

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF  
JEFFREY PITZER,

COMPLAINANT,

v.

CASE NO. 15-298-GE-CSS

DUKE ENERGY OHIO, INC.,

RESPONDENT.

SECOND ENTRY ON REHEARING

Entered in the Journal on January 3, 2018

I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing of the August 30, 2017 Opinion and Order filed by Duke Energy Ohio, Inc. and the Ohio Consumers' Counsel.

II. DISCUSSION

A. *Procedural History*

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

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

{¶ 4} On February 11, 2015, Gail Lykins, acting as the personal representative of Dorothy Easterling and her son, Estill Easterling III (jointly, Easterlings), who are

deceased, filed a complaint against Duke. Ms. Lykins, who is the daughter of Dorothy Easterling and the sister of Estill Easterling III, asserted that, on November 4, 2011, Duke disconnected the Easterlings' gas and electric services at 11312 Orchard Street, Cincinnati, Ohio (Easterlings' property). Ms. Lykins further asserted that, as a result of the disconnection, the Easterlings died of hypothermia. Ms. Lykins alleged that Duke's disconnection of the Easterlings' gas and electric services, due to nonpayment, was improper under the special procedures that apply during the winter heating season. According to Ms. Lykins, the Easterlings had made a payment, prior to the disconnection, greater than one-third of their previous account balance. Ms. Lykins requested that the Commission determine whether Duke's disconnection of the utility services at the Easterlings' property failed to comply with the disconnection procedures and requirements set forth in Ohio Adm.Code 4901:1-18-06 and the winter heating season plan defined in Ohio Adm.Code 4901:1-18-05 and award compensation in light of the Company's actions.<sup>1</sup>

{¶ 5} On February 27, 2015, Duke filed an answer to the complaint, generally denying the material allegations of the complaint and asserting a number of affirmative defenses. In its answer, Duke denied that it ever disconnected the gas service at the Easterlings' property. Duke further denied that it improperly disconnected the electric service at the Easterlings' property. Duke admitted that it properly disconnected the electric service at the Easterlings' property on November 4, 2011, for nonpayment of consumed utility services, after providing all required and additional, voluntary notices to Estill Easterling, the customer of record. Duke denied that the ten-day notice requirement of Ohio Adm.Code 4901:1-18-06(B) applied to the disconnection of electric service at the Easterlings' property, because the electric service was disconnected only for the nonpayment of utility services incurred during August, September, and October 2011,

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<sup>1</sup> Throughout this Second Entry on Rehearing, references to the Commission's rules are to the rules in effect at the time of the disconnection at issue in this proceeding.

as well as relevant late fees, and not for the nonpayment of charges incurred during the winter heating season. Duke noted that, although Ohio Adm.Code 4901:1-18-06(B) did not apply, Duke sent a final ten-day disconnection notice to Estill Easterling on October 19, 2011, and did not disconnect the electric service at the Easterlings' property until 16 days later. Duke also denied that Ohio Adm.Code 4901:1-18-05(B)(3) applied to the disconnection of the electric service at the Easterlings' property on November 4, 2011, because Duke did not disconnect the electric service for any unpaid bills that included usage occurring during the period of November 1 to April 15; the partial payment that Duke received on October 12, 2011, was made prior to the winter heating season; the disconnection notice included with the bill prepared by Duke on October 4, 2011, explained all payment plans, including those applicable during the winter heating season; and neither Estill Easterling nor any other authorized person on his account contacted Duke to enter into any payment plan. Finally, Duke asserted a number of affirmative defenses, including that Complainant lacks standing, failed to state a claim upon which relief may be granted, and failed to state reasonable grounds for complaint, as required by R.C. 4905.26. Duke contended that it has complied with all applicable statutes, rules, regulations, and tariffs and that the complaint should, therefore, be dismissed.

{¶ 6} A settlement conference was held on April 16, 2015. However, the parties were unable to resolve this matter.

{¶ 7} By Entry dated April 29, 2015, a hearing in this matter was scheduled to commence on August 25, 2015. Subsequently, in order to afford the parties additional time to complete the discovery process, the hearing was rescheduled on numerous occasions.

{¶ 8} On July 10, 2015, the attorney examiner granted a motion to amend the complaint to substitute Ms. Lykins' husband, Jeffrey Pitzer (Complainant), as the Complainant in this matter, given that Mr. Pitzer had been substituted as fiduciary of the

Easterlings' estates in the Probate Court of Hamilton County, Ohio. Further, the attorney examiner granted a motion to intervene in this proceeding filed by the Ohio Consumers' Counsel (OCC).

{¶ 9} A prehearing discovery conference was held on November 10, 2015, in order to resolve a number of discovery disputes among the parties. During the prehearing conference, the attorney examiner granted Complainant's second motion to amend the complaint, which was filed on October 22, 2015, and directed Duke to file an answer to the amended complaint within 20 days. In accordance with the attorney examiner's ruling, Complainant filed the amended complaint on November 12, 2015, and Duke filed its answer to the amended complaint on November 20, 2015.

{¶ 10} In the amended complaint, which superseded the original complaint filed on February 11, 2015, Complainant, in his capacity as the personal representative of the estates of the Easterlings, alleged that, at all relevant times, Dorothy Easterling was Duke's customer with respect to the utility service provided at the Easterlings' property, because, consistent with Ohio Adm.Code 4901:1-18-01(G), the Company accepted her utility payments for several years after her husband, Estill Easterling II, died, which constituted a contract with the Company to purchase gas and electric service at the Easterlings' property. Complainant further alleged that, prior to September 2011, Dorothy Easterling had made timely payments to Duke for utility service at the Easterlings' property. According to Complainant, Duke disconnected the electric service at the Easterlings' property in November 2011, in violation of the Commission's disconnection notice requirements set forth in Ohio Adm.Code 4901:1-18-06(A), (A)(2), and (A)(5), as well as the special winter heating procedures in Ohio Adm.Code 4901:1-18-06(B). Complainant asserted that Duke also failed to comply with a number of directives ordered by the Commission for the 2011-2012 winter heating season. *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*), Finding and Order (Sept. 14, 2011). Specifically, Complainant alleged that Duke violated the *2011 Winter Reconnect Order* by failing to err on the side of maintaining service to the Easterlings' property, when there was a doubt as to whether the Company gave proper notification to Dorothy Easterling, and permitting disconnection under Ohio Adm.Code 4901:1-18-03; by disconnecting service, despite the fact that Dorothy Easterling had made a payment toward the past due balance; by failing to provide Dorothy Easterling with special notice of reconnection rights; and by failing to provide Dorothy Easterling with the availability of payment plan options. Complainant concluded that, as a result of Duke's actions in disconnecting service at the Easterlings' property, the Easterlings died of hypothermia.

{¶ 11} In its answer to the amended complaint, Duke generally denied Complainant's allegations and asserted a number of affirmative defenses. With respect to the allegations at issue, Duke denied that Dorothy Easterling was the Company's customer on any gas or electric account at the Easterlings' property or that the Company had a contract with Dorothy Easterling. Duke admitted that the Company properly disconnected the electric service at the Easterlings' property on November 4, 2011, after timely providing all required notices. Duke also admitted that the *2011 Winter Reconnect Order* applied to the Company.

{¶ 12} A second prehearing discovery conference was held on January 14, 2016, in order to resolve a number of discovery disputes among the parties.

{¶ 13} The hearing in this matter commenced, as rescheduled, on February 1, 2016, and concluded on February 2, 2016.

{¶ 14} Briefs were filed by the parties on February 11, 2016.

{¶ 15} By Opinion and Order dated August 30, 2017, the Commission found that Complainant sustained his burden of proof with respect to his claim that Duke failed to

comply with the disconnection requirements of Ohio Adm.Code 4901:1-18-06(B) and, with respect to all other claims, found that Complainant had not sustained his burden of proof.

{¶ 16} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 17} On September 29, 2017, Duke and OCC filed applications for rehearing of the August 30, 2017 Opinion and Order. Memoranda contra the applications for rehearing were filed by Duke and OCC on October 10, 2017. On that same date, Complainant filed a notice joining in the arguments raised by OCC in its memorandum contra Duke's application for rehearing.

{¶ 18} By Entry on Rehearing dated October 20, 2017, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing filed by Duke and OCC.

{¶ 19} The Commission has reviewed and considered all of the arguments raised in Duke's and OCC's applications for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

**B. *Consideration of the Applications for Rehearing***

**1. DUKE**

{¶ 20} Duke asserts three grounds for rehearing. First, Duke contends that the Commission incorrectly found that Ohio Adm.Code 4901:1-18-06(B) is applicable based on the actual date of disconnection, as opposed to the disconnection date stated on the 14-day notice. Specifically, Duke alleges that the Commission violated well-established

rules of statutory interpretation by not applying the plain and unambiguous language of Ohio Adm.Code 4901:1-18-06(B). Duke further alleges that the Opinion and Order runs afoul of the doctrine of *in pari materia* and creates an irreconcilable conflict between Ohio Adm.Code 4901:1-18-06(A)(5) and Ohio Adm.Code 4901:1-18-06(B). Finally, Duke asserts that the Commission incorrectly found that the Company violated Ohio Adm.Code 4901:1-18-06(B), notwithstanding the undisputed evidence that the Company provided all notices, including the extra ten-day notice required by the rule.

{¶ 21} In support of its arguments, Duke contends that Ohio Adm.Code 4901:1-18-06(B) expressly provides that it applies only where the date of disconnection as stated on the disconnection notice falls between November 1 and April 15. According to Duke, the rule is not triggered by the date on which the utility service is actually disconnected. Because the date of disconnection on the 14-day notice issued in this case was October 28, 2011, Duke asserts that the Commission should have concluded that Ohio Adm.Code 4901:1-18-06(B) was inapplicable to the disconnection of the Easterlings' electric service. Duke notes that, instead, the Commission focused on the actual date of disconnection and ignored a critical phrase in the rule, namely "if payment or payment arrangements are not made to prevent disconnection before the disconnection date stated on the fourteen-day disconnection notice." Although Duke initially claims that the rule is clear and unambiguous and, thus, there is no need to engage in statutory interpretation, the Company proceeds to assert that, under basic rules of statutory interpretation, this key phrase is modified by the introductory language of the rule, which confirms that the triggering point for determining whether Ohio Adm.Code 4901:1-18-06(B) is applicable is the disconnection date on the 14-day notice. Duke points out that all of the words in Ohio Adm.Code 4901:1-18-06(B) must be given effect. Duke adds that, if the Commission had intended that the disconnection requirements of Ohio Adm.Code 4901:1-18-06(B) apply to any disconnection occurring between November 1 and April 15, regardless of the date provided on the 14-day notice, the Commission could have drafted the rule to

reflect its intent by omitting the reference to the disconnection date on the 14-day notice or otherwise making the rule more clear for utility companies and their customers.

{¶ 22} Duke also argues that Ohio Adm.Code 4901:1-18-06(B) must be read in conjunction with Ohio Adm.Code 4901:1-18-06(A). According to Duke, if Ohio Adm.Code 4901:1-18-06(B) is triggered when a disconnection occurs between November 1 and April 15, a utility company is necessarily and unfairly poised to violate Ohio Adm.Code 4901:1-18-06(A)(5), which requires that the 14-day notice include the earliest date on which disconnection may occur. Duke concludes that it is unduly prejudicial to deprive all parties affected by this rule of their due process by arbitrarily altering the language of the rule through a complaint case. Duke also notes that the Commission's interpretation of the rule will result in unnecessary administrative burden and expense as systems would need to be programmed to ensure that issued work orders are timely retrieved from the field and reissued for a future date. Additionally, Duke emphasizes that the Company provided the additional ten-day notice before disconnecting the Easterlings' service, consistent with the Company's practice of providing all customers, on a year-round basis, a 24-day notice period by combining the 14-day notice period of Ohio Adm.Code 4901:1-18-06(A) and the additional ten-day period of Ohio Adm.Code 4901:1-18-06(B). Duke notes that its policy benefits its customers by providing more notice than is required under the rule. As a final point, Duke claims that, contrary to Ohio Adm.Code 4901:1-18-06(B), the Commission has essentially prohibited disconnections of residential service during the first ten days of November.

{¶ 23} In its memorandum contra, OCC responds that the plain language of Ohio Adm.Code 4901:1-18-06(B) supports the Commission's decision that Duke unlawfully disconnected the Easterlings' electric service. OCC asserts that the rule focuses on the date on which service is actually disconnected, while the date on the 14-day disconnection notice is only relevant as the deadline for the customer to take action to



avoid disconnection. OCC also disagrees with Duke's contention that the decision creates an irreconcilable conflict between Ohio Adm.Code 4901:1-18-06(A)(5) and Ohio Adm.Code 4901:1-18-06(B). OCC notes that, under Ohio Adm.Code 4901:1-18-06(A)(5), the 14-day disconnection notice must include the earliest possible date of disconnection rather than the actual date on which service will be disconnected. Finally, in response to Duke's contention that it provides customers with 24 days' notice on a year-round basis, OCC asserts that the Commission did not err in finding that Duke violated Ohio Adm.Code 4901:1-18-06(B), because the rule plainly provides that, during the winter heating season, the utility must extend the date of disconnection stated on the 14-day notice by ten additional days.

{¶ 24} The Commission finds that Duke's first ground for rehearing lacks merit and should be denied. In the Opinion and Order, we rejected Duke's argument that Ohio Adm.Code 4901:1-18-06(B)<sup>2</sup> is not applicable to the disconnection at issue in this proceeding. We noted that the rule's requirements were triggered because the disconnection of the Easterlings' electric service occurred on November 4, 2011, which is within the bounds of the winter heating season specified in the rule. Opinion and Order at ¶ 57. We are not persuaded by Duke's argument that the rule is only applicable if the disconnection date stated on the 14-day notice falls within the period of November 1 through April 15. In asserting its position, Duke misuses the last antecedent rule of

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<sup>2</sup> Ohio Adm.Code 4901:1-18-06(B) provides:

During the period of November first through April fifteenth, if payment or payment arrangements are not made to prevent disconnection before the disconnection date stated on the fourteen-day disconnection notice, the utility company shall not disconnect service to residential customers for nonpayment unless the utility company completes each of the following: (1) Makes contact with the customer or other adult consumer at the premises ten days prior to disconnection of service by personal contact, telephone, or hand-delivered written notice. Utility companies may send this notice by regular, U.S. mail; however, such notice must allow three calendar days for mailing. This additional notice shall extend the date of disconnection, as stated on the fourteen-day notice required by paragraph (A) of this rule, by ten additional days.

construction.<sup>3</sup> Ohio Adm.Code 4901:1-18-06(B) does not include a series of antecedents to which the last antecedent rule can be applied. In any event, as Duke freely admits, Ohio Adm.Code 4901:1-18-06(B) is unambiguous. The rule is clear that the disconnection date provided on the 14-day disconnection notice is the deadline for the customer to make the necessary payment or payment arrangements in order to avoid the disconnection of service. Duke attempts to create confusion where there is none.

{¶ 25} Further, the Opinion and Order is consistent with our past precedent. In succinctly describing the fundamental point of Ohio Adm.Code 4901:1-18-06(B) (and its predecessor),<sup>4</sup> the Commission has consistently stated that the rule prohibits electric companies and natural gas companies from disconnecting service to residential customers for nonpayment during the period of November 1 through April 15, unless the company completes the three requirements set forth in the rule. *See, e.g., In re Dayton Power and Light Co.*, Case No. 05-1171-EL-UNC, et al., Entry (Jan. 4, 2006) at 1-2; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-1168-EL-UNC, et al., Entry (Jan. 4, 2006) at 1-2; *In re Investigation into Long-Term Solutions Concerning Disconnection of Gas and Electric Service in Winter Emergencies*, Case No. 05-1068-GE-UNC, Entry (Apr. 5, 2006) at 4. We, therefore, reject Duke's contention that the Commission has arbitrarily altered the language of the rule through this complaint case.

{¶ 26} We also disagree with Duke's claim that the Commission has created an irreconcilable conflict between Ohio Adm.Code 4901:1-18-06(A)(5) and Ohio Adm.Code 4901:1-18-06(B), contrary to the *in pari materia* rule of statutory construction.<sup>5</sup> The Commission notes that the rule is only applied when "some doubt or ambiguity exists."

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<sup>3</sup> The last antecedent rule provides that referential or qualifying words or phrases refer to the language immediately preceding the qualifier, where no contrary intention appears. *See, e.g., Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 12.

<sup>4</sup> Ohio Adm.Code 4901:1-18-06(B) was formerly designated as Ohio Adm.Code 4901:1-18-05(B).

<sup>5</sup> Under the *in pari materia* rule of statutory construction, all statutes relating to the same general subject matter must be read together to give proper force and effect to each one. *In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 27.

*In re Application of Duke Energy Ohio, Inc.*, 150 Ohio St.3d 437, 2017-Ohio-5536, 82 N.E.3d 1148, ¶ 27. We find no doubt or ambiguity within the provisions of Ohio Adm.Code 4901:1-18-06 and, therefore, there is no need to apply the *in pari materia* rule of construction. Ohio Adm.Code 4901:1-18-06(A)(5) provides that the 14-day disconnection notice must clearly display the “earliest date when disconnection may occur.” As discussed above, under Ohio Adm.Code 4901:1-18-06(B), the disconnection date stated on the 14-day notice is the date by which the customer must make the necessary payment or payment arrangements in order to avoid the disconnection. Contrary to Duke’s assertion, there is no conflict between Ohio Adm.Code 4901:1-18-06(A)(5) and Ohio Adm.Code 4901:1-18-06(B).

{¶ 27} Finally, we reject Duke’s argument that the Commission incorrectly found a violation of Ohio Adm.Code 4901:1-18-06(B) in this case. Duke emphasizes that it provided the Easterlings with all required disconnection notices, including the additional ten days’ notice required under Ohio Adm.Code 4901:1-18-06(B). We affirm our finding that Duke’s year-round plan to “front load” the entire notice period, by using 24 days to calculate the date of disconnection stated on the 14-day disconnection notice, is inconsistent with the rule. Opinion and Order at ¶ 59. As we noted in the Opinion and Order, the rule is clear that the additional ten-day notice “shall *extend* the date of disconnection, *as stated on the fourteen-day notice* required by paragraph (A) of this rule, by ten additional days” and, therefore, Duke cannot account for the extra ten-day period at the outset of the disconnection process. Opinion and Order at ¶ 59. In response to Duke’s contention that its process is more advantageous for residential customers, we note that the proper case for raising that argument is the next five-year review of Ohio Adm.Code Chapter 4901:1-18.<sup>6</sup>

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<sup>6</sup> While the Commission has determined that Duke did not comply with the requirements of Ohio Adm.Code 4901:1-18-06(B), we note that, if the Company had disconnected the Easterlings’ service during the October 28 through October 31, 2011 period, there would have been no rule violation in this case. As we explained in the Opinion and Order, because Duke did not complete the disconnection

{¶ 28} In its second ground for rehearing, Duke claims that the Commission incorrectly found that Dorothy Easterling was the Company's customer. As an initial matter, Duke points out that there is no dispute that the named customer on the utility account at issue was Estill Easterling, the spouse of Dorothy Easterling, and that Mrs. Easterling did not have the utility service placed in her name following Mr. Easterling's death. Turning to the Opinion and Order, Duke contends that, contrary to Ohio law, the Commission appears to have found that the Company and Dorothy Easterling had both an express contract under the Company's tariff and an implied contract through Mrs. Easterling's payment of the utility bills. *Weber v. Billman*, 165 Ohio St. 431, 135 N.E.2d 866 (1956). Next, Duke claims that the Commission's decision is not consistent with Ohio Adm.Code 4901:1-18-01, which does not provide for the creation of a customer relationship merely through payment of a utility bill. Further, Duke asserts that the Commission ignored a portion of the Company's tariff requiring the Company's written consent to the assignment of the service contract. Duke notes that there is no evidence in the record that the Company provided written consent to the assignment of service to Dorothy Easterling. Duke also argues that the prior decisions referenced by the Commission are factually inapposite.

{¶ 29} OCC responds that, under Duke's tariff, Dorothy Easterling was a customer of the Company, because the benefits and obligations of the application for service at the Easterlings' property inured to and were binding upon Mrs. Easterling as the surviving spouse. OCC adds that, at a minimum, the record shows that Mrs. Easterling had an implied contract with Duke for gas and electric service, given that the Company accepted her payments for more than 20 years.

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until November 4, 2011, a disconnection that may have otherwise been proper and lawful was rendered counter to the rule. We also noted that we intend, during the next five-year review of Ohio Adm.Code Chapter 4901:1-18, to consider whether the timing requirements for disconnections for nonpayment are appropriate in balancing the interests of utility companies and consumers. Opinion and Order at ¶ 60.

{¶ 30} In the Opinion and Order, the Commission noted that Dorothy Easterling was a customer of Duke. We thoroughly analyzed the evidence of record on this issue, and concluded that Dorothy Easterling's payment of the bills for utility service at the Easterlings' property and Duke's acceptance of those payments, which occurred over a period of more than 20 years following the death of Mrs. Easterling's spouse, constituted a contractual arrangement for gas and electric service under Ohio Adm.Code 4901:1-18-01(G). Further, we noted that our conclusion was consistent with Duke's tariff. Opinion and Order at ¶ 41.

{¶ 31} Although Duke emphasizes in its application for rehearing that the named customer on the utility account at issue was Estill Easterling, the Company does not dispute that Mr. Easterling has been deceased for more than 20 years and that, since his death, the Company accepted utility payments from his spouse, Dorothy Easterling. With respect to Duke's argument that the Commission found that the Company had both an express contract and an implied contract with Dorothy Easterling, the Company has mischaracterized the Opinion and Order. Instead, we found that Dorothy Easterling was a "customer,"<sup>7</sup> both by contract and under Duke's tariff. We also reject Duke's assertion that the Opinion and Order is inconsistent with Ohio Adm.Code 4901:1-18-01, because the mere payment of a utility bill does not establish a customer relationship under the rule. Again, Duke mischaracterizes our findings. The evidence in this case reflects a lengthy history of payments from the spouse of the long-deceased customer named on the account, as well as the acceptance of these payments by Duke. We, therefore, found that Dorothy Easterling's payment of the bills and Duke's acceptance of the payments, over a period of more than 20 years, constituted a contractual arrangement for gas and electric service, consistent with Ohio Adm.Code 4901:1-18-01(G). Finally, we reject Duke's argument that the tariff required the Company's written consent to the

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<sup>7</sup> Under Ohio Adm.Code 4901:1-18-01(G), a "customer" is defined as "any person who enters into an agreement, whether by contract or under a tariff, to purchase: electric, gas, or natural gas utility service."

assignment of the service contract from Mr. Easterling to Mrs. Easterling. As Duke notes, its tariff provides that “no assignment [of the benefits and obligations of the application for service] shall be made by the customer without first obtaining the Company’s written consent.” Duke fails to explain how this limitation can possibly apply under circumstances in which the customer named on the account has died and is, therefore, unable to seek and obtain the Company’s written consent to the assignment of the service contract to the surviving spouse. For these reasons, Duke’s second ground for rehearing should be denied. We note, however, that our decision on this point is made in the context of the facts of this case (i.e., where the surviving spouse has made payments for bills on an account in the name of a decedent for over 20 years and Duke has accepted those payments).

{¶ 32} In its third ground for rehearing, Duke contends that the Commission failed to clarify that the Opinion and Order is effective only as to a claim filed by Complainant on behalf of Dorothy Easterling. Duke notes that the Commission did not resolve the disputed status of Estill Easterling III. Duke requests that the Commission clarify and confirm that Estill Easterling III was not a customer of the Company.

{¶ 33} OCC replies that Duke’s request should be rejected, because the issue was raised for the first time in the Company’s application for rehearing. OCC adds that Duke failed to explain how the Opinion and Order was unlawful or unreasonable with respect to this issue and, therefore, the Company’s application for rehearing does not comply with R.C. 4903.10.

{¶ 34} The Commission finds that Duke’s third ground for rehearing should be denied. The amended complaint alleges only that Dorothy Easterling was a “customer” of Duke (Amended Complaint at 1). The briefs filed by Complainant and OCC also focused solely on the issue of whether Dorothy Easterling was a “customer” of Duke (Complainant Br. at 6-8; OCC Br. at 7-8). Neither Complainant nor OCC alleged that Estill Easterling III was also a “customer” of Duke. The Commission, in turn, concluded

only that Dorothy Easterling was Duke's customer, and made no findings with respect to Estill Easterling III. Opinion and Order at ¶ 41. As there was no dispute among the parties over the status of Estill Easterling III, there was no need for the Commission to address this issue in the Opinion or Order. We have no basis to do so here.

## 2. OCC

{¶ 35} In its application for rehearing, OCC raises three arguments. First, OCC asserts that the Commission unlawfully and unreasonably failed to order Duke to discontinue disconnection practices that are unlawful or otherwise contrary to the Commission's rules and the Company's tariff and that are, thus, harmful to consumers. OCC notes that, given Duke's admitted practice of front loading the additional ten days' notice required by Ohio Adm.Code 4901:1-18-06(B), the Company has very likely carried out other unlawful disconnections aside from the disconnection of the Easterlings' electric service. Asserting that Duke's practice is harmful to consumers, OCC claims that the Opinion and Order should have required the Company, on a going-forward basis, to afford all residential customers an additional ten days before disconnecting utility service during the winter heating season. OCC concludes that the Commission should order Duke immediately to cease and desist from its unlawful practice. Additionally, noting that the Commission determined that, contrary to Duke's position, Dorothy Easterling was a customer of the Company, OCC asserts that the Commission should also direct Duke to comply with its tariff provisions and the Commission's rules specifying whether an individual is a "customer."

{¶ 36} In its memorandum contra, Duke argues that OCC improperly seeks to litigate claims and issues that are neither of record in the pleadings nor admitted into the evidentiary record. As a procedural matter, Duke asserts that OCC waived any claim that the Commission should order the Company to discontinue certain disconnection practices. Duke notes that OCC did not assert any affirmative claims against the Company or request a cease and desist order or injunctive relief of any kind from the

Commission. According to Duke, it would be prejudicial and inappropriate for the Commission to grant any such relief at this late stage of the proceeding. Duke adds that, from a substantive perspective, OCC's request for rehearing should also be denied, because there is no evidence in the record to support OCC's speculative allegations regarding harm to other consumers, this case relates only to the Commission's disconnection rules in effect in 2011, and the Commission erred in finding that Ohio Adm.Code 4901:1-18-06(B) was applicable to the disconnection of the Easterlings' service and that Dorothy Easterling was the Company's customer. Duke emphasizes that its current disconnection practices are not at issue in this case.

{¶ 37} The Commission finds that OCC's first ground for rehearing should be denied. As a fundamental matter, we fully expect that, on a going-forward basis, Duke will comply with the findings in the Opinion and Order, consistent with the Company's obligation under R.C. 4905.54, which requires every public utility to comply with Commission orders. Further, in the Opinion and Order, we found that a comprehensive review of Duke's disconnection policies and procedures is necessary and appropriate. Opinion and Order at ¶ 83. This forthcoming audit of Duke's current disconnection practices and policies will ensure that the Company is fully complying with the Commission's disconnection requirements. The auditor may offer recommendations with respect to any necessary steps that Duke should take to improve its performance in this area. We, therefore, do not find it necessary to direct Duke to cease and desist from any current practice at this time.

{¶ 38} In its second ground for rehearing, OCC argues that it was unreasonable for the Commission not to assess forfeitures against Duke after finding that the Company unlawfully disconnected the Easterlings' electric service, in violation of Ohio Adm.Code 4901:1-18-06(B). Noting that R.C. 4905.54 subjects Duke to a forfeiture of up to \$10,000 for each day that the violation occurred, OCC asserts that the Commission should impose a forfeiture of at least \$60,000, because the Company disconnected the Easterlings' electric



service six days before it should have under the rule. OCC concludes that, under the circumstances, it was unreasonable for the Commission not to impose a forfeiture.

{¶ 39} Initially, Duke replies that its disconnection of the Easterlings' electric service was lawful and therefore, it would be inappropriate for the Commission to impose a forfeiture on the Company. Duke also argues that it would be prejudicial to assess a forfeiture, because OCC did not seek any relief from the Company before or at the evidentiary hearing. Regardless, Duke asserts that a forfeiture of \$60,000 is not warranted and would be contrary to R.C. 4905.54, as the Commission did not find that the Company was in violation of any rule or regulation over a period of time.

{¶ 40} R.C. 4905.54 authorizes the Commission, in its discretion, to assess a forfeiture of not more than \$10,000 for each violation or failure of a public utility to comply with an order, direction, or requirement of the Commission. In this case, the Commission found that Complainant sustained his burden of proof with respect to his claim that Duke's disconnection of the Easterlings' electric service was contrary to Ohio Adm.Code 4901:1-18-06(B). As a result, we found that it is necessary and appropriate to conduct a comprehensive audit at this time, particularly given that considerable time has passed since Duke's disconnection policies and procedures were last reviewed. We, therefore, indicated that a request for proposals (RFP) would be issued to select an auditor to undertake the investigation of Duke's disconnection practices and policies for both its gas and electric service. Opinion and Order at ¶ 83. Consistent with the Opinion and Order, in Case No. 17-2089-GE-COI, the Commission initiated the audit, issued the RFP, and selected an auditor to complete the review of Duke's disconnection procedures and policies. *In re Duke Energy Ohio, Inc.*, Case No. 17-2089-GE-COI, Entry (Nov. 29, 2017). We affirm our decision to conduct a comprehensive audit, as an appropriate outcome of this complaint proceeding, and do not agree that it was unreasonable to adopt this course of action without the concurrent assessment of a forfeiture against Duke. Accordingly, OCC's second ground for rehearing should be denied.

{¶ 41} In its third ground for rehearing, OCC contends that it was unlawful and unreasonable for the Commission to determine that Duke did not violate the Commission's directives for the 2011-2012 winter heating season. *2011 Winter Reconnect Order*, Finding and Order (Sept. 14, 2011). OCC claims that the timing of the disconnection in this case created doubt as to the validity of Duke's interpretation of the Commission's disconnection rules and, therefore, the Company should have erred on the side of maintaining the Easterlings' electric service, consistent with the *2011 Winter Reconnect Order*. OCC, thus, disputes the Commission's finding that nothing in the record supports OCC's position that there was doubt regarding Duke's interpretation of Ohio Adm.Code 4901:1-18-06(B). According to OCC, no reasonable interpretation of the plain language of the rule could lead to the conclusion that the required ten-day extension of the disconnection date does not apply if the disconnection date on the 14-day notice is before November 1. OCC asserts that the Commission should modify the Opinion and Order to find that Duke violated the *2011 Winter Reconnect Order*, because the Company did not err on the side of maintaining the Easterlings' electric service.

{¶ 42} OCC adds that Duke's overly rigid application of its own internal disconnection policy to the Easterlings is also contrary to the Commission's directive in the *2011 Winter Reconnect Order* that the utilities err on the side of maintaining service. Specifically, OCC contends that Duke should have maintained the Easterlings' electric service, in light of their partial payment made just before the effective date of the *2011 Winter Reconnect Order*. OCC requests that the Commission modify the Opinion and Order to direct Duke to consider the effect of customer payments made shortly before utility service is to be disconnected for nonpayment.

{¶ 43} Duke responds that, because the Commission erred in finding that the Company violated Ohio Adm.Code 4901:1-18-06(B) and that Dorothy Easterling was a customer of the Company, there can be no related violation of the *2011 Winter Reconnect Order*, as OCC claims. Duke adds that, in any event, the provisions of the *2011 Winter*

*Reconnect Order* are separate and distinct from the requirements of Ohio Adm.Code 4901:1-18-06(B). Duke notes that OCC offered no legal support for its argument that a violation of the rule leads to a violation of the 2011 *Winter Reconnect Order*. Duke also emphasizes that, as the Commission correctly found, there is no evidence in the record that anyone contacted the Company to invoke the 2011 *Winter Reconnect Order*, in order to maintain the Easterlings' service. Finally, in response to OCC's request for rehearing on the issue of customer payments received shortly before disconnection is scheduled to occur, Duke argues that the request is outside the scope of the proceeding and beyond the statutory parameters of R.C. 4903.10.

{¶ 44} In the Opinion and Order, the Commission concluded that there is no evidence in the record that Dorothy Easterling contacted Duke to avoid the disconnection of her service under the special maintenance procedures outlined in the 2011 *Winter Reconnect Order*. Consequently, we found that Complainant did not sustain his burden of proof on this issue. Opinion and Order at ¶ 75, citing 2011 *Winter Reconnect Order*, Finding and Order (Sept. 14, 2011) at 3-6. We also rejected OCC's argument that the timing of the disconnection in this case created doubt as to the validity of Duke's interpretation of the Commission's disconnection rules and that the Company should, therefore, have erred on the side of maintaining the Easterlings' electric service. As we noted, nothing in the record indicates that the Easterlings, Ms. Lykins, or any Duke employee questioned the Company's interpretation of the Commission's rules in the months leading up to the disconnection. Opinion and Order at ¶ 76. Additionally, we disagreed with OCC's claim that Duke should have maintained the Easterlings' electric service due to the partial payment made just before the effective date of the 2011 *Winter Reconnect Order*. The Commission noted that nothing in the 2011 *Winter Reconnect Order* required Duke to suspend the disconnection of service due to the partial payment of \$143.49 received on October 12, 2011. Opinion and Order at ¶ 76. OCC has raised no new arguments on this issue and its third ground for rehearing should, therefore, be denied.

III. ORDER

{¶ 45} It is, therefore,

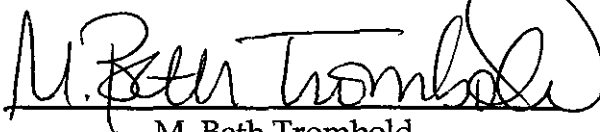
{¶ 46} ORDERED, That the applications for rehearing filed by Duke and OCC be denied. It is, further,

{¶ 47} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



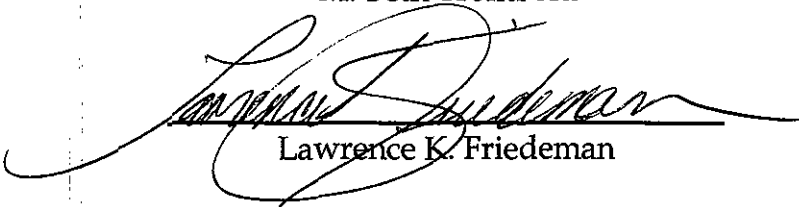
Asim Z. Haque, Chairman



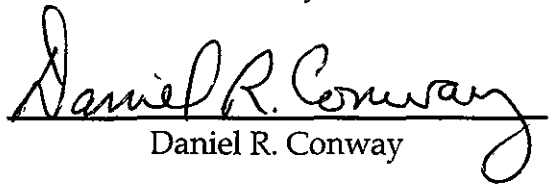
M. Beth Trombold



Thomas W. Johnson



Lawrence K. Friedeman



Daniel R. Conway

SJP/sc

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JAN 03 2018



Barcy F. McNeal  
Secretary