BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO, INC.'S REPLY TO MEMORANDUM CONTRA THE MOTION TO DISMISS THE COMPLAINT

I. INTRODUCTION

On October 8, 2015, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) moved for an order from the Public Utilities Commission of Ohio (Commission) dismissing the Complaint filed in the above-captioned proceeding. The Complainants[1] filed their opposition to the motion (Memorandum Contra) on October 23, 2015. Duke Energy Ohio hereby files its reply (Reply) to the Memorandum Contra, pursuant to O.A.C. 4901-1-12(B)(2).

II. DISCUSSION

A. The Motion to Dismiss Should Be Evaluated Based on Whether Reasonable Allegations in the Complaint Would Support the Requested Relief.

The Complainants propose that, when a motion to dismiss is being considered, all of the material allegations in the complaint must be accepted as true. Duke Energy Ohio does not disagree. But certainly that is not enough, or a motion to dismiss could never be granted. The

[1] The Office of the Ohio Consumers' Counsel (OCC) and Communities United for Action (CUFA)(collectively, the Complainants).

allegations made in the complaint must also be **reasonable** and must be sufficient to state a cause of action. Ohio law allows a complaint to move to a hearing only where "reasonable grounds" for the requested Commission action have been stated.[2] This reading of the law has been confirmed by the Commission, which has opined that, if the complaint is to meet the 'reasonable grounds' test, it must contain allegations, which, if true, would support the finding that the rates, practices, or services complained of are unreasonable or unlawful."[3]

Even OCC has asserted, before this Commission, that **un**reasonable allegations would not warrant setting a complaint for hearing.[4] And the Commission has specifically found that the statutory requirement that reasonable grounds be stated allows the Commission latitude in considering dismissal. For example, in 2005, the Commission concluded that, "although there is not an explicit statute of limitations applicable to complaints . . ., the statutory reasonable grounds limitation enables the commission to apply reasonable limitations to dismiss . . . outdated claims . . .."[5] It is indisputable that the Commission not only can, but **must**, consider the reasonableness of allegations prior to setting a complaint for hearing.

If all of the factual allegations in the Complaint are correct, could a reasonable legal interpretation of those facts and the applicable law result in the Commission's conclusion that the Complaint should ultimately be granted? Here, the answer must be no. As will be discussed below: (1) the Complaint failed to reference any specific facts, incidents, or injuries but was, instead, purely hypothetical; (2) critical "facts" stated by the Complainants are facially and patently incorrect; (3) certain legal issues are already under consideration by the Commission in

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[2] R.C. 4905.26.

[3] *In the Matter of the Complaint of the Office of the Ohio Consumers' Counsel v. West Ohio Gas Company*, 88-1743-GA-CSS, Entry, at pg. 16 (January 31, 1989).

[4] *In the Matter of the Complaint of the Office of the Ohio Consumers' Counsel v. West Ohio Gas Company*, Case No. 89-275-GA-CSS, 1989 Ohio PUC LEXIS 325, at finding (3) ("According to OCC, the Supreme Court has found that allegations alone, **if reasonable**, warrant the setting of a hearing.")(emphasis added).

[5] *In the Matter of the Complaint of Richards Ltd., Inc., et al. v. Ameritech Mobile Communications, Inc., et al.*, Case No. 05-190-RC-CSS, *et al.*, Entry on Rehearing, at pp. 17-18 (December 7, 2005)(emphasis in original).

separate, more appropriate proceedings; and (4) other matters are unrelated to any Ohio law that would give rise to a cause of action.

1. The Complaint Should be Dismissed as Prospective and Hypothetical.

The Complainants urge the Commission to interpret R.C. 4905.26 as allowing actions that are entirely based on speculation and guesses as to possible future behavior. They propose that the statute "specifically allows the filing of complaints to prevent injury to customers."[6] While the section does include language about future services, it cannot be interpreted as allowing the Commission to, in essence, enjoin behaviors that have not yet occurred. Such a reading would be in direct conflict with R.C. 4905.60, which requires the Commission – if it believes that a violation is about to occur – to proceed through the attorney general's office to get an injunction from a court of competent jurisdiction. As with all statutory interpretation, the law must be read so as to make sense and so as to prevent such obvious conflicts. The Commission does not have the power to enjoin future behavior, such as is sought by the Complainants. Thus, contrary to the Complainants' suggestion, R.C. 4905.26 must be interpreted as applying to conduct that is actually occurring or actually imminent, rather than to mere conjecture.

2. The "Facts" Are Incorrect.

The Complaint includes two general claims. The first claim is that Duke Energy Ohio's statements in another case – the so-called *Pitzer* case[7] – merit this separate complaint by OCC and CUFA. The premise of this claim is that the allegations in *Pitzer* relate to the Company's compliance with the "2011 Winter Reconnect Order." However, the *Pitzer* complaint included no allegation relating to any Winter Reconnect Order.[8] The Complainants' "factual" basis for the present case is therefore facially untrue and patently invalid. It strains credulity to believe

[6] Memorandum Contra, at pg. 4.
[7] *Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS (*Pitzer*).
[8] Complaint, at para. 28.

that the Complainants can file this action on the basis of statements that the Company **did not make**.

3. The *Pitzer* Case Is Still Pending.

Furthermore, even if the Company's statement in *Pitzer* had related to the Winter Reconnect Order, this case should still be dismissed as the issues would be ripe for consideration in the *Pitzer* case. It violates every sense of administrative efficiency to consider the same claim in two separate cases at the same time.

4. Data Showing Different Disconnection Rates Do Not Justify an Action.

The second "claim" in the Complaint is that the Company's disconnection rates are too high – evidenced solely by a comparison to other Ohio utilities. Unfortunately for the Complainants, they were unable, in the Complaint itself, to conjure up any legal theory under which such a comparison could give rise to a legal action. Although they seem to suggest, in the Memorandum Contra, that simply being "unique" in some way provides sufficient grounds for a complaint, this is certainly not an accurate portrayal of the 1978 case they cite. Rather, in that case, the Court concluded that the impact of contributions in aid of construction (CIAC) on the rates of a particular utility – which Commission Staff had described as being in a unique circumstance – provided sufficient basis for a Commission investigation. But Staff's mere use of that adjective does not mean that a complaint may be brought solely on the ground that a utility is unusual in some way. It was the impact of CIAC on rates that provided reasonable grounds for the complaint. Here, Duke Energy Ohio is simply different from other utilities. That difference does not, in itself, provide any justification for a legal action.

B. The Complainants Have Not Established Reasonable Grounds for Complaint Regarding Winter Heating Rules

The Complainants assert that there are two "facts" that form the basis for their complaint: the Company's position in the *Pitzer* case and the increasing number of disconnections in the Company's territory. With this backdrop, the Complainants attempt to identify reasonable grounds.

First, pointing out that the Commission has previously referenced possible actions that it could take to assure compliance with its orders or to consider the Company's disconnections, the Complainants suggest that "reasonable grounds for a complaint are satisfied when the complaint was directed to what the PUCO said it intended to do." Complainants rely on language in *Allnet Communications Services, Inc. v. Pub. Util. Comm.*[9] for the proposition that a complaint that asks the Commission to do something it has said it would do must be found to have reasonable grounds.

They misread *Allnet*. *Allnet* was appealed to the Court after the Commission dismissed the complaint based on the determination that it was actually an untimely application for rehearing of another proceeding. The Court disagreed. Rather than treating the *Allnet* complaint as a rehearing request, the Court concluded that the complaint was simply initiating a review, just as the Commission had said it might do. The holding of the case was that "reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders." The case did **not** hold that asking the Commission to do what it said it might do is, **in itself**, reasonable grounds for complaint. The issue before the Court was whether the nature of the complaint made it properly subject to treatment as a late-filed application for rehearing. The Court concluded that it did not, and then determined that the complainant had

[9] 32 Ohio St.3d 115, 512 N.E.2d 350 (1987)("*Allnet*").

stated reasonable grounds such that it should proceed to hearing. Thus, neither the Commission's prior statements in other dockets nor the holding in *Allnet* can provide the Complainants with "reasonable grounds for complaint," as required under R.C. 4905.26.

The Complainants' other attempt at identifying reasonable grounds is to point to data concerning the number of customers disconnected by the Company for nonpayment, as compared with analogous data for other utilities. However, as discussed at length above, there is no Ohio law that requires a utility to disconnect customers for nonpayment at rates that are comparable to disconnections by other utilities. And, also as discussed previously, the single case cited by the Complainants provides absolutely no support for the contention that a utility can be investigated solely due to its lack of similarity to other utilities.

The Complainants have failed to show any reasonable grounds for their Complaint. They conclude this section of the Memorandum Contra by repeating their reference to the Company's statements in *Pitzer*. But that is a pending proceeding, one that the Commission is or will be actively considering and in which the Commission has already allowed the OCC to intervene. There is absolutely no justification for separately addressing an issue that the Complainants believe stems from that case.[10]

C. The Cases Cited by the Company Are Directly Relevant to this Case, as the Complainants Have Not Stated Reasonable Grounds.

The Complainants posit that the cases cited in the Motion to Dismiss are not relevant, because they have stated reasonable grounds. As we have seen, however, no reasonable grounds exist. And the cases cited are absolutely relevant:

[10] Interestingly, in yet another attempt to litigate these same issue, the Commission just dismissed an application for rehearing of its current winter reconnect order, specifically stating that it was an inappropriate "attempt to litigate issues that are pending in other cases before the Commission . . .." *In the Matter of the Commission's Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for 2015-2016 Winter Heating Season*, Case No. 15-1460-GE-UNC, Entry on Rehearing, at pg. 5 (Oct. 28, 2015).

- The Commission dismissed a complaint against a utility "because the complainant did not allege even one instance of inadequate service."[11] The Complainants here think they have specifically pointed to inadequate service, but all they have pointed to is a legal position taken by Duke Energy Ohio in another case.
- The Commission dismissed a case in which the complaint that failed to clearly state reasonable grounds. The Complainants here think they have made "specific allegations regarding Duke's disconnection practices,"[12] but all they have done is set up a hypothetical. The Complainants have not demonstrated any harm to even one customer.
- The Commission dismissed two cases in which the complainants failed to allege any particular issue related to a utility service.[13] Again, the Complainants think they have identified a specific problematic "practice," but all they have pointed to baseless conjecture and unfounded allegations.

The cases cited by Duke Energy Ohio are directly relevant and indisputably support the Motion to Dismiss.

III. CONCLUSION

Duke Energy Ohio respectfully requests that the Commission dismiss the Complaint with prejudice, on the grounds set forth herein.

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[11] Memorandum Contra, at pg. 8 (discussing *Ohio CARES v. FirstEnergy Corp.*, Case No. 98-1616-EL-CSS).
[12] Memorandum Contra, at pg. 9 (discussing *In the Matter of the Complaint of James M. Carpenter v. Acme Telephone Answering Service*, Case No. 89-326-RC-CSS).
[13] Memorandum Contra, at pg. 10 (discussing *Williams v. Ohio Edison*, Case No. 08-1230-EL-CSS, and *Goldsberry v. United Telephone*, Case No. 07-559-TP-CSS).

Respectfully submitted,

DUKE ENERGY OHIO, INC.

Amy B. Spiller (0047277) (Counsel of Record)
Deputy General Counsel
Jeanne W. Kingery (0012171)
Associate General Counsel
Duke Energy Business Services LLC
139 E. Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, Ohio 45202-0960
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com (e-mail)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply was served on the following parties this 30th day of October, 2015, by regular U.S. Mail, overnight delivery, or electronic delivery.

Jeanne W. Kingery

Terry L. Etter
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
terry.etter@occ.ohio.gov

Noel M. Morgan
Legal Aid Society of Southwest Ohio, LLC
215 East Ninth Street, Suite 500
Cincinnati, Ohio 45202
nmorgan@lascinti.org

Kimberly W. Bojko
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 N. High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com

William Wright, Chief
Attorney General's Office
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, Ohio 43216
William.wright@puc.state.oh.us

Summary: Memorandum Duke Energy Ohio, Inc.'s Reply to Memorandum Contra the Motion to Dismiss the Complaint electronically filed by Carys Cochern on behalf of Kingery, Jeanne W Ms.