

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
COMMUNITIES UNITED FOR ACTION**

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The Office of the Ohio Consumers' Counsel ("OCC") and Communities United for Action ("CUFA") (collectively, "Complainants") file this application for rehearing¹ to protect consumers against wrongful disconnection of utility service to residential consumers. On September 15, 2015, Complainants filed a Complaint against Duke Energy Ohio, Inc. ("Duke"). The Complaint alleges that Duke violated the Public Utilities Commission of Ohio's ("PUCO") regulations concerning the disconnection of utility service to residential consumers for nonpayment. The Complaint also alleges that Duke failed to provide adequate and reasonable public utility service under Ohio law and PUCO rules because of its high rate of disconnecting customers. The Complaint notes that two consumers had died from hypothermia after Duke unlawfully disconnected their electric service in November 2011. The Complaint further alleges

¹This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

that Duke violated the PUCO's previous winter reconnection orders. Given that the Complaint likely would not be resolved before the start of the 2015-2016 winter heating season, Complainants also filed a motion to protect Duke's consumers against wrongful disconnection during the 2015-2016 winter heating season.

Over two years later, on October 11, 2017, the PUCO dismissed the 2015 Complaint against Duke regarding its unlawful and unreasonable disconnection practices.² The Entry dismissing the Complaint is unlawful and unreasonable in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO violated controlling precedent by finding that the parties did not state reasonable grounds for a complaint.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by dismissing the Complaint on the grounds that statistics alone cannot sustain a complaint against a motion to dismiss before discovery is conducted and by failing to follow controlling precedent.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred by dismissing the Complaint without ruling on OCC's Motion to Compel Discovery.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by finding that Complainants would be able to have their concerns vindicated through participation in the PUCO-ordered Investigative Audit of Duke's Disconnection Policies and Procedures.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its October 11, 2017 Entry as requested herein by Complainants.

² Entry (October 11, 2017).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

OCC has been concerned about the impact of Duke’s disconnection policies and practices on Ohioans. OCC sought PUCO review of Duke’s disconnection policies and practices in another case three years ago.³ There, the PUCO denied OCC the opportunity to address the issue and advised OCC to raise the matter “in an appropriate docket.”⁴ In response to the PUCO’s directive, OCC joined CUFA in filing a Complaint against Duke on September 15, 2015.

Complainants alleged that Duke (1) failed to comply with the PUCO’s Special Winter Reconnection Orders concerning disconnections, reconnections, and maintaining

³ See *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, Direct Testimony of James D. Williams (December 31, 2014).

⁴ Case No. 14-1051-GE-RDR, Entry (January 22, 2015) at 3.

service to residential customers during the Ohio winter months; (2) failed to comply with the PUCO's Winter Rule concerning disconnection of utility service to residential customers, and; (3) failed to provide adequate and reasonable utility service.⁵

On October 8, 2015, Duke filed a Motion to Dismiss the Complaint.⁶ That same day, Duke also filed a Motion for a Protective Order to Stay Discovery while its Motion to Dismiss was pending.⁷ Complainants opposed each of Duke's October 8 motions.⁸ Then, on November 12, 2015, OCC filed a Motion to Compel Responses to Discovery.⁹ The case then lay dormant for nearly two years as the parties awaited PUCO rulings on these motions. The PUCO did not schedule a settlement conference as required by Ohio Adm. Code 4901-9-01(G).

The PUCO never ruled on that motion or directed Duke to comply with its discovery obligations. Instead, the PUCO simply dismissed the Complaint altogether, nearly two years after OCC asked it to compel discovery.¹⁰ In doing so, the PUCO set a near-impossible standard for any party that wishes to challenge a utility's policies and practices that unreasonably and unlawfully harm its consumers. Under the terms laid out in the PUCO's dismissal of the Complaint, all complainants must be able to support their claims regarding a utility's policies and practices in granular detail—even general statistics will not suffice—and they must do so without being afforded the ability to conduct even a modicum of discovery.

⁵ *Id.*

⁶ Motion to Dismiss at 1 (October 8, 2015) (“Motion to Dismiss”).

⁷ Motion for a Protective Order at 1 (October 8, 2015) (“Motion for Protective Order”).

⁸ Memorandum Contra Duke's Motion to Dismiss at 1 (October 23, 2015); Memorandum Contra Duke's Motion for a Protective Order at 1 (October 23, 2015).

⁹ Motion to Compel Responses to Discovery at 1 (November 12, 2015) (“Motion to Compel”).

¹⁰ *See* Entry at ¶1.

Complainants now respectfully request rehearing of the PUCO's unreasonable and unlawful decision to grant Duke's Motion to Dismiss without discovery and without being heard on the Complaint. The arguments in support of this application for rehearing are set forth below.

II. STANDARD OF REVIEW

"[A]ny party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding" within 30 days of the issuance of a PUCO order.¹¹ OCC and CUFA are the Complainants in this case with standing to request rehearing and this request falls within the 30-day timeline for parties to apply for rehearing.

III. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The PUCO violated controlling precedent by finding that the Complaint did not state reasonable grounds.

Ohio law requires that complaints against public utilities state "reasonable grounds for complaint."¹² The PUCO found that this Complaint did not set forth reasonable grounds for a hearing.¹³ In dismissing the Complaint on that basis, the PUCO acted contrary to the Supreme Court of Ohio's ("Court") precedent that dictates a less demanding standard than the one the PUCO applied here.

The Court has held that the "unique circumstance" of one utility was sufficient to "provide[] 'reasonable grounds' for the commission to proceed to hearing."¹⁴ There, the

¹¹ R.C. 4903.10.

¹² R.C. 4905.26.

¹³ Entry at ¶18.

¹⁴ *Ohio Utilities Company v. The Public Utilities Commission of Ohio*, 58 Ohio St. 2d 153, 159 (1979).

Court was addressing an investigation initiated by Staff of the PUCO, but the Court stated that the same “reasonable grounds” analysis “should apply whether the commission begins such a proceeding on its own initiative, *or on the complaint of another party.*”¹⁵

Here, evidence reveals unique circumstances surrounding Duke’s disconnection policies and practices that constitute reasonable grounds to support this Complaint. The Complaint drew the PUCO’s attention to the fact that Duke was disconnecting residential customers at a rate that was between 42 percent and 490 percent higher than other Ohio utilities.¹⁶ Moreover, the Complaint noted that Duke had recently shown a dramatic increase in the number of residential disconnections it was conducting.¹⁷ And these unusually high numbers of residential customers being disconnected by Duke were not an anomaly; the Complaint revealed that Duke had consistently disconnected significantly more residential customers than had other Ohio utilities.¹⁸

Given the unique circumstances surrounding Duke’s disconnection policies and practices, the Complainants stated sufficient reasonable grounds to proceed to discovery and, eventually, a hearing. Therefore, the PUCO should grant Complainants’ rehearing request.

¹⁵ *Id.* (emphasis added).

¹⁶ Complaint at 6, Table 1.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 8, Table 3.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by dismissing the Complaint on the grounds that statistics alone cannot sustain a complaint against a motion to dismiss before discovery is conducted and by failing to follow controlling precedent.

The PUCO contradicted its own controlling precedent when it said that “general statistics” were insufficient to sustain a complaint at the motion to dismiss stage.¹⁹ The PUCO cited *In re Complaint of the Office of the Consumers’ Counsel v. West Ohio Gas Co.* (“*West Ohio Gas I*”)²⁰ for its statement of the requirements of the “reasonable grounds test.”²¹ It failed, however, to consider the precedent of a later case concerning the very same issues that was filed after the PUCO initially dismissed the complaint in *West Ohio Gas I*.

Shortly after it dismissed *West Ohio Gas I*, the PUCO took up *In the Matter of the Complaint of the Office of the Consumers’ Counsel v. West Ohio Gas Co.* (“*West Ohio Gas II*”).²² This case was OCC’s attempt to remedy the issues that had doomed its complaint in *West Ohio Gas I* in the eyes of the PUCO. Much like in the instant case, the PUCO was concerned about the sufficiency of the data offered by OCC and the relation of that data to the factual and legal issues at the heart of the complaint.²³ However, the PUCO still declined to dismiss the complaint because it believed that “OCC should be given the opportunity to present to the Commission . . . other data that would begin to support a finding” that the complaint was valid.²⁴

¹⁹ See Entry at ¶18.

²⁰ Case No. 88-1743-GA-CSS (*West Ohio Gas I*), Entry (January 31, 1989).

²¹ Entry at ¶18.

²² Case No. 89-275-GA-CSS (*West Ohio Gas II*), Entry (April 18, 1989), 1989 Ohio PUC LEXIS 325.

²³ *Id.*, 1989 Ohio PUC LEXIS 325, [*9].

²⁴ *Id.*

The PUCO then went on to explain just how OCC should go about presenting that data when it stated: “In order for OCC to respond to the Commission’s concerns, OCC may need to engage more fully in discovery.”²⁵ The PUCO specifically noted that, under Ohio law, “discovery is appropriate at the outset of a proceeding.”²⁶

Here, Complainants were denied the opportunity to engage in any discovery, even though, like OCC in *West Ohio Gas II*, they could have, through discovery, substantiated a complaint that the PUCO found to be lacking. As discussed above, Complainants maintain that the Complaint is sufficient to stand on its own merits. But had the PUCO compelled Duke to respond appropriately to OCC’s discovery, Complainants would have been able to prove through specific allegations what the statistics surrounding Duke’s disconnection policies and practices suggest generally. Accordingly, Complainants would then have been able to satisfy the more demanding standard for complaints that the PUCO employed in this matter. When the PUCO dismissed this Complaint without allowing any discovery, it violated its own precedent that complainants should be given the opportunity to substantiate even complaints that, as filed, might not be able to withstand a motion to dismiss at the outset of filing the complaint. Therefore, the PUCO should grant Complainants’ rehearing request.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred by dismissing the Complaint without ruling on OCC’s Motion to Compel Discovery.

R.C. 4903.082 provides that all parties shall be granted ample rights of discovery, which may include deposing witnesses under R.C. 4903.06. Additionally, the PUCO’s rules “encourage[] the prompt and expeditious use of prehearing discovery in order to

²⁵ *Id.*, 1989 Ohio PUC LEXIS 325, [*10].

²⁶ *Id.*

facilitate thorough and adequate preparation for participation in commission proceedings.”²⁷ Complainant OCC attempted to use the discovery process just as the rules intended, i.e., to prepare to substantiate the claims against Duke—which general statistics already suggested were valid—in a hearing before the PUCO. When Duke resisted lawful attempts to procure discovery, OCC filed a Motion to Compel Discovery with the PUCO.²⁸ That Motion was pending for nearly two years before the PUCO dismissed the Complaint, without addressing the Motion to Compel.

The PUCO acknowledged in its Entry dismissing the Complaint that Duke’s discovery avoidance tactics did not comport with parties’ obligations before the PUCO. In a footnote, the PUCO stated: “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.”²⁹ By failing to address OCC’s Motion to Compel, the PUCO effectively permitted Duke to do just that.³⁰

This decision to ignore Duke’s blatant disregard for its discovery obligations carries with it disastrous precedential implications. The PUCO has essentially blessed similar future tactics by Duke and other utilities. Utilities can delay—if not avoid—their discovery obligations merely by contending that the complaint lacks merit. Although the PUCO somewhat chastised Duke for improperly stymieing discovery, it exacted no

²⁷ Ohio Adm. Code 4901-1-16; *see also* Ohio Adm. Code 4901-1-17 through 4901-1-24.

²⁸ *See* Motion to Compel.

²⁹ Entry at 5, n.2.

³⁰ *Id. See also id.*, n.3.

consequences upon Duke for doing so. So, in the end, Duke saw no repercussions from denying Complainants the discovery rights to which they are entitled.

Aside from the broader precedential concerns, the PUCO's failure to address the Motion to Compel had negative implications for this case specifically. The PUCO's Entry dismissing the Complaint raised concerns about the sufficiency of the evidence underlying the Complaint. However, had the PUCO properly granted the Motion to Compel, it would have never needed an Entry addressing the Motion to Dismiss.

If the PUCO had granted the Motion to Compel, one of two things would have happened: Complainants either would have amended the Complaint to reflect the specific facts they learned in discovery—thus alleviating the PUCO's concerns about the specificity of the Complaint—or, they would have learned that the facts are not as the general statistics suggest and dismissed the Complaint on their own volition. Either way, a full discovery process would have brought additional actual facts of Duke's disconnection policies and practices to light and allowed the case to proceed accordingly. Instead, the PUCO opted to terminate the case without Complainants ever conducting the discovery they are entitled to under Ohio law. Consistent with Ohio law and its precedent, the PUCO should grant rehearing to allow discovery to proceed in order for Complainants to properly prosecute the Complaint.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by finding that Complainants would be able to have their concerns vindicated through participation in the PUCO-ordered Investigative Audit of Duke's Disconnection Policies and Procedures.

In the Entry dismissing the Complaint, the PUCO invited "Complainants and any other interested stakeholders who have . . . concerns to participate in the Commission's

investigative audit of Duke’s disconnection policies and practices.”³¹ The PUCO found that because interested parties have the ability to participate in this audit, “this complaint is not the appropriate instrument.”³² The PUCO-ordered audit, however, does not provide for the possibility of the same relief that this Complaint seeks.

In the request for relief, Complainants ask the PUCO to assess the maximum civil forfeitures permitted by law and the PUCO’s rules as specified in Ohio Adm. Code 4901:1-10-30. The Complainants also sought a finding that Duke violated R.C. 4905.22 and R.C. 4933.121(A), which would allow Duke’s customers to seek treble damages in a civil court.³³ Although the PUCO’s Request for Proposal in that audit asks the auditor to review R.C. 4933.121, it does not ask for a review of R.C. 4905.22.³⁴ Moreover, the audit is prospective-looking, with a purpose to “audit and evaluate Duke’s gas and electric disconnection practices, and to recommend any steps that the Company should take to improve its performance in this area.”³⁵ OCC intervened in that PUCO investigation in order to protect the interests of residential customers,³⁶ as it did by filing this Complaint. That intervention, however, might not allow OCC—or any other party—to obtain a judgment from the PUCO against Duke that would allow either civil forfeitures or a suit for treble damages in civil court.

³¹ Entry at ¶22.

³² *Id.*

³³ Complaint at 18.

³⁴ *See In the Matter of the Commission’s Investigation of the Disconnection Practices and Policies of Duke Energy Ohio, Inc.*, Case No. 17-2089-GE-COI (PUCO Audit of Duke), Request for Proposal at 3 (October 11, 2017) (Audit Request for Proposal).

³⁵ *Id.* at 2.

³⁶ *See* PUCO Audit of Duke, Motion to Intervene by the Office of the Ohio Consumers’ Counsel (October 24, 2017).

Additionally, the Request for Proposal, which was issued the same day as the Entry Dismissing this Complaint, lists the docket numbers of PUCO matters that the auditor is to consider in reviewing Duke’s disconnection policies and practices.³⁷ The PUCO does not include the matters involved with this Complaint among those listed. The omission of the allegations in this case from the matters the auditor will review belies the contention that this audit will allow Complainants in this case to vindicate their concerns.

OCC welcomes the PUCO’s willingness to put the disconnection policies and practices of Duke—or any other utility—under a microscope to ensure that they comply with Ohio law. OCC does, however, urge the PUCO to reconsider its determination that a PUCO-ordered audit is an adequate substitute for complaints against utilities. R.C. 4905.26 plainly allows for complaints “against any public utility . . . relating to any service furnished by the public utility....” The fact that the PUCO separately chooses to conduct an audit to protect against future inadequate service should not serve as a barrier to complaints that address past inadequacies and rule and statutory violations just because the audit and the complaint concern the same general subject matter. Therefore, the PUCO should grant rehearing.

IV. CONCLUSION

The PUCO erred when it dismissed this Complaint for failure to state reasonable grounds and when it failed to rule on Complainants’ Motion to Compel Discovery. The precedent of both the PUCO and the Court dictate that the Complaint *did* state reasonable grounds, which entitles the parties to proceed to discovery and an eventual hearing. The

³⁷ Audit Request for Proposal at 3-4.

PUCO should grant hearing to allow Complainants to proceed with the Complaint and protect consumers from unlawful disconnection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Application for Rehearing was served upon the following parties via electronic mail on November 13, 2017.

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This foregoing document was electronically filed with the Public Utilities

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11/13/2017 4:38:41 PM

in

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

Summary: App for Rehearing Application for Rehearing 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.