

**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.)	

**REPLY TO DUKE’S MEMORANDUM CONTRA MOTION TO COMPEL
RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”) and Communities United for Action (collectively, “Consumer Parties”) filed this complaint to protect residential customers from Duke Energy Ohio, Inc.’s (“Duke”) unlawful and unreasonable disconnection practices. As allowed under discovery law and rules, shortly after the Complaint was filed OCC served discovery on Duke to obtain information regarding its disconnection practices. In its response, Duke objected to every one of OCC’s discovery requests and refused to provide substantive responses. After several unsuccessful attempts to get substantive responses from Duke, on November 12, 2015 OCC moved the Public Utilities Commission of Ohio (“PUCO”) for an Order compelling Duke to fully respond to OCC’s discovery.

On November 25, 2015, Duke filed a memorandum contra OCC's Motion to Compel. Duke's memorandum contra reiterates the arguments it made in previous documents filed in this case, particularly its motion for stay of discovery filed shortly after OCC propounded discovery on Duke. The core of Duke's position is that it is not required to respond to OCC's discovery while the motion to dismiss is pending.

Duke's position is baseless and misguided. If Duke's position is upheld, a respondent could stonewall discovery in a complaint case merely by filing a motion to dismiss and waiting for the PUCO to rule on the motion. This would frustrate Ohio law giving parties ample rights of discovery.¹ It would also nullify PUCO rules allowing parties to begin discovery immediately after a proceeding is commenced and urging parties to complete discovery as expeditiously as possible.² And it is contrary to the wide open scope of discovery under PUCO rules that permits parties to obtain discovery of any unprivileged matter that is relevant to the subject matter of the proceeding.³ The PUCO should grant OCC's Motion to Compel and require Duke to respond to OCC's discovery.

II. ARGUMENT

A. **Duke's overriding argument – that discovery should be stayed pending PUCO action on Duke's motion to dismiss – would thwart Ohio law and PUCO rules that provide for ample discovery rights beginning when a proceeding commences.**

Duke's overriding argument in its memorandum contra is that it does not have to respond to OCC's discovery until the PUCO acts on Duke's motion to dismiss.⁴ Indeed, this position was the primary cause of OCC filing the motion to compel; Duke has made

¹ R.C. 4903.082.

² Ohio Adm. Code 4901-1-17(A).

³ Ohio Adm. Code 4901-1-16(B).

⁴ Memorandum Contra at 2-4.

it clear that so long as the motion to dismiss is pending, it need not – and will not – respond to any discovery requests from OCC in this case. Duke is simply not answering OCC’s interrogatories while the motion to dismiss is pending. Duke’s position is contrary to Ohio law and PUCO rules of discovery.

Ohio law grants all parties ample rights of discovery in PUCO cases.⁵ The PUCO’s rules provide that “discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible.”⁶ Further, the purpose of the PUCO’s discovery rules “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.”⁷ Duke’s behavior in this proceeding thwarts the intent of the discovery process and renders the PUCO’s discovery rules meaningless.

Under Duke’s flawed rationale, a respondent in a complaint case could halt discovery simply by filing a motion to dismiss. The respondent could claim that it is under no obligation to respond to discovery requests until the PUCO acted on the motion to dismiss. This would stymie a complainant’s discovery rights under R.C. 4903.082 because, in nearly every case, the utility is the sole possessor of documents and other information essential to the complainant’s case. The PUCO’s rules would also be hindered because discovery would not proceed promptly and expeditiously, and the

⁵ R.C. 4903.082.

⁶ Ohio Adm. Code 4901-1-17(A).

⁷ Ohio Adm. Code 4901-1-16(B).

PUCO would be drawn into nearly every discovery dispute, such as this one. Complaint cases would be needlessly prolonged.

In support of its illogical position, Duke reiterated the arguments it made in response to the Consumer Parties' memorandum contra Duke's motion to stay discovery. Duke also incorporated by reference its motion to stay discovery and its reply to the Consumer Parties' memorandum contra.⁸ Duke offers no new arguments. It merely reiterates its previously filed arguments concerning its motion to stay discovery. Duke's arguments are unavailing like its arguments in its motion to stay discovery.⁹

The only PUCO case cited by Duke to support its theory was *Wilkes v. Ohio Edison*.¹⁰ Duke cited *Wilkes* for the proposition that the PUCO in the past has exercised discretion "in order to stay discovery pending the resolution of a dispositive motion."¹¹ But the facts in *Wilkes* are so removed from the facts of this case that *Wilkes* has no precedential value.

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.¹² 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.¹³ 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

⁸ Memorandum Contra at 3, n. 9.

⁹ See the Consumer Parties' Memorandum Contra Duke's Motion for Protective Order to Stay Discovery Pending Resolution of its Motion to Dismiss (October 23, 2015).

¹⁰ Case No. 09-682-EL-CSS.

¹¹ Memorandum Contra at 2-3.

¹² Case No. 09-682-EL-CSS, Entry (December 16, 2009) at 1.

¹³ Id.

lines.¹⁴ Further, Ohio Edison had sought a remedy by filing a complaint for declaratory and injunctive relief in the Mahoning County Court of Common Pleas.¹⁵ Importantly, the complainants in *Wilkes* did not file a memorandum contra Ohio Edison’s motion.¹⁶

Based on the pleadings in that case – and the absence of a memorandum contra Ohio Edison’s 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.”¹⁷

By contrast, in this case there is no court case pending to resolve the issues, OCC zealously opposes Duke’s motion for stay, and the stay of discovery is not in the interest of both parties. In fact, staying discovery is prejudicial to OCC. The facts of the two cases are inapposite, and therefore, Duke’s continued reliance on *Wilkes* is misplaced. Additionally, the other cases cited by Duke were based on court cases where the court controlled discovery. Those court cases are also not relevant to the case at bar.

Additionally, the PUCO explicitly has allowed discovery to begin immediately in complaint cases. In *Toliver*, the PUCO ruled that complainants may begin discovery once a complaint is filed: “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

¹⁴ Id.

¹⁵ Id.

¹⁶ Id. at 2.

¹⁷ Id. (Emphasis added).

instance, immediately upon the filing of the complaint....”¹⁸ Duke did not even attempt to distinguish this case from *Toliver*, and in fact would be unable to do so.

Toliver, and not the cases cited by Duke, should control in this case. The PUCO should reject Duke’s arguments and order Duke to respond to OCC’s discovery.

B. Duke’s arguments against the specific interrogatories show that Duke is unreasonably attempting to narrow the scope of discovery.

In its memorandum contra, Duke reiterated its objections to OCC’s interrogatories. With few exceptions, Duke claims that OCC’s interrogatories are irrelevant to the timeframe covered by the PUCO’s winter heating rules and Winter Reconnect Order.¹⁹ But, as OCC has noted, this case is about more than just Duke’s disconnection policies and procedures during the winter heating season.

The Consumer Parties’ Complaint has two aspects. One involves Duke’s repeated statements expressing a misapplication of the winter heating rules. The other relates to Duke’s extraordinarily high number and proportion of customers who are being disconnected for nonpayment. OCC’s discovery seeks information regarding Duke’s disconnection process and policies, which directly relates to issues in this case.

Duke’s unwillingness to offer any substantive response to OCC’s interrogatories demonstrates a disdain for the PUCO’s process. If Duke believes that some information sought by OCC is publicly available, Duke should identify where the information may be obtained. Also, contrary to standard practice in the utility bar, Duke objected to some interrogatories as not specifying a relevant timeframe, but did not offer to provide

¹⁸ *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.

¹⁹ See Memorandum Contra at 8-17.

information for timeframes it believes to be relevant. If its concerns were legitimate, this would have helped to narrow the discovery issues. Instead, Duke decided to not provide any information, and to only raise non-specific objections to OCC's discovery.

Duke's unlawful and unjustifiable attempt to narrow the scope of this proceeding precludes OCC from obtaining information it is entitled to receive under Ohio law and the PUCO's rules. The PUCO should grant OCC's Motion to Compel.

III. CONCLUSION

Duke's position that it need not respond to discovery unless and until its motion to stay has been acted upon by the PUCO is contrary to Ohio law and the PUCO's rules. If Duke is allowed to prevail, other respondents in utility cases – who control most of the documents and information needed by complainants – would be able to thwart the discovery process merely by filing a motion to dismiss and a motion to stay discovery. The PUCO should protect the discovery process and protect the rights of complainants by rejecting such legal maneuvering. OCC respectfully requests that the PUCO reject Duke's arguments and grant OCC's Motion to Compel.

Respectfully submitted,

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Terry L. Etter
Terry L. Etter (0067445), Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-7964 (Etter direct)
Terry.etter@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was provided to the persons listed below electronically this 2nd day of December 2015.

/s/ Terry L. Etter _____
Terry L. Etter
Assistant Consumers' Counsel

SERVICE LIST

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

Amy B. Spiller
Elizabeth H. Watts
Duke Energy Business Services
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
Amy.Spiller@duke-energy.com
Elizabeth.watts@duke-energy.com

Attorney Examiner:

Bryce.McKenney@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/2/2015 5:01:45 PM

in

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

Summary: Reply Reply to Duke's Memorandum Contra Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel