

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Antuan Burrell-El)	
5607 Ebersole Avenue)	
Cincinnati, Ohio 45227)	
)	
Complainant,)	Case No. 21-0298-GA-CSS
)	
v.)	
)	
Duke Energy Ohio, Inc.)	
)	
Respondent.)	

DUKE ENERGY OHIO INC.’S MOTION TO DISMISS

On March 31, 2021, Mr. Antuan Burrell-El (Complainant) filed a complaint against Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company), contractor KS Energy Services (KS Energy), and insurance company Gallagher Bassett Services, Inc. (Gallagher Bassett), alleging, among other things, “insurance fraud,” “negligence and immoral acts,” “defamation of character,” “intentional emotional distress,” violation of the Fifth Amendment of the Constitution of the United States of America, and violation of Article I of the Ohio Constitution.¹ Now comes Duke Energy Ohio and moves to dismiss this Complaint because, as further detailed in the attached Memorandum in Support, the Public Utilities Commission of Ohio (Commission) lacks subject matter jurisdiction over the claims asserted and lacks personal jurisdiction over key entities and because Complainant fails to state a claim upon which relief can be granted.

¹ Complaint, pp. 5-6.

Respectfully Submitted,

DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco D'Ascenzo (0077651)

Deputy General Counsel

Larisa M. Vaysman (0090290) (Counsel of Record)

Senior Counsel

Duke Energy Business Services, LLC

139 East Fourth Street, 1303-Main

Cincinnati, Ohio 45202

(513) 287-4010 (telephone)

Rocco.D'Ascenzo@duke-energy.com

Larisa.Vaysman@duke-energy.com

Willing to accept service via email

Attorneys for Duke Energy Ohio, Inc.

MEMORANDUM IN SUPPORT

Complainant initiated this case on March 31, 2021, alleging that Duke Energy Ohio, Duke Energy Ohio's contractor, KS Energy, and each entity's respective insurer had, collectively, committed "insurance fraud," "negligence and immoral acts," "defamation of character," "intentional emotional distress," violation of the Fifth Amendment of the Constitution of the United States of America, and violation of Article I of the Ohio Constitution, by allegedly being negligent in temporarily shutting off and restoring gas service and failing to reimburse Complainant for alleged damages resulting from such negligence.² As detailed below, the Commission should dismiss this Complaint.

As the Commission has previously explained, its "broad jurisdiction...over utility service-related matters... does not affect the basic jurisdiction of the court of common pleas in other areas of possible claims against utilities, including pure tort and contract claims."³ The Supreme Court of Ohio applies a two-part test to determine whether the Commission has jurisdiction over a complaint:

First, is PUCO's administrative expertise required to resolve the issue in dispute?

Second, does the act complained of constitute a practice normally authorized by the utility?⁴

The answer to **both** questions must be in the affirmative in order for the claim to fall within the Commission's jurisdiction.⁵

² Complaint, pp. 5-6.

³ *In the Matter of the Complaint of Anthony W. Garrabrant*, Case No. 15-401-EL-CSS, Entry, p. 4 (July 20, 2016) (internal quotation marks and citations omitted).

⁴ *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶ 12, 893 N.E.2d 824.

⁵ *See id.*, ¶ 13 ("If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction."); *see also Garrabrant*, Case No. 15-401-EL-CSS, Entry, p. 5 (July 20, 2016) (finding that complaint was not within Commission jurisdiction where only one of the two prongs was met and ordering dismissal).

In 2015, the Commission applied this test to dismiss, for lack of jurisdiction a complaint regarding alleged negligence by a utility contractor that was claimed to have damaged a customer's personal property. In that case, a customer complained that the utility's "actions (through its contractor) to 'change out' his electric service meter, resulted in major damage to components of Complainant's backup generator," and sought "to be compensated for all damages, including labor and equipment charges, incurred in repairing the components damaged during the meter change out."⁶ The Commission found that the second prong of the test was met⁷ but dismissed the complaint "for lack of jurisdiction" because the first prong was *not* met:

The complaint alleges that the actions of AEP Ohio (through its contractor) caused major property damage to a back-up generator during a meter change out. *The facts alleged by Complainant do not involve AEP Ohio's meter service but, rather, whether the contractor exercised reasonable care in replacing one particular meter.* In order to determine this claim, the Commission would have to examine *if AEP Ohio committed a tort in replacing Complainant's utility service meter, which caused damages.* In summary, the complaint does not allege or identify any rate or service that is unjust or unreasonable, under R.C. 4905.26. Consequently, the Commission finds that resolving the issues alleged in the complaint *does not require the Commission's administrative expertise.*⁸

Similarly here, Complainant's claim does not require the Commission's administrative expertise. As far as the Company can discern and accepting for the sake of argument all of Complainant's factual allegations as true, Complainant appears to identify two fundamental grievances: (1) that Company contractor KS Energy was somehow negligent in the process of turning off Complainant's gas, restoring gas, and/or working on or near Complainant's furnace and that such negligence caused Complainant's furnace to stop working; and (2) that insurers

⁶ *Garrabrant*, Case No. 15-401-EL-CSS, Entry, pp. 1-2 (July 20, 2016).

⁷ *Id.*, p. 5 (explaining the second prong was met because meter replacement "constitute[d] a practice normally authorized by the utility" and was "within the normal purview of the utility company").

⁸ *Id.*, pp. 4-5 (emphasis added).

Gallagher Bassett and/or Sedgwick Claims Management Services, Inc. (Sedgwick) improperly failed to reimburse Mr. Burrell-El for his claimed damages to the furnace and/or consequential damages stemming from the absence of a furnace. As in *Garra-brant*, Complainant's claims in this case do not involve the Company's gas service, but, at best, "whether the contractor exercised reasonable care" in restoring "one particular" service connection.⁹ As in *Garra-brant*, the Complaint fails to allege or identify any rate or service that is unjust or unreasonable. Thus, the resolution of the Complaint in this case lies beyond the Commission's jurisdiction and the Complaint should be dismissed.

Furthermore, Complainant clearly seeks monetary damages for the alleged tort(s). For example, he seeks consequential damages for "for higher bills due to having to pay extra for using more electricity due to no furnace all winter."¹⁰ Even though he frames this as a "refund" of bills, this refund is clearly premised on the Company's alleged liability for the absence of a furnace and not on unreasonableness or miscalculation of tariffed rates. Additionally, he seeks a new furnace, "[r]eimbursement for the purchase of 5 heaters and 2 surge protectors," and a new oven unit, as well as alleging (without specifying damages) negligence, intentional emotional distress, and fraud.¹¹ All such claims are beyond the Commission's jurisdiction, as is Complainant's requested relief.

In addition to a lack of subject matter jurisdiction, there is also a lack of personal jurisdiction over certain entities against which Complainant makes allegations here. The Commission has also previously found that it lacks jurisdiction over utility contractors and over insurers. For example, the Commission dismissed a customer's claim for water damage allegedly stemming from a utility's installation of a new meter because "the complaint concerns

⁹ *Id.*

¹⁰ Complaint, p. 5.

¹¹ *Id.*, pp. 5-6.

the denial of complainant's claim for damages by Columbia's insurer and is not a matter within our service and rate-related jurisdiction" and because "the Commission has no jurisdiction over Columbia's insurer."¹² Additionally, the Commission justified dismissal of a claim regarding a utility contractor's negligence in part because "complainant's claim may not be limited to [the utility], but may also include [the utility's] contractor, an entity over which we have no personal jurisdiction."¹³

Complainant states explicitly at the outset of the Complaint that he is "filing a complaint against" the Company's contractor KS Energy,¹⁴ and makes various allegations against the Company's and contractor's insurers, Sedgwick and Gallagher Bassett respectively.¹⁵ Complainant's main point of grievance against the insurers appears to be that they allegedly improperly denied his claims. The Commission lacks jurisdiction over these non-utility entities and over the claims against them.

For the reasons given above, pursuant to O.A.C. 4901-9-01(C) (1), (2), and (3), Duke Energy Ohio states that this matter should be dismissed for lack of jurisdiction over the subject matter, lack of jurisdiction over key entities, and failure to state a claim on which relief can be granted.

¹² Case No. 06-568-GA-CSS, Entry, pp. 3-4 (September 27, 2006).

¹³ *In the Matter of the Complaint of Anne Eishen v. Columbia Gas of Ohio, Inc.*, Case No. 01-885-GA-CSS, Entry, p. 3 (November 20, 2001).

¹⁴ See Complaint, p. 2.

¹⁵ *Id.*, pp. 4-6.

Respectfully Submitted,

DUKE ENERGY OHIO, INC.

/s/ Larisa M. Vaysman

Rocco D'Ascenzo (0077651)

Deputy General Counsel

Larisa M. Vaysman (0090290) (Counsel of Record)

Senior Counsel

Duke Energy Business Services, LLC

139 East Fourth Street, 1303-Main

Cincinnati, Ohio 45202

(513) 287-4010 (telephone)

Rocco.D'Ascenzo@duke-energy.com

Larisa.Vaysman@duke-energy.com

Willing to accept service via email

Attorneys for Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss the Complaint of Antuan Burrell was served via UPS, this 18th day of May, 2021, upon the following:

Antuan Burrell
5607 Ebersole Ave
Cincinnati, Ohio 45227

/s/ Larisa M. Vaysman
Larisa M. Vaysman

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/18/2021 12:02:21 PM

in

Case No(s). 21-0298-GA-CSS

Summary: Motion Duke Energy Ohio, Inc.'s Motion to Dismiss electronically filed by Carys Cochern on behalf of Duke Energy Ohio, Inc.