

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**DUKE ENERGY OHIO, INC.’S MEMORANDUM CONTRA
COMPLAINANTS’ MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

For the reasons set forth more fully in Duke Energy Ohio, Inc.’s (Duke Energy Ohio or the Company) Motion to Compel filed on March 13, 2018, and below, the Public Utilities Commission of Ohio (the Commission) should deny Complainants’ Motion for Protective Order. Complainants mistakenly believe that they may file claims against the Company and then dictate how the Company is allowed to defend those claims, including how, when and where discovery may be taken. Regardless of Complainants’ strategy surrounding which of the named Complainants may testify at the hearing in support of their claims, Duke Energy Ohio is entitled to decide the best manner to defend its vegetation management plan and to conduct discovery under the applicable Rules. That includes deposing every Complainant who has asserted claims against the Company in the Second Amended Complaint and those who were not dismissed by the Commission’s Entry dated March 8, 2018. The Company’s discovery efforts are neither unduly burdensome nor harassing but, instead, are designed to ascertain the nature of the facts supporting each of the

Complainants' claims in this case. While certain Complainants may not be selected to testify, their complaints remain of record and will be dealt with by the Commission in this proceeding. Each Complainant has the burden of proof with respect to their respective complaints. If the Company is not permitted to conduct discovery, the allegations of the individual Complainants must be dismissed. Otherwise, the Company is accused of noncompliance with no due process. Accordingly, the Commission should deny Complainants' motion, order the remaining Complainants to appear for their depositions forthwith and dismiss every Complainant from this case who refuses to appear for his or her deposition.

II. DISCUSSION

In an effort to avoid repeating the same issues and arguments already pending before the Commission, Duke Energy Ohio hereby incorporates by reference its Motion to Compel filed on March 13, 2018, including the Affidavit of Robert A. McMahon. Below, the Company responds to some of the more offensive and unsubstantiated arguments and accusations asserted in Complainants' motion. Once the Commission strips away Complainants' baseless bombast, it will conclude that Duke Energy Ohio is entitled to depose each Complainant in the case.

Rather than focus on the central issue before the Commission—namely, whether Duke Energy Ohio is entitled to depose Complainants who filed claims against the Company—Complainants start their motion with an Introduction filled with *ad hominem* attacks on Duke Energy Ohio and its attorneys. Those attacks are neither relevant nor supported by the record in this case. Yes, Duke Energy Ohio served written discovery to investigate the nature and evidence relating to the 100+ Complainants' claims. Such discovery is typical and appropriate under the Rules. In their improper and inapt response, Complainants take offense to and seek to shut down

the Company's discovery efforts, thereby preventing Duke Energy Ohio from being able to fully prepare for hearing.

Now that the Commission has dismissed those Complainants who do not own property on the Company's high-voltage transmission lines at issue in this case and, therefore, lack standing to assert claims against the Company,¹ Duke Energy Ohio only seeks to depose the Complainants remaining in the case. In addition, even though the Company confirmed in its Motion to Compel that it "does not want to depose both people (whether husband and wife or otherwise) who jointly own their residential property,"² Complainants think it necessary to seek a protective order regarding depositions of Complainants that Duke Energy Ohio does not desire. Moreover, in their Memorandum Contra Duke Energy Ohio's Motion to Compel, filed March 19, 2018, Complainants attack Duke Energy for not having withdrawn the deposition notices as to those Complainants who jointly own property with their spouses or significant others and whom the Company already confirmed it does not want to depose. But Complainants ignore the fact that Complainants have not identified which of the two property owners will be produced for deposition and, instead, now seek a protective order as to all remaining Complainants who have not yet been deposed. Therefore, there is no possible way for Duke Energy Ohio to withdraw deposition notices when Complainants refuse to produce even one of two joint owners for deposition.

With respect to the strategy and impact surrounding the filing of the Second Amended Complaint, Complainants mistakenly equate a procedural tactic—allowing all Complainants to

¹ Those Complainants never should have been joined in the Second Amended Complaint in the first place, nor should all of Complainants' accusations about such irrelevant issues as alleged erosion, lost property values and money damages. Having filed their Second Amended Complaint with those inappropriate and baseless claims, Complainants have the audacity to falsely accuse Duke Energy Ohio of harassing and burdening them with, of all things, written discovery requests and notices of deposition.

² Duke Energy Ohio's Motion at 5

join in a single Second Amended Complaint and dismiss their individual cases—with the more substantive issues relating to the investigation and proof of their claims. At no point in time did Duke Energy Ohio ever suggest that it would not need to conduct discovery from all Complainants. Nor did the Commission limit the Company’s discovery rights under the Rules when it allowed Complainants to file the Second Amended Complaint.

Notably Complainants’ own actions lead to additional written discovery from Duke Energy Ohio about which they now take issue. The Company previously served written discovery on those Complainants who had filed *pro se* complaint cases before joining in the Second Amended Complaint. Those previously *pro se* Complainants actually ignored the written discovery served by Duke Energy Ohio in their individual cases, thereby forcing the Company to serve new discovery requests in this action. Complainants’ feigned reasonableness is a sham.

Similarly, Duke Energy Ohio has never claimed that every Complainant must testify at the hearing. Nor has the Company dictated how Complainants present their case, as they now argue in vain. Instead, as the Company explained before filing its Motion to Compel (and in the motion itself), regardless of which Complainants may decide to testify in support of their claim, Duke Energy Ohio may want other Complainants to testify in defense of those claims. As such, it is incumbent that Complainants not be permitted to dictate Duke Energy Ohio’s defense strategy, both in discovery and at the evidentiary hearing.

The legal authorities cited by Complainant generally do not support their arguments. For example, as the Commission has recognized, Rule 4901-1-16 of the Ohio Administrative Code, expressly provides that a party may not object to discovery because the information may be inadmissible at the hearing provided “the information sought appears reasonably calculated to lead

to the discovery of admissible evidence.”³ The depositions of Complainants unquestionably may lead to the discovery of admissible evidence. In another case cited by Complainants involving facts and issues distinguishable from those present here, the Commission denied a motion to compel because the discovery requests involved customers and issues outside the scope of the complaint in that case.⁴ Here, Duke Energy seeks to depose Complainants named in the Second Amended Complaint about the facts and issues surrounding their claims, not irrelevant matters. Complainants also cite to inapposite dicta in another Commission case even though the actual decision merely explains the available remedy under the Rules and does not remotely support the imposition of a protective order.⁵

One particular case cited by Complainants to support the argument that they need not produce all complainants for deposition is especially misleading.⁶ Had Complainants done their homework they would have learned that in *In the Matter of Steve Bowman, et al.*, the version of R.C. 4905.26 that was cited was the 1979 version, which was quite different. That version of the R.C. provided for a particular process relevant to telephone proceedings only. The R.C. section was subsequently amended and no longer provides for such procedures. The earlier procedure was designed to streamline particular types of telephone cases wherein certain telephone exchange matters were at issue. Since the statute was amended to delete the provision, this case is especially inapposite and misleading.⁷

³ See, *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer in Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SS0, Entry (Dec. 10, 2010), at (8)

⁴ See, *In the Matter of the Complaint of Ps Executive Centers, Inc.*, Panel Case No. 01-2771-TP-CSS, Entry (November 14, 2002), at (5).

⁵ See, *In the Matter of the Petition of Ohiotelnet.com, Inc. for Arbitration of Interconnection Rates, Terms, & Conditions & Related Arrangements with Alltel Ohio, Inc.*, Panel Case No. 00-1601-TP-ARB, Arbitration Award (January 11, 2001), at 6.

⁶ *In the Matter of the Complaint of Distributors Associates, Inc., and Numerous Other Petitioners v. General Telephone Company of Ohio*, Case Nos. 79-543-TP-CSS, 79-543-TP-CSS.

⁷ See: Sub.S.B. 162, Sec. 1., (128th GA), a copy of the amended language is attached.

Finally, once the Commission reviews the emails attached to the affidavits of the parties' attorneys, it will become crystal clear that Complainants paint a false picture of what actually transpired. For one, Complainants' counsel provides an incomplete description of her communications with Duke Energy Ohio's attorney on March 2, 2018, by conveniently omitting the explanation as to how Complainants may not limit the Company's defense efforts.⁸ Second, Complainants engage in unwarranted and personal attacks on the Company and its counsel by suggesting that "Duke's counsel also has adopted an overtly harassing and threatening tone throughout our email correspondence."⁹ Not only is that accusation offensive, the actual emails attached to Ms. Bojko's affidavit reflect that Complainants were not providing information requested by Duke Energy Ohio's attorney so that the Company could accommodate Complainants' request to conduct Complainant Fred Vonderhaar's deposition by telephone. As a result, it took Complainants 9 days to provide the necessary information regarding Mr. Vonderhaar's location, thereby impacting Duke Energy Ohio's ability to arrange a court reporter in advance of that deposition.

III. CONCLUSION

For the reasons previously stated, including in the Company's separately filed Motion to Compel, the Commission should deny Complainants' Motion for Protective Order; direct all remaining Complainants to appear for deposition or to have their claims dismissed; and grant Duke Energy Ohio, Inc. such other relief as the Commission deems appropriate.

⁸ See, Affidavit of Kimberly Bojko at ¶¶14-15; Affidavit of Robert A. McMahon at ¶7

⁹ See, Affidavit of Kimberly Bojko at ¶13

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 21st day of March, 2018, to the following:

/s/ Elizabeth H. Watts

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Sec. 4905.26. Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or 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, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. ~~Such~~ The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

~~Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange, whichever number be smaller, or by the legislative authority of any municipal corporation served by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by the telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory, or preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall fix a time for the hearing of such complaint.~~

~~The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the date, time of day, and location of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by the telephone company in the county or counties affected, and shall be published for not less than two consecutive weeks in a newspaper of general circulation in the county or counties affected.~~

~~Such hearing shall be held not less than fifteen nor more than thirty days after the second publication of such notice.~~

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Commission of Ohio Docketing Information System on

3/21/2018 10:05:15 AM

in

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

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra Complainants'
Motion for Protective Order electronically filed by Carys Cochern on behalf of Watts,
Elizabeth H. Ms.