

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio Adm.)
Code 4901-9 Rules Regarding) Case No. 18-278-AU-ORD
Commission Complaint Proceedings.)

**REPLY COMMENTS ON THE PUBLIC'S RIGHT TO FILE A COMPLAINT
AGAINST A PUBLIC UTILITY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE NORTHWEST OHIO AGGREGATION COALITION**

Bruce Weston (0016973)
Ohio Consumers' Counsel

Amy Botschner O'Brien (0074423)
Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone [Botschner O'Brien]: (614) 466-9575
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

Thomas R. Hays (0054062)
Counsel for Lucas County
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com
(willing to accept service by e-mail)

February 10, 2020

*Attorney for The Northwest Ohio
Aggregation Coalition*

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. THERE IS NO STATUTORY AUTHORITY FOR THE PROPOSED RULE AGAINST CLAIMED VEXATIOUS LITIGATION BY CONSUMERS WHO SUE THEIR PUBLIC UTILITIES.	3
III. IN ADDITION TO THE PUCO LACKING THE AUTHORITY TO STATUTORILY ESTABLISH A VEXATIOUS LITIGATOR RULE, THE PROPOSED RULE COULD BE USED BY UTILITIES TO ENDANGER OHIOANS’ RIGHTS TO BRING COMPLAINTS ABOUT THEIR UTILITY SERVICES.....	5
A. The proposed draft rule regarding vexatious litigation is not needed.....	5
B. Utility comments illustrate why the PUCO should adopt the OCC/NOAC recommendation (regarding claims of vexatious litigation) for providing more information to the public about filing complaints against utilities at the PUCO.....	7
IV. CONCLUSION.....	10

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio Adm.)
Code 4901-9 Rules Regarding) Case No. 18-278-AU-ORD
Commission Complaint Proceedings.)

**REPLY COMMENTS ON THE PUBLIC’S RIGHT TO FILE A COMPLAINT
AGAINST A PUBLIC UTILITY
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND
THE NORTHWEST OHIO AGGREGATION COALITION**

I. INTRODUCTION

During the recent ten years of complaints against utilities by Ohioans through December 31, 2019, the Docketing Information System of the Public Utilities Commission of Ohio (“PUCO”) shows there were a just *12* complainants who filed two complaints involving utilities (among the total complaints filed against utilities).¹ And there appears to be only *one* instance where a complainant filed more than three complaints during that ten-year period. Even the Ohio Telecom Association recognized that, “the frequency of frivolous or vexatious litigation at the Commission does not appear to be high.”²

Under a civil-court statute, a vexatious litigator is defined as a person who “habitually, persistently, and without reasonable grounds, engage[s] in vexatious conduct” in

¹ In the same time period DP&L, for example, twice withdrew from PUCO Orders that had required considerable administrative time to implement and then twice initiated more administrative processes to replace the withdrawn plans at further imposition on state and parties’ time. Of course, such a utility imposition is not considered “vexatious” because utilities managed to have this favored process adopted in the 2008 energy law. *See In re the Application of the Dayton Power and Light Company for Approval of the Electric Security Plan*, Case No. 08-1094-EL-SSO, Notice of Withdrawal (July 27, 2016); Case No. 16-395-EL-SSO, Notice of Withdrawal (Nov. 26, 2019).

² Comments of Ohio Telecom Association at 4 (Jan. 13, 2020).

a civil action in an Ohio court.³ The number of consumers filing complaints at the PUCO falling under this definition is few and far between, at most.

Certainly, truly vexatious conduct is to be avoided. But the General Assembly did not give the PUCO the authority to declare a litigator as vexatious, either at the outset of a proceeding or during a proceeding.⁴ In not granting such authority to the PUCO, the General Assembly protected the right of Ohioans to file complaints against their public utilities, without subjecting consumers to the potential for utilities to exploit even a well-intentioned rule barring vexatious complaints. As things now stand, it is already a formidable task for a consumer to sue their monopoly utility.

The PUCO cannot by rule eliminate the statutory right of any person, firm, or corporation to file a complaint under R.C. 4905.26 or 4927.21. R.C. 2323.52 expressly provides that the authority to declare a vexatious litigator belongs to Ohio's civil courts. Even if the PUCO possessed such authority, there is not sufficient evidence of vexatious litigation in complaints against utilities so as to warrant further imperiling the public's right of redress to their government against the monopoly providers of utility services essential to Ohioans' life and health.

The PUCO requested comments on its proposed amendments to Ohio Adm. Code 4901-9 regarding complaint proceedings, including the PUCO's proposed rule adding 4901-9-02 that it can declare a person or party a vexatious litigator.⁵ OCC and the

³ See, R.C. 2323.52(A)(3).

⁴ Case No. 18-0278-AU-ORD, *Comments on the Public's Right to File a Complaint Against a Public Utility by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition* (Jan. 13, 2020) ("OCC/NOAC Comments").

⁵ *In re the Matter of the Review of Ohio Adm. Code Chapter 4901-9 Regarding Commission Complaint Proceedings*, Case No. 18-0278-AU-ORD, Entry at 74-76 (Dec. 4, 2019).

Northwest Ohio Aggregation Coalition (“NOAC”) jointly filed initial comments on this topic.⁶ OCC/NOAC recommended that the PUCO reject the vexatious litigator proposal, to preserve the rights of Ohioans to seek redress against their public utilities under R.C. 4905.26 and 4927.21. OCC/NOAC further recommended addressing the issue by improving the information that is available to the public about the formal complaint process.⁷

II. THERE IS NO STATUTORY AUTHORITY FOR THE PROPOSED RULE AGAINST CLAIMED VEXATIOUS LITIGATION BY CONSUMERS WHO SUE THEIR PUBLIC UTILITIES.

R.C. 4905.26 grants any person, firm, or corporation the right to file a complaint against a public utility. The proposed rule is not authorized by Ohio law which gives the right to any person, firm, or corporation to file a complaint against a public utility that any rate or charge is unjust, unreasonable, or a violation of law. In fact, R.C. 4905.26 is even broader, and if it appears that the complaint is based on “reasonable grounds,” the PUCO is required to hold a hearing on the complaint. Parties to complaint proceedings are entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

This statutory authority is regularly summarized by the PUCO in its orders in complaint proceedings:

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.⁸

⁶ See OCC/NOAC Comments.

⁷ *Id.* at 3-4.

⁸ R.C. 4905.26.

But under the proposed rule change, the public’s statutory right is restricted. The PUCO seeks to limit the ability of any person, firm, or corporation to file a complaint against a public utility by declaring a complainant vexatious.

In its Business Impact Analysis that was filed contemporaneously with the proposed new rule, the PUCO cites R.C. 4901.13 as the Ohio law authorizing the agency to adopt the new rule. But R.C. 4901.13 does not give the PUCO the power it seeks.

Dominion East Ohio supports the proposed vexatious litigator rules and claims that the PUCO has the authority under R.C. 4901.13 to establish such a rule.⁹ Dominion is wrong.

According to R.C. 4901.13, the PUCO “may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it.”¹⁰ This is a rule of general applicability giving the PUCO authority to adopt and publish rules to govern its own proceedings. *The statute allows for the PUCO to adopt rules governing its proceedings; not whether the proceeding itself (e.g., complaint cases) can be held.* R.C. 4901.13 has nothing to do with limiting public access to their due-process rights under R.C. 4905.26 and 4927.21.¹¹ The General Assembly reserved for civil courts, in R.C. 2323.52, the authority to act upon claims of vexatious litigation.

⁹ Comments of Dominion East Ohio at 5 (Jan. 13, 2020).

¹⁰ See R.C. 4901.13.

¹¹ See *Akron & B.B.R. Co. v. Public Utilities Com.*, 165 Ohio St. 316 (1956).

Even if there were authority, the PUCO should be very wary about giving utilities a new claim to potentially exploit against consumers, beyond any good intention of a rule. It is already a formidable task for Ohioans to sue their public utility.

III. IN ADDITION TO THE PUCO LACKING THE AUTHORITY TO STATUTORILY ESTABLISH A VEXATIOUS LITIGATOR RULE, THE PROPOSED RULE COULD BE USED BY UTILITIES TO ENDANGER OHIOANS' RIGHTS TO BRING COMPLAINTS ABOUT THEIR UTILITY SERVICES.

A. The proposed draft rule regarding vexatious litigation is not needed.

The Ohio Telecom Association commented that, “the frequency of frivolous or vexatious litigation at the Commission does not appear to be high.”¹² The proposal for the new rule and utility comments do not lay out a record of vexatious litigation being a significant problem for the PUCO.

The vexatious litigator rule was originally proposed by Columbia Gas of Ohio during a PUCO rulemaking workshop.¹³ According to Columbia Gas of Ohio (“Columbia”) the rule was needed “Because of the tendency of certain individuals to repeatedly file comments and numerous proceedings at the Commission...”¹⁴ (Columbia did not similarly note that utilities have a tendency to file numerous proceedings at the PUCO.)

But the Ohio Telecom Association commented, more factually, that “the frequency of frivolous or vexatious litigation at the Commission does not appear to be high.”¹⁵ During the ten-year period between January 1, 2010 and December 31, 2019,

¹² Comments of Ohio Telecom Association at 4 (Jan. 13, 2020).

¹³ Case No. 18-0278-AU-ORD, Transcript at 21 (July 19, 2018).

¹⁴ *Id.*

¹⁵ Comments of Ohio Telecom Association at 4 (Jan. 13, 2020).

there were 921 formal complaints docketed with the PUCO. Out of the total 921 complaints, there were approximately 866 that involved customers of the investor-owned utilities. A review of these complaints indicated that there were just *12 complainants* who filed *two* complaints over the ten-year period. In most instances, the complaints involved industries, different utilities and different matters. There were *three complainants* filing *three* complaints over the ten-year period mostly involving different industries, different utilities, and different matters. And there was *one instance* where a complainant *filed more than three complaints* during that ten-year period.¹⁶ If there are duplicative complaints as alleged by Columbia and Duke (in the joint comments they filed), they are few and far between. The PUCO should ignore the unfounded comments of Columbia Gas and Duke and reject the proposed vexatious litigator rule.

Columbia and Duke jointly recommended that duplicative filings be included as another reason why a complainant should be labeled vexatious.¹⁷ According to these comments, “vexatious litigators tend to file multiple proceedings that make duplicative allegations” or attempt to relitigate previous cases.¹⁸ These utilities attempt to bar not only litigation that is “frivolous or...conducted for improper purpose,” but also litigation that is supposedly “duplicative.” Columbia and Duke state that this is necessary because “vexatious litigators tend to file multiple proceedings that make duplicative allegations.” However, a review of the formal complaints filed at the PUCO, noted above, does not align with these comments. And the PUCO has existing means and legal precedent to limit or prevent duplicative litigation.

¹⁶ Review of complaints covering a 10-year period registered on the PUCO’s DIS system.

¹⁷ Initial Comments of Columbia Gas of Ohio, Inc. and Duke Energy Ohio, Inc. at 4 (Jan. 13, 2020).

¹⁸ *Id.*

The very limited occurrences of a complainant filing multiple complaints over a ten-year period involving different industries, different utilities, and different matters is simply not sufficient reason to adopt this new rule. And, in not granting this authority to the PUCO, the General Assembly protected the right of Ohioans – which the proposed rule could unlawfully threaten – to file complaints against their public utilities. There is the potential for utilities to exploit even a well-intentioned rule barring vexatious complaints, to distract and deter consumers who undertake the already formidable task of suing their utility monopoly. There is not sufficient evidence of vexatious complaints against utilities so as to warrant further imperiling the public’s right of redress to their government against the monopoly providers of their essential utility services for life and health.

B. Utility comments illustrate why the PUCO should adopt the OCC/NOAC recommendation (regarding claims of vexatious litigation) for providing more information to the public about filing complaints against utilities at the PUCO.

FirstEnergy recommended that the definition for what constitutes “frivolous” in the proposed vexatious litigator rules include conduct demonstrating a disregard for the Commission’s Rules of Practice.^{19 20} This should be rejected. Americans have rights to access their courts and other quasi-judicial forums by appearing on their own behalf.

FirstEnergy’s proposal would, in essence, require customers to retain a regulatory lawyer knowledgeable about practicing before the PUCO to file a complaint against a

¹⁹ Comments of FirstEnergy at 6 (Jan. 13, 2020).

²⁰ The PUCO will recall that it criticized Duke for disregarding the PUCO’s rules, and Duke has plenty of access to legal representation. *See In re the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Entry ¶ 7 (May 9, 2012) (noting Duke’s “continued disdain for the established rules and processes” and stating that the “Commission will no longer tolerate Duke’s unwillingness to follow our directives in this matter”).

utility. The fact that an Ohioan may not have the money to hire a regulatory attorney should not go unnoticed when considering FirstEnergy's proposal.

FirstEnergy also recommended that an additional rule be added where utilities could file motions for summary judgments that could support an administrative law judge ("ALJ") disposing of complaints without the burden of a hearing.²¹ However, FirstEnergy's proposal would severely disadvantage residential customers with another hurdle in the already formidable process of seeking redress at the PUCO for their utility-service complaint.

In considering the utility proposals against Ohioans' alleged vexatious complaints, the PUCO should use a filter in acknowledgement that the utilities don't like being sued by the public. And the utilities could try to use their proposed rules to avoid being sued by the public, vexatiously or not.

Rather, FirstEnergy's proposal illustrates why the PUCO should adopt the OCC/NOAC recommendation, described in our initial comments, for consumer information. The PUCO's website should provide the public with more information and assistance about formal complaint proceedings.²²

AEP recommends a new rule that would require the PUCO Staff (instead of those at the PUCO with quasi-judicial authority) to review formal complaints to determine if the PUCO has jurisdiction over the matter and if reasonable grounds are stated in the complaint prior to scheduling a settlement conference.²³ AEP states that requiring the

²¹ Comments of FirstEnergy at 8.

²² OCC/NOAC Comments at 2.

²³ Initial Comments of AEP at 7 (Jan. 13, 2020).

utility to attend settlement conferences, prepare for hearings, and litigate complaints that are (allegedly) outside the PUCO's jurisdiction or do not state reasonable grounds harms other customers.²⁴ However, AEP does not elaborate on how other customers are harmed.

Regardless, the PUCO Staff should not be involved in determining if there are reasonable grounds stated in a complaint as this may result in the formal complaint process being ineffective for many consumers. That judicial function is the province of those at the PUCO vested with quasi-judicial authority. For one thing, utilities may view their access and communications with the PUCO Staff as not off limits under the state's statute limiting *ex parte* communications (R.C. 4903.081).²⁵ This would be distinguished from the limits on discussions with attorney examiners and Commissioners about pending cases. This potentiality would be unfair to consumers.

In fact, the AEP proposal serves to further support why the PUCO should adopt the OCC/NOAC recommendation about consumer information. The PUCO should provide Ohioans with more information, on the PUCO's website, about the formal complaint process.

Since the complaint rules were last reviewed, the Cleveland Plain Dealer and the Columbus Dispatch featured an article describing the difficulties many Ohioans experience in obtaining favorable outcomes through formal complaints filed at the PUCO against the utilities.²⁶ Formal complaints can be very daunting and time-consuming for

²⁴ *Id.*

²⁵ *See also* Ohio Adm. Code 4901-1-09.

²⁶ Gearino, *Ohio consumers face difficulties filing complaints against utilities*, Columbus Dispatch (May 10, 2015) <https://www.dispatch.com/article/20150510/NEWS/305109934>, (“If you are an Ohio consumer filing a complaint against a utility company, get ready for a long battle, and be prepared to lose.”); Gearino, *Prepare to lose your case at PUCO*, Cleveland Plain Dealer (May 11, 2015), page A1.

consumers. The complaint rule in Ohio Adm. Code 4901-9-01(B) describes the minimum information that must be included in a consumer formal complaint and how to request a sample complaint form from the PUCO service monitoring and enforcement department.

However, currently the rules do not require that an explanation of the formal complaint process be provided *on the PUCO's website*. Nor do the rules require a link for customers to obtain the sample complaint form. This information should be provided on the PUCO's website to be helpful for consumers in fully assessing and pursuing formal a complaint. To help better inform consumers about the PUCO's complaint process, Ohio Adm. Code 4901-9-01(B) should be amended as described in OCC/NOAC's initial comments.

Better information could also help avoid problems, such as what is being considered by the PUCO as vexatious.

IV. CONCLUSION

OCC/NOAC appreciate this opportunity to reply to the utilities' comments. The PUCO should find a path to efficiently administer its proceedings in a way that respects Ohioans' rights to seek redress from their state government (PUCO). That right to redress includes complaints about the utility services that Ohioans rely upon for life and health. The General Assembly did not give the PUCO the legal authority for the proposed rule to limit or prevent consumer complaints by declaring a complainant a vexatious litigator. But the PUCO has the authority to apply various legal precedents and principles for administering its proceedings. And, as OCC/NOAC have recommended, the PUCO should provide on its website additional information to assist the public with the formal process for complaints against their public utilities. Even without the likely impediments that utilities

could advance under the proposed rule and their additional proposals, it is a formidable task for a consumer to assert his or her rights against a lawyered-up utility monopoly. That daunting task for asserting one's rights against utilities should not be made even harder.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Amy Botschner O'Brien
Amy Botschner O'Brien (0074423)
Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone [Botschner O'Brien]: (614) 466-9575
amy.botschner.obrien@occ.ohio.gov
(willing to accept service by e-mail)

/s/ Thomas R. Hays
Thomas R. Hays (0054062)
Counsel for Lucas County
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com
(willing to accept service by e-mail)

*Attorney for The Northwest Ohio
Aggregation Coalition*

CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments was served on the persons stated below via electronic transmission, this 10th day of February 2020.

/s/Amy Botschner O'Brien
Amy Botschner O'Brien
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

John.jones@ohioattorneygeneral.gov
Fdarr2019@gmail.com
edanford@firstenergycorp.com
rocco.dascenzo@cuke-energy.com
Jeanne.kingery@duke-energy.com
Larisa.vaysman@duke-energy.com
sseiple@nisource.com
josephclark@nisource.com
stnourse@aep.com
cblend@aep.com
mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
Andrew.j.campbell@dominionenergy.com
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Attorney Examiner:

Patricia.schabo@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/10/2020 5:01:51 PM

in

Case No(s). 18-0278-AU-ORD

Summary: Comments Reply Comments on the Public's Right to File a Complaint against a Public Utility by The Office of The Ohio Consumers' Counsel and The Northwest Ohio Aggregation Coalition electronically filed by Mrs. Tracy J Greene on behalf of Botschner O'Brien, Amy