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January 18, 2007

FEDERAL EXPRESS

The Public Utilities Commission of Ohio
Attention: Renee Jenkins
Docketing Division
180 East Broad Street
10th Floor
Columbus, OH 43215

RECEIVED-DOCKETING DIV
2007 JAN 19 AM 10:47
PUCO

RE: AT&T Ohio v. The Dayton Power and Light Company,
PUCO Case No. 06-1509-EL-CSS

Dear Docketing Clerk:

Enclosed are an original and twelve copies of The Dayton Power and Light Company's Reply to AT&T Ohio's Memorandum Contra The Dayton Power and Light Company's Motion to Dismiss the Complaint and Request for Emergency Relief in the above-captioned matter (which was fax filed on Thursday, January 18, 2007). Please return one file-stamped copy of the document to me in the enclosed self-addressed, stamped envelope.

Very truly yours,

Jeffrey S. Sharkey

JSS/tes
Enclosures

cc: Michael T. Sullivan, Esq. (w/enclosure; via electronic mail and U.S. mail)
Jon F. Kelly, Esq. (w/enclosure; via electronic mail and U.S. mail)
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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO, Complainant, v. THE DAYTON POWER AND LIGHT COMPANY, Respondent.	:	CASE NO. 06-1509-EL-CSS

THE DAYTON POWER AND LIGHT COMPANY'S REPLY TO AT&T OHIO'S MEMORANDUM CONTRA THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO DISMISS THE COMPLAINT AND REQUEST FOR EMERGENCY RELIEF

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THE DAYTON POWER AND LIGHT COMPANY'S
REPLY TO AT&T OHIO'S MEMORANDUM CONTRA
THE DAYTON POWER AND LIGHT COMPANY'S MOTION TO DISMISS
THE COMPLAINT AND REQUEST FOR EMERGENCY RELIEF

Pursuant to Ohio Admin. Code § 4901-1-12(B)(2), The Dayton Power and Light Company ("DP&L") submits this Reply to AT&T Ohio's Memorandum Contra DP&L's Motion to Dismiss the Complaint and Request for Emergency Relief ("Opposition"). AT&T Ohio's Opposition fails to counter the central assertion in DP&L's Motion to Dismiss that each party claims the other has breached a long standing joint use contract. This is a classic court dispute *not properly before the Commission and is, in fact, currently pending before the Common Pleas* Court.[1] Contrary to AT&T Ohio's flawed interpretations, no statutory provision, including R.C. §§ 4905.51 and 4905.71, provides authority for the Commission to reform retroactively a joint use contract which has been in place for more than 75 years. Instead, R.C. §§ 4905.51 and 4905.71 explicitly limit the Commission's jurisdiction to tariffed pole attachment rates and instances in which public utilities have failed to reach initial agreement on the terms and conditions of joint use. It is undisputed that such facts are not present in this case. Accordingly, AT&T Ohio's Complaint and Request for Emergency Relief ("Complaint") should be dismissed *with prejudice.*

I. INTRODUCTION

In its Opposition, AT&T Ohio takes a scattershot approach to justify the Commission's jurisdiction over the Joint Pole Line Agreement Pole Rental Contract ("Joint Use Agreement")

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[1] *See The Dayton Power and Light Co. v. The Ohio Bell Telephone Co., d/b/a AT&T Ohio,* No. 06-10306 (Court of Common Pleas, Montgomery County, December 29, 2006), attached to DP&L's Motion to Dismiss at Exhibit A.

dispute between these two utilities. In so doing, AT&T Ohio points to several tangentially related, but ultimately irrelevant, statutory provisions while neglecting the sole critical factor -- namely, that this is a dispute based in contract requiring a judicial determination.

II. R.C. § 4905.51 DOES NOT APPLY TO AT&T OHIO'S CLAIMS

AT&T Ohio attempts to justify Commission jurisdiction primarily under R.C. § 4905.51.[2] Instead of supporting the Commission's jurisdiction over AT&T Ohio's claims, however, R.C. § 4905.51 explicitly prevents the Commission from hearing the dispute.

A. R.C. § 4905.51 Does Not Permit The Commission Retroactively To Reform Joint Use Agreements

Under R.C. § 4905.51, the Commission may establish the terms and conditions of a joint use relationship between two public utilities only when the utilities are unable otherwise to agree, which is not the case here. The statute contemplates that public utilities will, at least initially, privately negotiate the rates, terms and conditions applicable to the joint use of their respective poles. In those instances in which public utilities fail "to agree upon such use or joint use, or upon the conditions or compensation for such use or joint use agreement," R.C. § 4905.51 allows either one of the public utilities to ask the Commission to resolve the impasse. The Commission, in turn, then has the ability to "direct that such use or joint use be permitted" and "prescribe reasonable conditions and compensation for such joint use."

In this case, the parties entered into a Joint Use Agreement more than 75 years ago. *See* Complaint Exhibit A. The Joint Use Agreement, and the related Operating Routine, have defined the joint use relationship of the parties ever since. Among other things, the Joint Use

[2] Opposition at 3-6.

Agreement established joint use of company poles (*Id.* at Art. 4), a process for obtaining permission to establish a joint use pole (*Id.* at Art. 8), the rental rate for joint use poles when there is a disparity of ownership in the number of joint use poles (*Id.* at Art. 11), a method of calculating that rental rate if the parties are unable to agree on it (*Id.* at Art. 13), and a method for achieving parity in the ownership of joint use poles. (*Id.* at Art. 13). Nowhere does R.C. § 4905.51 contemplate a power to rewrite an existing agreement voluntarily entered into by two utilities or to resolve damage claims arising out of alleged breaches of an existing agreement.

Where the Commission has exercised its authority under R.C. § 4905.51, it has done so only to promote "inaugural" cooperation between two public utilities. *See Ohio Central Tel. Corp. v. Pub. Util. Comm. of Ohio*, 166 Ohio St. 180, 140 N.E.2d 782 (1957). AT&T Ohio identifies no instances in which the Commission has relied on R.C. § 4905.51 to interpret the terms of a private agreement in the manner that it requests here, and DP&L is not aware of any.

It is no exaggeration that AT&T Ohio's distorted reading of R.C. § 4905.51 would virtually invalidate all existing agreements between public utilities and substitute instead an after-the-fact "reasonableness" standard.

B. A Comparison Of R.C. §§ 4905.71 And 4905.51 Demonstrates The More Limited Role Of The Commission In Overseeing Joint Use Agreements

AT&T Ohio further attempts to justify Commission jurisdiction under R.C. § 4905.51 by drawing an analogy to the operation of R.C. § 4905.71.[3] This comparison only serves to highlight the very different approaches taken by the legislature to resolve R.C. § 4905.71 *pole*

[3] Opposition at 5. AT&T Ohio does not repeat the claim made in its complaint that the Commission's jurisdiction is based on R.C. § 4905.71, thereby apparently conceding its mistaken reliance on that section.

attachment disputes between a public utility pole owner and a non-public utility attacher, on the one hand, and R.C. § 4905.51 *joint use disputes* between two public utility pole owners on the other.

R.C. § 4905.71 mandates that "[e]very telephone, telegraph, or electric light company shall file tariffs with the public utilities commission containing the charges, terms, and conditions established" for pole attachments. Further, R.C. § 4905.71 states that the Commission "shall regulate the justness and reasonableness of the charges, terms, and conditions contained in any such tariff, and may, upon complaint of any persons in which it appears that reasonable grounds for complaint are stated, or upon its own initiative, investigate such charges, terms, and conditions and conduct a hearing to establish just and reasonable charges, terms, and conditions, and to resolve any controversy which may arise among the parties as to such attachment." This R.C. § 4905.71 language establishes a comprehensive regulatory scheme conferring upon the Commission the authority to regulate pole attachment relationships in the first instance and on an ongoing basis. The provision is inapplicable here.

This is not a pole attachment case involving a public utility pole owner and a third party attacher. AT&T Ohio has not attached to DP&L's poles pursuant to any tariff, and AT&T Ohio is not a "person" as contemplated by the statute but rather a "public utility." Thus, AT&T Ohio cannot rely on this provision to establish the Commission's jurisdiction either directly or by analogy.

R.C. § 4905.51 recognizes that the joint use of utility poles is very different than non-joint use pole attachment arrangements. "Joint use" negotiations involve similarly situated pole owning entities of equal bargaining power sharing the assets presumably for their mutual benefit.

"Pole attachment" negotiations, conversely, involve requests by third party attachers to use the infrastructure of a public utility pole owner whose exclusive ownership of utility poles gives it bargaining leverage over the attachers.

In harmony with the different regulatory approaches established in R.C. §§ 4905.51 and 4905.71, the Supreme Court of Ohio has explained that regulation is appropriate to protect against market imbalances but is not appropriate when parties are in equal bargaining positions: "Where a company acts in its publicly-sanctioned monopolistic capacity, public regulation is appropriate in order to protect against utility overreaching. Where, however, a public utility's activities take place in an open market, the elements of competition are, at least theoretically, sufficient to protect the public interest." *See Dayton Communications Corp. v. Pub. Util. Comm'n*, 64 Ohio St.2d 302 (1980). Because public utility pole owners are mutually dependent upon each other in the joint use context, extensive regulation is not appropriate.

Although the regulatory schemes envisioned under R.C. §§ 4905.71 and 4905.51 are entirely dissimilar, AT&T Ohio would have the Commission assume that they function in the same manner simply because "poles" are at issue in each. Such a cosmetic analysis of the comprehensive tariffed regime of R.C. § 4905.71 vis-a-vis the limited market-based approach of R.C. § 4905.51 is unsupported by both the statutory language and economic realities.

C. The Precedent Cited By AT&T Ohio Highlights The Distinctions Between R.C. §§ 4905.71 And 4905.51

The cases cited by AT&T Ohio further highlight the differences between the Commission's joint use and pole attachment jurisdiction. As a result, these cases are not

"dispositive" regarding the Commission's jurisdiction over existing joint use agreements, as AT&T Ohio claims.[4]

Capital Satellite Systems, Inc., v. Ohio Edison Co., 612 N.E.2d 1339 (Ohio App. 1993), discusses the Commission's jurisdiction with respect to *tariffed* pole attachment terms and conditions under R.C. § 4905.71.[5] The dispute in that case involved the tariffed terms and conditions for a non-public utility seeking an attachment to public utility owned poles. The case provides no basis for a finding of jurisdiction over a contract dispute between two public utility pole owners operating pursuant to an existing Joint Use Agreement – a dispute clearly under the jurisdiction of (and actually pending before) the courts.

D. The Inapplicability Of R.C. § 4905.51 To AT&T Ohio's Complaint Is Consistent With Federal Law

In 1978, the United States Congress enacted the Pole Attachment Act to require owners of utility poles to allow other providers to attach to those poles. In an approach similar to that taken by the state legislature, the federal Pole Attachment Act, 47 U.S.C. § 224(a)(5), specifically prohibits incumbent local exchange carrier pole owners like AT&T Ohio from qualifying as a "telecommunications carrier" entitled to protections as an attacher under the Pole Attachment Act (47 U.S.C. §§ 224 *et seq.*). In doing so, federal law reinforces DP&L's positions that AT&T Ohio is not entitled to the protections of R.C. § 4905.71 and that R.C. § 4905.51 is inapplicable.

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[4] Opposition at 4.

[5] In addition, AT&T Ohio cites to *Kazmaier Supermarkets., Inc., v. Toledo Edison Co.*, 61 Ohio St.3d 147, 573 N.E.2d 655 (1991). *Kazmaier* involved a customer claim regarding tariffed rates for electrical service and is not analogous to this dispute.

III. R.C. §§ 4905.06, 4905.22 AND 4905.26 DO NOT APPLY TO AT&T OHIO'S CLAIMS

AT&T Ohio further attempts to justify Commission jurisdiction under R.C. §§ 4905.06, 4905.22 and 4905.26,[6] but to no avail. It is undisputed that these sections confer broad authority upon the Commission. For example, R.C. § 4905.06, entitled "General Supervision," grants the Commission jurisdiction to oversee the function of public utilities. R.C. § 4905.22 prohibits unreasonable charges and requires adequate service and facilities. R.C. § 4905.26 confers upon the Commission the authority to hear complaints. The authority conveyed by these statutes provides the Commission the foundation by which to perform many of its critical regulatory duties but does not confer the comprehensive jurisdiction that AT&T Ohio imagines.

None of these sections establishes jurisdiction over this matter. R.C. § 4905.06 is not an independent basis for jurisdiction but rather relies on R.C. § 4905.05 ("[t]he public utilities commission has general supervision over all public utilities within its jurisdiction as defined in R.C. § 4905.05 of the Revised Code."). R.C. § 4905.05 is a general statement of jurisdictional power to regulate public utilities, but the analysis cannot end there; the Commission's general powers, while sizable, have long been recognized to have limits. The Commission, for example, does not have jurisdictional power to award damages in contract disputes involving a public utility, *see e.g., Dayton Power & Light Co. v. Riley,* 53 Ohio St.2d 168, 373 N.E.2d 385 (1978), or for torts allegedly caused by utility employees, *see e.g., Bailey v. The Toledo Edison Co.*, Pub Util. Comm'n. of Ohio, No. 87-765-EL-CSS (August 4, 1987). ATT Ohio's interpretation of these sections is overly broad and fails to recognize that the Commission has neither assumed the

[6] Opposition at 2. AT&T Ohio's conclusory statement that the Commission has jurisdiction under R.C. § 4905.48 must be rejected. The section governs the sharing of lines or plant by two public utilities furnishing a like service or product, which is not presented here.

burden, nor has the legislature imposed a duty on the Commission, to resolve every dispute of every kind that involves a public utility.

R.C. § 4905.22 is merely a statement of policy and does not discuss the jurisdiction of the Commission.[7] Additionally, R.C. § 4905.22 relates to charges for services and the public service offered by DP&L is electricity which is not the subject of this dispute.

Finally, R.C. § 4905.26 is meant to apply to disputes regarding "publicly available rates" and not the terms and conditions contained in a private contract.[8] The judiciary, in fact, has previously determined that R.C. § 4905.26 does not provide the Commission jurisdiction to review disputes between public utilities in a complaint proceeding. *See Dayton Communications Corp. v. Pub. Util. Comm'n*, 64 Ohio St.2d 302 (1980) ("The General Assembly has not, to date, enacted legislation by which the Commission may balance the interests of a public utility ... vis-à-vis its competitors in a complaint proceeding"); *but cf. Allnet Communications Services v. Pub. Util. Comm'n of Ohio*, 38 Ohio St.3d 195 (1988) (holding that the PUCO has discretion to hear complaints between carriers with regard to intrastate access charges).

Additionally, even if those provisions had some applicability to a dispute between two public utilities, they are inapplicable here. R.C. § 4905.51 defines the Commission's powers

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[7] R.C. § 4905.22 states: "Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission. "

[8] R.C. § 4905.26 provides for the adjudication of complaints *against* a public utility by any "person, firm or corporation" but does contemplate complaints *by* public utilities.

here, because it is the sole statute section specifically relating to joint use agreements between public utilities and is not trumped by the Commission's more general authority. *See e.g., Quality Ready Mix, Inc. v. Mamone*, 35 Ohio St.3d 224, 520 N.E.2d 193 (1988) ("it is an elementary rule of statutory construction that, in the absence of language to the contrary, a specific statute controls over a general provision").

AT&T Ohio's labored attempts to justify the Commission's jurisdiction to interpret an existing contract is the same type of improper forum shopping over which the Commission already has expressed concerns when delineating the line between the Commission's regulatory functions and the jurisdiction of a court to hear claims based in tort and contract. *See, Investigation into Limitations of Liability Clause Contained in Util. Tariffs*, Pub Util. Comm'n. of Ohio, No. 85-1406-AU-COI (October 6, 1987). AT&T Ohio's claims have no real place in Title 49, and it is only AT&T Ohio's apparent desire to avoid the Ohio judiciary that can explain AT&T Ohio's choice of forum.

IV. THE COMPLAINT ALLEGES A PURE CONTRACT DISPUTE THAT IS PROPERLY BROUGHT BEFORE A COURT

AT&T Ohio attempts to back away from its initial Complaint on the grounds that its many claims for breach of contract are not "purely" based in that theory, and that the facts alleged in AT&T Ohio's Complaint can alternatively be read to establish a cause of action under any one of a number of creatively compiled sections of Title 49.[9] Regardless of AT&T Ohio's attempts to cloak its claims, it is in fact alleging various breaches of contact. AT&T Ohio's claims rest solely on one issue: whether DP&L and AT&T Ohio performed as required under

[9] Opposition at 9.

the Joint Use Agreement. No other matter must be resolved in order to adjudicate AT&T Ohio's *Complaint.*

AT&T Ohio cites to cases in which the Commission was found to have jurisdiction over complaints alleging "contract" disputes over a public utility's rates and/or service.[10] Each of the cases cited, however, relates to publicly available (*i.e.*, tariffed) rates which are clearly within the Commission's jurisdiction to determine and which are not at issue here. *See e.g., Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 96, 850 N.E.2d 1190 (2006) ("it is readily apparent that the General Assembly has provided for commission oversight of filed tariffs, including the right to adjudicate complaints involving customer rates and services"); *Milligan v. Ohio Bell Tel.*, 56 Ohio St.2d 191, 195, 383 N.E.2d 575, 578 (Ohio 1978) ("The General Assembly has provided a comprehensive plan by which subscribers may contest the reasonableness of rates, rules, regulations and quality of service of a public utility, which plan does not include proceedings in the Court of Common Pleas"). AT&T Ohio does not ask the Commission to review DP&L's "rates" in the manner in which that term is used by Ohio courts, but instead asks the Commission to review retroactively the terms of the Joint Use Agreement.

Although hastily dismissed by AT&T Ohio, the case of *McComb v. Suburban Natural Gas Co.* 85 Ohio App.3d 397 (1993) is dispositive here. The court in *McComb* decided that jurisdiction properly lay with the courts, and not the Commission, with regard to the procedure used by a public utility to raise its rates under a lease agreement with the Village of McComb. The court reasoned that the issue did not concern publicly available "rates," but the method by which privately contracted rates were determined. The court in *Lawko v. Ameritech Corp.,* 2000

[10] Opposition at 14.

Ohio App. LEXIS 5687 (2000)[11] amplified the decision, holding that the key factor in *McComb* was the existence of a private agreement between the parties.[12] The Court explained:

> In *McComb*, the plaintiff Village of McComb filed suit against Suburban Natural Gas Company, alleging that the gas company had breached its lease agreement with the Village by requesting a rate determination from the PUCO even though the lease agreement specified that rates were to be fixed by the Village. The Village sought to have the lease agreement declared null and void. ... [T]he Village asserted that the gas company had breached the lease agreement by raising its rates through a procedure that was contrary to the terms of the parties' lease agreement. The Court of Appeals held that such a dispute is within the jurisdiction of the common pleas court.[13]

The facts here are virtually identical to those in *McComb*. AT&T Ohio's Complaint is solely whether DP&L breached the terms of the Joint Use Agreement when it imposed a joint use pole rental rate calculated using the default provision of the Joint Use Agreement. Such a dispute clearly arises solely from an interpretation of the contract.

V. CONCLUSION

For the reasons set forth above and in its Motion to Dismiss, DP&L respectfully moves that the Commission dismiss AT&T Ohio's Complaint in its entirety with prejudice.

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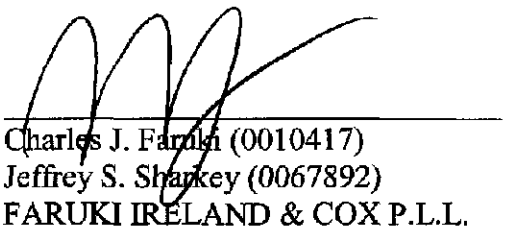
[11] A courtesy copy of this decision is attached hereto as Exhibit A.

[12] AT&T Ohio's reliance on the "two-step approach" in *Ayers-Sterrett, Inc. v. American Telecomm. Systems, Inc.* in this instance overstates the extent of the Commission's jurisdiction and is misleading. Opposition at 12, n. 2. As explained above, R.C. 4905.51 assumes that joint use rates negotiated by mutually dependent utility pole owners are reasonable, and therefore beyond Commission jurisdiction. *See Ayers-Sterrett, Inc. v. American Telecomm. Systems, Inc.*, 833 N.E.2d 348, 351 (Ohio App. 2005). In addition, at least one Ohio Appellate court has rejected this approach. *See Lawko v. Ameritech Corp.*, 2000 Ohio App. LEXIS 5687 (2000) citing *Kazmaier Supermarket, Inc. v. Toledo Edison Co*, 61 Ohio St.3d 147, 573 N.E.2d 655 (Ohio 1991). Moreover, contract interpretation is not within the unique purview of the Commission.

[13] *Lawko v. Ameritech Corp.*, 2000 Ohio App. LEXIS 5687 (2000).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing The Dayton Power and Light Company's Reply to AT&T Ohio's Memorandum Contra The Dayton Power and Light Company's Motion to Dismiss the Complaint and Request for Emergency Relief has been served via electronic mail and regular U.S. mail, postage prepaid, upon the following counsel of record, this 18th day of January, 2007:

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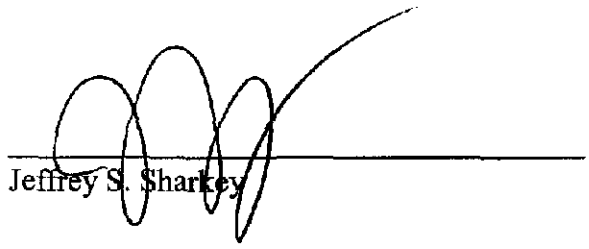

Jeffrey S. Sharkey

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FOCUS - 1 of 3 DOCUMENTS

SUSAN M. LAWKO, PLAINTIFF-APPELLANT v. AMERITECH CORPORATION, ET AL., DEFENDANTS-APPELLEES

NO. 78103

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2000 Ohio App. LEXIS 5687

December 7, 2000, Date of Announcement of Decision

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court, No. CV-399174.

DISPOSITION:

AFFIRMED.

COUNSEL: For Plaintiff-Appellant: Susan M. Lawko, Esq. (pro se), Lawko & Lawko, Cleveland, OH.

For Defendants-Appellees: Thomas A. Linton, Esq., Chagrin Falls, OH.

JUDGES: TIMOTHY E. McMONAGLE, P.J. PATRICIA A. BLACKMON, J. and ANNE L. KILBANE, J., CONCUR.

OPINION BY: TIMOTHY E. McMONAGLE

OPINION:

JOURNAL ENTRY AND OPINION

TIMOTHY E. McMONAGLE, P.J.:

Plaintiff-appellant, Susan M. Lawko, Esq., appeals *pro se* the order of the Cuyahoga Court of Common Pleas granting the motion to dismiss of defendants-appellees, Ameritech Corporation and The Ohio Bell Telephone Company. The facts giving rise to this appeal are as follows.

On December 29, 1999, appellant commenced this action by filing a complaint against Ameritech Corporation. On February 11, 2000, appellant filed an amended complaint, naming The Ohio Bell Telephone Company as a new party defendant. In the amended complaint, appellant alleged that appellees had entered into an oral contract with appellant to provide "efficient, ongoing phone service," but had breached the contract "by virtue of [appellees'] failure to provide telephone service to [appellant]." Appellant [*2] also alleged that "by virtue of [appellees'] willful, wanton disregard for its duty to correct [appellant's] phone service," various of her clients were unable to contact her for legal advice. Finally, appellant alleged that although she and her clients had repeatedly advised appellees of the problems with appellant's telephone service, appellees "did nothing to correct the problems with appellant's phone lines." Appellant characterized her claims as breach of contract (Count One), tortious interference with contractual relations (Count Two) and negligence (Count Three).

On March 13, 2000, appellees moved the trial court to dismiss the Amended Complaint for lack of subject matter jurisdiction, arguing that the Public Utilities Commission of Ohio ("PUCO") had exclusive jurisdiction of the claims raised against appellees. The trial court granted the motion to dismiss and this appeal followed.

Appellant's single assignment of error provides:

> THE TRIAL COURT ERRED IN GRANTING DISMISSAL OF APPELLANT'S CLAIMS BY DETERMINING THAT THE PUCO HAS EXCLUSIVE JURISDICTION OF THE

EXHIBIT A

CONTRACT AND TORT CLAIMS ASSERTED BY APPELLANT PER ORO SECTION 4905.26.

Appellant contends that the [*3] jurisdiction of the PUCO is not exclusive as to all issues and that *R.C. 2905.26* does not vest in the PUCO exclusive jurisdiction over common law torts committed by public utilities. She also contends that the PUCO is not a court of general jurisdiction and has no power to judicially ascertain and determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility is involved.

Appellees, on the other hand, assert that *R.C. 4905.26* gives the PUCO exclusive jurisdiction to determine liability involving claims of a utility's failure to supply or properly supply regulated public utility service. Thus, appellees contend, because appellant's claims are, in essence, claims that appellees failed to supply an adequate quality of service, the PUCO has exclusive jurisdiction of appellant's claims.

Chapter 4905 of the Revised Code vests the PUCO with the authority to supervise all public utilities within its jurisdiction. To that end, *R.C. 4905.06* provides, in relevant part:

> The public utilities commission has general supervision over all public utilities within [*4] its jurisdiction as defined in *section 4905.05 of the Revised Code*, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, ***and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service,*** the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises and charter requirements. *** (Emphasis added.)

R.C. 4905.26 requires, among other things, that the PUCO set for hearing a complaint against a public utility whenever reasonable grounds appear that service is insufficient or inadequate. It states, in relevant part:

> Upon complaint in writing against any public utility by any person, firm, or corporation, *** that any *** service, *** or service rendered, *** 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, [*5] or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or justly preferential, ***or that any service is, or will be, inadequate or cannot be obtained,*** *** 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. *** (Emphasis added.)

Appellees are telephone companies as defined in *R.C. 4905.03(A)(2)* and public utilities as defined in *R.C. 4905.02*. As such, they are subject to the jurisdiction of the PUCO under authority of *R.C. 4905.04* and *4905.05*.

In State, *ex rel. Northern Ohio Telephone Co. v. Winter (1970), 23 Ohio St. 2d 6, 260 N.E.2d 827*, the Supreme Court of Ohio held that by the enactment of statutory provisions providing a detailed procedure for service and rate complaints, the General Assembly lodged "exclusive jurisdiction" regarding such matters in the PUCO, subject to review by the Ohio Supreme Court. *Id.*, paragraph one of the syllabus. The Ohio Supreme Court stated:

> The [*6] General Assembly has enacted an entire chapter of the Revised Code dealing with public utilities, requiring, *inter alia*, adequate service, and providing for permissible rates and review procedures. *E.g., R.C. 4905.04, 4905.06, 4905.22, 4905.231* and *4905.381*. Further, *R.C. 2905.26* provides a detailed procedure for filing service complaints. This comprehensive scheme expresses the intention of the General Assembly that such powers were to be vested solely in the commission.

Id. at 9.

Consistent with the holding announced in *Winter*, in *Kazmaier Supermarket, Inc. v. Toledo Edison Co. (1991), 61 Ohio St. 3d 147, 153-54, 573 N.E.2d 655*, the Supreme Court of Ohio determined that the PUCO has exclusive jurisdiction to hear and determine matters which are "in essence" rate and service-oriented. The Supreme Court noted, however, that the courts of common pleas retain jurisdiction over "pure common law tort claims" and "pure contract claims not involving tariffs" brought against public utilities. *Id.*, citing *Marketing Research Services, Inc. v. Pub. Util. Comm. (1987), 34 Ohio St. 3d 52, 517 N.E.2d 540;* [*7] *Kohli v. Pub. Util. Comm. (1985), 18 Ohio St. 3d 12, 479 N.E.2d 840; Milligan v. Ohio Bell Tel. Co. (1978), 56 Ohio St. 2d 191, 383 N.E.2d 575.* The question, therefore, is whether appellant's claims are, in essence, service-oriented or pure common law tort or contract claims. See *Ohio Graphco, Inc. v. The Ohio Bell Telephone Co., 1994 Ohio App. LEXIS 2050* (May 12, 1994), Cuyahoga App. No. 65466, unreported.

Appellant's complaint raises three claims: 1) appellees breached a duty to provide adequate telephone service to appellant; 2) appellees disregarded their duty to fix appellant's telephone service, thereby interfering with appellant's business relationships with her clients; and 3) appellees did nothing to correct the problems with appellant's telephone service, despite numerous complaints regarding the service from appellant and her clients.

Although characterized as claims for breach of contract, tortious interference with contractual relations and negligence, appellant's claims are clearly service-oriented. In essence, appellant claims that appellees provided less than adequate service and repair of her telephone service. Such allegations are actionable pursuant to [*8] *R.C. 4905.26* and the exclusive jurisdiction for disposition of such claims lies with the PUCO.

Appellant argues, however, that *McComb v. Suburban Natural Gas Co. (1993), 85 Ohio App. 3d 397, 619 N.E.2d 1109*, in which the Third Appellate District held that the common pleas court had jurisdiction of the plaintiff's complaint that the gas company breached its lease agreement with the plaintiff, is controlling because its facts are "strikingly similar" to this case. We disagree.

In *McComb*, the plaintiff Village of McComb filed suit against Suburban Natural Gas Company, alleging that the gas company had breached its lease agreement with the Village by requesting a rate determination from the PUCO even though the lease agreement specified that rates were to be fixed by the Village. The Village sought to have the lease agreement declared null and void. The Village did not assert, as appellant does in this case, that the utility had supplied defective service. Rather, the Village asserted that the gas company had breached the lease agreement by raising its rates through a procedure that was contrary to the terms of the parties' lease agreement. The [*9] Court of Appeals held that such a dispute is within the jurisdiction of the common pleas court. Appellant's dispute with appellees, however, concerns the quality of service rendered by appellees, not the terms of a private agreement between the parties. Accordingly, *McComb* is not persuasive.

Appellant also cites three cases-- *State ex rel. Ohio Edison Co. v. Morris, 1984 Ohio App. LEXIS 11825* (Dec. 3, 1984), Stark App. No. CA-6432; *Harris v. Ohio Edison Co., 1995 Ohio App. LEXIS 3381* (Aug. 17, 1995), Mahoning Cty. App. No. 94 C.A. 84, unreported; and *Gayheart v. Dayton Power & Light Co. (1994), 98 Ohio App. 3d 220, 648 N.E.2d 72*--as "proof that appellant's complaint in tort and contract lies within the jurisdiction of the common pleas court, not the PUCO." We disagree.

In *Morris, supra*, the plaintiffs filed a complaint in the court of common pleas alleging that Ohio Edison Company had installed improperly grounded electrical service to the plaintiffs' premises and that the premises, including plaintiffs' livestock, were severely affected by the resulting stray voltage. In response to the plaintiffs' complaint, Ohio Edison filed a complaint for writ of prohibition with the Fifth Appellate District, arguing [*10] that the PUCO had exclusive jurisdiction of the plaintiffs' complaint. In determining whether the trial court had subject matter jurisdiction of the plaintiffs' complaint, the Fifth Appellate District noted that the PUCO had failed to act by way of standard or regulation regarding the specific phenomenon alleged in the plaintiffs' complaint, thereby suggesting that the issue raised in the plaintiffs' complaint was not one of those contemplated by the legislature in granting significant administrative authority to the PUCO. In the absence of any standard or regulation regarding stray voltage, the Fifth Appellate District found that the plaintiffs'

complaint was "not a complaint about service," but rather, a tort claim unrelated to the provision of services by a utility. Therefore, it held that the trial court had subject matter jurisdiction of the plaintiffs' complaint. Unlike *Morris*, however, appellant's negligence claim is clearly a claim regarding appellees' alleged inadequate service and, therefore, subject to the exclusive jurisdiction of the PUCO.

In *Harris, supra,* also cited by appellant, the plaintiffs alleged that they sustained significant property damage when a power [*11] surge occurred in their electrical system as a result of a negligently connected neutral tap. In considering whether the trial court had properly granted defendant Ohio Edison's motion to dismiss the plaintiffs' complaint, the Seventh Appellate District noted Ohio Edison's argument that the plaintiffs' complaint was premised upon an allegation of inadequate or improper service and, therefore, was subject to the exclusive jurisdiction of the PUCO. The Appeals Court also found, however, that there were also allegations that "not only did [Ohio Edison Company] fail to properly install the neutral tap connection, it negligently, recklessly and intentionally failed to investigate and correct this dangerous and potentially deadly breach in its system, despite repeated and urgent requests to do so." *Id.* Accordingly, the Seventh Appellate District held that "where circumstances determining jurisdiction may be subject to more than one interpretation, then the basis of the complaint alone is insufficient to support a dismissal in absence of additional inquiry." The Court reversed the judgment of the trial court, therefore, and remanded the case for further proceedings. Unlike *Harris,* [*12] however, in this case the circumstances determining jurisdiction are subject to only one interpretation: that appellees failed to provide adequate service to appellant. Accordingly, appellant's complaint is service-oriented and subject to the exclusive jurisdiction of the PUCO.

The third case cited by appellant as "proof" that the common pleas court has jurisdiction of her claims is similarly unpersuasive. In *Gayheart, supra,* the Second Appellate District held that a complaint asserting that a power surge created by the defendant power company's negligence had caused a fire on the plaintiffs' property was a common law tort claim, rather than a claim related to service. The Court of Appeals reasoned that a power surge was not a "practice" engaged in regularly by the power company and that the crucial issue in the case involved whether a power surge or faulty wiring caused the fire, not whether any "service" provided by the power company was unsatisfactory. Accordingly, because the expertise of the PUCO in interpreting its resolutions was not necessary to the resolution of the case, the Second Appellate District held that common pleas court properly exercised jurisdiction [*13] over the claim. *Id.*

We do not find the analysis in *Gayheart* persuasive. As the Supreme Court of Ohio noted in *Kazmaier Supermarket, supra,* the basis for determining whether PUCO has exclusive jurisdiction is a determination regarding whether a matter involves claims which are in essence rate or service-oriented--not whether a claim involves a common "practice" of the utility or whether resolution of the claim requires the expertise of the PUCO in interpreting its resolutions. Thus, because appellant's claims in this case are service-oriented, they fall under the exclusive jurisdiction of the PUCO.

Appellant's assignment of error is overruled. The action filed by appellant was very clearly a complaint that the service rendered by appellees was not adequate. These allegations are actionable pursuant to *R.C. 4905.06* and the jurisdiction for disposition of such a complaint rests exclusively with the PUCO. The trial court, therefore, was without jurisdiction to consider the case and properly granted appellees' motion to dismiss.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court [*14] finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure.*

TIMOTHY E. McMONAGLE

PRESIDING JUDGE

PATRICIA A. BLACKMON. J. and
ANNE L KILBANE, J., CONCUR.

N.B. This entry is an announcement of the court's

decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; Loc.*App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II*, Section **[*15]** 2(A)(1).