

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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
RENEWED MOTION TO DISMISS**

I. INTRODUCTION

Pursuant to Ohio Adm. Code 4901-1-12(B)(1), Citizens Against Clear Cutting (CACC or Complainants) hereby file with the Public Utilities Commission of Ohio (Commission) this Memorandum Contra Duke Energy Ohio, Inc.'s (Duke) Renewed Motion to Dismiss the claims of some of the Complainants in the above-captioned proceeding. Specifically, Duke seeks to dismiss the claims of the following Complainants: Amanda Sachs, David Siff, Carrie Gause, Dan Gause, Susan Falick, Jerry Ullrich, Lou Ullrich, Darrelle Reese, Julie Carnes, Todd Bacon, Michelle Bacon, Patricia Lohse, Robb and Kathleen Olson, John Collins, Barbara Collins, Valerie Van Iden, Joe Zukor, Darrelle Reese, Fu Wong and Peony Lo, John and Sally Riester, Sandra Nunn, Mark and Calissa Thompson, and the Symmes Township Trustees because they allegedly do not own property that is subject to Duke's easement or its plan to remove vegetation (collectively, Purported Off-Easement Complainants).¹ As explained previously, Duke's arguments lack merit, and should be rejected.

¹ See Renewed Motion to Dismiss (February 20, 2018) (Renewed Motion to Dismiss).

Duke already has multiple pending motions to dismiss and filing a “renewed,” third motion to dismiss with regard to the Purported Off-Easement Complainants that asserts arguments that are essentially identical to those it previously asserted is unnecessary, unduly burdensome, unjust, and unreasonable. Duke does not assert any new or different arguments with regard to these Purported Off-Easement Complainants than what it already raised in its December 4, 2017 Motion to Dismiss.² It is improper, unduly burdensome, unreasonable, and unjustly prejudicial for Duke to file repeated, identical motions when it already raised the arguments previously and, to the extent Duke deemed necessary, could have re-raised every claim in its Renewed Motion to Dismiss in its previously submitted Second Motion to Dismiss filed on February 2, 2018. Simply stated, Duke’s “renewed” motion to dismiss filed 18 days after its last motion to dismiss and approximately 11 weeks after its first motion to dismiss can only be construed as harassing.

II. ARGUMENT

Its Renewed Motion to Dismiss is the second motion to dismiss filed by Duke in less than a month; filed after its Motion to Dismiss all Complainants submitted on February 2, 2018.³ Although Duke filed an essentially identical Motion to Dismiss on December 4, 2017, if it truly believed it was necessary to reassert its claims, Duke could have and should have asserted the grounds for dismissal asserted in its February 20th Renewed Motion to Dismiss in its February 2nd Motion to Dismiss, but it chose not to. Duke’s choice to assert each purported ground for dismissal as a separate motion and subject Complainants to the burden of filing repeated responsive pleadings each time that Duke decides to file a new motion to dismiss is harassing and a waste of time and resources of the Complainants and the Commission, especially when, as

² See First Motion to Dismiss (December 4, 2018).

³ See Second Motion to Dismiss (February 2, 2018).

is the case with this motion, Duke's new motion simply regurgitates arguments it previously made.

As to the merits of Duke's arguments asserted in its previous motions to dismiss, Complainants have thoroughly addressed the defects of Duke's arguments and contentions and the factual realities that Duke ignores in Complainants' Memoranda Contra Duke Energy Ohio, Inc.'s Motions to Dismiss filed on December 19, 2017 and February 20, 2018.⁴ Complainants incorporate by reference those responsive arguments into this Memorandum Contra as if fully restated herein.

In arguing for the dismissal of the Purported Off-Easement Complainants, Duke summarily dismisses or ignores certain allegations explicitly asserted in the Second Amended Complaint, incorrectly narrowing the Second Amended Complaint and focusing only upon CACC's claims related to the destruction of trees and other vegetation located on Complainants' properties under the wires.⁵ Duke intentionally ignores allegations contained in Count II of the Second Amended Complaint related to Duke's practice and policy of using toxic herbicides as part of its vegetation management program, the effects of vegetation removal on soil erosion, allegations concerning the decrease in property value, and the diminution in "Complainants' enjoyment of their property by decreasing the aesthetic value of the property where Complainants' reside, surrounding property, and their communities."⁶ Duke further ignores Counts III and IV of the Second Amended Complaint, which allege that Duke improperly modified its vegetation management plan, misrepresented the revisions made to the plan in its application filed in Case No. 16-915-EL-ESS in violation of Commission rules, and is unjustly

⁴ See Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Dismiss (December 19, 2017); Memorandum Contra Duke Energy Ohio, Inc.'s Renewed Motion to Dismiss (February 20, 2018).

⁵ See Renewed Motion to Dismiss.

⁶ Second Amended Complaint at ¶¶ 119-28.

and unreasonably implementing its modified vegetation management plan.⁷ These are service-related issues concerning a public utility that may be raised by any customer of Duke. Notably, all of the Purported Off-Easement Complainants are customers of Duke.

Additionally, Duke mischaracterizes its activities related to this case in an attempt to prevent the Purported Off-Easement Complainants from vindicating their statutory right to file a complaint against a public utility. R.C. 4905.26 and 4905.22. Ultimately, as demonstrated in prior pleadings, all Complainants have standing to bring the Second Amended Complaint and this case should proceed with regard to both the Purported Off-Easement Complainants and the Complainants that own property and have an easement with Duke or its predecessor.

Duke states that its arguments for dismissal in its February 20th Motion to Dismiss are the same as those in its December 4, 2017 motion. Those arguments were premised on the legal claim that “the claims of these Complainants in this case do not involve any service rendered by Duke Energy Ohio to these Complainants or any other service or regulation applicable to these Complainants.”⁸ In that Motion, Duke cited two cases ostensibly in support of its claim that a service rendered by a public utility cannot affect a customer unless it is performed on that customer’s property.⁹ Neither case supports that proposition. In the first case, *In the Matter of the Complaint of Diana Williams v. Ohio Edison Co.*, the Commission held that it has jurisdiction only over cases related to service provided or rates charged by public utilities, and did not address the question of whether the utility’s services in question needed to occur directly

⁷ Second Amended Complaint at ¶¶ 129-44.

⁸ First Motion to Dismiss at 5.

⁹ See *id.*

on a customer's property in order for that customer to have standing to bring a complaint before the Commission.¹⁰

Duke's reliance on the second case, *In the Matter of the Complaint of Richard Powell, d.b.a. Scioto Lumber Company v. The Cincinnati Gas and Electric Company*, is also misplaced as it does not support dismissal. As an initial matter, the Commission dismissed that case because a party that was required by law to be represented by an attorney was not so represented.¹¹ Even the Commission's discussion of the merits, however, does not apply to the case at bar. That case did not address the question of whether a service-related issue had to occur on a complainant's property. Instead, the Commission dealt with the question of its jurisdiction to consider the complainant's claims that sounded in tort and contract.¹² Here, the Complaint is regarding service-related issues where the Commission has explicit jurisdiction. The Supreme Court of Ohio has already confirmed that vegetation management activities of electric utilities are "manifestly service-related."¹³ Thus, these cases that do not address a similar factual situation as the instant case do not support dismissal of the Purported Off-Easement Complainants' claims.

Rather, given that the statute allows for complaints concerning a service rendered by a public utility that "*is in any respect* unjust, unreasonable, unjustly discriminatory, unjustly

¹⁰ See *In the Matter of the Complaint of Diana Williams v. Ohio Edison Co.*, Case No. 08-1230-EL-CSS at ¶ 11.

¹¹ See *In the Matter of the Complaint of Richard Powell, d.b.a. Scioto Lumber Company v. The Cincinnati Gas and Electric Company*, Case No. 88-916-GE-CSS, 1988 WL 1623050, Entry at ¶ 4.

¹² *Id.*

¹³ *Corrigan v. Cleveland Electric Illum. Co.*, 122 Ohio St.2d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 21.

preferential, or in violation of law,”¹⁴ the Commission has heard many complaints that deal with services rendered by utilities that do not specifically occur on a consumer’s property.¹⁵

In the absence of compelling precedent to support its position, Duke selectively discusses the allegations in the Complaint to focus only on those which, arguably, do not directly affect the property of the Purported Off-Easement Complainants.

Here, each and every Complainant on the Second Amended Complaint is a Duke customer. Duke’s vegetation management practices and policies are part of the service that it provides to its customers as a public utility,¹⁶ and Duke receives cost recovery for these services from all of its customers. Although Duke’s current clear cutting activities provide a basis for much of the Second Amended Complaint, the allegation that Duke is unlawfully, unjustly, and unreasonably clear cutting trees and other vegetation is not the only allegation set forth by CACC.

In particular, the Second Amended Complaint alleges that:

Duke’s implementation of its vegetation management plan further harms all Complainants and others in the Duke service territory because herbicides being sprayed by Duke throughout the Township could have negative impacts to the Polk Run Creek that carries water to the Little Miami River. The negative effects of this pollution of Polk Run Creek will be felt by all of Duke’s customers in the area, not just those directly positioned on Duke’s easement. Duke is unjustly and unreasonably using these herbicides even

¹⁴ R.C. 4905.26 (emphasis added)

¹⁵ See, e.g., *In the Matter of the Complaint and Request for Relief for Consumers by the Office of the Ohio Consumers’ Counsel*, Case No. 16-782-EL-CSS, Complaint (April 12, 2016) (Complaint filed by the Office of the Ohio Consumers’ Counsel (OCC) against the Ohio Power Company (AEP Ohio) on behalf of residential consumers regarding AEP Ohio’s submetering practices); *In the Matter of the Complaint and Request for Relief of Fiber Technologies Networks, LLC v. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1902-AU-CSS, Complaint (November 13, 2015) (Complaint filed against electric distribution utilities regarding access to pole attachments); *In the Matter of the Complaint of the Office of the Ohio Consumers’ Counsel v. The Toledo Edison Company, The Ohio Edison Company, and The Cleveland Electric Illuminating Company*, Case No. 10-1128-EL-CSS, Complaint (August 12, 2010) (Complaint filed by OCC against electric distribution utilities for violating the Commission’s net metering rules). Like the case at bar, the allegations in these complaints were not specific to certain properties and, moreover, the complainants had standing to bring the complaints even though they did not concern activity occurring on property owned by those entities.

¹⁶ See Ohio Adm. Code 4901:1-10-27(E)(1)(f).

though doing so is not necessary to improve safety or reliability as required by Ohio Adm. Code 4901:1-10-27 in violation of R.C. 4905.22.¹⁷

The Second Amended Complaint also alleges that:

Tree and vegetation removal will also negatively impact the Complainants' enjoyment of property by decreasing the aesthetic value of the property where Complainants' reside, surrounding property, and their communities. Diminishing this enjoyment of property is unjust and unreasonable because the proposed vegetation management policies, practices, and plan do not make Duke's electric distribution system more reliable or safer as required by Ohio Adm. Code 4901:1-10-27 in violation of R.C. 4905.22.¹⁸

The Second Amended Complaint further alleges that:

Duke's proposed removal of trees and vegetation will contribute to soil erosion, which will decrease all Complainants' property values and endanger portions of property that include hills and uneven terrain by creating the risk that homes, decks, and other portions of some of the Complainants' properties will lose their base of support. It is both unjust and unreasonable for Duke to create this risk without any clear benefits to service reliability or safety as required by Ohio Adm. Code 4901:1-10-27 in violation of R.C. 4905.22. Further, Duke's unjust and unreasonable policies and practices could enhance the problem of soil erosion, which itself could impact the safety and reliability of Duke's electric distribution service in violation of Ohio Adm. Code 4901:1-10-27 and R.C. 4905.22.¹⁹

Lastly, the Second Amended Complaint alleges that Duke improperly modified its vegetation management program in Case No. 16-915-EL-ESS in violation of the Commission's rules when it, knowing that the Commission's rules provided for automatic approval of such plans 45 days after they are filed, made misleading statements that disguised the substantial changes it

¹⁷ Second Amended Complaint at ¶ 127 (January 5, 2018) (Second Amended Complaint).

¹⁸ Id. at ¶ 125.

¹⁹ Id. at ¶ 128.

was making to its vegetation management plan as mere clarifications.²⁰ Duke's deceptive filing, which did not comply with the Commission's rules for filing modifications to its plan,²¹ in and of itself violated the Commission's rules. See Ohio Adm. Code 4901:1-10-24(D).

None of these allegations depend on the activities actually occurring on a Complainant's property. The Purported Off-Easement Complainants have alleged that Duke's unjust and unreasonable decision to destroy and completely remove trees and vegetation (as opposed to trimming and pruning vegetation) is contradictory to the Commission's rules, negatively impacts the value and enjoyment of their properties, will contribute to soil erosion, and that Duke's use of herbicides has resulted in poisonous chemicals being spread throughout their communities and waterways. Further, the Purported Off-Easement Complainants have also alleged that Duke improperly modified its vegetation management plan and misrepresented the revisions made to the plan in its application filed in Case No. 16-915-EL-ESS in violation of Commission rules. These allegations are related to the services that Duke provides in the provision of electric service to its customers as a public utility and are sufficient to allow the Purported Off-Easement Complainants' involvement in this case.

Because the vegetation management practices are part of the services that Duke provides as a public utility, which is paid for by all of its customers, the services at issue here are being provided to all of Duke's customers in the area, not just those who own trees that Duke seeks to cut down on their property. Furthermore, the allegations in the Second Amended Complaint are much broader than what Duke would have this Commission believe. Therefore, the Purported Off-Easement Complainants have standing to bring this Complaint before this Commission.

²⁰ Id. at ¶¶ 88-97.

²¹ Ohio Adm. Code 4901:1-10-27(F) and (E)(2).

Moreover, Duke claims that it is an open question as to whether motions to dismiss remain pending that were filed in cases that have been voluntarily dismissed by the Purported Off-Easement Complainants. The question, however is not open; the motions to dismiss filed in cases that no longer exist do not remain pending. The complaints in those cases have been voluntarily withdrawn, and a motion to dismiss a complaint that contains different allegations from the Second Amended Complaint at issue in this case are not pending in this case and certainly would not remain pending against Complainants to a different complaint (Second Amended Complaint).

III. CONCLUSION

Duke's motion practice is needlessly harassing, and is unjust and unreasonable. For the reasons discussed herein and in Complainants' December 19, 2017 and February 20, 2018 Memoranda Contra the prior Motions to Dismiss, Duke's Renewed Motion to Dismiss should also be denied.

Respectfully submitted,

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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 March 7, 2018, by electronic mail upon all parties of record.

/s/ Brian W. Dressel

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Counsel for Complainants

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/7/2018 4:16:00 PM

in

Case No(s). 17-2344-EL-CSS

Summary: Memorandum Contra Duke Energy Ohio, Inc.'s Renewed Motion To Dismiss
electronically filed by Mrs. Kimberly W. Bojko on behalf of Complainants