

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Citizens)	
Against Clear Cutting, et al.)	
)	
Complainants,)	
)	
v.)	Case No. 17-2344-EL-CSS
)	
Duke Energy Ohio, Inc.,)	
)	
Respondent.)	

MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.’S MOTION TO DISMISS

I. INTRODUCTION

On February 2, 2018, Duke Energy Ohio, Inc. (Duke) filed a Motion to Dismiss the Second Amended Complaint filed on February 2, 2018,¹ seeking to restart its plan to indiscriminately and unreasonably clear cut the trees and vegetation on or near Complainants’ properties in violation of Ohio law, in essence creating an eight-lane highway along the transmission lines and through the Complainants’ properties and communities. In order to protect Complainants’ properties and the communities in which they reside, Complainants hereby submit, pursuant to Ohio Adm. Code 4901-1-12(B)(1), this memorandum contra Duke’s Motion to Dismiss the Second Amended Complaint. Although it perfunctorily mentions all four claims—with varying levels of accuracy—Duke essentially asks the Public Utilities Commission of Ohio (Commission) to dismiss the Second Amended Complaint in its entirety based on a single legal argument that only arguably applies to Counts III and IV of that Complaint.

¹ Motion to Dismiss of Respondent Duke Energy Ohio, Inc. (February 2, 2018) (Motion to Dismiss).

Contrary to Duke's representations in its Motion to Dismiss, each claim set forth by the Complainants in the Second Amended Complaint is supported by sufficient legal authority and factual allegations. Even if the Commission were to entertain Duke's Motion without a hearing and accept Duke's representations of the state of the law underlying the claims of the Second Amended Complaint, Duke only discussed two of the Complainants' four claims in its Motion. Therefore, Duke's Motion to dismiss the Complaint in its entirety must be rejected on its face. Nonetheless, even considering the issues that Duke did discuss in its Motion, Duke does not offer an adequate justification for dismissing those two claims. Accordingly, Duke's Motion to Dismiss should be denied in its entirety and the Second Amended Complaint should proceed as scheduled.

II. PROCEDURAL BACKGROUND

Complainants first filed a complaint against Duke on November 14, 2017.² In the Complaint, Complainants raised issues concerning the reasonableness and lawfulness of Duke's vegetation management policies, practices, and plan, including the plan's adequacy, defects in how it was modified, and Duke's implementation of it, which includes clear cutting of trees and vegetation on customers' properties and the use of dangerous herbicides. On November 16, 2017, the Attorney Examiner granted Complainants' request to stay Duke's implementation of its vegetation management plan and stay of clear cutting and removal of Complainants' trees and vegetation on their properties during the pendency of the Complaint.³ On November 22, 2017, Complainants moved to amend the Complaint to include additional complainants and allegations and asked the Commission to extend the stay to all complainants added to the Amended

² See Complaint (November 14, 2017).

³ See Entry at ¶ 5 (November 16, 2017).

Complaint.⁴ That motion was granted and the Amended Complaint was accepted on November 28, 2017.⁵ Then, on January 5, 2018, Complainants again moved to amend the Amended Complaint.⁶ The Commission granted that Motion and accepted the Second Amended Complaint on January 25, 2018.⁷

Duke filed a Motion to Dismiss select Complainants to the First Amended Complaint on December 4, 2017.⁸ Complainant filed a memorandum contra that motion on December 19, 2017,⁹ and Duke asked the Commission to accept an untimely reply memorandum on December 28, 2017.¹⁰ Duke filed a second Motion to Dismiss which purports to offer grounds for dismissal of all claims for all Complainants on February 2, 2018.¹¹ For the reasons set forth below, Duke's second Motion to Dismiss should also be denied.

III. LEGAL ARGUMENT

R.C. 4905.26 provides for complaints to be filed by customers against public utilities. The law is intentionally broad and provides for complaints to be brought by customers if *any service* rendered by a public utility “is in *any respect* unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.”¹² Additionally, the PUCO may investigate *any*

⁴ See Motion to Amend Complaint and Expedited Request to Extend Stay (November 22, 2017).

⁵ See Entry at ¶ 7 (November 28, 2017).

⁶ See Motion to Amend the Amended Complaint and Expedited Request to Extend Stay (January 5, 2018).

⁷ See Entry at ¶ 15 (January 25, 2018).

⁸ Motion to Dismiss (December 4, 2017) (Motion to Dismiss Select Complainants).

⁹ Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Dismiss (December 19, 2017)

¹⁰ See Motion for Leave to File Reply in Support of Its Motion to Dismiss, Instantly (December 28, 2017); Reply Memorandum in Support of Motion to Dismiss (December 28, 2017).

¹¹ See Motion to Dismiss at 6.

¹² R.C. 4905.26 (emphasis added).

“regulation, measurement, or *practice affecting or relating to any service* furnished by the public utility.”¹³

The Complainants alleged four claims against Duke in the Second Amended Complaint, all dealing with how a service being rendered by Duke is in many respects unjust, unreasonable, unjustly discriminatory, and in violation of law. Although Duke crudely characterizes the entire Second Amended Complaint as a “collateral challenge” to Duke’s modified vegetation management plan and requests that the Commission dismiss the Second Amended Complaint on that basis alone,¹⁴ the Complaint clearly articulates that it is challenging Duke’s policies and practices, as well as the implementation of its modified vegetation plan (even assuming it was proper), as unjust and unreasonable.¹⁵ Complainants also challenge whether Duke’s policies, practices, and implementation of its modified vegetation plan comply with Ohio law and the Complainants’ easements.¹⁶ Contrary to Duke’s claims, each claim or count should be analyzed to determine whether those claims “stand on [their] own” and Complainants have stated “reasonable grounds” to support each claim.¹⁷ As demonstrated below, Complainants have stated reasonable grounds for each of the four claims or counts asserted in the Second Amended Complaint.

¹³ Id. (emphasis added).

¹⁴ Motion to Dismiss at 7.

¹⁵ See Second Amended Complaint at ¶¶ 119-28.

¹⁶ See Second Amended Complaint at ¶¶ 119-28, 146.

¹⁷ *In the Matter of the Complaint of Diana Williams v. Ohio Edison Company*, 08-1230-EL-CSS, Finding and Order at ¶ 13 (October 28, 2009).

A. Complainants have Stated Reasonable Grounds to Support Count I of the Second Amended Complaint.

Count I of the Second Amended Complaint plainly concerns a “practice affecting or relating to [a] service furnished by” Duke and whether it is in violation of Ohio law.¹⁸ In its Motion to Dismiss, Duke references Count I to the Second Amended Complaint, but inaccurately or incompletely summarizes the allegations contained in the Second Amended Complaint. Contrary to Duke’s representations, Count I does not contain allegations regarding “how the modified Section (f) [of Duke’s vegetation management plan] compares to the superseded provision and how Duke supposedly has not justified the already approved modification [of its vegetation management plan] (Count I).”¹⁹ Rather, Count I of the Second Amended Complaint states:

Duke has failed to demonstrate that it is authorized to remove the trees under its vegetation management plan and its easements because it has not made a determination that these trees actually pose a risk and that complete removal is necessary. See Ohio Adm. Code 4901:1-10-27. Instead, Duke has sent identical generic notices to property owners and/or customers across its service territory. Without tying its attempts to remove trees to the reliability or safety of its service, Duke has no authority to engage in the practice.²⁰

Count I asserts that Duke is only authorized pursuant to Ohio Adm. Code 4901:1-10-27(E)(1)(f) “to conduct ‘right-of-way vegetation control’ in order to ‘maintain safe and reliable service” and Duke is required to justify its plan for doing so. Ohio Adm. Code 4901:1-10-27(E)(1)(f), (E)(2), and (F)(1). Count I also alleges that Duke is permitted to remove trees under its easements only after it has made a determination that the trees and vegetation being removed ““may endanger the safety of or interfere with the construction, operation or maintenance of” the

¹⁸ See R.C. 4905.26.

¹⁹ Motion to Dismiss at 6.

²⁰ Second Amended Complaint at ¶118.

system.”²¹ In support of the position that mass removal of trees is not necessary to ensure the safety or operation of Duke’s electrical system, as required by the rules, Complainants asserted that Duke, through its prior practices, has long been able to successfully manage vegetation surrounding its lines without removing trees in their entirety as it proposes to do in this case. Complainants do not mention Section (f) of Duke’s vegetation management plan anywhere in Count I.

Duke does not challenge the central assertion of Count I—that it has not demonstrated its authority to remove trees and vegetation from Complainants’ properties. Duke has not demonstrated that the Complainants lack adequate grounds to support the claims contained in Count I to the Second Amended Complaint. Indeed, Duke’s Motion to Dismiss does not address these claims at all. As such, the Commission should deny Duke’s request to dismiss Count I.

B. Complainants have Stated Reasonable Grounds to Support Count II of the Second Amended Complaint.

Count II to the Second Amended Complaint asserts that Duke’s implementation of its modified vegetation management plan, practices, and procedures is unjust, unreasonable, and in violation of Ohio law.²² As noted above, a complaint that a service rendered by a public utility, and how that utility is rendering such service, is unjust, unreasonable, unjustly discriminatory, and in violation of Ohio law is permitted under R.C. 4905.26. This is true even if the service itself has been authorized by the Commission. The fact that a service has been authorized by the Commission, does not mean that the utility is properly implementing or properly applying the service to all customers. It certainly does not preclude customers from raising concerns or filing a complaint that the utility is offering, implementing, or rendering a service in an unjust,

²¹ Second Amended Complaint at ¶¶ 113-18 (citing Exhibit A to the Complaint, an easement Duke owns that covers some of the Complainants’ properties.)

²² Second Amended Complaint at ¶¶ 119-28; see also R.C. 4905.26.

unreasonable, discriminatory, or unlawful manner or fashion. That is the whole point of the complaint statute—to give customers a mechanism to assert that a public utility is conducting, implementing, or rendering an authorized service (such as a vegetation management plan) in an unauthorized or unlawful fashion.

Duke, however, misreads the Second Amended Complaint and incorrectly argues that Count II asserts that the Company’s plan, as a whole, is unjust and unreasonable.²³ Count II repeatedly asserts that it is concerned with how Duke is implementing its modified vegetation management plan: “Duke’s implementation of its recently modified vegetation management plan to indiscriminately remove its customers’ trees by clear cutting is unjust and unreasonable;”²⁴ “Duke’s plan to engage in mass tree cutting is also unjust and unreasonable because . . .;”²⁵ Duke’s implementation of its vegetation management plan further harms all Complainants . . .;”²⁶ “it is both unjust and unreasonable for Duke to create this risk without any clear benefits . . .”²⁷ Complainants’ repeated assertions throughout Count II to the Second Amended Complaint illustrate that Count II concerns Duke’s actions in implementing its modified vegetation management plan, and not that plan itself.

Although Complainants assert that the modified vegetation management plan itself is unjust or unreasonable in Count IV of the Second Amended Complaint,²⁸ there is a difference between asserting that the implementation of a plan is unjust and unreasonable and asserting that the plan itself is unjust and unreasonable. This is why Complainants asserted each argument as a

²³ See Motion to Dismiss at 6.

²⁴ Second Amended Complaint at ¶ 122.

²⁵ Id. at ¶ 124.

²⁶ Id. at ¶ 127.

²⁷ Id. at ¶ 128.

²⁸ Id. at ¶¶ 139-44.

separate claim in the Second Amended Complaint. Here, however, Duke attempts to group claims about the implementation of its vegetation management plan with claims about the plan itself in attempt to minimize the issues before the PUCO and to broaden its dismissal arguments. This maneuver by the Company does not change the fact that Count II asserts valid claims against Duke, separate and distinct from the valid claims asserted in Count IV. Duke has not offered any argument to dismiss claims related to the unreasonableness, unjustness, or unlawfulness of Duke's implementation of its vegetation management plan. Accordingly, the Commission should deny Duke's request to dismiss Count II.

C. Complainants have Stated Reasonable Grounds to Support Count III of the Second Amended Complaint.

Count III to the Second Amended Complaint asserts that Duke violated the Commission's rules when it filed an improper application to modify its vegetation management plan and when Duke acted in a deceptive and misleading manner that failed to properly disclose its modifications.²⁹ The Second Amended Complaint also alleges that Duke failed to provide supporting justification and rationale for its application as required by Ohio Adm. Code 4901:1-10-27(E)(2) and (F)(1).³⁰

Duke, however, again misreads the Second Amended Complaint and incorrectly argues that Count III asserts that the Company's plan, as a whole, is unjust and unreasonable.³¹ In another attempt to group all claims with the claim about the plan itself, Duke tries to minimize the issues before the PUCO and to broaden its dismissal arguments. Duke's attempt, however, does not change the fact that Count III is distinguishable from every other count in the Second Amended Complaint and is a valid claim, separate and distinct from the valid claims asserted in

²⁹ Second Amended Complaint at ¶¶ 130-38; see also Ohio Adm. Code 4901:1-10-24(D).

³⁰ Id.

³¹ See Motion to Dismiss at 6.

Count IV. Duke has not offered any argument to dismiss the claim related to the improper application to modify its vegetation management plan, the failure to file a complete application with the requisite supporting justification, or the misleading and deceptive statements made by Duke in its application, all in violation of the Commission's rules.³² Therefore, the Commission should deny Duke's request to dismiss Count III.

D. Complainants have Stated Reasonable Grounds to Support Count IV of the Second Amended Complaint.

As discussed above, the four claims in the Second Amended Complaint are distinct from each other, even though Duke essentially treats them as a single claim with the same arguments. A fair attempt at parsing Duke's arguments reveals that the arguments boil down to one argument against Count IV of the Second Amended Complaint. Duke basically characterizes the entire Second Amended Complaint as a "collateral attack" on Duke's modified vegetation management plan itself;³³ however, Count IV is the only count that addresses that plan as a whole (and not Duke's implementation of the plan related to the Complainants' properties and communities).³⁴ Even as applied to only Count IV, Duke still fails to offer a legal basis to dismiss Count IV.

As an initial matter, the Commission's rules specifically provide for complaints filed under R.C. 4905.26.³⁵ R.C. 4905.26 provides for complaints related to "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 . . ." That law does not exclude

³² See Ohio Adm. Code 4901:1-10-24(D), 4901:1-10-27(E)(2), and 4901:1-10-27(F)(1).

³³ See, e.g., Motion to Dismiss at 3.

³⁴ Second Amended Complaint at ¶¶ 113-44.

³⁵ See Ohio Adm. Code 4901-9-01(B).

complaints related to vegetation management policies and practices, or any practices, on the basis that such complaints could be characterized by a utility as a “collateral attack.”

Nonetheless, throughout its motion, Duke characterizes, refers to, and demeans the Second Amended Complaint as “nothing but a collateral attack on Duke’s modified vegetation management plan.”³⁶ Twice, Duke states that Complainants “may not” collaterally attack the modified vegetation management plan.³⁷ However, in support of its claim, Duke only cites to a 1992 Commission Entry.³⁸ But in that case, the Commission actually reached the opposite conclusion from the one Duke urges it to reach in this case.

Duke selectively quotes from an Entry in *Board of Education v. Cleveland Electric Illuminating Company*, Case No. 91-2309-EL-CSS, to assert that:

Instead, much like in the case of a collateral challenge to a tariff, the Commission should, ‘in the interest of judicial economy and efficiency, dismiss a complaint against a Commission approved’ vegetation management plan where Commission Staff thoroughly considered the provisions of that modified plan and the Complainants allege ‘nothing new or different for the Commission’s consideration.’³⁹

Duke’s partial use of the language from that Entry creates a mirage that the Commission in that case reached a different conclusion than the one it actually reached. A more thorough review of the case reveals that the Commission concluded that the simple fact that Commission Staff, or even the Commission itself, considered an issue in a prior proceeding does not render that issue inappropriate for a complaint in a future proceeding. The Commission stated:

While, in the interest of judicial economy and efficiency, a complaint against approved rates might be dismissed if the rates

³⁶ See Motion to Dismiss at 6.

³⁷ See id. at 3, 7.

³⁸ See id. at 7.

³⁹ Id. (citing *Board of Education v. Cleveland Electric Illuminating Company*, Case No. 91-2308-EL-CSS, Entry at ¶ 9 (July 2, 1992) (*Board of Education v. CEI* Entry)).

have been recently and thoroughly considered by the Commission and the complainant alleges nothing new or different for the Commission's consideration, those circumstances are not present in the instant cases regarding the Board's claims that CEI's current tariff rates are unjust and unreasonable as applied to schools. The Board has been served pursuant to contract for the last sixteen years and this issue has not been thoroughly considered in CEI's last rate proceeding. Accordingly, the Commission finds that the Board's allegations that CEI's current tariffs are unreasonable when applied to the Board do state reasonable grounds for complaint.⁴⁰

Similar to the contract issue in *Board of Education v. CEI*, there is no evidence that the Commission thoroughly considered the issues in the vegetation management plan proceeding that the Complainants raise in the Second Amended Complaint. As Duke notes, the modified vegetation management plan it now relies on was automatically deemed approved on the 46th day after Duke filed it in Case No. 16-915-EL-ESS.⁴¹ Because Commission Staff did not file a report, the Commission did not issue an order, and no parties intervened in that case, there is nothing in any Commission record to support the contention that either the misrepresentation issue (Count III) or the arguments for the plans unjustness and unreasonableness (Count IV) advanced by the Complainants in this proceeding were thoroughly considered.

Complainants do not allege in any way that Commission Staff was derelict in its consideration of Duke's 2016 filing; nor do they allege that the Commission's process is improper.⁴² Rather, Complainants recognize that some issues, as was the case in *Board of Education v. CEI*, only receive full consideration when exposed to a complaint about a specific service or rate being offered, rendered, or applied in a particular manner to a particular customer

⁴⁰ *Board of Education v. CEI* Entry at ¶ 9.

⁴¹ See *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Revised Paragraph (f) of Its Programs for Inspection, Maintenance, Repair, and Replacement of Distribution and Transmission Lines*, Case No. 16-915-EL-ESS, Application (April 28, 2016); Ohio Adm. Code 4901:1-10-27(E)(2).

⁴² See Motion to Dismiss at 7-8.

or group of customers. Given the lack of record from the docket wherein Duke's modified vegetation management plan was deemed approved, the Commission should not consider the Complainants' issues resolved as Complainants do in fact raise new and different issues for the Commission's consideration. Moreover, neither Ohio law nor the Commission's rules support Duke's contentions related to collateral attacks and Duke cites no basis aside from that which is discussed above to support dismissal. As such, the Commission should deny Duke's request to dismiss Count IV.

III. CONCLUSION

For the reasons discussed above, the Commission should deny Duke's Motion to Dismiss in its entirety as Complainants have stated adequate grounds for each claim or count in the Second Amended Complaint.

Respectfully submitted,

/s/ Kimberly W. Bojko

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing reply was filed and served on February 20, 2018, by electronic mail upon all parties of record.

/s/ Brian W. Dressel

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Counsel for Complainants

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