

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
MONIQUE MAISENHALTER,

COMPLAINANT,

CASE NO. 21-816-EL-CSS

v.

DUKE ENERGY OHIO, INC.,

RESPONDENT.

ENTRY

Entered in the Journal on October 18, 2023

I. SUMMARY

{¶ 1} The Commission grants the motion to dismiss filed by Duke Energy Ohio, Inc., with prejudice, as Monique Maisenhalter has failed to state reasonable grounds for complaint.

II. DISCUSSION

{¶ 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 the Company) is an electric light company and 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 July 23, 2021, Monique Maisenhalter (Ms. Maisenhalter or Complainant) filed a complaint against Duke. In her complaint, Ms. Maisenhalter states that she is disabled by electromagnetic field (EMF) sensitivity and should be accommodated in such a

manner as to have her gas and electric service provided by Duke via analog electromechanical non-digital meters, without being charged smart meter opt-out fees that apply under Duke's Commission-approved tariff. Complainant confirmed that she has been paying Duke's opt-out fee since August 2016, when she had analog meters of that type installed at her home. Ms. Maisenhalter alleges that such smart meter opt-out fees are unlawful under the Americans with Disabilities Act (ADA) and Fair Housing Act (FHA), and their respective amendments, as well as the related state laws. Complainant seeks to be reimbursed for all opt-out fees she has paid since 2016. Moreover, the complaint also alleges that Duke has, without appropriate notice or Complainant's consent, engaged in meter testing and/or meter inspection at her home. Ms. Maisenhalter asserts that she solicited from Duke, but never received, a written statement indicating that if the Company found her existing analog electromechanical non-digital meter to be inaccurate, it would be replaced with another meter of that same type. Complainant claims that, instead, Duke told her during a July 15, 2021 phone call, that the Company "didn't have any more analog electromechanical non-digital meters so it would be replaced with a digital opt-out meter" in such an event. Beyond this, Complainant requests that Duke provide her "with the engineering schematics showing that the meters installed at her home "are purely mechanical meters, not a digital computer compiling data of some sort through electromagnetic means."

{¶ 5} On August 11, 2021, as amended on September 20, 2021, Duke filed its answer in which it admits some, and denies others of the complaint's allegations and sets forth several affirmative defenses. Among other things, in its answer, Duke admits that: (1) Complainant started service at her current address in August 2016; (2) Complainant has been on the AMI (smart meter) opt-out program as set forth in the Company's Commission-approved tariff; and (3) it has arranged with Complainant to test the electric meter at her property on November 21, 2021, as provided for Commission rule and, if that meter fails the test, to replace the meter with the requested analog meter. On the other hand, in its answer, Duke denies: (1) that its electric meters at Complainant's property have caused her any

disabling health effects; (2) that any fees or charges authorized by the Company's smart meter opt-out service are unlawful under any statute or federal law or regulation; (3) that Complainant is entitled to be reimbursed for any opt-out fees; and (4) that Complainant is entitled to "engineering schematics" of any meter owned by the Company or installed at her property. Duke asserts that the Commission's approval of the Company's smart meter opt-out service tariff demonstrates that the tariff is neither unjust nor unreasonable. Furthermore, in its amended answer, Duke requests that the Commission dismiss the complaint for failure to set forth reasonable grounds for the complaint.

{¶ 6} By Entry issued September 22, 2021, the attorney examiner scheduled a settlement conference for October 13, 2021. The conference occurred as scheduled; however, the parties were unable to reach a settlement.

{¶ 7} Initially, the Commission has exclusive jurisdiction to hear complaints against public utilities regarding any rate, practice, or service of the utility relating to any service furnished by the utility that is unjust, unreasonable, or unjustly discriminatory. R.C. 4905.26. The Commission may only exercise the jurisdiction conferred upon it by statute. *Lucas Cty. Commrs. v. Pub. Util. Comm. of Ohio*, 80 Ohio St.3d 344, 347, 686 N.E.2d 501 (1997). Further, we acknowledge the Commission is not a court and has no power to ascertain and determine legal rights and liabilities. *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144, 2012-Ohio-5445, 980 N.E.2d 996. As such, the Commission agrees with Duke that the case should be dismissed, as Complainant has not provided reasonable grounds for the complaint.

{¶ 8} Pursuant to R.C. 4905.26, the Commission has exclusive jurisdiction over claims pertaining to service-related matters. *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 11, 16. In *Allstate*, the Supreme Court of Ohio adopted a two-part test to determine whether the issues raised in a complaint are within the exclusive jurisdiction of the Commission or whether they are claims better suited for Ohio courts. The first part of the test asks whether the Commission's administrative expertise is required to resolve the issue in dispute. The second part of the test asks whether

the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is in the negative, the claim is not within the Commission's jurisdiction. *Allstate* at ¶ 12-13. Under this analysis, Complainant's complaint falls outside of the Commission's jurisdiction. First, we find that the Commission's administrative expertise as the public utility regulator of Ohio is unnecessary to resolve a claim arising out of the ADA, FHA, and related state laws. Ms. Maisenhalter does not claim that any rate or service provided by the Company is unjust, unreasonable, or in violation of utility law, regulation, or Commission order. Instead, the ultimate question raised for determination is whether the Company's opt-out fee constitutes a violation of the ADA, FHA, and related state law. The Commission notes that there are more appropriate tribunals for claims based on these laws. We concede that Complainant's allegation meets the second part of the *Allstate* test, in which the complaint involves Duke's smart meter implementation and smart meter opt-out fee as approved by the Commission. However, as we have found that we must answer the first question in the negative, the complaint fails the *Allstate* test.

{¶ 9} As such, the Commission determines that the complaint alleges issues beyond the scope of the Commission's jurisdiction rather than implicating matters disputing a public utility's services and rates. See *In re Complaint of Heather Tyson v. The Cleveland Elec. Illum. Co. (Tyson)*, Case No. 21-818-EL-CSS, Entry (Aug. 9, 2023); *In re Complaint of Judy DeFrench v. The Cleveland Elec. Illum. Co. (DeFrench)*, Case No. 21-950-EL-CSS, Entry (July 12, 2023)(Commission dismissed the complaint alleging that the company's opt-out fee was a violation of the ADA and discriminated against her health condition.); *In re Complaint of Samantha Shively v. Ohio Edison Co. (Shively)*, Case No. 21-54-EL-CSS, Entry (May 3, 2023); *In re the Complaint of Edward Porter v. Ohio Power Co. d/b/a AEP Ohio*, Case No. 20-260-EL-CSS, Opinion and Order (June 2, 2021). Moreover, in the *Tyson*, *Shively*, and *DeFrench* decisions, we were also informed by the Pennsylvania Public Utility Commission's finding that it was not the designated body to make determinations regarding violations of the ADA during complaint case proceedings in which complainants similarly contested the installation of a smart meter. *In re the Complaint of Jeffery Ulmer v. PPL Electric Utilities Corp.*, Pa.P.U.C. Docket

No. C-2018-3003824, Initial Decision (Mar. 5, 2020); *In re the Complaint of Kathleen Anthony v. PPL Electric Utilities Corp.*, Pa.P.U.C. Docket No. C-2018-3000490, Initial Decision (Sept. 15, 2020).¹ As such, we find that we lack subject matter jurisdiction over Complainant's claims of discrimination regarding her health condition.

{¶ 10} Additionally, in the matter at hand, Complainant indicates that she seeks reimbursement from Duke for all smart meter opt-out fees paid since 2016. The Commission, likewise, has no authority to award such monetary relief. See *In re the Complaint of Double K Kirby Farms*, Case No. 18-691-EL-CSS, Entry (Nov. 13, 2018) at ¶ 9-10, quoting *In re the Complaint of Delmer W. Smith v. Dayton Power & Light Co.*, Case No. 03-2544-EL-CSS, Entry (Jan. 29, 2004). Accordingly, the Commission dismisses the specific requests for relief found within the complaint.

{¶ 11} Furthermore, as we determined in the *Bushong* case, if a customer's analog meter is at the end of its useful life, pursuant to the utility's tariff, the customer must have the option of either having a non-emitting digital meter that is used in the utility's opt-out service option installed or having a smart meter installed at a new location at the customer's expense. *In re the Complaint of Ned Bushong v. Ohio Power Company d/b/a AEP Ohio (Bushong)*, Case No. 18-1828-EL-CSS, Opinion and Order (Oct. 7, 2020) at ¶ 28. As such, we find the Company's proposal to install a digital opt-out meter an appropriate alternative if Complainant's analog meter has reached the end of its useful life.

{¶ 12} The Commission previously considered and dismissed a related concern requesting a waiver of the smart meter opt-out fee in *Bushong* and found that implementing an opt-out charge was allowable, even when the complainant raised health and safety risk concerns in opposition of the smart meter use. *Bushong*, Opinion and Order (Oct. 7, 2020) at

¹ Interestingly, as noted in those decisions, Pennsylvania state law does not allow a customer to opt-out of an electric utility's smart meter program. Those complainants ultimately sought an ADA accommodation in the form of an opt-out from a smart meter installation, which is precisely what the Company's tariff in this case provides.

¶ 26-27. Further, the Commission issued a Finding and Order approving the Company's tariff in Case No. 14-1160-EL-UNC (*Duke's Smart Meter Fee Case*), which included an opt-out fee from the Company's smart meter technology. Moreover, in a recent rulemaking, we noted that "customers' choice regarding retention of a properly functioning traditional meter should be respected" but found that a customer may only retain the use of a traditional meter in accordance with the procedures outlined in Ohio Adm.Code 4901:1-10-05, including paying the cost-based, tariffed opt-out service. *In re the Commission's Review of the Rules for Electrical Safety and Service Standards Contained in Ohio Adm.Code Chapter 4901:1-10 (ESSS Rules Case)*, Case No. 17-1842-EL-ORD, Finding and Order (Feb. 26, 2020) at ¶ 12, 34; Entry on Rehearing (Jan. 27, 2021). As we have already found the substance of the complaint falls outside of our jurisdiction, we will not address whether the complaint should also be considered an improper collateral attack on the Commission's prior decisions and, therefore, dismissed on that basis. We observe, however, that the complaint was filed in July 2021, approximately five years after the Commission's decision in *Duke's Smart Meter Fee Case* and more than one year after the Commission's initial Finding and Order in the *ESSS Rules Case*.

{¶ 13} Further, we are not persuaded that Complainant's other allegations raise reasonable grounds for a complaint. As a customer of the Company, Ms. Maisenhalter is not entitled to copies of Duke's engineering schematics for its meters to verify that replacement meters meet her expectations. Additionally, electric distribution companies are not required to provide prior notification to consumers regarding in-person meter testing and availability of a non-emitting digital meter.

{¶ 14} Based on the foregoing, the Commission concludes that Ms. Maisenhalter fails to raise reasonable grounds for complaint. As such, we find that Duke's motion to dismiss should be granted and the complaint dismissed, with prejudice.

III. ORDER

{¶ 15} It is, therefore,

{¶ 16} ORDERED, That the Company's motion to dismiss be granted and that Case No. 21-816-EL-CSS be dismissed with prejudice and closed of record. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters
John D. Williams

IMM/dmh

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

10/18/2023 2:36:38 PM

in

Case No(s). 21-0816-EL-CSS

Summary: Entry granting the motion to dismiss filed by Duke Energy Ohio, Inc., with prejudice, as Monique Maisenhalter has failed to state reasonable grounds for complaint. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.