

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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 FOR PROTECTIVE ORDER TO
STAY DISCOVERY PENDING RESOLUTION OF ITS MOTION TO DISMISS
THE CONSUMER PARTIES’ COMPLAINT
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND COMMUNITIES UNITED FOR ACTION**

I. INTRODUCTION

On September 15, 2015, 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 Duke Energy Ohio, Inc.’s (“Duke”) unlawful and unreasonable disconnection practices. Concurrently with the Complaint, we filed a Motion asking the Public Utilities Commission of Ohio (“PUCO”) to protect consumers against Duke’s unreasonable and unlawful disconnection practices during the upcoming winter heating season.

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 were 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. In its most recent Winter Reconnect Order the PUCO 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."¹ The Complaint and Motion to protect customers were made against a backdrop of Duke disconnecting for nonpayment the highest percentage of residential customers, by far, among Ohio's electric utilities.

OCC attempted to address Duke's unlawful and unreasonable disconnection practices in Duke's Smart Grid Case.² But the PUCO precluded OCC from pursuing the issue there. Rather, the PUCO advised OCC that it could raise the issue of Duke's unlawful and unreasonable disconnection practices "in an appropriate docket."³

On October 8, 2015, Duke filed a motion asking the PUCO to dismiss the Complaint. Concurrently with this Memorandum Contra, the Consumer Parties are responding to motion to dismiss.

Also on October 8, 2015, Duke filed a motion for a protective order asking the PUCO to stay discovery pending resolution of its motion to dismiss. Duke's basic assertion is that it should not be required to respond to OCC's discovery because "it is

¹ *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.

² *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.

³ *Id.*, Entry (January 22, 2015) at 3.

clear that the Complaint must be dismissed.”⁴ Duke’s view of the PUCO’s rules and discovery process are incorrect and the PUCO should deny Duke’s motion for protection.

II. LEGAL STANDARD FOR MOTIONS FOR PROTECTIVE ORDER

The PUCO’s legal standard for motions for a protective order is contained in Ohio Adm. Code 4901-1-24. Ohio Adm. Code 4901-1-24(A) provides, in part: “Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁵

In addition, Ohio Adm. Code 4901-1-24(B) states, in part: “No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery.”

Further, Ohio Adm. Code 4901-1-24(C) provides, in part: “If a motion for a protective order filed pursuant to paragraph (A) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.”

⁴ Motion at 3-4.

⁵ As discussed below, Duke does not claim that an order is necessary to protect it from annoyance, embarrassment or oppression, and Duke does not claim responding to OCC’s discovery will subject it to an undue burden or expense.

III. DISCUSSION

- A. **Duke's motion for protective order is defective because it does not contain an affidavit of counsel setting forth the efforts that have been made to resolve any differences with the party seeking discovery as required by PUCO rules, and Duke has not shown that it has exhausted all other reasonable means of resolving any differences with the party seeking discovery.**

Ohio Adm. Code 4901-1-24(B) requires a party seeking a protective order to exhaust all other reasonable means to resolve any differences with the requesting party. Ohio Adm. Code 4901-1-24(B)(3) further requires that a party filing a motion for protective order include an "affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts that have been made to resolve any differences with the party seeking discovery." Duke failed to follow the PUCO's rules and, thus, its Motion does not satisfy these PUCO requirements.

Duke's Motion is defective because it does not include the affidavit of counsel required by Ohio Adm. Code 4901-1-24(B)(3). Rather, Duke's Motion merely includes an unsworn copy of two emails – one from Duke's counsel to OCC's attorney in the case, and OCC's response. There is no sworn statement from Duke relating its differences with OCC over the discovery, or the efforts to resolve the differences.

In fact, Duke's "efforts" to resolve the differences regarding discovery are inadequate under the PUCO's rules. The PUCO's discovery rules are "intended to minimize commission intervention in the discovery process."⁶ This means that the party seeking protection must exhaust all other reasonable means of resolving any differences with the party seeking discovery *before* filing a motion for protection. Duke, however,

⁶ Ohio Adm. Code 4901-1-16(A).

broached the issue of discovery just once with OCC – in a very brief conversation held the day before Duke filed its motion for protective order.⁷ Duke’s attempt to satisfy the requirement was to ask OCC to agree to a complete halt of discovery. There was no attempt to otherwise extend the response time for discovery served, to limit the amount of discovery requested, or to consider other resolution or compromise. This is hardly an effort to exhaust all other reasonable means of resolving the differences over discovery.

The PUCO should not issue a protective order based on a defective motion and inadequate efforts to resolve differences. The PUCO should deny Duke’s Motion.

B. Duke does not claim that a protective order is necessary to protect it from annoyance, embarrassment, oppression, or undue burden or expense.

Ohio Adm. Code 4901-1-24(A) provides that a protective order may be issued if it “is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Duke’s Motion does not allege that it will be subjected to any of these conditions absent a protective order.

Duke’s Motion does not even mention annoyance, embarrassment or oppression. And burden and expense are mentioned only twice in the Motion.⁸ The Motion also mentions that discovery will be “time-consuming and costly....”⁹ But Duke does not allege anywhere in the Motion that either the burden or the expense associated with responding to OCC’s discovery will be undue.

Duke has not satisfied the criteria for a protective order under the PUCO’s rules. The PUCO should deny the Motion.

⁷ See Motion, Exhibit B.

⁸ Id. at 3, 5.

⁹ Id. at 6.

C. Contrary to Duke’s assertions, discovery in a complaint case may begin with the filing of the complaint.

Duke claims that OCC “is not entitled to automatically engage in discovery in a complaint proceeding for which it bears the burden of proof.”¹⁰ Duke is wrong.

Ohio Adm. Code 4901-1-16 states, in relevant part:

(A) The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

(B) Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission. The frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the Administrative Code.¹¹

Ohio Adm. Code 4901-1-17 provides: “Except as provided in paragraph (E) of this rule, discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.”¹²

¹⁰ Id. at 4.

¹¹ Paragraph (G) prohibits discovery that seeks information already available in documents filed in the proceeding. Paragraph (I) makes the discovery rules inapplicable to PUCO Staff. Neither paragraph is relevant to the issues raised in Duke’s Motion.

¹² Paragraph (E) discusses discovery periods for long-term forecasting cases and is irrelevant to this proceeding.

The PUCO has ruled that, combined, these two rules allow complainants to begin discovery once a complaint is filed. In *Toliver*, the PUCO stated: “Taken together, Rules 4901-1-16(C), and 4901-1-17(A), O.A.C., allow a party to a Commission proceeding to commence discovery, in this instance, immediately upon the filing of the complaint...”¹³ Thus, Duke’s assertion that OCC is not entitled to discovery at this point in the proceeding is erroneous.

Furthermore, Duke’s desire to not respond to OCC’s discovery is based on the false assumption that the PUCO will grant Duke’s motion to dismiss the Complaint. But as discussed in the Consumer Parties’ Memorandum Contra Duke’s motion to dismiss, filed concurrently with this Memorandum Contra, Duke’s arguments do not support dismissal of the Complaint.¹⁴ Further, the PUCO has 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.”¹⁵ Hence, Duke’s arguments concerning the timing of discovery in this case are baseless.

D. Contrary to Duke’s assertions, OCC’s discovery is reasonably calculated to lead to the discovery of admissible evidence.

Duke claims that OCC’s discovery is a “fishing expedition.”¹⁶ As with the other allegations in the Motion, Duke is wrong.

¹³ *In the Matter of the Complaint of Nancy S. Toliver v. Vectren Energy*, Case No. 12-3234-GE-CSS, Opinion and Order (July 17, 2013) at 4.

¹⁴ Consumer Parties’ Memorandum Contra Duke’s Motion to Dismiss (October 23, 2015) at 2-11.

¹⁵ *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).

¹⁶ Motion at 3, 5.

In this proceeding, the Consumer Parties have specifically pointed to Duke's misapplication of the winter heating rules. Duke's contention that the consumer protections of the winter heating rules do not apply when the bill includes delinquent charges for usage from before the winter heating season places consumers at risk. Duke's misapplication of the winter heating rule is particularly troubling in light of the extremely high number of Duke residential customers who have been disconnected for nonpayment. Combined, these facts provide reasonable grounds for the allegations that Duke's practices regarding winter disconnections are or will be unjust and unreasonable.

OCC's discovery, attached to Duke's Motion as Exhibit A, goes directly to the heart of the Consumer Parties' Complaint. The discovery is intended to delve into Duke's practices concerning the disconnection of residential customers and Duke's application of the PUCO's winter heating rules and winter reconnection orders. The discovery OCC served upon Duke is "reasonably calculated to lead to the discovery of admissible evidence...."¹⁷ As such, the PUCO's rules require Duke to respond to the discovery propounded upon it.

Duke contends that in the past the PUCO has exercised discretion "in order to stay discovery pending the resolution of a dispositive motion."¹⁸ For support Duke cites to *Wilkes v. Ohio Edison*.¹⁹ The facts of that case, however, are so removed from the facts of this case that *Wilkes* has no precedential value.

¹⁷ Ohio Adm. Code 4901-1-16(B).

¹⁸ Motion at 5.

¹⁹ Case No. 09-682-EL-CSS.

In *Wilkes*, the complainants asked the PUCO to compel Ohio Edison to move a 69kV electrical transmission line that runs near structures on their property.²⁰ In the alternative, the complainants asked the PUCO to determine whether Ohio Edison's 69kV line is located at a safe distance from their property.²¹ In its motion for stay of discovery, Ohio Edison said the case was really about the complainants infringing on an easement by constructing a swimming pool and storage shed too close to Ohio Edison's power lines.²² Further, Ohio Edison had sought a remedy by filing a complaint for declaratory and injunctive relief in the Mahoning County Court of Common Pleas.²³ Importantly, the complainants in *Wilkes* did not file a memorandum contra Ohio Edison's motion.²⁴

Based on the pleadings – and absence of a memorandum contra the motion – the attorney examiner granted the motion for stay of discovery. The attorney examiner stated: “**Noting no opposition** and finding that staying discovery is in the interest of both parties should the Commission ultimately decide to grant Ohio Edison's motion to dismiss, the attorney examiner finds that Ohio Edison's motion is reasonable and should be granted.”²⁵ By contrast, there is no court case pending to resolve the issues in this case and the Consumer Parties zealously oppose Duke's Motion. The facts of the two cases are inapposite, and therefore, Duke's reliance on *Wilkes* is misplaced.

²⁰ Id., Entry (December 16, 2009) at 1.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id. at 2.

²⁵ Id. (Emphasis added.)

Duke's arguments for a protective order are flawed and based on case law which provides no precedential value in this proceeding. The PUCO should deny Duke's Motion.

IV. CONCLUSION

Duke has filed a defective motion, based on deficient efforts to resolve its discovery dispute with OCC and on flawed arguments. Contrary to Duke's assertions, OCC's discovery is permissible under PUCO rules. Further, Duke's Motion is based on the false assumption that Duke's motion to dismiss will be granted, even though all material allegations of the Complaint must be accepted as true and construed in favor of the Consumer Parties. To protect consumers, the PUCO should dismiss Duke's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Terry L. Etter

Terry L. Etter
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Summary: Memorandum Memorandum Contra Duke's Motion for Protective Order to Stay Discovery Pending Resolution of its Motion to Dismiss the Consumers Parties' Complaint by the Office of the Ohio Consumers' Counsel and Communities United for Action electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.