

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

DUKE ENERGY OHIO, INC.'S MEMORANDA CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO COMPEL DISCOVERY

Comes now Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), and for its memoranda contra the Motion to Compel filed by the Office of the Ohio Consumers' Counsel (OCC) states as follows.

I. Introduction

On September 15, 2015, the OCC, along with Communities United for Action (CUFA), filed a baseless complaint against Duke Energy Ohio, alleging that its disconnections for nonpayment were too high and that the Company was incorrectly applying Public Utilities Commission of Ohio (Commission) regulations regarding the winter heating season and the Commission's Winter Reconnect Order.¹ Notably, one of the causes of action failed to identify any specific conduct on the Company's part that allegedly violated any law, statute, rule, or order² and the Complaint, as a whole, failed to include mention of any specific incident in which the Company acted in contravention of applicable Commission regulation. Indeed, as discussed

¹ See Complaint.

² See Complaint, at Third Cause of Action.

in Duke Energy Ohio’s Motion to Dismiss, the Complaint must be characterized as premature and void of any judicial controversy.³ Simply stated, through the Complaint, the OCC and CUFA are improperly seeking an advisory opinion from the Commission.

Despite the representations made via counsels’ certification (*i.e.*, signature on the Complaint), the OCC has tendered overly broad, irrelevant, and undeniably inappropriate discovery in this proceeding. Such requests are clearly intended to manufacture a basis for the Complaint. That is, the OCC is now searching for information – for anything – it can arguably use to support its allegations against the Company, the legitimacy of which should have already been evaluated by Complainants’ counsel. For the reasons discussed herein, Duke Energy Ohio respectfully requests that the Commission reject the OCC’s efforts and deny the Motion to Compel.

II. Discussion

A. Discovery Should be Stayed Pending Resolution of Duke Energy Ohio’s Motion to Dismiss.

The OCC posits that it has the *immediate* right to engage in discovery – to tender irrelevant, overly broad, and vague requests – and that the Company *must* respond to those requests now. But the Commission’s regulations and the discovery process are not as absolute as the OCC would portend.

It is well established that Ohio’s trial courts and this Commission have broad discretion to limit or delay discovery in order to prevent an abuse of the discovery process.⁴ The courts and

³ See Motion to Dismiss, at pp. 6-8.

⁴ See *State ex rel. Grandview Hospital and Medical Center v. Gorman*, 51 Ohio St.3d 94, 95 (1990) (explaining that “[t]rial courts have extensive jurisdiction and power over discovery”); *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, et al. for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, 2000 Ohio PUC LEXIS 676 (explaining that “[t]he Commission and the attorney examiners necessarily have considerable discretion in the procedural management of proceedings, including discovery”); *Sawyer v. Mardis Devore*, 1994 Ohio App. LEXIS 4954, *14 (Cuyahoga Cty. 1994), internal citations omitted (noting that the trial court “possesses considerable discretion with respect to its regulation of discovery proceedings”).

this Commission have exercised that discretion in order to stay discovery pending the resolution of dispositive motions.⁵ Indeed, even the statutory framework for complaint proceedings before the Commission contemplates the existence of a legitimate complaint – one containing reasonable grounds therefor – to avoid dismissal and to enable a hearing.⁶ This framework is appropriate as it prevents litigants from abusing the discovery rules by engaging in impermissible fishing expeditions intended to gather information that they hope may possibly give credence to an otherwise defective and baseless complaint.⁷ And it prevents a drain on the Commission resources by avoiding motion practice that is inevitable where inappropriate discovery requests have been issued.

It is also well established that the Commission’s right to control discovery is predicated upon the need to balance the rights of litigants to obtain relevant information and the rights of parties and non-parties alike to avoid the undue burden of incurring time and expense to divulge information that is irrelevant.⁸ And here, where there is pending a Motion to Dismiss the Complaint, it is appropriate to stay the discovery process until such time as the Commission determines whether a justiciable controversy exists and the Complaint will proceed.⁹ Indeed, to allow otherwise unreasonably prejudices the Company by forcing it to expend significant resources in providing information to the OCC that will be to no avail should the Company’s Motion to Dismiss be granted. Staying the discovery process until such time as dispositive

⁵ See, e.g., *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, at ¶ 12 (upholding the lower court’s decision to stay discovery pending resolution of motion to dismiss); *Wilkes v. Ohio Edison Co.*, Case No. 09-682-EL-CSS (Entry, Dec. 16, 2009), at ¶ 4 (finding that “staying discovery is in the interest of both parties should the Commission ultimately decide to grant Ohio Edison’s motion to dismiss”).

⁶ R.C. 4905.26 (*if it appears that reasonable grounds for a complaint are stated, the commission shall affix a time for hearing*)(emphasis added).

⁷ *In re: All Kelley & Ferraro Asbestos Cases v. A.W. Chesterton Co.*, 2011 Ohio Misc. LEXIS 1017, *7-8 (Cuyahoga Cty. 2011), citing, *Drawl v. Cleveland Orthopedic Ctr.*(1995), 107 Ohio App.3d 272, 277-278, citing *Bland v. Graves* (1993), 85 Ohio App.3d 6, 44.

⁸ See, e.g., *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 85-86 (Cuyahoga Cty. 1987).

⁹ Duke Energy Ohio incorporates herein by reference its Motion to Stay Discovery and Reply to the OCC’s Memoranda Contra said Motion.

motions are addressed also eliminates the OCC's ability to use the discovery responses in an attempt to manufacture yet more claims against the Company. And given the OCC's requests here for information about unrelated proceedings, such a concern is both real and improper. As the Commission's practice confirms, the discovery process was never intended to provide litigants such as the OCC the unfettered right to burden other parties and unfairly expose them to processes that are premature. Duke Energy Ohio thus respectfully submits that a ruling on the Motion to Compel should be stayed pending a ruling on its Motion to Dismiss and Motion to Stay Discovery. However, should the Commission proceed with addressing the merits of the OCC's Motion to Compel at this time, Duke Energy Ohio offers the following in response thereto.

B. The OCC's Discovery Requests are Not Properly Tailored to the Allegations in its Complaint.

With rather sweeping, yet unsubstantiated statements, the OCC maintains that *all* of its interrogatories and documents requests are relevant or otherwise reasonably calculated to lead to the discovery of admissible evidence. The OCC concludes – without any explanation whatsoever – that the issues in this proceeding involve “Duke’s repeated statements expressing a misapplication of the winter heating rules” and Duke Energy Ohio’s “extraordinarily high number and proportion of customer who are being disconnected for nonpayment.”¹⁰ From this, the OCC casually describes its discovery as simply seeking information about disconnection processes and policies. But a review of the actual requests – which the OCC ignored for purposes of attempting to establish its immediate right to discovery responses – yields a different conclusion. Indeed, the OCC has not tailored its discovery requests to its Complaint, to the alleged facts or the pertinent time periods identified therein. In this regard, it must be

¹⁰ OCC Motion to Compel, at pg. 5.

remembered that the Commission’s regulations limit discovery to that which is relevant or otherwise reasonably calculated to lead to the discovery of admissible evidence.¹¹ And what is relevant? It is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹² Here, the determination of the action has been framed by the Complaint, as drafted by the OCC.

As an initial matter, Duke Energy Ohio observes that the OCC relies only on decisions addressing the federal rules of civil procedure for the contention that Duke Energy Ohio failed to articulate how the discovery requests were overly broad and unduly burdensome. The irony with this contention is astounding. Just days before filing its Motion to Compel in this proceeding, the OCC filed a memoranda contra a motion to compel that had been filed against it in another case. Therein, the OCC maintained that it had properly responded to allegedly overly broad discovery by asserting an objection as to scope. In doing so, the OCC argued that the “Commission can protect ‘a party or person from annoyance, embarrassment, oppression, or undue burden or expense’ regarding discovery.”¹³ As the OCC further maintained in this other proceeding, discovery requests seeking information as to whether communications occurred between parties that just recently entered into a joint defense agreement “is the epitome of an overly broad and unduly burdensome request – it is not reasonably calculated to lead to the discovery of admissible evidence.”¹⁴ The OCC did not articulate any further rationale; it did not specifically explain how requests for admitted communication between litigants that predated the execution of a joint defense agreement or for the mere identification of such communications after the

¹¹ O.A.C. 4901-1-16

¹² Evid.R. 402.

¹³ *In the Matter of the Complaint of Jeffrey Pitzer v. Duke Energy Ohio*, Case No. 15-298-GE-CSS, Memoranda Contra Motion to Compel, at pg. 12, November 10, 2015.

¹⁴ *Id.*, at pg. 13.

agreement was signed were overly broad or unduly burdensome. Here, however, the OCC now seeks to hold Duke Energy Ohio to a higher standard. Such an outcome is inappropriate.

Further damaging to the OCC's motion is the fact that the federal decisions it cited have no bearing on the Commission's oversight and management of the discovery process in Ohio regulatory proceedings or the obligations of parties to said proceedings. But to the extent the Commission is inclined to consider court decisions, Duke Energy Ohio submits that those decisions from Ohio courts – discussing the Ohio rules of procedure – are vastly more convincing than those from the federal judiciary. And as Ohio courts have consistently found, where it can reasonably be concluded that the “objective of the discovery request is burdensome or harassing,” the discovery is properly prohibited.¹⁵ Significantly, Ohio courts impose an obligation on the requesting party, such as the OCC here, to “demonstrate a likelihood that relevant evidence will be obtained.”¹⁶

Thus, contrary to the OCC's assertions, Duke Energy Ohio was not required to identify, with specificity, how the discovery requests were overly broad and unduly burdensome. Such a conclusion is readily evident from the very terminology used in the requests – terminology that lacked any association to relevant time periods (as identified by the OCC in its Complaint) or to the allegations of specific conduct that relate to identified Commission regulations or orders. And as the Third Cause of Action fails to set forth more than a dissatisfaction with numbers, it is not actionable and the OCC cannot now abuse the discovery process to try to find some bit of information on which to support its otherwise defective claim.¹⁷ Further, as confirmed below, the

¹⁵ *In re: All Kelley & Ferraro Asbestos Cases*, 2011 Ohio Misc. LEXIS 1017, *5.

¹⁶ *Drawl v. Cleveland Orthopedic Center*, 107 Ohio App.3d 272, 278 (Lake Cty. 1995), internal citations omitted.

¹⁷ See e.g., *Winkle v. Southdown, Inc.*, 1993 Ohio App. LEXIS 4295 (“the purpose of discovery is not to permit one party to conduct a ‘fishing expedition’ for evidence to support his or her claim”); *Keenan v. Adecco Employment Services*, 2006-Ohio-3633, ¶15 (Allen Cty. 2006) (“the purpose of discovery is not to permit one party to conduct a ‘fishing expedition’ for evidence to support their claim”); *Harp Midam Beachwood Hotel Investors, LLC v.*

Company did not just assert objections as to the scope of the discovery. It identified other objections, as appropriate for each individual request. The OCC, however, has failed to demonstrate a “likelihood that relevant evidence will be obtained” from its expansive requests. This shortcoming on the OCC’s part is sufficient to warrant a denial of its Motion to Compel. However, the Company discusses below additional, specific problems with the discovery requests, identified by topic for ease in review.¹⁸

Publicly Available Information is Already Available to the OCC

The Commission’s regulations establish that a party is not required to produce information available in the public record. Indeed, the applicable regulation indicates that such a request is inappropriate.¹⁹ Despite this regulation, the OCC tendered requests seeking information that it already possesses. Importantly, the very documents on which it relied in filing its Complaint provide the information sought in Interrogatory Nos. 1 and 7.²⁰ For the OCC to contend, as it now does, that such information is restricted only to Commission Staff is plainly wrong and reflects a careless disregard for the scope of discovery, as outlined in Commission regulations. The Company’s objections to these specific requests were appropriate and, again the irony in the OCC’s responses palpable. The OCC has refused to answer discovery seeking information possessed only by the OCC on the basis that it “is not required to produce documents already in [the requesting party’s] possession or in that are in the public domain.”²¹

The OCC attempts to overlook its disregard for the rules by alleging that the Company failed to articulate how information is not capable of being produced. But this argument fails. As

Cuyahoga County Board of Revision, 2008 Ohio Tax LEXIS 1417, *5 (Bd. of Tax Appeals 2008); *Beard v. New York Life Insurance and Annuity Corp.*, 2013-Ohio-3700 (Franklin Cty. 2013).

¹⁸ As Duke Energy Ohio’s responses are attached to the OCC’s Motion to Compel, the Company does not reattach them here. Rather, reference is made to Exhibit 1 of the OCC’s Motion.

¹⁹ O.A.C. 4901-1-19(C).

²⁰ See, e.g., *In the Matter of the Annual Report of Service Disconnections for Nonpayment, as Required by Section 4933.123*, Case No. 15-882-GE-UNC, Duke Energy Ohio’s Report (June 19, 2015), which is cited in the Complaint.

²¹ *Pitzer v. Duke Energy Ohio*, Memoranda Contra Motion to Compel, at pg. 4 (November 10, 2015).

Commission regulation provides, a party is required to furnish information “as is available to the party.”²² If the information, as requested by the OCC, does not exist, Duke Energy Ohio is not required to produce it. The Company’s responses to Interrogatory Nos. 2, 3, 4, 8, 9, and 10 were proper.

Lack of Time Parameters or Otherwise Inapplicable Time Periods is Irrelevant

The OCC has tendered several discovery requests that are overly broad and unduly burdensome given the lack of time parameters pursuant to which they are to be answered. In this regard, Duke Energy Ohio observes that it is not obligated to rewrite the OCC’s discovery requests or to otherwise speculate as to what the OCC may have intended. The obligation to tender appropriately drafted requests and to demonstrate how they are likely to lead to relevant evidence rests with the OCC. And as the OCC has failed to satisfy either such obligation, its Motion to Compel should be denied.

Moreover, the majority of requests that lack a time period or otherwise refer to periods outside of the winter heating season, as defined in O.A.C. 4901:1-18-01 and as identified in the Winter Reconnect Orders (hereinafter collectively the winter heating season), also seek information that is patently irrelevant. The desired information can have no bearing on the disputed facts or the allegations in this proceeding related to the winter heating season. On this point, Duke Energy Ohio would be remiss if it did not mention the OCC’s Third Cause of Action – an unspecific and unsubstantiated claim that Duke Energy Ohio simply disconnects too many customers for nonpayment of their utility bills. The OCC fails to include *any* specific conduct on the part of Duke Energy Ohio that contravenes any law, regulation, or order. Rather, the OCC attempts to piece together a claim by alleging that the Company is not providing adequate service simply because its disconnection rates are what they are. The OCC, in its Complaint,

²² O.A.C. 4901-1-19(A).

does not provide any further specificity; it does not even attempt to demonstrate how generic and high-level references to disconnection rates establishes a legitimate claim that Duke Energy Ohio has violated Commission regulation or Ohio law. Simply put, this allegation does not reflect a justiciable controversy; it reflects dissatisfaction with numbers. But general dissatisfaction is not actionable. And, as firmly established under Ohio jurisprudence, the OCC cannot use discovery as a means to find support for its Third Cause of Action.

The interrogatories that fail to contain any time parameter or otherwise reference time periods irrelevant to the Complaint include Interrogatory Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, and 65.

The requests for production of documents suffer from the same flaw; many, if not most, fail to contain any time parameters pursuant to which they are to be answered or otherwise refer to periods of time outside the winter heating season. They thus seek information that is irrelevant or otherwise not reasonably calculated to lead to the discovery of admissible evidence. The document requests at issue here include Production of Document Nos. 3, 4, 5, 6, 7, 11, 12, and 13.

Grid Modernization and AMI Meters are Irrelevant to Claims of Misinterpretation

As the OCC confirmed in its Motion to Compel, this case concerns its allegation that the Company is not properly applying the requirements applicable to the winter heating season. It also alleges, although devoid of any actionable claim, that the Company's disconnection numbers are too high. Focusing on those allegations for which Commission regulation or orders have been identified, it is undeniable that the OCC's criticism lies with how the Company determines eligibility for disconnection for nonpayment during the winter heating season. *How* the disconnections physically occur is irrelevant to such a claim. And whether the metering

capabilities in the Duke Energy Ohio service territory allow for remote disconnections cannot lead to the discovery of admissible evidence. Indeed, as this Commission has found, there is no indication that the installation of smart meters will affect disconnection rates.²³

Interrogatory Nos. 13, 14, 15, 16, and 21 and Production of Document No. 4 confirm that the OCC is improperly using the discovery process in this proceeding to try to uncover some bit of information regarding the Company's grid modernization efforts that it can manufacture into an actionable claim. The fact that metering capabilities allow for remote disconnections does not concern the interpretation and application of Commission regulations or orders about when disconnection can occur. And the cost to perform a remote reconnection is well beyond any logical parameters of this proceeding. The OCC did not allege any claims related to the reconnection process and its blatant fishing expedition should not be permitted here.

Revenues and Budgets are Irrelevant to Claims of Misinterpretation

The OCC has, through discovery, sought to elicit financial information related to what the Company collected in late payment and reconnection charges. But this is immaterial to the allegations in the Complaint – the sought-after information does not speak to the Company's alleged misinterpretation of the winter heating season rules. The undeniable inference created by Interrogatory Nos. 17 through 20 is that the OCC is hoping to find some bit of information on which it can legally support its claims concerning the number of disconnections. The same holds true for Interrogatory Nos. 52 and 53, which are also improper given their reference to credit practices and policies. But this is a perverse application of the discovery process. When filing the Complaint, the OCC should have had a good faith belief that the Company's conduct in respect of disconnections for nonpayment violated an identifiable law or Commission regulation or

²³ *In the Matter of the Application of Ohio Power Company for a Limited Waiver of Ohio Adm. Code 4901:1-18-06(A)(2)*, Case No. 13-1938-EL-WVR, Entry, at pg. 7 (March 18, 2015).

order. That no such legal foundation was provided confirms that none existed on September 15, 2015, and the OCC is using the discovery process to cure the deficiencies in its Complaint. Those attempts should be rejected.

Payment Plans are Irrelevant to Claims of Misinterpretation

The OCC has tendered requests about the number of customers enrolled in payment plans. But the number of customers who, at any undefined time, initiated contact with the Company and enrolled in payment plans to avoid a disconnection of service is immaterial to whether the Company is allegedly improperly disconnecting service during the winter heating seasons for discrete years. Interrogatory Nos. 22 through 26 are overly broad and otherwise seek information that is irrelevant or otherwise not reasonably calculated to lead to the discovery of admissible evidence. Duke Energy Ohio further notes that the number of customers who may have been disconnected because they defaulted on an agreed-upon payment plan again confirms the improper scope of discovery. After having filed allegations of a purported misapplication of rules and orders related to the winter heating season and after failing to identify any legal basis for its criticism of disconnection rates, the OCC now seeks to elicit information on a new and unrelated topic – actions of default occurring over undefined periods of time.

Day of Disconnection Conduct is Not Implicated by the Complaint

Interrogatory Nos. 27, 28, 29, and 30 seek to elicit information about events occurring on the day of disconnection. But, again, the issue of *how* disconnections may occur is not relevant to the allegations of *when* disconnections may occur and whether the Company is allegedly misapplying the winter heating season rules and regulations. Indeed, the Complaint is devoid of any allegation that the Company is failing to appear at customers' premises on the day of disconnection. The OCC has not alleged a lack of notice and it has not identified any Duke Energy Ohio customer who claims to have been denied same. These questions reflect one of the

OCC's ulterior motives – to gather information here it hopes it can use in an unrelated case in which it intervened.²⁴ Significantly, this other case provides the sole basis for the OCC's Complaint in this proceeding and the OCC thus has an interest in hoping to discover information here that it can then attempt to use in that other proceeding. But the cases are separate; the allegations entirely different. The OCC cannot use this proceeding to support its efforts in an unrelated case in which it has fully participated.

Average Unpaid Balances are Immaterial to this Proceeding

Through Interrogatory No. 40, the OCC is asking about average balances at the time of disconnection. Notably, however, this Interrogatory is not relevant to the allegations in the Complaint. Indeed, the OCC is not alleging that disconnected accounts were not in arrears. Again, the allegations are limited to an interpretation of the winter heating season rules. As such, the information sought herein is not relevant or otherwise reasonably calculated to lead to the discovery of admissible evidence.

Separation of Services is Not an Issue in this Proceeding

The OCC now believes, albeit incorrectly, that separation of services is relevant to its Complaint and it has tendered requests concerning same. But the Complaint is devoid of any allegation that the Company is not informing customers of their rights or that customers are being denied same. Interrogatory Nos. 41 through 43 are irrelevant to the claims in this proceeding and otherwise seek information that is not reasonably calculated to lead to the discovery of admissible evidence.

Defining and Handling Customer Complaints is Immaterial to this Proceeding

The OCC tendered discovery directed to the definition of a “customer ‘complaint’” relative to an undefined period of time. There is absolutely no context for this question and Duke

²⁴ *In the Matter of the Complaint of Jeffrey Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS (*Pitzer*).

Energy Ohio is not required to speculate as to what sort of “complaint” the OCC was referring. As written, therefore, Interrogatory Nos. 44 through 47 and Production of Document No. 11 are overly broad and vague; they also seek information that is irrelevant or otherwise not reasonably calculated to lead to the discovery of admissible evidence.

Public Demonstrations are Immaterial to this Proceeding

The OCC has inquired into whether Duke Energy Ohio is aware of public demonstrations – regardless of when they occurred – regarding its practices related not only to disconnections but also credit and collections. Whether some member of the public has so demonstrated does not render valid the OCC’s unfounded allegations. Moreover, disconnections can occur for many reasons other than nonpayment. Significantly, the Commission’s regulations allow for disconnection for fraud or tamper, to address a safety issue, or at the customer’s request. As broadly drafted, the requests are seeking information as to these topics. Moreover, this proceeding is not, based upon the allegations, about credit or all collections practices. The OCC has not tailored Interrogatory Nos. 48 and 49 appropriately and they thus are overly broad, vague, and unduly burdensome and they otherwise seek information that is irrelevant or otherwise not reasonably calculated to lead to the discovery of admissible evidence.

Medical Certifications Are Not at Issue in this Proceeding

The OCC tendered several requests related to medical certifications – seeking numeric information as well as processes and procedures related to same. But, again, the parameters of this proceeding are reflected in the Complaint and they are specific to the winter heating season and the application of the Commission’s regulations and orders concerning same. Whether Duke Energy Ohio received one or one hundred medical certifications during any month of any year has no bearing on those allegations. Further, because there is no legally supported claim reflected in the Third Cause of Action, the OCC’s tactics are again readily apparent. They are hoping,

after having certified a Complaint, that they can find something in respect of the Company's handling of medical certification requests on which to support their allegations or on which they may base a new cause of action. Interrogatory Nos. 54 through 61 and Production of Document Nos. 12 and 13 confirm the inappropriate fishing expedition on which the OCC wishes to take the Company.

Credit and Collections Practices are Not at Issue in this Proceeding

The OCC has sought production of current credit and collections policies and practices through Production of Document Nos. 2, 3, and 6. But these requests, as worded, are overly broad. Credit policies and practices are not material to *how* the Company is applying the winter heating season rules and, indeed, the Complaint makes no mention of alleged violation of the Commission's rules related to credit. Further, policies in effect for periods prior to those identified in the Complaint are immaterial to this proceeding. These requests are inappropriate as they seek to elicit information that is irrelevant or otherwise not reasonably calculated to lead to the discovery of admissible evidence.

Moreover, the Company further objected to these requests on the basis that they sought confidential information. The OCC has patently ignored that objection and, instead, now seeks to enforce production of such confidential information without any protections associated with same.

An Unrelated Proceeding is Immaterial to the Allegations of Misinterpretation

As is evident from the pleadings in this proceeding, the OCC is basing its allegations against the Company on language – taken out of context – contained in pleadings filed in another proceeding.²⁵ It does not, as support for its Complaint here, identify *any* circumstance in which a customer's service was improperly disconnected during the winter heating season. The

²⁵ *Pitzer*, Complaint, at pg. 3 (February 6, 2015).

Complaint has not described a justiciable controversy and instead seeks an advisory ruling from the Commission based upon what the OCC wants the Commission to believe Duke Energy Ohio said in certain, unrelated filings. To further its inappropriate quest to now support the allegations lodged against the Company, the OCC is asking for production of all discovery in this unrelated case through Production of Document Nos. 8 through 10. But that case and the discovery exchanged therein are specific to very discrete facts – the alleged failure to give notice of disconnection of electric service on November 4, 2011, for which payment admittedly had not been made. The Complaint here does not allege that the Company has failed to give notice of disconnection for accounts that are in arrears and, as such, an unrelated proceeding will have no bearing on the outcome of this proceeding. Further compounding the inappropriateness of the requests is the lack of attention to detail demonstrated by the OCC. As a party to this unrelated proceeding, the OCC is well aware of who is and is not involved in the case. The OCC has engaged in discovery in that other proceeding.²⁶ The OCC knows that the Staff is not involved in the unrelated proceeding and, as such, would not have issued discovery. For the OCC to request, in this proceeding, all discovery tendered by Commission Staff reflects a careless approach to discovery and the Company should not have to bear the consequences of the OCC’s conduct by responding to inappropriate requests. The OCC’s requests further seek to improperly convolute Commission proceedings. Unrelated complaint cases should stand, or fall, on their individual merit; the proceedings should not be merged via the discovery process. Indeed, even the Commission’s regulations identify the desire for separation, noting that discovery shall concern that which is relevant to the “subject matter of the proceeding.”²⁷

²⁶ *Pitzer*, Duke Energy Ohio, Inc.’s Motion to Compel Discovery Responses by the Office of the Ohio Consumers’ Counsel (November 3, 2015); *Pitzer*, Memorandum Contra Duke Energy Ohio, Inc.’s Motion to Compel Discovery by the Office of the Ohio Consumers’ Counsel (November 10, 2015).

²⁷ O.A.C. 4901-1-16. See also, O.A.C. 4901-1-22 (requests for admission may be served for purposes of the pending proceeding only).

C. Duke Energy Ohio Properly Objected to the OCC's Requests.

As confirmed above, Duke Energy Ohio has properly objected to the OCC's discovery requests. That certain objections were similarly lodged in response to a multitude of requests does not establish a lack of good faith on the Company's part. Rather, the common objections confirm that the OCC has failed to even attempt to tender discovery requests that are tailored to the allegations in its Complaint. The OCC's disfavor with the objections is not sufficient to compel responses to such improper requests. Duke Energy Ohio discusses some of the OCC's misdirected criticism here.

The OCC argues that the Company improperly asserted objections to those discovery requests that purportedly sought either a "yes" or "no" response. This argument reflects a misunderstanding of the rules. Duke Energy Ohio has objected to discovery for the reasons set forth in response to each specific request. With those objections having been asserted, it is now incumbent upon the OCC to demonstrate its entitlement to the discovery; to establish the likelihood that the requests will lead to relevant evidence. Duke Energy Ohio is not required to answer over objections, particularly where it would have to revise the discovery requests to do so. Using the request identified by the OCC as an example, Interrogatory No. 35 contains no time parameters pursuant to which it is to be answered. It thus concerns periods of time immaterial to the Complaint. It also seeks information that is not pertinent to whether the Company is allegedly improperly interpreting and applying the winter heating season rules. There is no dispute that a public utility may proceed with disconnection of service for those accounts in arrears, consistent with Commission regulation. Notably, those regulations do not establish a monetary threshold that must be met before disconnection may occur. As such, the information sought herein has no relevance to the allegations in the Complaint.

The OCC further criticizes Duke Energy Ohio for objecting to requests on the basis that the terminology used therein has either common meaning or specific meaning as prescribed under Commission regulation. This response confirms the lack of specificity in the requests. A phrase such as “disconnection notice” does have specific meaning under Commission regulation, but that meaning is not limited to one instance. Indeed, a public utility is required, under Commission regulation, to provide at least two notices of disconnection. But about which notice of disconnection was the OCC inquiring in Interrogatory Nos. 62, 63, 64, or 65? The OCC does not provide the proper definitional context for its requests and Duke Energy Ohio should not be forced to provide the context for it.

D. The Complaint Fails to Identify a Legally Supported Claim Regarding the Number of Disconnections and Discovery Related Thereto Reflects an Impermissible Fishing Expedition.

As detailed in Duke Energy Ohio’s Motion to Dismiss and reiterated here, the Third Cause of Action is facially deficient. It does not identify any law or Commission regulation or order that the Company has violated through specific actions. It merely reflects the OCC’s displeasure with the number of disconnections for nonpayment and argues that such an outcome equates with inadequate service. But, again, mere displeasure is not actionable. There must be a valid, identified, legal basis to support this final claim. There is none. And in its Motion to Compel, the OCC again fails to articulate the legal basis for this cause of action, instead hoping to divert attention away from its shortcomings by accusing Duke Energy Ohio of not understanding the Complaint. The Company fully appreciates both the lack of any cognizable, valid allegations and the OCC’s effort, through discovery, to try to obtain information it believes will support its otherwise baseless claim. The Company’s objections to the undeniable fishing expedition were properly asserted.

E. The OCC has not Attempted to Cure the Deficiencies with its Requests.

The OCC contends that it has satisfied its obligation to exhaust extra-judicial means before filing its Motion to Compel. The Company disagrees. As noted in the attached affidavit,²⁸ counsel for Duke Energy Ohio contacted counsel for the OCC about the requests and specific concerns related thereto. Counsel noted the lack of time parameters evident in the overwhelming majority of the requests and was told, by the OCC's counsel, that she could identify responsive dates. Counsel also asked about the definition of a "customer 'complaint'" and was told she could narrow the question if that helped to answer it. The OCC simply refused to revisit its discovery requests and revise them. Rather, it wrongly left that task to Duke Energy Ohio. But it is not for Duke Energy Ohio to cure the deficiencies, to speculate as to what the OCC may have been thinking, to do the job of its adversary.

III. Conclusion

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Commission deny the OCC's Motion to Compel. As an initial matter, the discovery process should be stayed pending decision on the Company's Motion to Dismiss and its Motion to Stay Discovery. Further, as demonstrated herein, Duke Energy Ohio has properly objected to the overly broad, vague, and irrelevant requests tendered by the OCC. The onus now is on the OCC to demonstrate how its expansive requests are relevant and, until such time, it should not be permitted to compel Duke Energy Ohio to interpret its requests, to tailor them to the allegations in the Complaint, and to respond.

²⁸ See Affidavit Attached hereto as Attachment A.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra was served on the following parties this 25 day of November, 2015 by regular U.S. Mail, overnight delivery, or electronic delivery.



Amy B. Spiller

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**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. |) | |

**AFFIDAVIT OF AMY B. SPILLER IN SUPPORT OF
DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE OFFICE OF THE
OHIO CONSUMERS' MOTION TO COMPEL DISCOVERY**

| | |
|--------------------|------|
| STATE OF OHIO |) |
| |) SS |
| COUNTY OF HAMILTON |) |


Comes now Affiant, Amy B. Spiller, after having been duly cautioned and sworn, and states as follows.

1. Affiant is the counsel of record for Duke Energy Ohio in Case No. 15-1588-GE-CSS, filed with the Public Utilities Commission of Ohio (Commission) on September 15, 2015.
2. On November 12, 2015, Affiant spoke with Terry Etter, assistant consumers' counsel, relative to the discovery tendered by the Office of the Ohio Consumers' Counsel (OCC) to her client and the responses thereto.
3. In the conversation, Affiant noted the lack of time parameters associated with the majority of the discovery requests, a copy of which is attached to the OCC's Motion to Compel filed subsequent to the conversation between counsel. Mr. Etter responded that he would not be revising the discovery and that Duke Energy Ohio could identify time periods.
4. Affiant further questioned Mr. Etter on the broad reference to "customer 'complaints'", as referenced in the discovery and how such undefined complaints were related to the OCC's allegations regarding a misinterpretation of certain Commission rules and orders.

Mr. Etter merely responded that there may be someone who complained. But Mr. Etter refused to agree to revisit the discovery and refine its scope.


5. Shortly after the conversation in which counsel for the OCC refused to revise its requests or otherwise attempt to demonstrate how its overly broad requests had any bearing on the Complaint, Mr. Etter caused to be filed a Motion to Compel.

FURTHER AFFIANT SAYETH NAUGHT.



Amy B. Spiller

Sworn to and subscribed before me, a notary public for the state of Ohio, on this the 25th day of November 2015.



Notary Public
My commission expires: July 8, 2017



E. MINNA ROLFES
Notary Public, State of Ohio
My Commission Expires
July 8, 2017

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in

Case No(s). 15-1588-GE-CSS

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra The Office of the Ohio Consumers' Counsel Motion to Compel Discovery electronically filed by Ms. E Minna Rolfes on behalf of Amy B. Spiller and Duke Energy Ohio, Inc.