; Tr. at 14-16, 18-19.)

In addition, complainants argued that Duke Energy discussed matters concerning their personal business with a third party, Stephanie Carson. Complainants stated that Duke Energy shared information about their accounts with Ms. Carson, who was living at complainants' former residence, 1923 John Grey Road, Cincinnati, Ohio (1923 John Grey

Road), after complainants moved to 61 Hunters Court, Amelia, Ohio (61 Hunters Court). Topics that were discussed between the company and Ms. Carson included information about Ms. Fitzgerald being Ms. Carson's mother or her boyfriend's mother, and the fact that Ms. Carson lived at 1923 John Grey Road, the account for which remained in Ms. Fitzgerald's name. (Complaint at 1; Tr. at 18.)

Finally, in a post-hearing statement filed on June 3, 2011, complainants cited to testimony given by Cindi Mack at hearing. Specifically, complainants noted Ms. Mack's testimony on cross-examination stating that, after listening to a recorded telephone call between complainants and Duke Energy, she determined that the company was in the wrong. Further, Ms. Mack testified that, to her, the complaint was that the company misinformed complainants and that was confirmed by listening to the first call. (Tr. at 57-58.) Complainants argued that the one recorded telephone call listened to by Ms. Mack was sufficient for her to draw the conclusion that the company lied to complainants and misinformed them and that her conclusion confirms the complaint. (Complainant's Post-Hearing Statement at 1.)

Cynthia M. Givens - Duke Energy

Ms. Givens found that, when complainants had been customers of Duke Energy at their former residence, 1923 John Grey Road, they were on the PIPP program in 2008 and 2009. Ms. Fitzgerald called Duke Energy and asked that service be disconnected on December 1, 2009. The company disconnected service on that date. But Ms. Fitzgerald again called the company and explained that service was supposed to be disconnected on December 10, 2009, and not December 1, 2009. Duke Energy then reconnected the service. On December 9, 2009, Ms. Fitzgerald called a third time and cancelled the cancellation order for the next day. On March 29, 2010, the electric service for 1923 John Grey Road was disconnected for nonpayment. Duke Energy issued a final bill for that account in December 2009 when the account was disconnected and then issued another final bill in April 2010 for electricity after the service was restored and then disconnected. (DE-Ohio Exhibit A at 6.)

After complainants moved from their former residence at 1923 John Grey Road, they established electric service with Duke Energy at 61 Hunters Court (Ms. Fitzgerald's name was on the accounts at both 1923 John Grey Road and 61 Hunters Court.). Duke Energy twice transferred unpaid portions of the 1923 John Gray Road account, relating to the electric service only, to the 61 Hunters Court account. The company originally transferred \$1,053.63 in electric charges from the first "Final Bill" and later transferred \$222.60 in electric charges in April 2010 when the 1923 John Grey Road account was closed the second time. (DE-Ohio Exhibit A at 7; Tr. at 143.)

Bills for January, February, and March 2010 notified complainants that their electric service was subject to disconnection if they did not pay the past due amounts of the bills by the payment deadlines. Complainants, however, did not make the required payments by the payment deadlines in February and March. On March 29, 2010, Ms. Fitzgerald contacted Duke Energy and discussed the potential disconnection of electric service at 61 Hunters Court. The company explained the following options to Ms. Fitzgerald to avoid disconnection: (1) pay \$1,676.22, which included the unpaid bill of \$1,376.22, plus a \$25 reconnection fee, and a security deposit of \$275, (2) participate in the Winter Rules program which would have allowed complainants to avoid disconnection by paying \$175 by April 8, 2010, followed by monthly payments to pay off the balance within six months, and (3) submit a medical certification which would remove the disconnection notice, if complainants provided the appropriate documentation. (DE-Ohio Exhibit A at 7-8; Tr. at 31, 143-144, 147, 150, 151.)

Complainants made a partial payment of \$300 on April 5, 2010; but, they did not inform Duke Energy that they wanted to take advantage of the Winter Rules program, and did not provide any medical certification paperwork. Moreover, the \$300.00 payment was not sufficient to avoid disconnection because complainants did not sign up for the Winter Rules program or tell Duke Energy Ohio that they wanted to participate in that program. The company, therefore, disconnected the electric service at 61 Hunters Court on April 15, 2010. (DE-Ohio Exhibit A at 8-9; Tr. at 141-142, 145, 147.)

Ms. and Mr. Fitzgerald, in separate telephone calls, contacted Duke Energy on April 15, 2010, to have their electric service restored. Duke Energy did not offer the Winter Rules program to either of the complainants at that time and, instead, told Mr. Fitzgerald that the amount required to restore the electric at 61 Hunters Court was \$1,762.50. Complainants paid the full amount due of \$1,762.50. (DE-Ohio Exhibit A at 9-10.)

Ms. Givens testified that there was a lot of confusion about the 1923 John Gray Road and 61 Hunters Court accounts. At various times, complainants would give the 1923 John Gray Road account number when discussing the 61 Hunters Court account with the company. Also, according to Duke Energy's records, an individual named Stephanie Carson, who lived at 1923 John Gray Road after complainants moved to 61 Hunters Court, and who telephoned Duke Energy in order to have the electric service established in her name, related to the company that Ms. Fitzgerald was her mother or her boyfriend's mother. However, there is no indication in Duke Energy's records that the company ever shared information concerning complainants' accounts with Ms. Carson. (DE-Ohio Exhibit A at 10-11.)

Cindi Mack - Commission Staff

Ms. Mack determined that, after listening to the first recorded telephone call between complainants and Duke Energy (Complainants' Exhibit 3), the company's representative had misinformed complainants about the Winter Rules. Also, when complainants first called the company, they gave an incorrect account number for their electric account. That number was for the electric account at their former address, 1923 John Grey Road, and not the electric account at complainant's residence that is the subject of this complaint, 61 Hunters Court. The incorrect account number, in turn, led to the misidentification of complainants' then-current electric account at 61 Hunters Court and some confusion on the part of the Commission's investigator, Ms. Mack, and the company's representative. Some points of discussion between Ms. Mack and the company's representative, such as whether complainants had made a \$300.00 payment on their account, were discussed with reference to the 1923 John Grey Road account, when they actually applied to the 61 Hunters Court account. (Tr. at 57-58, 60, 63, 68, 72.)

Ms. Mack noted that the basis for her telephone conversation with Mr. Fitzgerald, and the basis for the complaint, was that Mr. Fitzgerald was misinformed by the company. She concluded that the company had misinformed complainants about their obligation to pay the full amount due instead of explaining the possibility of proceeding under the Winter Rules. Ms. Mack, however, further noted that she had no reason to believe that the company tried to defraud complainants, or that the company lied to complainants in order to obtain more money from them. If the company had explained the Winter Rules in April 2010, and the complainants had elected to proceed under those rules, they would have paid \$175.00 and a \$36.00 reconnection fee; then, complainants would have paid the remaining balance over a period of six months, plus their current electric bills. (Tr. 68-70.)

Vel Mitchell, Cindy Laycock, and Pam Ball - Duke Energy

Vel Mitchell verified that, when Stephanie Carson called Duke Energy to obtain service in her name at 1923 John Grey Road, she told Ms. Carson to send the company a copy of her lease and picture identification. Ms. Mitchell stated that she did not reveal any confidential information about complainants to Ms. Carson. (Tr. at 85-88.)

Cindy Laycock testified that, when Mr. Fitzgerald called on April 16, 2010, he gave her the wrong account number for the address that he referenced and that, while she could discuss information about the account with him, she could not set up any arrangements with regard to the account (Tr. at 89-91).

Pam Ball testified that complainants made a \$300.00 payment to Duke Energy on April 5, 2010, but they did not tell the company that it was a payment under the Winter Rules. Consequently, because some people do not want to use the Winter Rules, the

company did not know that the \$300.00 was to be applied as a Winter Rules payment. Moreover, with the amount complainants owed on their account at that time, the \$300.00 would not have been enough to cancel the disconnection of their electric service. (Tr. at 105-106.)

Ms. Ball noted that, as reflected in Company Exhibit 4 (Account Note History for 61 Hunters Court), Ms. Fitzgerald was advised of the Winter Rules in a telephone call on March 29, 2010, and told to pay \$175 by April 8, 2010, in order to avoid disconnection. Further, complainants' bills for January, February, and March 2010 all contained disconnect notices. Complainants failed to pay the amount that was necessary to avoid disconnection before April 15, 2010, and their account at 61 Hunters Court was disconnected for non-payment. (Tr. 121-123.)

#### IV. Discussion and Conclusion:

##### Winter Rules and Disconnection Issues

There is no disagreement between the parties that the company did not discuss the Winter Rules with complainants on April 15, 2010. Although the Winter Rules do not require a utility to explain the rules in every telephone conversation with a customer, the company admitted to not offering the Winter Rules on that particular date, and stated that it probably should have done so (Tr. at 8-9; DE-Ohio Exhibit A at 9-10). Our investigator, Cindi Mack, agreed. The record, however, demonstrates that Ms. Mack did not, as complainants would have it, testify to Duke Energy having wronged complainants in some fraudulent manner. Quite the contrary, she stated that the company had misinformed complainants with regard to the Winter Rules, but that she had no reason to suspect that the company intentionally lied to complainants for the purpose of getting them to pay more money. (Tr. 68-69.)

We have reviewed the record and can find no history or pattern of misinformation by Duke Energy with regard to complainants. We believe that the company's failure to inform complainants about the Winter Rules on April 15, 2010, was an isolated mistake rather than evidence of any improper or unlawful act that was committed by Duke Energy against complainants. The evidence in this matter does reveal that Ms. Fitzgerald was offered the Winter Rules, on March 29, 2010, at complainants' 61 Hunters Court address and that complainants also had their account billed under the PIPP program at their former address, 1923 John Grey Road (Tr. at 30-31, 121; DE-Ohio Exhibit A at 6, 8). We thus believe that complainants should have known about the Winter Rules when they called the company on April 15, 2010.

The Commission notes that, a party who wants to take advantage of the Winter Rules first must inform a utility company of that fact. Unless the utility is so informed, it

would not know how a customer wants to proceed, i.e., pay the full amount due or pay under the Winter Rules (Tr. at 121-122). Also, the Winter Rules require a customer to apply for the regular Home Energy Assistance Program (HEAP), and enroll in an extended payment plan, or the PIPP program. In this case, complainants did not do any of those things. They did not tell the company that they wanted the Winter Rules applied to their account; nor did they apply for HEAP or enroll in a payment plan. (Tr. at 31, 145-146.) Consequently, although the \$300.00 that complainants paid on April 5, 2010, exceeded the Winter Rules' \$175.00 initial payment, it did not serve as the sole means of placing complainants' payments under the Winter Rules (Tr. at 145).

In addition, we would observe that complainants' \$300.00 payment was not enough for them to avoid disconnection. When their electric service was disconnected, complainants owed Duke Energy more than \$1,700.00 in charges. At that time, complainants were more than 60 days in arrears on their account. (Tr. at 141-142, 147.) In light of the warnings that complainants were given in their January, February, and March bills (Company Exhibit 2 - 61 Hunters Court Bills), and the ten-day disconnection notice (Company Exhibit 5) that was hand-delivered to their residence (Tr. at 148-149), we believe that they had notice of the minimum amount, \$1,326.41, that was due by April 9, 2011, in order for them to avoid disconnection (Tr. at 141-142). Complainants' disconnection was the result of their failure to pay that minimum amount (Tr. at 123).

#### Billing Issue

As noted by both parties, complainants paid the full amount of their electric bill, \$1,762.50, on April 15, 2010, after being told by a Duke Energy representative that they had to pay that much in order to get their power reconnected (Complaint at 1; Tr. at 14-15, 125-126). Complainants did not dispute that they actually owed that amount (Tr. at 69). Subsequently, in telephone conversations with Duke Energy on April 19, 2010, complainants first learned that they owed an additional \$250.00, and then later, the company informed them that the additional amount totaled \$478.00. The company's statements during those telephone calls, informing complainants that they had additional electric bills, are apparently what led complainants to believe that Duke Energy was extorting money from them. The record reveals otherwise. After reviewing complainants' bills, account statements, and e-mails connected with the case, we conclude that complainants were properly charged for their electric service. We note that complainants closed and then reopened their electric account at 1923 John Grey Road in December 2009. Those actions resulted in two unpaid, final bills in electric charges that were transferred to complainants' new residence at 61 Hunters Court. The second final bill, \$222.60, was transferred to 61 Hunters Court on April 19, 2010. (DE-Ohio Exhibit A at 6-7.) Complainants' account at 61 Hunters Court also had additional usage charges of \$175.12 and \$8.86, a \$22.24 late fee, and a \$50.00 after-hours reconnection fee that totaled \$478.82 ( $222.60 + \$175.12 + \$8.86 + \$22.24 + \$50.00 = \$478.82$ ). (Company Exhibit 2 - Bills for 61



Hunters Court, Complainants' Exhibit 3 at 3 - Case Report Notes, Complainants' Exhibit 5 - Pam Ball E-mail, Complainants' Exhibit 7 - Account Statement for 61 Hunters Court.)

### Personal Business Issue

Complainants alleged in their complaint and at hearing that the company discussed matters concerning their personal business with a woman named Stephanie Carson, who lived at 1923 John Grey Road after complainants moved out (Complaint at 1, Tr. at 18). At hearing, Mr. Fitzgerald testified that he came to this conclusion after reading the summary notations (Complainant's Exhibit 4) made by a Duke Energy representative during a telephone call from Ms. Carson to Duke Energy. Mr. Fitzgerald testified that he had no basis, other than the summary notations, for arriving at this conclusion. However, the summary notations and the testimony given at hearing show that Ms. Carson merely requested in that telephone call that the utilities at 1923 John Grey Road be listed in her name. Further, Duke Energy only responded to Ms. Carson's request for service. (Tr. at 85-88.) We can find no indication in the record that Duke Energy discussed complainants' personal business with Ms. Carson.

### V. Conclusion:

Duke Energy did not explain the Winter Rules to complainants on one occasion. However, with the exception of that single missing explanation, there is no evidence to support a finding that Duke Energy did anything wrong toward complainants with respect to the Winter Rules, the disconnection of their electric service, the billing of their accounts, or their personal business. We are of the opinion that complainants did not meet their burden of proof by presenting evidence in support of the allegations in the complaint. The Commission, therefore, finds that Duke Energy's actions in this matter do not constitute inadequate service in violation of Section 4905.22, Revised Code.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 8, 2010, Brenda and Gerard Fitzgerald (Fitzgeralds, complainants) filed a complaint against Duke Energy alleging that they were wrongfully billed for electric service. Complainants stated that, after being disconnected, they paid Duke Energy the full amount of a bill to be re-connected and that the company did not tell them about the \$175.00 payment provision under the Commission's Winter Rules before they paid to have their power restored. Complainants also stated that Duke Energy discussed their personal business with a third party and lied to them. Complainants argued that they are victims of extortion.

- (2) On June 28, 2010, Duke Energy filed an answer denying the allegations in the complaint.
- (3) On September 7, 2010, a settlement conference was held; however, the parties failed to resolve this matter informally.
- (4) A hearing was held on April 27, 2011.
- (5) Duke Energy is a public utility and an electric company pursuant to Sections 4905.02 and 4905.03, Revised Code. Thus, Duke Energy is subject to the jurisdiction of this Commission under the authority of Sections 4905.04 through 4905.06, Revised Code.
- (6) This complaint is properly before the Commission, pursuant to the provisions of Sections 4905.22 and 4905.26, Revised Code.
- (7) In a complaint case, such as this one, the burden of proof is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St. 2d 189, 214 N.E. 2d 666 (1966).
- (8) On March 29, 2010, Ms. Fitzgerald was informed about the Winter Rules in a telephone call with a Duke Energy customer service representative.
- (9) Complainants were enrolled in the PIPP program at their former residence.
- (10) On April 15, 2010, a Duke Energy customer service representative did not explain complainants' options under the Winter Rules in a telephone conversation.
- (11) Complainants did not contact Duke Energy and advise the company that they wanted to take advantage of the Winter Rules.
- (12) Complainants did not apply for HEAP, and did not enter into a payment plan as required by the Winter Rules.
- (13) Because complainants did not advise the company that they wanted to take advantage of the Winter Rules, the \$300.00 that they paid to the company on April 5, 2010, did not qualify as the initial \$175.00 payment under those rules.

- (14) Complainant's \$300.00 payment on April 5, 2010, was not sufficient to avoid disconnection of their electric service on April 15, 2010.
- (15) When their electric service was disconnected, complainants owed Duke Energy more than \$1,700.00 in charges. At that time, complainants were more than 60 days in arrears on their account.
- (16) Duke Energy sent 14-day disconnection notices and a final 10-day disconnection notice to complainants prior to disconnecting their electric service; thus, Duke Energy complied with the Commission's disconnection requirements.
- (17) The company properly disconnected complainants' electric service for nonpayment.
- (18) Under the Winter Rules, a utility company is not required to inform a customer about the Winter Rules option every time the utility is contacted by the customer.
- (19) Duke Energy's actions in this matter did not constitute inadequate service.
- (20) Complainants have not met their burden of proof that Duke Energy's actions amounted to inadequate service.

It is, therefore,

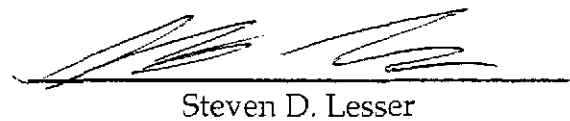
ORDERED, That this complaint shall be dismissed. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties and interested persons of record.

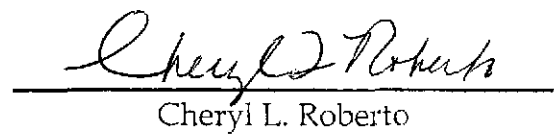
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Paul A. Centofella

  
Steven D. Lesser

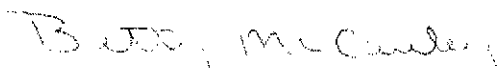
  
Andre T. Porter

  
Cheryl L. Roberto

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Entered in the Journal

**SEP 14 2011**

  
Betty McCauley  
Secretary