

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF  
ANTUAN BURRESS-EL,

COMPLAINANT,

CASE NO. 21-298-GA-CSS

v.

DUKE ENERGY OHIO, INC.,

RESPONDENT.

## ENTRY ON REHEARING

Entered in the Journal on November 2, 2022

### I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Complainant, Antuan Burress-El.

### II. DISCUSSION

#### A. *Procedural Background*

{¶ 2} Pursuant to R.C. 4905.26, 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.

{¶ 3} Duke Energy Ohio, Inc. (Duke or Respondent) is a natural gas company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 4} On March 31, 2021, Antuan Burress-El (Complainant) filed a complaint against Duke in which he alleges, among other things, that negligence on the part of Duke and/or its contractor KS Energy, caused Complainant to lose use of his furnace for an extended period and, as a result, to incur damages which he believes entitle him to compensation. As explained by Complainant, Complainant's natural gas service was temporarily shut off and

restored during a procedure conducted by Duke through its contractor KS Energy in order to facilitate completion of a scheduled local township street repair project. Complainant alleges that, during that process, his furnace was irreparably damaged. The complaint also alleges that insurance companies for Duke and KS Energy (respectively, Sedgwick Claims Management Services, Inc., and Gallagher Basset) improperly failed to reimburse Complainant for claimed damages, both for alleged damage to his furnace and for alleged damages consequent to his being without a furnace.

{¶ 5} On April 20, 2021, Duke filed its answer, in which it denies all the complaint's allegations, asserts its own allegations of fact, and sets forth several affirmative defenses.

{¶ 6} By Entry issued May 14, 2021, a settlement teleconference was scheduled to occur on June 2, 2021. The settlement teleconference was held, as scheduled, on June 2, 2021. Later, on August 23, 2021, the settlement teleconference was resumed. On neither occasion did the parties arrive at a settlement of the case.

{¶ 7} On May 18, 2021, Duke filed a motion to dismiss this case, in which Respondent argued the Commission lacked subject matter jurisdiction over the claims asserted in the complaint and lacked personal jurisdiction over certain entities named in the complaint, as well as because the complaint failed to state a claim upon which relief can be granted.

{¶ 8} Complainant did not, within the time parameters established in Ohio Adm.Code 4901-1-12, file a memorandum contra Respondent's motion to dismiss. However, on January 26, 2022, Complainant filed a motion by which he sought an extension of time for filing a formal response to Duke's motion to dismiss. By Entry issued on February 16, 2022, Complainant was granted an extension of time, until March 3, 2022, to file a memorandum contra Duke's motion to dismiss. By the same Entry, Duke was granted seven days from the date of filing of any such memorandum contra to file a response.

{¶ 9} On February 10, 2022, Complainant filed a pleading labeled, in part, as “Response to Duke Energy Motion to Dismiss.” In this pleading, Complainant asserts that, in determining whether it has subject matter jurisdiction in this matter, the Commission should apply the two-part test established by the Supreme Court of Ohio in *Allstate Ins. v. The Cleveland Elec. Illum. Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824. By applying this test, Complainant asserts that the Commission should answer in the affirmative both questions. However, within this same pleading, Complainant does not expound on the basis for this assertion, except to contend that the Commission has substantial duties to regulate business activities of public utilities, including the regulation of utility service and rates, in order to protect the public welfare. The pleading also appeared to contain various discovery requests.

{¶ 10} On February 17, 2022, Duke filed a pleading by which it reiterated the arguments set forth in its motion to dismiss.

**B. Commission’s Dismissal Entry**

{¶ 11} On September 7, 2022, the Commission issued an Entry which granted Duke’s motion to dismiss, with prejudice, based upon a finding that the Commission lacks subject matter jurisdiction over the complaint (Dismissal Entry). In determining that it did not have subject matter jurisdiction, the Commission, within the Dismissal Entry, applied the two-part test established by the Supreme Court of Ohio in the *Allstate* case. The Commission specifically found that nothing in the complaint raised utility service issues over which the Commission has jurisdiction, such as the reasonableness of utility customer rates, services, or claims relating to conduct covered by Commission rules and/or utility tariffs. The Commission found that the real question presented in this case is not whether an appropriate standard of care was exercised by a utility or its contractor in restoring utility service. Rather, the real question, one which does not require Commission expertise to resolve, is whether a reasonable and appropriate standard of care was provided by the person undertaking the repair of the furnace. Having decided that the first part of the *Allstate* subject matter jurisdictional test must be answered in the negative, the Commission,

in its Dismissal Entry, found it unnecessary either to apply the second part of *Allstate* test, or to address any the other arguments Duke raised in its motion to dismiss.

**C. *Complainant's Application for Rehearing***

{¶ 12} On October 11, 2022, Complainant filed an application for rehearing. Complainant's rehearing application makes numerous references to administrative, statutory, and constitutional assertions that do not apply to the claims and issues set forth in the complaint. For example, reference is made within the application for rehearing both to Ohio statutes relating to underground utility damage and to federal regulations pertaining to procedures for Transportation Workforce Drug and Alcohol Testing Programs. In all, there is only one instance where the rehearing application hints that anything within the Dismissal Entry is unreasonable, or unjust. This is Complainant's assertion that the Commission incorrectly stated that Complainant "never filed a pleading addressed to the arguments set forth in Duke's Motion to Dismiss."

**D. *Respondent's Memorandum Contra Application for Rehearing***

{¶ 13} On October 13, 2022, Respondent filed a memorandum contra Complainant's application for rehearing. Respondent argues that rehearing should be denied on both procedural and substantive grounds. Procedurally, says Respondent, the rehearing application was not timely filed within the 30-day deadline imposed by R.C. 4903.10. In this regard, Respondent points to case law which makes clear that "the statutory deadline is jurisdictional, is not subject to Commission waiver, and has been consistently upheld" by both the Commission and the Supreme Court of Ohio. *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 361, 176 N.E.2d 416 (1961). Substantively, Respondent contends both that the Commission correctly dismissed the complaint for lack of subject matter jurisdiction, and that the application for rehearing fails to demonstrate how the Dismissal Entry is either unreasonable or unlawful.

### III. COMMISSION CONCLUSION

{¶ 14} Upon review, the Commission finds that Complainant's application for rehearing should be denied, and the Dismissal Entry affirmed. First, the application for rehearing was not filed within the permitted 30-day statutory period imposed by R.C. 4903.10. To be considered timely, the application for rehearing needed to be filed on or before October 7, 2022. The Commission's records reflect that the application for rehearing was not filed until October 11, 2022. The Commission has no authority to change or waive the statutory filing deadline. *Greer*, 172 Ohio St. 361, 361, 176 N.E.2d 416. Because it was not timely filed, the application for rehearing must be denied.

{¶ 15} Moreover, the Commission takes this opportunity to explain that, even if the application for rehearing had been timely filed, in substance, it fails to provide proper grounds for granting rehearing of the Dismissal Entry. Complainant, in his rehearing application, recharacterizes the nature of his complaint as one addressed to an alleged violation of pipeline safety regulations. The Commission has carefully reviewed the complaint and finds nothing within it to suggest that pipeline safety issues are presented. Within the Dismissal Entry, the Commission analyzed the entire scope of the complaint and determined that the only issue it presented was whether Duke, in its capacity as a Commission-regulated public utility, bears liability for the alleged inability of its contractor, in Complainant's own words, "to get my furnace to work." The basis for the Commission's dismissal for lack of subject matter jurisdiction in this case stems from its conclusion, set forth in the Dismissal Entry, that the Commission lacks expertise to adjudicate the standard of care which must be exercised by one undertaking the repair of a furnace, even if that furnace exists within premises where utility gas service restoration has been achieved following a planned temporary utility service shut-off. Nothing in the application for rehearing challenges that determination in this case. For that reason, the application for rehearing, even if had been timely filed, fails to present proper grounds for rehearing of the Dismissal Entry.

{¶ 16} In closing, we take this time to acknowledge a topic addressed within Complainant's application for rehearing. Upon review, we acknowledge that Paragraph 9 of the Dismissal Entry did, through inadvertence, contain an incorrect statement of fact, indicating that Complainant "never filed a pleading addressed to the arguments set forth in Duke's Motion to Dismiss." We address this now by noting that, on February 10, 2022, Complainant did, in fact, file correspondence partially titled "Response to Duke Energy Motion to Dismiss." However, we find that nothing about our earlier incorrect statement presents sufficient grounds for granting rehearing. The Commission did apply the *Allstate* test which Complainant concedes is the appropriate standard to determine our jurisdiction. Merely disagreeing with the Commission's outcome from such analysis is not appropriate grounds for rehearing. Upon full consideration of Complainant's February 10, 2022 pleading, we continue to find that the first prong of the *Allstate* test should be answered in the negative. Accordingly, this case was correctly dismissed for lack of Commission subject matter jurisdiction.

#### IV. ORDER

{¶ 17} It is, therefore,

{¶ 18} ORDERED, That Complainant's application for rehearing be denied. It is, further,

{¶ 19} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

*Approving:*

Jenifer French, Chair

Lawrence K. Friedeman

Daniel R. Conway

DEF/mef

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Summary: Entry on Rehearing denying the application for rehearing filed by  
Complainant, Antuan Burrell-El. electronically filed by Ms. Mary E. Fischer on  
behalf of Public Utilities Commission of Ohio