

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
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.

ENTRY

Entered in the Journal on October 11, 2017

I. SUMMARY

{¶ 1} The Commission finds that the complaint filed September 15, 2015, in this proceeding should be dismissed for failure to state reasonable grounds for complaint as required by R.C. 4905.26. To the extent that the complaint is based on claims from *In re the Complaint of Jeffrey Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS, those claims have been litigated to conclusion, subject to rehearing, with the full participation of the Ohio Consumers' Counsel. The Commission further notes that the complainants in this proceeding, and any other interested stakeholders, will have a full and fair opportunity to participate in the Commission's investigative audit case regarding Duke Energy Ohio, Inc.'s disconnection practices and policies. *In re the Commission's Investigation of the Disconnection Practices and Policies of Duke Energy Ohio, Inc.*, Case No. 17-2089-GE-COI.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke) is an electric light company and a natural gas company as defined by R.C. 4905.03 and a public utility as defined in R.C. 4905.02. As such, Duke is subject to this Commission's jurisdiction.

{¶ 3} Pursuant to R.C. 4905.26, the Commission has authority to consider a written complaint against a public utility by any person or corporation regarding any rate, service, regulation, or practice affecting or relating to any service furnished by that public utility that is unreasonable, unjust, insufficient, or unjustly discriminatory or preferential.

{¶ 4} Before addressing the matter at hand, two previous cases bear mentioning. Those cases are *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 (*Rider Case*) and *In the Matter of the Complaint of Jeffrey Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS (*Pitzer Case*). Each is relevant to the present controversy.

{¶ 5} Duke initiated the *Rider Case* on June 13, 2014, by filing an application to adjust its Distribution Reliability - Infrastructure Modernization Rider (Rider DR-IM) and its Advanced Utility Rider (Rider AU). The Ohio Consumers' Counsel (OCC) and others moved for and were granted intervention. In the course of the *Rider Case*, OCC submitted direct witness testimony that included statistics regarding Duke's disconnections for nonpayment and the suggestion that disconnections were increasing, in part, due to allegedly improper disconnection practices. Upon Duke's motion to strike and associated briefing, the attorney examiner struck that portion of the prefiled testimony related "to customer disconnections and Duke's credit and collection policies" as irrelevant to that proceeding. *Rider Case*, Entry (Jan. 22, 2015) at 3. The attorney examiner further commented, "Should OCC wish to pursue its concerns regarding those issues, [it] should file in an appropriate docket." *Id.*

{¶ 6} Shortly thereafter, the Commission was called upon to consider a complaint directly related to Duke's disconnection practices. On February 11, 2015, a personal representative of Dorothy and Estill Easterling (the Easterlings) filed a complaint asserting that, in 2011, Duke improperly disconnected the Easterlings' gas and electric services due to nonpayment, which resulted in the Easterlings' inability to heat their home and ensuing death from hypothermia. *Pitzer Case*, 15-298-GE-CSS. On May 14, 2015, OCC moved to intervene. On July 10, 2015, over Duke's objection, the attorney examiner granted OCC's motion. *Pitzer Case*, Entry (July 10, 2015).

{¶ 7} In an amended complaint filed November 12, 2015, the complainant in the *Pitzer Case* alleged, inter alia, that Duke disconnected the Easterlings' electric service in violation of the Commission's special winter heating disconnection procedures set forth in Ohio Adm.Code 4901:1-18-06(B). The amended pleading further contended that Duke failed to comply with a number of the Commission's directives for the 2011-2012 winter heating season as set forth in *In re Commission's Consideration of Solutions Concerning the Disconnection of Gas and Electric Service in Winter Emergencies for 2011-2012 Winter Heating Season*, Case No. 11-4913-GE-UNC (2011 Winter Reconnect Order).

{¶ 8} Although it did not file its own complaint, OCC's involvement in the *Pitzer Case* was robust and included full participation in discovery, prehearing conferences, and the adjudicatory hearing. Ultimately, the Commission found that the complainant in the *Pitzer Case* failed to show that Duke violated the 2011 *Winter Reconnect Order*. The Commission did conclude, however, that the complainant sustained his burden of proof regarding Ohio Adm.Code 4901:1-18-06(B) (the Winter Rules). The Commission found that Duke's disconnection of electric service on November 4, 2011, was premature under the Winter Rules. *Pitzer Case*, Opinion and Order (Aug. 30, 2017) at ¶ 58-59. Moreover, given the record in the *Pitzer Case* and upon noting that Duke's disconnection practices have remained the same since 2011, the Commission found that Duke's disconnection

practices and policies should be subjected to formal review. *Id.* at ¶ 83. Specifically, we stated:

* * * The Commission, therefore, intends, by subsequent entry, to issue a request for proposals in order to select an auditor to undertake an investigation of Duke's current disconnection practices and policies for both its gas and electric service, which will include, but not be limited to, issues raised in this case, such as the separation-of-service and minimum payment requirements. * * *

Pitzer Case, Opinion and Order (Aug. 30, 2017) at ¶ 83.¹

{¶ 9} On October 3, 2017, the Commission opened a docket to initiate the process for that investigative review. *In re the Commission's Investigation of the Disconnection Practices and Policies of Duke Energy Ohio, Inc.*, Case No. 17-2089-GE-COI.

{¶ 10} Returning to the instant matter, on September 15, 2015, OCC and Communities United for Action (together, Complainants) filed a complaint against Duke. Beginning with a recitation of statutory authority and a presentation of Duke's disconnection statistics from reporting years 2009 through 2015, the Complainants set forth their grievances against Duke in three counts. First, Complainants allege that Duke failed to comply with the annual special winter reconnection orders—such as the 2011 *Winter Reconnect Order*—issued by the Commission. Pointing generally to the statistics and specifically to the *Pitzer Case*, Complainants assert that it appears Duke is willfully failing to properly interpret and apply applicable Winter Reconnect Orders. Thus, Complainants conclude that Duke is providing unreasonable and inadequate service in violation of R.C. 4905.22. Second, the Complainants contend that Duke is improperly applying the Commission's Winter Rules found at Ohio Adm.Code 4901:1-18-06(B)

¹ The August 30, 2017 Opinion and Order is currently subject to applications for rehearing.

concerning disconnection of utility service to residential consumers. Again, backed by statistics and allegations from the *Pitzer Case*, the Complainants assert that Duke's apparently improper application of the Winter Rules also amounts to unreasonable and inadequate service in violation of R.C. 4905.22, as well as R.C. 4933.121, R.C. 4933.122, and Ohio Adm.Code 4901:1-18-06. Finally, Complainants submit that Duke's comparatively higher number and proportion of customers disconnected for nonpayment, alone, is evidence of a disconnection practice that further amounts to unreasonable and inadequate service in violation of R.C. 4905.22.

{¶ 11} Also on September 15, 2015, Complainants filed a motion seeking to protect Duke's consumers against wrongful disconnection during the 2015-2016 winter heating season. Duke filed a memorandum contra the motion on September 29, 2015, to which Complainants filed a reply on October 6, 2015.

{¶ 12} On October 5, 2015, Duke filed an answer containing general denials and asserting various affirmative defenses. Those affirmative defenses included failure to set forth reasonable grounds for a complaint as required by R.C. 4905.26.

{¶ 13} Subsequently, on October 8, 2015, Duke filed two separate motions: a motion to dismiss the complaint and a motion for a protective order, wherein it requests that the Commission stay discovery pending resolution of its motion to dismiss.² It is the motion to dismiss that we focus on in this Entry.³

III. THE MOTION TO DISMISS

{¶ 14} Duke raises two general arguments for dismissal of the complaint. First, Duke states that the complaint must be dismissed because it does not concern a justiciable

² Although we do not discuss Duke's motion for a protective order in this Entry, the Commission notes that there is no basis in our rules for a party to stymie discovery while a motion to dismiss is under consideration.

³ On November 12, 2015, after briefing of Duke's motion to dismiss and for a protective order concluded, OCC also filed a motion to compel discovery responses. It, too, will not be addressed in this Entry.

controversy but, instead, seeks an advisory opinion from the Commission. Duke contends that the only facts set forth in the complaint are bare statistics reporting the number of disconnections for nonpayment and references to the circumstances present in the single instance of disconnection at issue in the *Pitzer Case*. This is not enough, Duke argues, to create a real, substantial controversy requiring decision by the Commission. Here, Duke stresses that Complainants cannot use the factual circumstances of a single incident that is the subject of an independent complaint case before the Commission, in which OCC is an active participant, as the basis for a second, separate complaint case. Duke additionally points out that the disconnection statistics alone are, at most, evidence of a possible unsubstantiated concern, not an actual, justiciable controversy. Second, Duke asserts that the pleading fails to state reasonable grounds for a complaint under R.C. 4905.26. In this, Duke argues that, absent allusions to the *Pitzer Case*, Complainants fail to set forth the specific facts or instances of inadequate or unreasonable service necessary to proceed before the Commission.

{¶ 15} On October 23, 2015, Complainants filed a memorandum contra Duke's motion to dismiss. Complainants argue that the Commission must consider all material allegations of their complaint as true when reviewing a motion to dismiss and, under such a review, dismissal is inappropriate. Complainants observe that, using Duke's own words from pleadings and other filings in the *Pitzer Case*, the complaint specifically alleges that Duke misapplies the Commission's Winter Reconnect Orders and Winter Rules. They contend that these allegations, if true, state a claim under R.C. 4905.26. Additionally, Complainants argue that they need not allege actual harm; instead, they assert that R.C. 4905.26 allows the filing of a complaint to prevent future injury. Further, R.C. 4905.26 requires only "reasonable grounds," not specific facts, and Complainants submit that the complaint is supported by several "reasonable grounds." First, they cite to the Commission's stated intent to "take those steps we deem appropriate to protect the customers served by" a utility not following the procedures laid out in the Winter Reconnect Order. *In re the Commission's Consideration of Solutions Concerning the*

Disconnection of Gas and Electric Service in Winter Emergencies for the 2015-2016 Winter Heating Season, Case No. 15-1460-GE-UNC (2015 Winter Reconnect Order), Finding and Order (Sept. 2, 2015) at 9. Second, Complainants state that they are following the Commission's advice from the *Rider Case*; they are raising the issue of Duke's unlawful and unreasonable disconnection practices in an appropriate docket. Third, Duke's high rate of disconnections for nonpayment constitutes unique circumstances that provide reasonable grounds for a complaint. Furthermore, Complainants contend that the cases cited by Duke in support of its argument that the complaint lacks reasonable grounds are distinguishable.

{¶ 16} On October 30, 2015, Duke filed its reply to Complainants' memorandum contra. Duke agrees that all material allegations of a complaint must be considered true when analyzing a motion to dismiss, but states that those allegations must be reasonable and sufficient to support a finding that a practice is unreasonable or unlawful. Duke asserts that the instant complaint misses the mark because, other than those from the *Pitzer Case*—which are properly litigated in that proceeding only—the material allegations are hypothetical, incorrect, or simply insufficient to support a claim. Further responding, Duke contends that Complainants misconstrue relevant case law in an effort to advance their case. Finally, Duke reiterates that Complainants have simply failed to show reasonable grounds for the complaint.

IV. DISCUSSION

{¶ 17} The Commission's jurisdiction to hear complaints regarding the public utilities we regulate is defined by R.C. 4905.26, which states:

Upon complaint in writing against any public utility by any person
* * * that any * * * service * * * is in any respect unjust [or]
unreasonable, * * * or that any * * * practice affecting or relating to
any service furnished by the public utility, or in connection with

such service, is, or will be, in any respect unreasonable, unjust, [or] insufficient, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. * * *

The statutory language makes clear that, in considering a complaint, the Commission must determine whether reasonable grounds to justify a hearing have been stated. "Broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony." *In re Complaint of the Office of the Consumers' Counsel v. The Dayton Power & Light Company*, Case No. 88-1085-EL-CSS, Entry (Sept. 27, 1988). Instead, "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." *In re Complaint of the Office of Ohio Consumers' Counsel v. West Ohio Gas Co.*, Case No. 88-1743-GA-CSS (*West Ohio Gas*), Entry (Jan. 31, 1989). To find otherwise and "permit a complaint to proceed to hearing when complainant has failed to allege one or more elements necessary to a finding of unreasonableness or unlawfulness would improperly alter both the scope and burden of proof." *Id.*

{¶ 18} The Commission finds that the complaint in this proceeding fails to set forth reasonable grounds for hearing. Factually, Complainants' pleading is based on (1) general statistics showing that Duke has comparatively higher rates of customer disconnections for nonpayment than Ohio's five other electric distribution utilities and (2) allegations specific to, and even taken from, the *Pitzer Case*. From these general statistics and allegations, Complainants hope the Commission finds reasonable grounds for a finding that Duke has unreasonably, unlawfully, and willfully failed to comply with the Commission's Winter Reconnect Orders and Winter Rules for essentially four reasons: the Commission said it would, the Commission said OCC should, it may have happened once, and one can infer from statistics that it will happen again. None constitute reasonable grounds for hearing this complaint.

{¶ 19} The Complainants' reliance on a single sentence of the Commission's 2015 *Winter Reconnect Order* is misplaced. Therein, we stated, "If the Commission determines that a utility company is not following these procedures, we will take those steps we deem appropriate to protect the customers served by that utility." 2015 *Winter Reconnect Order, Finding and Order* (Sept. 2, 2015) at 9. This statement was not an invitation for complaints seeking problems to solve; it is a statement of our enforcement powers. Moreover, in itself, the statement does not create reasonable grounds for complaint. For the same reason, the attorney examiner's instruction to OCC in the *Rider Case* "to pursue its concerns regarding [Duke's customer disconnections and credit and collection policies] * * * in an appropriate docket" is not a reasonable ground for hearing this complaint. *Rider Case*, Entry (Jan. 22, 2015) at 3.

{¶ 20} The only specific, material allegations in the complaint to support a finding that Duke is misapplying the Winter Reconnect Orders and the Winter Rules are taken from a single disconnection of service: the *Pitzer Case*. There are no less than four references to the *Pitzer Case* in the complaint. In fact, Complainants specify that their belief that Duke is not properly interpreting and applying the Commission's Winter Reconnect Order is "[b]ased on pleadings in the *Pitzer Complaint*." *Complaint*, ¶ 28-30. The same is true for Complainants' allegations regarding Duke's application of the Winter Rules in Ohio Adm.Code 4901:1-18-06(B): each of the allegations is supported by a reference to arguments Duke raised in the *Pitzer Case*. *Complaint*, ¶ 42-44. The proper place to litigate the material allegations specific to the Easterlings' disconnection of service for nonpayment is in the *Pitzer Case*, not in a separate, parallel proceeding. Indeed, those circumstances were thoroughly litigated in the *Pitzer Case* from discovery through hearing and the issuance of an Opinion and Order. It is improper to give OCC a chance to re-litigate the same facts here.

{¶ 21} Removing the specific allegations of the *Pitzer Case* from the complaint leaves only the statistics regarding Duke's disconnection rates. The statistics, however,

are what they are: a compilation of the number of Duke's customers, the number of those customers whose service was disconnected for nonpayment during the course of a year, and a calculation of what percentage of Duke's total customers that subgroup represents. The numbers do not say in which season of the year the disconnections occurred, nor do they tell of the circumstances under which the disconnections were made, other than for nonpayment. Simply put, the numbers alone, even if true, cannot support a finding of the reasonableness or unreasonableness of the practice or policy used to complete the disconnection. These circumstances are analogous to those presented by OCC in the *West Ohio Gas* case: finding that the mere allegation that disconnecting more customers than other electric distribution utilities, alone, constitutes reasonable grounds for a complaint would improperly shift the burden of proof to the respondent company to prove that its disconnections were lawful when it is plainly the Complainants' obligation to show that they were unreasonable. *West Ohio Gas*, Entry (Jan. 31, 1989) at 7.

V. CONCLUSION

{¶ 22} In short, the Commission finds that Complainants' pleading fails to set forth reasonable grounds for complaint. To the extent that the complaint is based on claims from the *Pitzer Case*, those claims have been litigated to conclusion, subject to rehearing.⁴ And, to the extent that it is based on Complainants' general concerns regarding Duke's disconnection practices as expressed in statistical data, this complaint is not the appropriate instrument. Rather, the Commission invites Complainants and any other interested stakeholders who have such concerns to participate in the Commission's investigative audit of Duke's disconnection practices and policies.⁵ Neither instance, however, sets forth reasonable grounds for this complaint as required by R.C. 4905.26. Accordingly, Complainants' complaint should be dismissed.

⁴ *Pitzer Case*, 15-298-GE-CSS, Opinion and Order (Aug. 30, 2017).

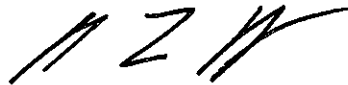
⁵ *In re the Commission's Investigation of the Disconnection Practices and Policies of Duke Energy Ohio, Inc.*, Case No. 17-2089-GE-COI.

{¶ 23} It is, therefore,

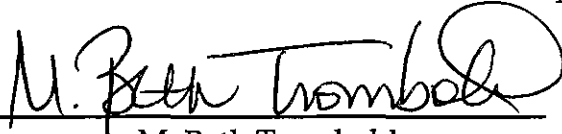
{¶ 24} ORDERED, That Complainants' complaint against Duke filed September 15, 2015, be dismissed. It is, further,

{¶ 25} ORDERED, That a copy of this Entry be served upon all parties of record.

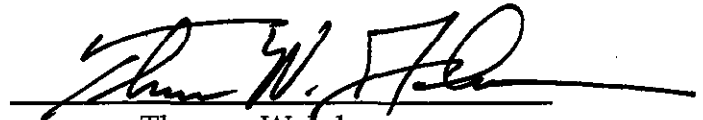
THE PUBLIC UTILITIES COMMISSION OF OHIO



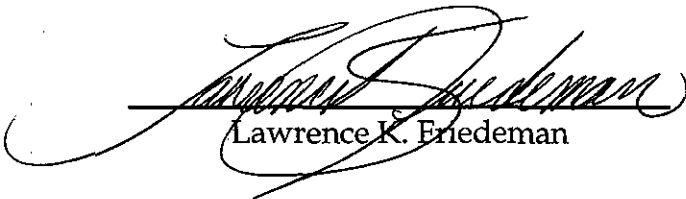
Asim Z. Haque, Chairman



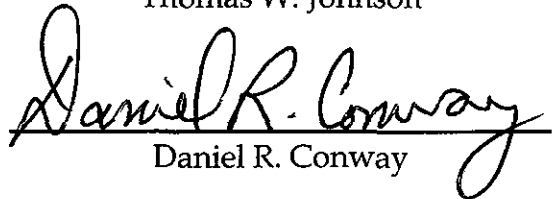
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman



Daniel R. Conway

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Barcy F. McNeal
Secretary