

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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|-----------------------------------|---|-------------------------|
| The Office of the Ohio Consumers' |) | |
| Counsel, and |) | |
| |) | Case No. 15-1588-GE-CSS |
| Communities United for Action |) | |
| |) | |
| Complainants, |) | |
| |) | |
| v. |) | |
| |) | |
| Duke Energy Ohio, Inc. |) | |
| |) | |
| Respondent. |) | |

**MEMORANDUM CONTRA DUKE'S MOTION TO DISMISS THE CONSUMER
PARTIES' COMPLAINT ABOUT DISCONNECTIONS OF CONSUMERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND COMMUNITIES UNITED FOR ACTION**

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I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”) and Communities United for Action (“CUFA”) (collectively, “Consumer Parties”) filed a complaint to protect residential customers from the unlawful and unreasonable disconnection practices of Duke Energy Ohio, Inc.’s (“Duke”). Concurrently with the Complaint, we filed a Motion asking the Public Utilities Commission of Ohio (“PUCO”) to protect consumers against Duke’s disconnection practices during the upcoming winter heating season, while our Complaint is pending a resolution by the PUCO.

The Consumer Parties’ Complaint and Motion were prompted by a concerning position advanced several times by Duke that the PUCO’s rules governing winter disconnection of customers do not apply if the arrearages leading to the disconnection

included amounts incurred prior to the winter heating season. This position is contrary to the plain language of the PUCO's winter heating rules and its Winter Reconnect Orders. The Motion was made against a backdrop of Duke disconnecting, for nonpayment, by far the highest percentage of residential customers among Ohio's electric utilities.

On October 8, 2015, Duke filed a motion asking the PUCO to dismiss the Complaint. Duke's basic assertion is that no justiciable controversy exists because the Consumer Parties have not identified any customers who were unlawfully disconnected by Duke.¹ Duke's arguments do not support dismissal of the Complaint. The PUCO should deny Duke's Motion to Dismiss.

II. DISCUSSION

A. An appropriate review of Duke's Motion to Dismiss should lead the PUCO to deny the Motion.

The PUCO stated its standard for reviewing a motion to dismiss in *OCC v. Dominion Retail*. There, the PUCO stated: "[W]hen a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party."² Under this review, the PUCO should not dismiss the Complaint.

The Complainants in this case, the Consumer Parties, have alleged that Duke misapplies the PUCO's winter heating rules and Winter Reconnect Orders as permitting Duke to avoid the protections afforded by the rules when disconnecting residential customers during the winter heating season because their bill included delinquent charges

¹ See Motion at 6-15.

² *OCC v. Dominion Retail*, Case No. 09-257-GA-CSS, Entry (July 1, 2009) at 3, citing *In the Matter of the Complaint of XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (July 1, 2003).

for service that occurred prior to the winter heating season. This puts consumers at risk of being unlawfully disconnected.

In considering Duke's Motion to Dismiss, the PUCO must accept this allegation as true. For this reason and for the reasons discussed below, the PUCO should deny Duke's Motion to Dismiss.

B. The Consumer Parties have established reasonable grounds for the Complaint regarding Duke's misapplication of the winter heating rules.

Contrary to Duke's assertions,³ the Consumer Parties do not seek an advisory opinion from the PUCO. The Consumer Parties ask the PUCO to stop Duke's unlawful and unreasonable disconnection practices. The basis for the Complaint rests on two facts.

First, Duke has repeatedly and boldly stated its erroneous position that the consumer protections in the PUCO's winter heating rules⁴ do not apply if the customer's usage occurred before the winter heating season.⁵ Duke's misapplication of the winter

³ Motion at 6-10.

⁴ Ohio Adm. Code 4901:1-18-06(B).

⁵ *Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS ("*Pitzer Case*"), Answer of Duke Energy Ohio, Inc. at 4 ("Duke Energy Ohio denies that the 10-day notice requirement under O.A.C. 4901:1-18-06(B) applied to the subject disconnection of electric service at the Property because the electric service was disconnected only for the non-payment of utility services incurred during August, September and October 2011, and relevant late fees, and *not* for the nonpayment of charges incurred during the winter heating season") (emphasis in original); *id.* at 5 ("Duke Energy Ohio denies that O.A.C. 4901:1-18-06(B)(3) applies to the Company's disconnection of the electric service at the Property on November 4, 2011, because (a) the Company did not disconnect Estill Easterling's electric service for any unpaid bills which included usage occurring during November first to April fifteenth of each year,..."); *id.* at 7 ("the customer's services were not subject to disconnection for nonpayment of charges incurred during the winter heating season"); *id.*, Duke's Memorandum Contra OCC's Motion to Intervene (May 22, 2015) at 4 ("The Duke Energy Ohio bills for the Account attached to the Complaint demonstrate that the Company disconnected the electric service to the Account for the non-payment of electric services provided to the Account from August 3 through September 1, 2011. ... Therefore, the allegations *in* the Complaint are contradicted by the utility bills attached *to* the Complaint because the Account was not disconnected for the non-payment of any bills including usage during the winter heating season") (emphasis in original); *id.* at 8 ("the Account was not disconnected for unpaid bills including electric charges incurred during the winter heating season"); *id.*, Duke's Memorandum in Opposition to Complainant Jeffrey Pitzer's Second Motion to Compel (August 27, 2015) at 4 ("Moreover, the Duke Energy Ohio bills for the Account attached to the

heating rules first came to light in the *Pitzer* case, where the complaint states that two consumers were unlawfully disconnected by Duke, resulting in death.

Second, as mentioned in the Complaint, the number of customers Duke has disconnected for nonpayment has steadily increased since 2009. The latest figures filed with the PUCO show that in the last reporting year Duke disconnected almost as many residential customers for nonpayment as AEP Ohio did, even though AEP Ohio has more than twice as many residential customers as Duke. The result is that Duke's percentage of residential customers who were disconnected for nonpayment – about 14 percent – was twice as high as AEP Ohio's.

Duke contends that the Complaint does not reference “specific facts, current incidents of disconnection, or articulated, actual customer injury....”⁶ But that is not the requirement for a complaint under the law.

R.C. 4905.26 does not require the actual harm that Duke asserts is necessary to support an allegation in a complaint. Instead, the law specifically allows the filing of complaints to prevent injury to customers. Under the statute, a complaint may alleged that “a service rendered, charged, demanded, exacted, *or proposed to be rendered*, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law....” (Emphasis added.) The statute also provides that a complaint may allege “that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in

Complaint demonstrate that the Company disconnected the electric service to the Account for the non-payment of electric services provided to the Account from August 3 through September 1, 2011. ... Therefore, the allegations *in* the Complaint are contradicted by the utility bills attached *to* the Complaint because the Account was not disconnected for the non-payment of any bills including usage during the winter heating season.”) (emphasis in original).

⁶ Motion at 8.

connection with such service, *is, or will be, in any respect* unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential....” (Emphasis added.)⁷ Duke’s practice of misapplying the PUCO’s winter heating rules is or will be unreasonable and unjust, because Duke believes it may avoid necessary consumer protections during the winter heating season based on when the customer’s usage occurred.⁸

Duke’s position would preclude aggrieved parties from filing a complaint unless and until they had filed evidence of their assertions.⁹ In reality, the statutory standard in R.C. 4905.26 is that complainants need only show that they have “reasonable grounds” for a complaint. After a complaint is filed, parties then engage in discovery to gather the appropriate evidence for hearing.¹⁰

Contrary to Duke’s assertions, reasonable grounds for the Complaint exist for a number of reasons. First, the PUCO in its Winter Reconnect Order advised that if a utility is not following the procedures it laid out, “we will take those steps we deem appropriate to protect the customers served by that utility.”¹¹

⁷ The statute also provides that a complaint may allege “that any service is, *or will be*, inadequate or cannot be obtained....” (Emphasis added.)

⁸ See, e.g., *In the Matter of the Complaint of Westside Cellular, Inc. v. New Par Companies*, Case No. 93-1758-TP-CSS, Opinion and Order (January 18, 2001) at 92-93 (finding that a complaint can proceed on allegations that a rate proposed *to be charged* is unjust and unreasonable and can proceed despite the fact that the complainant is a potential, and not actual customer of the respondent); *In the Matter of the Complaint of National Electrical Contractors Assn. et al. v. Ohio Edison, et al.*, Case No. 98-1400-EL-CSS Entry (May 19, 1999), ¶ 8 (holding that the PUCO would not limit the scope of the complaint to the issue of whether customers are actually harmed by utility practices that violate a statute or rule).

⁹ See Motion at 8. Not an easy task, considering that utilities often control all the very documentation upon which a complaint would be based.

¹⁰ Ohio Adm. Code 4901-1-16.

¹¹ *In the Matter of the Commission’s Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season*, Finding and Order (September 2, 2015) at 9.

Second, the PUCO advised OCC that it could raise the issue of Duke’s unlawful and unreasonable disconnection practices “in an appropriate docket.”¹² The PUCO made this statement after precluding OCC from pursuing the issue of Duke’s unlawful and unreasonable disconnection practices in Case No. 14-1051-GE-RDR.

The Consumer Parties’ Complaint asks that the PUCO do what its Orders said it intended to do – take steps necessary to protect consumers from utilities that are not observing the Winter Reconnect Order and pursue its claim in an appropriate docket. Thus, consistent with the Ohio Supreme Court’s ruling in *Allnet Communications Services*,¹³ reasonable grounds for a complaint are satisfied when the complaint was directed to what the PUCO said it intended to do.

Third, Duke has disconnected a very high number and proportion of customers for non-payment since 2009, as compared with the number of residential customers disconnected for non-payment by other Ohio electric utilities. Specifically, from 2009 through 2015, Duke’s rate of disconnections ranged from a low of 11.3 percent to a high of 14.2 percent of the total number of residential customers.¹⁴ At the same time, disconnections by the other Ohio electric utilities ranged from a low of 2.2 percent to a high of 8.9 percent of the total number of their residential customers.¹⁵ These high levels

¹² *In the Matter of the Application of Duke Energy Ohio, Inc., to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs*, Case No. 14-1051-GE-RDR, Entry (January 22, 2015) at 3.

¹³ *Allnet Communications Services, Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115.

¹⁴ See Complaint at 6, Table 1.

¹⁵ See *id.* at 8, Table 3.

of disconnections make Duke unique, and provide reasonable grounds for the Complaint, consistent with *Ohio Utilities Co. v. Pub. Util. Comm.*¹⁶

The Consumer Parties have established reasonable grounds for this Complaint. As noted above, Duke – in its defense in another complaint case – has repeatedly expressed its belief that the consumer protections in the PUCO’s winter heating rules do not apply if the customer’s usage occurred before the winter heating season.¹⁷ Duke’s erroneous belief puts residential consumers at risk of unlawfully losing their electric and/or natural gas service during Ohio’s cold winter months.

C. The cases cited by Duke to refute the PUCO’s jurisdiction over the Consumer Parties’ Complaint are not analogous to this case because the Consumer Parties *have* stated reasonable grounds for the Complaint.

In claiming that the PUCO lacks jurisdiction over the Consumer Parties’ Complaint, Duke cites several cases where the PUCO dismissed a complaint for failure to state reasonable grounds. But the cases cited by Duke are not analogous to this case, and thus have no bearing on the Consumer Parties’ Complaint.

First, Duke cites *Ohio CARES v. FirstEnergy Corp.*¹⁸ for the proposition that “a complaint that reflects *concerns* is insufficient to enable the case to proceed.”¹⁹ *Ohio CARES* involved allegations by the complainant that FirstEnergy was providing unsafe and unreliable electric power because FirstEnergy’s workforce was insufficient to

¹⁶ 58 Ohio St.2d 153 (1979) (finding that the utility’s unique circumstances provided reasonable grounds for a complaint).

¹⁷ Duke has not once asserted that it has been misquoted by the Consumer Parties.

¹⁸ Case No. 98-1616-EL-CSS.

¹⁹ Motion at 14.

properly maintain the distribution system.²⁰ The complainant asked the PUCO to conduct an investigation and to require FirstEnergy to maintain sufficient numbers of trained workers to properly maintain the system.²¹ The PUCO dismissed the complaint because the complainant did not allege even one instance of inadequate service.²² That is not the case here.

In this proceeding, the Consumer Parties have specifically pointed to Duke's misapplication of the winter heating rules, alleging specific violations of PUCO rules and orders. Duke's contention that the consumer protections of the winter heating rules do not apply when the customer's usage had occurred before the winter heating season places consumers at risk. Duke's misapplication of the winter heating rules is particularly troubling in light of the extremely high number of Duke's residential customers who have been disconnected for nonpayment. Combined, these two facts provide reasonable grounds for the allegations that Duke's practices regarding the winter heating rules are or will be unjust and unreasonable and, therefore, will or could harm customers.

Next, Duke cites *Carpenter*²³ for the proposition that "'broad and bare allegations of wrongdoing' do not suffice."²⁴ In that case, the attorney examiner had determined that the complainant had not stated reasonable grounds for a complaint and ordered the

²⁰ Case No. 98-1616-EL-CSS, Entry (May 19, 1999) at 1.

²¹ Id.

²² Id. at 3-4.

²³ *In the Matter of the Complaint of James M. Carpenter v. Acme Telephone Answering Service*, Case No. 89-326-RC-CSS, Entry (June 28, 1989).

²⁴ Motion at 14.

complainant to file a more definite statement of the complaint.²⁵ Instead, the complainant filed numerous other documents (including documents seeking to quash pleadings by the respondent), none of which provided the information required by the attorney examiner.²⁶ Because of the complainant's lack of proper response to the attorney examiner's entry, the PUCO dismissed the complaint:

Of all the complainants' pleadings which followed the April 12, 1989 entry, none even remotely addresses the requirements set forth in that entry. Instead, in the manner of the original complaint, they make even more broad and bare allegations of wrongdoing against an increasingly widening array of named individuals whose relationships to concerns within this Commission's jurisdiction remain unspecified and highly doubtful. Meanwhile, the complainants have moved to quash virtually every paper or ruling which has been filed in this case since their filing of the original complaint. Their position, stated in their April 20, 1989 filing, is that the complaint, as originally filed, is without further need of elucidation, that the examiner's entry calling for a more definite statement circumvents the issues and facts presented in the complaint, that the entry is a waste of time, and that it demonstrates the examiner's discrimination and antagonism towards the complainants and violates their constitutional right to due process of law.²⁷

The facts in this proceeding, however, are different from the facts in *Carpenter*. Unlike in *Carpenter*, the Complaint in this case makes specific allegations regarding Duke's disconnection practices. The Complaint cites Duke's own words and Duke's own data to show that Duke's disconnection practices regarding the winter heating season are or will be unjust and unreasonable.

²⁵ Case No. 89-326-RC-CSS, Entry (June 28, 1989), 1989 Ohio PUC LEXIS 606, ¶ 2.

²⁶ See *id.*, ¶¶ 3-7.

²⁷ *Id.*, ¶ 10.

Finally, Duke cites to two cases for the proposition that the complaint must stand on its own.²⁸ Duke cites to *Williams v. Ohio Edison*,²⁹ in which the complainant did not allege any issue relating to the utility's rates or terms of service. Instead, the purpose of the complaint was to gain access to some Ohio Edison records, by subpoena, in connection with a garnishment of the complainant's wages.³⁰ Duke also relies on *Goldsberry v. United Telephone*.³¹ The Goldsberry complaint stated only that it was about wrongful charges, failure to tender compensation for consultation fee, and improper disruption of phone service.³² The attorney examiner ordered the complainant to file an explanation of the facts underlying the complaint. The only thing the complainant filed was a list of charges alleged to be wrongful and an invoice for consultant's fees.³³ The complainant filed nothing explaining why the charges were wrongful, and nothing about disruption of service.³⁴ The PUCO determined that the complainant failed to relate the alleged charges to any particular service, failed to disclose sufficient facts related to the consultation fee, and failed to provide any information regarding alleged disruption of service.³⁵

Again, the facts in this proceeding are different from the facts in the cases Duke cited. Here, the Consumer Parties have identified the specific practice at issue (i.e.,

²⁸ Motion at 14-15.

²⁹ Case No. 08-1230-EL-CSS.

³⁰ See *id.*, Complaint (November 17, 2008).

³¹ Case No. 07-559-TP-CSS.

³² *Id.*, Complaint (May 9, 2007).

³³ *Id.*, revised complaint (June 5, 2007).

³⁴ See *id.*, Finding and Order (January 9, 2009) at 2.

³⁵ *Id.* at 3.

Duke's misapplication of the winter heating rules and the Winter Reconnection Orders) and have specified the remedy (i.e., prevent Duke from improperly disconnecting customers based on the misapplication of the PUCO's rules and orders).

The cases Duke cited for the various propositions regarding PUCO jurisdiction are inapposite to the facts in *this* case. These cases do not provide a basis for the PUCO to dismiss the Complaint. The PUCO should deny Duke's motion.

III. CONCLUSION

Duke's motion to dismiss is based on flawed arguments and faulty case law. Contrary to Duke's assertions, the Consumer Parties' Complaint has stated reasonable grounds for a hearing per R.C. 4905.26. To protect consumers, the PUCO should dismiss Duke's motion and set the Complaint for hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Duke's Motion to Dismiss was served by electronic mail to the persons listed below, on this 23rd day of October 2015.

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