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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

THOMAS & DERRELL WILKES

Complainants,

vs.

OHIO EDISON COMPANY

Respondent.

CASE NO. 09-682-EL-CSS

PUCO

2011 MAR -8 PM12:35

RECEIVED-SOCKETING DIV

APPLICATION FOR REHEARING

Now come the complainants Thomas and Derrell Wilkes, through counsel, pursuant to O.R.C. §4903.10 and respectfully request the Public Utilities PUCO of Ohio ("PUCO") to grant a rehearing of the Order of Dismissal filed February 23, 2011¹. The reason for this Application is more fully set forth below and incorporated herein.

FACTS

The above complaint sought an order from the PUCO to enforce the National Electrical Safety Code ("NESC").

On August 5, 2009 the Wilkes filed a Complaint against Ohio Edison Company seeking to compel Ohio Edison to move a 69kV electrical transmission line that runs in proximity to structures on the Wilkes' property. The Wilkes seek an order from the PUCO compelling Ohio Edison to move the 69kV line to comply with the power line proximity restrictions set forth in the NESC.

¹ This Dismissal appears to be violation of the procedural rule against Motions for Summary Judgment before the PUCO as argued by Ohio Edison in their Memorandum Contra to the Wilkes' Motion for Order Compelling Ohio Edison to Move the 69kV Transmission lines.

Importantly, the PUCO granted a stay of discovery in this case that included requests for Ohio Edison's policies that dealt directly with the issues raised in the Complaint. Specifically, pursuant to O.R.C. §4903.03 and OAC§4901:1-16 the Wilkes requested from Ohio Edison Company a copy of all written programs, policies, procedures, and schedules required to be filed with the PUCO pursuant to Ohio Administrative Code §4901:1-10-27, and all other customer addresses in Ohio Edison's service area where there are structures in violation of the National Electrical Safety Code.

The PUCO dismissed the Complaint before these matters could be presented for consideration. Specifically, in findings (19) and (20) the PUCO dismissed the Complaint mainly because the Mahoning County Court of Common Pleas has issued a ruling relating the issues in the Complaint when it interpreted the Easement attached to the Wilkes' property at issue.

LAW AND ARGUMENT

The Ohio Administrative Code specifically states that PUCO has exclusive jurisdiction to enforce the NESC. Ohio Admin.Code 4901:1-10-06.

The Ohio Supreme Court in *Corrigan v. Illuminating Company* (2009), 122 Ohio St.3d 265 made it clear that the issue raised in the Complaint and the discovery request submitted to Ohio Edison falls squarely within the PUCO's exclusive jurisdiction.

{¶ 8} The General Assembly enacted R.C. 4901.01 et seq. to regulate the business activities of public utilities and created PUCO to administer and enforce these provisions. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655. R.C. 4905.26 provides that PUCO shall hear complaints filed against public utilities alleging that "any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, 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, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory*267, or unjustly preferential." This " 'jurisdiction specifically conferred by statute upon the Public Utilities PUCO over public utilities of the state * * * is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.' " State ex rel. N. Ohio Tel. Co. v. Winter (1970), 23 Ohio St.2d 6, 9, 52 O.O.2d 29, 260 N.E.2d 827, quoting State ex rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas (1934), 128 Ohio St. 553, 557, 1 O.O. 99, 192 N.E. 787; see also Kazmaier, 61 Ohio St.3d at 152, 573 N.E.2d 655

* * *

{¶ 15} We agree with the *DeLost* court that this type of case falls within the exclusive jurisdiction of PUCO. The first part of the *Allstate* test asks whether PUCO's administrative expertise is required to resolve the issue in dispute. Ohio Adm.Code 4901:1-10-27(D)(2) requires that each electric utility inspect its electric-transmission facilities (circuits and equipment) at least once every year. The inspections are to be conducted in accordance with written programs. Ohio Adm.Code 4901:1-10-27(E)(1). "These programs shall establish preventative requirements for the electric utility to maintain safe and reliable service. Programs shall include, but are not limited to, the following facilities: * * * (f) Right-of-way vegetation control * * *." *Id.* The vegetation-management plan takes a number of factors into consideration such as arcing, sagging, and line voltage as well as regulatory requirements from OSHA, FAA, and the Army Corps of Engineers. **In addition, electric utilities are required to comply with the American National Standard Institute's "National Electrical Safety Code."** Ohio Adm.Code 4901:1-10-06. Finally, electric utilities are required to submit their programs to the director of the consumer-services department for review and acceptance. Ohio Adm.Code 4901:1-10-27(E)(2). If the electric utility and the director cannot agree on the details and contents of the plan, the electric utility is required to file a complaint with PUCO. *Id.* The company's decision to remove *269 a tree is governed by its vegetation-management plan, which is regulated by PUCO. Therefore, we conclude that PUCO's administrative expertise is required to resolve the issue of whether removal of a tree is reasonable.

Corrigan, supra.

Thus, it is clear that enforcement of the NESC falls squarely within the PUCO's exclusive jurisdiction through the statutory framework set forth in O.R.C. §4901.01 et seq. and Ohio Admin.Code 4901:1-10-06 and as interpreted by the Ohio Supreme Court in

Corrigan, supra.

The fact that the Mahoning County Court of Common Pleas has issued a ruling relating to the same issue is irrelevant. *See, Western Reserve Transit Authority v. Public Utilities PUCO of Ohio* (1974), 39 Ohio St.2d 16, 313 N.E.2d 811.

R.C. 4905.26, on its face, permits 'any person, firm, or corporation' to file a complaint with the PUCO charging that the operation of a public utility is 'in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law * * *.' **This language is extremely broad, and would permit what might be strictly viewed as a 'collateral attack' in many instances.**

Upon receipt of a complaint pursuant to R.C. 4905.26, the PUCO is charged as follows:

'* * * if it appears that reasonable grounds for complaint are stated, the PUCO shall fix a time for hearing and shall notify complainants and the public utility thereof, and shall publish notice thereof in a newspaper of general circulation813 in each county in which complaint has arisen. Such notice shall be served and publication made not less than fifteen days nor more than thirty days before hearing and shall state the matters complained of. The *19 PUCO may adjourn such hearing from time to time.**

'The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.'

Id. at 18 (emphasis added).

Second, "[t]he broad jurisdiction of PUCO over 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."** *See, Corrigan v. Illuminating Company* (2009), 122 Ohio St.3d 265, at ¶9 (Emphasis added). The Wilkes brought the above Complaint for a service-related issue and unfair practices related to Ohio Edison's admission that the location of their electrical transmission lines are in violation of the NESC, which violates the Ohio Revised Code and the Ohio Administrative Code.

Ohio Edison's Complaint in Mahoning County dealt with the interpretation of an easement, which is a contract claim. As held by the Ohio Supreme Court, PUCO does not

lose jurisdiction simply because Ohio Edison filed a complaint in Mahoning County seeking interpretation of an easement. In fact, Ohio Edison, through its sister corporation The Illuminating Company, lost this very issue in the Ohio Supreme Court in 2002. *See, State ex rel. Illuminating Company v. Cuyahoga County Court of Common Pleas* (2002), 97 Ohio St.3d 69, 776 N.E.2d 92 (“*State ex rel. Illuminating Company*”).

In *State ex rel. Illuminating Company, supra*, the Illuminating Company sought to prevent the Cuyahoga County Court of Common Pleas from exercising jurisdiction over All Erection & Crane Rental Corporation’s (“AE”) counterclaim because the counterclaim raised issues covered by Ohio Revised Code §4905.22. The Ohio Supreme Court agreed that all issues in AE’s counterclaim that were covered by statute should be filed in the PUCO. Now that Ohio Edison is on the other side of the fence, they argue that PUCO has no jurisdiction. This could not be further from legal reality. In fact, in *State ex rel. Illuminating Company*, the Ohio Supreme Court held that PUCO had jurisdiction over AE’s counterclaims to the extent that they implicated PUCO’s exclusive jurisdiction; however, the Ohio Supreme Court allowed the non-statutory claims to proceed on a parallel track in the Common Pleas Court.

{¶ 32} Nevertheless, the court of common pleas and Judge Corrigan do not patently and unambiguously lack jurisdiction over AE's claims for declaratory judgment based upon indefiniteness and lack of consideration. **These are purely contractual claims that are independent of any claim that CEI violated any provision of R.C. Title 49 or PUCO regulations.** Regarding these claims, the PUCO has no power to determine rights and liabilities even though a public utility is involved. *See, e.g., Marketing Research Serv., Inc. v. Pub. Util. Comm.* (1987), 34 Ohio St.3d 52, 56, 517 N.E.2d 540. A writ of prohibition is thus inappropriate as to these claims.

Id. (emphasis added). Likewise, the Wilkes’ claims before the PUCO are independent from the Mahoning County case as they are based upon the PUCO statutes and Ohio Administrative Code.

In *State ex rel. Illuminating Company, supra*, the Ohio Supreme Court based its conclusions on decades of case precedent, citing to previous cases as follows:

{¶19} . . . “[t]he jurisdiction specifically conferred by statute upon the Public Utilities PUCO over public utilities of the state * * * is so complete, comprehensive and adequate as to warrant the conclusion that it is likewise exclusive.”**97” *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 9, 52 O.O.2d 29, 260 N.E.2d 827, quoting *73 *State ex rel. Ohio Bell Tel. Co. v. Cuyahoga Cty. Court of Common Pleas* (1934), 128 Ohio St. 553, 557, 1 O.O. 99, 192 N.E. 787; see, also, *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 152, 573 N.E.2d 655.

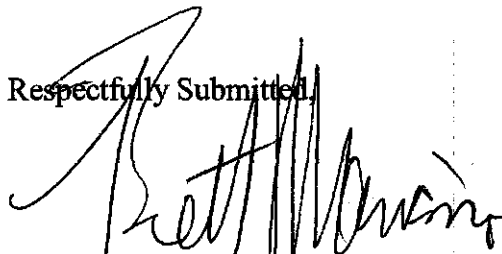
{¶22} * * * Allegations of violations of R.C. Chapter 4905 and PUCO regulations are within the exclusive initial jurisdiction of the PUCO. *State ex rel. Dayton Power & Light Co. v. Kistler* (1979), 57 Ohio St.2d 21, 23, 11 O.O.3d 108, 385 N.E.2d 1076 (“alleged violations of R.C. Chapter 4905 * * * are the concern of the Public Utilities PUCO in the first instance”).

Therefore, the PUCO clearly has jurisdiction over the service-related Complaint in this case.

CONCLUSION

WHEREFORE, the Complainants respectfully request the PUCO to grant them a rehearing and issue an order compelling Ohio Edison to move their lines to a distance that complies with the NESC.

Respectfully Submitted,

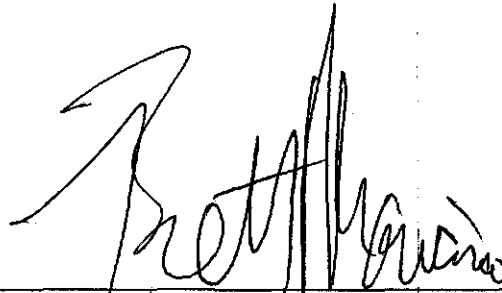


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PROOF OF SERVICE

A copy of the foregoing has been served upon the following via regular U.S. Mail
on this 4th day of March 2011.

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A handwritten signature in black ink, appearing to read "Brett M. Mancino", is written over a horizontal line.

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