

**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             | ) | Case No. 15-1588-GE-CSS |
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| Complainants,                             | ) |                         |
|   | ) |                         |
| v.  | ) |                         |
|   | ) |                         |
| Duke Energy Ohio, Inc.                    | ) |                         |
|   | ) |                         |
| Respondent.                               | ) |                         |

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**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA  
TO THE APPLICATION FOR REHEARING FILED BY THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL AND COMMUNITIES UNITED FOR ACTION**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) should deny in its entirety the Application for Rehearing (Application) filed by The Office of the Ohio Consumers' Counsel (OCC) and Communities United for Action (CUFA)(collectively Complainants). The Commission properly dismissed Complainants' Complaint because it fails to set forth reasonable grounds for complaint as required by R.C. 4905.26. The issues identified in Complainants' Application lack merit and do not justify allowing a legally flawed Complaint containing specious and conclusory allegations to go forward against Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company). For these reasons, and as discussed more fully herein, the Commission should deny the Application for Rehearing.

## **II. DISCUSSION**

### **A. Complainants Erroneously Interpret the Complaint Process Under Commission Regulation and Ohio Law.**

In generally advancing their Application, Complainants criticize the Commission for its appropriate management of its docket and, in doing so, contend that they should have been permitted to conduct discovery on a baseless complaint. This, however, is not the law in Ohio and accepting the propositions advanced by Complainants would only invite an avalanche of unsubstantiated allegations, convert any legitimate discovery exchange into an impermissible fishing expedition, and undermine the complaint processes contemplated under Ohio law. As discussed more fully herein, Complainants' Assignments of Error do not – and cannot – demonstrate any mistake in the Commission's decision to dismiss a groundless complaint and their Application must be denied.

### **B. The Commission Abided by Precedent and Properly Dismissed the Complaint for Failing to Set Forth Reasonable Grounds for Complaint.**

Although Complainants casually aver that the Commission “violated controlling precedent by finding that the Complaint did not state reasonable grounds,”<sup>1</sup> they do not cite to any controlling precedent that actually supports their argument. The omission is not surprising, because no such authority exists. Ohio law is quite specific. Before a complaint may proceed through the Commission's docket, there must be reasonable grounds for complaint. Specious allegations cannot provide reasonable grounds, as the Ohio Supreme Court has confirmed.

Complainants cite only to one case – *Ohio Utilities Co. v. Public Utilities Commission*<sup>2</sup> – in support for their contention that the Commission erred in dismissing their baseless complaint.

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<sup>1</sup> Complainants' Application for Rehearing, at pg. 3, Assignment of Error No. 1.

<sup>2</sup> 58 Ohio St.2d 153, 389 N.E.2d 483 (1979).

But the holding in that case, as well as other Court cases and Commission orders, confirm that the Commission did not err.

Importantly, in *Ohio Utilities*, the Court succinctly found that:

R.C. 4905.26 requires that ‘reasonable grounds for complaint be stated’ before the commission can conduct a hearing and order a utility to produce information. This prerequisite should apply whether the commission begins such a proceeding on its own initiative, or on the complaint of another party.<sup>3</sup>

The Court then confirmed that the allegations in the complaint before it provided such reasonable grounds. But the facts in *Ohio Utilities* are not analogous to the facts here; the pleadings are not the same. And the holding in *Ohio Utilities* does not absolve Complainants of their statutory obligation to put forth reasonable grounds for complaint.<sup>4</sup> More specifically, and as the Commission has instructed, there must be allegations that, if true, would support a finding that the rates, services, or practices complained of are unlawful or unreasonable:

...Section 4905.26, Revised Code, requires that the Commission shall set such a complaint for hearing only when reasonable grounds for complaint are stated. ...[I]n all cases, 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. To permit a complaint to proceed to hearing when a 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. Thus, in considering the sufficiency of the OCC complaint, one must bear in mind that there is more involved here than just a legal nicety.<sup>5</sup>

In their Complaint, the OCC and CUFA imply that Duke Energy Ohio has disconnected a significant number of its residential customers for non-payment in violation of law, regulation, or Commission order. That implication is based on the Company’s disconnection statistics and a

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<sup>3</sup> *Id.* at 159 (emphasis added).

<sup>4</sup> See, e.g., *Allnet Communications Services, Inc., v. Public Utilities Commission*, (1987) 32 Ohio St.3d 115, 117, 512 N.E.2d 350 (reiterating requirement to demonstrate reasonable grounds for a complaint as a prerequisite to hearing).

<sup>5</sup> *In the Matter of the Complaint of the Office of the Consumers’ Counsel v. West Ohio Gas Company*, 1989 Ohio PUC LEXIS 104, \*\*15-16.

comparison to disconnection statistics of other electric and gas utilities. The Complaint is devoid of any actual allegations of fact that would support Complainants' conclusion or, if taken as true, would support a finding that the Company's practices are unreasonable or unlawful. As the Commission properly found, "broad, unspecific allegations are not sufficient to trigger a whole process of discovery and testimony."<sup>6</sup> Complainants' mere arguments to the contrary do not rebut that well-reasoned decision.

Once the Commission stripped the Complaint of the repeated, irrelevant recitation of statistics and, instead, focused on the actual claims and causes of action and facts (or lack thereof) related thereto, it is undeniable that Complainants did not plead a real, justiciable controversy. Instead, Complainants essentially requested the Commission to allow a complaint proceeding through which they may *attempt* to prove their misplaced concerns regarding disconnections. Ohio law does not permit such an outcome.<sup>7</sup>

For these reasons, the OCC and CUFA are not entitled to a rehearing, including a modification of the Commission's Order, in connection with the first Assignment of Error in their Application.

**C. The Commission Correctly Dismissed The Complaint, Which Asserted Nothing More Than Conclusory, Statistics-Based Allegations.**

Once again the OCC and CUFA mistakenly claim that the Commission contradicted its own "controlling precedent" by dismissing their Complaint. That is not true. In fact, the Commission followed R.C. 4905.26 by dismissing Complainants' deficient Complaint, as confirmed by Complainants' own legal authorities.

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<sup>6</sup> Entry, at ¶ 17 (October 11, 2017).

<sup>7</sup> *In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems v. FirstEnergy Corporation and The Cleveland Electric Illuminating Company*, Case No. 98-1616-EL-CSS, Entry, at pp 3-4 (May 19, 1999)(dismissing complaint that was based upon *concerns*)(emphasis in original).

As in the *West Ohio Gas I* case, the Complaint here does not contain allegations that, if true, would set forth reasonable grounds for complaint under R.C. 4905.26.<sup>8</sup> Simply packaging data and statistics as a pleading is not sufficient. While the OCC may have been given a second bite at the apple when it filed another complaint in *West Ohio Gas II*, its complaint in that case *barely* survived a motion to dismiss.

Given the nature of this complaint, the Commission is not prepared to find, at this stage in the proceedings, that reasonable grounds for complaint have been stated by OCC. The Commission is concerned about the sufficiency of the data presented by OCC, about the factual and legal issues raised by this complaint, and about the remedies that OCC could obtain from the Commission even if OCC meets its burden of proving the allegations of the complaint. The Commission believes that OCC needs to present a more detailed and reasoned complaint in order to allow the Commission to determine if reasonable grounds for complaint have been stated.<sup>9</sup>

The only reason it survived the motion to dismiss is that the OCC was able to put a few specific numbers in its second complaint relating to the utility company's cost structure and rates. Here, the Commission aptly found:

Removing the specific allegations regarding the *Pitzer Case* from the complaint leaves only statistics regarding Duke's disconnection rates. ...Simply put, the numbers alone, even if true, cannot support a finding of the reasonableness of or unreasonableness of the practice or policy used to complete the disconnection. These circumstances are analogous to those presented by the 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' obligations to show that they are unreasonable.<sup>10</sup>

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<sup>8</sup> *In the Matter of the Complaint of the Office of the Ohio Consumers' Counsel v. West Ohio Gas Co.*, Case No. 88-1743-GA-CSS, Entry (Jan. 31, 1989), at pp. 16-17.

<sup>9</sup> *In the Matter of the Complaint of the Office of the Ohio Consumers' Counsel v. West Ohio Gas Co.*, Case No. 89-275-GA-CSS, Entry (Apr. 18, 1989), at p. 6.

<sup>10</sup> Entry, at ¶ 21 (October 11, 2017).



With that finding, the Commission properly followed and applied Ohio law, including R.C. 4905.26 and relevant legal authorities regarding motions to dismiss. The Commission's holdings in *West Ohio Gas I* and *West Ohio Gas II* do not support granting a rehearing.

For each of these reasons, the Commission should reject Complainants' second Assignment of Error and deny their Application.

**D. The Commission Was Not Required to Rule on a Pending Motion to Compel before Dismissing the Defective Complaint.**

Contrary to Complainants' argument, discovery cannot save a complaint that, on its face, does not set forth reasonable grounds for complaint, as mandated by R.C. 4905.26. There are no grounds under R.C. 4903.10 to allow Complainants to use a rehearing for purposes of conducting unnecessary discovery on a Complaint that does not set forth reasonable grounds. And, as the Court has instructed, there must be grounds for complaint before a utility can be ordered to produce information.<sup>11</sup>

The Commission has discretion to oversee and manage its dockets, which necessarily includes motion and discovery practice.<sup>12</sup> Here, the Commission found that the Complaint was based entirely on allegations from another case (the *Pitzer Case*)<sup>13</sup> and meaningless statistics that do not give rise to a credible and legitimate claim against Duke Energy Ohio. With respect to the former, the Commission correctly rejected Complainants' efforts to litigate identical facts in parallel cases: "It is improper to give OCC a chance to re-litigate the same facts here."<sup>14</sup> As to the latter, the OCC has heeded the Commission's advice and is participating in the Investigative Audit of Duke Energy Ohio's disconnection policies and procedures in Case No. 17-2089-GE-

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<sup>11</sup> *Ohio Utilities*, 58 Ohio St.2d at 159.

<sup>12</sup> See R.C. 4901.13; See also, *Toledo Coalition for Safe Energy v. Pub. Util. Commission*, (1982), 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214.

<sup>13</sup> *In the Matter of the Complaint of Jeffrey Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS.

<sup>14</sup> Entry, at ¶ 20 (October 11, 2017).

COI.<sup>15</sup> Accordingly, there are no grounds to allow the OCC and CUFA to go forward in this case while the OCC is participating in a proceeding concerning Duke Energy Ohio's current disconnection policies and procedures, particularly when the Complaint in this case does not set forth reasonable grounds for complaint.

For these reasons, Complainants' Application for Rehearing must be denied.

**E. Complainants are Not Entitled to a Rehearing for Purposes of Conducting Discovery on a Legally Deficient Complaint.**

Contrary to Complainants' implication, the Commission did not dismiss their Complaint because they could choose to participate in the separate Investigative Audit of Duke Energy Ohio's disconnection policies and procedures in Case No. 17-2089-GE-COI. Instead, the Commission dismissed their Complaint under R.C. 4905.26 because the Complaint, on its face, did not set forth reasonable grounds for complaint against Duke Energy Ohio.

The type of relief requested by Complainants is not relevant; they are not automatically entitled to such relief by having filed a complaint that does not comply with R.C. 4905.26 and the Commission has no obligation to preserve Complainants' myriad claims for relief under such a circumstance. The Complaint in this case necessarily must rise and fall on its own merits. Here, the lack of merit, as demonstrated by the absence of any allegations of fact that, even if proven to be true, would set forth reasonable grounds for complaint against Duke Energy Ohio, required the Commission to dismiss the Complaint under R.C. 4905.26.

For these reasons, Complainants' Application for Rehearing must be denied.

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<sup>15</sup> *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, Motion to Intervene (October 24, 2017).

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 or counsel of record on this 22<sup>nd</sup> day of November, 2017, by electronic delivery.

/s/ Amy B. Spiller

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Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra to the Application for Rehearing filed by the Office of the Ohio Consumer's Counsel and Communities United for Action. electronically filed by Mrs. Adele M. Frisch on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B and Watts, Elizabeth H