BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

THE R.C. MUSSON RUBBER CO.	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-0732-GA-CSS
	)	
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO,	)	
	)	
Respondent.	)	

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

In accordance with Ohio Adm. Code 4901-1-12, The East Ohio Gas Company d/b/a Dominion East Ohio (DEO or the Company) respectfully requests that the Commission dismiss the complaint in this case with prejudice. Good cause exists to grant the Company's motion to dismiss, as set forth in the attached Memorandum in Support.

Dated: May 8, 2014

Respectfully submitted,

/s/ Gregory L. Williams
Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
Gregory L. Williams
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3946
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com

ATTORNEYS FOR
THE EAST OHIO GAS COMPANY D/B/A
DOMINION EAST OHIO

MEMORANDUM IN SUPPORT

I. INTRODUCTION

R.C. Musson Rubber Co. does not state reasonable grounds for a complaint. Its complaint depends on the theory that DEO has an ongoing duty to individually review the past and expected usage of each one of its customers to ensure that every customer is being served under the most economical rate schedule. In R.C. Musson's view, the notion that a business customer should be expected to work with the utility to determine the most advantageous rate is an "absurdity." (Complaint at 1.)

But the Commission, with the Supreme Court of Ohio's affirmation, has already repudiated R.C. Musson's theory of this case:

> [A] utility has no affirmative duty or obligation to conduct an ongoing review of every customer's usage and load-demand levels to ensure that every customer is being served under the most economical tariff possible.

Luntz Corp. v. Pub. Util. Comm., 79 Ohio St.3d 509, 512 (1997). This means that even if R.C. Musson proved every fact alleged in its complaint, it would still lose. There is no need for a hearing or further proceedings, and the Commission should dismiss this case.

This is not the only reason to dismiss: none of the remedies requested may properly be granted. Two of the requested remedies—refunds to R.C. Musson and other commercial customers—are prohibited by the rule against retroactive ratemaking. And the third request—that DEO review and make changes to other customers' accounts—R.C. Musson lacks standing to pursue.

For these reasons, the Commission should dismiss this complaint with prejudice.

II. BACKGROUND AND PROCEDURAL HISTORY

Unless otherwise noted, the following facts are derived from the allegations of the complaint.

On October 19, 1982, R.C. Musson and DEO entered into a contract under which R.C. Musson would receive service under a large-volume general service rate schedule. (Complaint at 1.) From that time on, R.C. Musson received service under the contract.

In November 2013, R.C. Musson contacted DEO to inquire regarding its rate and determined that it was eligible for a lower rate. (*Id*.) It alleges neither that DEO failed to advise it of available rates nor that DEO failed to timely grant its request to change rates. (*Id*.) In fact, DEO placed R.C. Musson on the lower rate effective the next bill following its request. (*See* Answer at 2.)

On April 18, 2014, R.C. Musson filed a complaint against DEO. The complaint alleges that beginning January 18, 2005, R.C. Musson was eligible for an alternative rate schedule that (it says) would have resulted in a lower Basic Service Charge. (Complaint at 1.) It also alleges that DEO's failure to initiate a review of R.C. Musson's account, to determine the most economical rate, and then to affirmatively offer service under that rate constituted unjust and unreasonable service. (*See id*.)

As remedies, R.C. Musson requests that DEO provide refunds both to it and to "any large volume customer not meeting the 3,000 mcf annual threshold." (*Id.* at 2.) It also requests that DEO provide individual account reviews for a number of *other* customers and then place these customers on different rate schedules. (*Id*.)

III. ARGUMENT

R.C. Musson has failed to state a claim. The Commission, with the Supreme Court's approval, has already rejected R.C. Musson's theory that utilities must continuously and proactively review the usage and account of every customer to ensure that each customer is being served under the most economical rate schedule. *See Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 512 (1997). Utilities have no such duty. And the duty that DEO *did* have, it fulfilled: when the customer inquired about alternative rates, DEO worked with the customer and disclosed them. *See id.* R.C. Musson does not allege otherwise.

Not only does the complaint fail to state reasonable grounds, but all three of its requests for remedy exceed the power of the Commission. Two of the requests expressly ask for a refund of the payment of Commission-approved rates, in violation of the rule against retroactive ratemaking. And the third seeks to assert the rights of *other* parties, which violates the rules governing third-party standing.

For these reasons, as discussed more fully below, this complaint should be dismissed in its entirety.

A. DEO fully performed its legal obligations to R.C. Musson, and the Complaint should be dismissed.

This is not the first time that a customer has claimed that the utility should have been monitoring the accounts of it and every other customer and ensuring that each one was receiving service under the most economical rate schedule. This claim has consistently been rejected, and this issue has long been settled.

1. The law is clear that the customer, not the utility, has the duty to ensure that it is being served under the most economical rate schedule.

The Commission has long held that utilities are *not* required to "initiate regular reviews of a customer's bills in order to determine if an alternative rate is more advantageous." *N. Hill*

Marble v. Ohio Edison Co., Case No. 84-610-EL-CSS, 1985 Ohio PUC LEXIS 1780, Opin. & Order at *5 (Feb. 5, 1985). Rather, "[i]t is upon the inquiry of the customer that a company has a duty to disclose the availability of alternative rate schedules." *Id. See also, e.g., In re the Complaint of Luntz Corp.*, Case No. 94-1783-EL-CSS, 1996 Ohio PUC LEXIS 79, Opin. & Order at *18–19 (Feb. 8, 1996) (dismissing complaint in which customer paid additional $138,263.64 under higher rates; the utility "must inform customers of alternate tariffs for which the customer is eligible *upon inquiry by the customer*") (emphasis sic).

For example, in *In re the Complaint of Alexandra Realty Company*, Ohio Power did not advise Alexandra Realty of its right to cancel a contract, and the customer's failure to cancel eventually resulted in additional payments of approximately $18,000. Case No. 89-1913-EL-CSS, 1990 Ohio PUC LEXIS 896, Opin. & Order at *2 & *16 (Aug. 16, 1990). The customer complained to the Commission, alleging that the utility provided unjust and unreasonable service by failing to advise "that it would be advantageous to renegotiate the terms of its contract." *Id.* at *17. The Commission dismissed the complaint. *Id.* at *24. Although Ohio Power "has a duty to inform the customer of its rights under the contract upon inquiry from the customer," *id.* at *19, the utility had "no additional obligation" to ensure that Alexandra Realty was receiving the most advantageous rate, *see id.* at *21.

The Supreme Court of Ohio has affirmed the reasonableness of this "positive-inquiry" standard. *See Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St.3d 509, 512 (1997). In that case, the customer had paid over $138,000 *more* for service under the less-advantageous rate. Nevertheless, the Court affirmed that "a utility has no affirmative duty or obligation to conduct an ongoing review of every customer's [account] to ensure that every customer is being served under the most economical tariff possible." *Id*. But "if a customer inquires about possible

alternate rates, then the utility has a duty to disclose to the customer the availability of any applicable alternate-rate schedules." *Id*.

2. This positive-inquiry standard makes abundant sense.

These rules make sense. The party in the best, most-efficient position to determine whether to inquire about more economical and advantageous rates is the customer. DEO, for example, has over 1.1 million customers, and it would impose major costs and administrative burdens if it were required to continuously review each one of its customers' accounts, compare their planned usage to the various available rates, and determine which rate is most economical. DEO will of course work with any of its customers to determine the most economical arrangement, given their past and planned usage. But continuously reviewing *all* customer accounts would be exorbitantly expensive and utterly impractical.[1]

This is particularly true for commercial customers like R.C. Musson. DEO offers commercial customers a number of different rates and services, each one designed to serve varying needs. But it is impossible to generalize which rate is most economical without understanding the business's past *and* planned usage. For example, R.C. Musson determined that the General Sales Service – Nonresidential rate was best for it. That rate provides a fairly small volumetric rate for the initial block of usage; but usage beyond that initial block is substantially higher. The rate that R.C. Musson left (Large Volume General Sales Service) would be a better

---

[1] R.C. Musson asserts that DEO performs a usage review of certain accounts. While that is true to an extent, it is not the kind of review that R.C. Musson is asking for. DEO's General Sales Service (Residential and Nonresidential) and Energy Choice Transportation Service (Residential and Nonresidential) all require that customers "use less than 3,000 Mcf per year." DEO annually reviews the accounts served under these tariffs to ensure that customers meet the eligibility requirement. But this review is very straightforward and fully automated, and it is entirely different than the ongoing, individualized, most-economical-arrangement analysis requested by R.C. Musson.

choice for other commercial customers: it requires a higher rate for the initial block of usage, but after that, rates decline.

Just between these two rates, an understanding of past *and* planned usage is required to determine which rate is best. But DEO cannot know this without discussing with the customer how much service they plan to use. That is why customers must take the initiative—and if *any* customers should be expected to take the initiative and work with the utility to determine the most economical rate, it is commercial customers. The "positive inquiry" standard recognizes precisely this reality.

3. Under these authorities, the complaint must be dismissed.

These authorities show that R.C. Musson fails to state reasonable grounds for complaint.

R.C. Musson acknowledges that it was charged the rate that it agreed to in its October 19, 1982 contract with DEO. It does not allege that DEO ever charged a rate other than the one agreed to in the contract or the one approved by the Commission. It admits that on November 7, 2013, it made "[a]n inquiry to [DEO]" regarding its rates and that in response, certain information regarding rates "was explained." (Complaint at 1.) No allegation is made that DEO either failed to explain alternate rates or failed to respond to any request for an alternate rate.

Thus, even granting the truth of every allegation in the complaint, it only establishes that DEO performed *exactly* as required under the law: "if a customer inquires about possible alternate rates, then the utility has a duty to disclose to the customer the availability of any applicable alternate-rate schedules." *Luntz Corp.*, 79 Ohio St.3d at 512.

R.C. Musson's only complaint is that it has been eligible for another rate since January 18, 2005. But even if that is true, it is irrelevant. "[A] utility has no affirmative duty or obligation to conduct an ongoing review of every customer's [account] to ensure that every customer is being served under the most economical tariff possible." *Id*. R.C. Musson does not allege that it

ever inquired about another rate before November 7, 2013. In its view, the duty of determining the most economical arrangement falls on DEO, and the notion that a commercial customer should work with the utility to determine "the appropriate lower rate" is an "absurdity." (Complaint at 1.)

R.C. Musson may consider this absurd, but the Commission's positive-inquiry standard has long been the rule governing this issue. And this is precisely the type of complaint that the rule is meant to address. This complaint fails to state reasonable grounds and should be dismissed.

B. In addition to failing to state a claim, R.C. Musson's remedial requests are improper.

This is not the only reason to dismiss the complaint. In addition to failing to state reasonable grounds, the complaint also fails to include any request for remedy that may properly be granted: the requests would either violate the rule against retroactive ratemaking or the rules governing third-party standing.

1. R.C. Musson's requests for refund are prohibited by the rule against retroactive ratemaking.

Two of R.C. Musson's remedial requests are expressly for the "reimbursement" or "refund" of past payments of Commission-approved rates. (Complaint at 2.) These requests cannot be granted.

Ohio law prohibits retroactive ratemaking, and "[t]he rule against retroactive rates . . . also prohibits refunds." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 15. "Neither the commission nor this court can order a refund of previously approved rates . . . ." *Green Cove Resort I Owners' Ass'n v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, ¶ 27; *see also, e.g.*, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d

362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21 ("any refund order would be contrary to our precedent declining to engage in retroactive ratemaking").

R.C. Musson requests both "reimbursement" for itself of $4,656.29 and an "[a]ccumulated refund" to a number of other customers. (Complaint at 2.) But R.C. Musson does *not* allege that the charges were not "previously approved by the Commission." *Green Cove*, 103 Ohio St.3d 125, ¶ 27. Nor does it allege that DEO failed to properly meter, calculate, or bill these charges. On the contrary, as discussed above, R.C. Musson's only complaint is that it did not receive service under a *different* rate schedule.

This means that R.C. Musson is asking the Commission to order a refund of the payment of previously approved rates. Such a request is clearly prohibited under the rule prohibiting retroactive ratemaking.

2. R.C. Musson lacks standing to represent the interests of other commercial customers and to request remedies on their behalf.

R.C. Musson's other request for relief is that DEO should review the accounts of other commercial customers and change which rate schedule they are served under. (*See* Complaint at 2.) But R.C. Musson does not have standing to assert the claims of other customers.

"To have standing, the general rule is that a litigant must assert its own rights, not the claims of third parties." *Util. Serv. Partners v. Pub. Util. Comm'n*, 124 Ohio St.3d 284, 2009-Ohio-6764, ¶ 49 (internal quotations omitted). The Commission has denied requests for relief on the grounds that the requesting party lacked standing to assert the claims of others. *See, e.g.*, *In re Complaint of Plastex Indus., Inc.*, Case No. 00-2132-EL-CSS, 2002 Ohio PUC LEXIS 4, Entry at *3 (Jan. 3, 2002) ("Plastex . . . allege[s] that [the utility] failed to deliver all relevant records to the Commission. That is a matter between the Commission and the utility. . . . Plastex does not have standing to bring a complaint against a utility for failing to provide records to the

Commission upon its request."); *In re Complaint of All Erection & Crane Rental Corp.*, Case No. 01-567-EL-CSS, 2001 Ohio PUCO LEXIS 399, Entry at *4 (July 10, 2001) (denying protective order where movant "lack[ed] standing to object to the subpoenas issued to third-party individuals and/or entities"); *cf. In re the Complaint of Atlas Communications Systems, Inc.*, Case No. 00-144-TP-CSS, 2000 Ohio PUC LEXIS 462, Entry at *5 (May 24, 2000) (allowing company to bring third-party claims only after finding that the company was their agent).

In *Utility Service Partners*, the Court did recognize that there "may be . . . circumstances where it is necessary to grant a third party standing to assert the rights of another," namely, "when a claimant (*i*) suffers its own injury in fact, (*ii*) possesses a sufficiently close relationship with the person who possesses the right, and (*iii*) shows some hindrance that stands in the way of the [third-party] claimant seeking relief." *Id*. Such claims, however, are "not looked favorably upon." *Id*.

These authorities require dismissal of R.C. Musson's request on behalf of other customers. R.C. Musson is clearly asserting claims on behalf of other parties. And it has not satisfied the limited exception to the standing requirement recognized in *Utility Service Partners*, 124 Ohio St.3d 284, ¶ 49. Even assuming R.C. Musson has suffered an injury in fact, it neither alleges any relationship with the third-party commercial customers nor alleges any hindrance preventing such third parties from seeking relief. On the contrary, it is reasonable to expect (and to allow) these customers to make their own decisions regarding which rate schedule suits them best.

In short, R.C. Musson lacks standing to request account changes for other customers.

3. R.C. Musson has already received its full remedy under Ohio law.

The reality is that R.C. Musson has already fully availed itself of its rights and remedies under the law. It inquired about alternate rates; DEO provided the requested information; it is

now served under the desired rate. Everything else that the complaint asks for is beyond the power of the Commission to grant.

Why R.C. Musson did not inquire about alternate rates any earlier than it did is not clear. Only it can know the reasons; the relatively modest sum of the alleged "overcharge" might partially explain it. What is clear, however, is that R.C. Musson has provided no good reason that anyone else should be held liable for its own inaction.

IV. CONCLUSION

The complaint is foreclosed by the Commission's long-standing "positive inquiry" standard and requests remedies beyond the Commission's power to give. Accordingly, DEO respectfully requests that the Commission grant its request to dismiss R.C. Musson's complaint with prejudice.

Dated: May 8, 2014

Respectfully submitted,

/s/ Gregory L. Williams

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
Gregory L. Williams
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3946
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com

ATTORNEYS FOR
THE EAST OHIO GAS COMPANY D/B/A
DOMINION EAST OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was served by U.S. mail this 8th day of May to the following:

The R.C. Musson Rubber Co.
c/o Joseph P. Kostko
P.O. Box 7038
Akron, Ohio 44306-0038

/s/ Gregory L. Williams
One of the Attorneys for The East Ohio Gas Company d/b/a Dominion East Ohio

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/8/2014 4:24:12 PM

in

Case No(s). 14-0732-GA-CSS

Summary: Motion to Dismiss and Memorandum in Support electronically filed by Mr. Gregory L. Williams on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio