

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of Ella Mae	)	
Bowman,	)	
	)	
Complainant,	)	
v.	)	Case No. 11-4785-TP-CSS
	)	
Cavalier Telephone Corporation,	)	
	)	
Respondent.	)	

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**MOTION OF RESPONDENT CAVALIER TELEPHONE CORPORATION  
TO DISMISS THE COMPLAINT**

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Now comes Cavalier Telephone Corporation (“Cavalier” or “Company”) and hereby moves, pursuant to Ohio Revised Code Section 4905.26 and Ohio Administrative Code Rule 4901-9-01, that the Public Utilities Commission of Ohio dismiss the Complaint filed against Cavalier by Ms. Ella Mae Bowman (“Complainant” or “Ms. Bowman”) on August 16, 2011. A memorandum in support is attached hereto.

Respectfully submitted on behalf of,  
CAVALIER TELEPHONE CORPORATION



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## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

Cavalier, through its various subsidiaries (Talk America Inc., LDMI Telecommunications, Inc. and Intellifiber Networks LLC) which were indirectly transferred to PAETEC Holding—is authorized to provide resold and facilities based local exchange, interexchange and competitive telecommunications services in the State of Ohio. Although Cavalier is certificated to provide these services in Ohio, it also provides digital subscriber line (“DSL”) service to Ohio customers. As this Commission recognizes, “[b]oth DSL service and any charges or credits related to it are matters beyond the Commission’s jurisdiction.” *In the Matter of the Complaint of Mark Drake v. AT&T Ohio*, Case No. 10-411-TP-CSS (Entry issued June 22, 2011), citing to *In the Matter of the Complaint of Don Damyanic v. Verizon North Inc.*, Case No. 06-270-TP-CSS (Entry issued April 10, 2006, explaining that a complaint about DSL service would need to be filed with the Federal Communications Commission).

For this reason, and the reasons stated below, Complainant has failed to state a reasonable claim in its Complaint upon which relief can be granted against Cavalier. In fact, Complainant: 1) fails to establish that Cavalier has in any way failed to act in accordance with the law and/or this Commission’s rules; and 2) does not state reasonable grounds for the Commission to conclude that Cavalier has in any way provided unreasonable, unjust, or insufficient service in violation of statute, regulation or order of the Commission. Accordingly, Cavalier requests that the Complaint be dismissed with prejudice.

### **II. LEGAL ARGUMENT**

Contrary to established Ohio Supreme Court precedent, the Complainant asks this Commission to provide its opinion on issues outside the scope of this Commission’s jurisdiction,

and to adjudge a controversy that does not exist. Pursuant to Ohio Administrative Code (“OAC”) Rule 4901-9-01(C), Cavalier respectfully moves for the dismissal of the Complaint for the reasons set forth herein.

**A. This Commission Lacks Subject Matter Jurisdiction Over Ms. Bowman’s Complaint.**

The Ohio Supreme Court long ago stated: “This court has reiterated, many times, the obvious truth that the [public utilities] commission is solely a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.” *Akron & B. B. R. Co. v. PUCO* (1956), 165 Ohio St. 316, syllabus paragraph 1. Subsumed within the concept of the Commission’s jurisdiction is the concept of subject matter jurisdiction. The Ohio Supreme Court defines subject matter jurisdiction as “the power to hear and decide a case upon its merits,” or “the competency of a court to render a valid judgment in a particular action.” *Morrison v. Steiner* (1972), 32 Ohio St.2d 86.

As noted above, this Commission already recognizes that “[b]oth DSL service and any charges or credits related to it are matters beyond the Commission’s jurisdiction.” *In the Matter of the Complaint of Mark Drake v. AT&T Ohio*, Case No. 10-411-TP-CSS (Entry issued June 22, 2011).

Therefore, the Complaint must be dismissed as outside the scope of the Commission’s jurisdiction.

**B. The Complaint Fails to State Reasonable Grounds Because There is No Justiciable Controversy.**

R.C. 4905.26 requires that the Commission set for hearing a complaint only when “it appears that reasonable grounds for a complaint are stated”—namely that any rate charged or demanded is in any respect unjust, unreasonable, or in violation of law, or that any practice

affecting or relating to any service furnished is unjust or unreasonable. The burden of proof in a complaint proceeding is on the complainant. *Luntz Corp. v. Pub. Util. Comm.* (1997), 79 Ohio St. 3d 509, 513-14; *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189, 190. Therefore, it is the responsibility of a complainant to present evidence in support of the allegations made in a complaint and to establish reasonable grounds requiring the Commission to set the complaint for a hearing. The Commission has refused to allow a complaint to proceed that does not include sufficient factual allegations. See *In re the Complaint of Diana Williams v. Ohio Edison Co.* (October 28, 2009 Finding and Order), Case No. 08-1230-EL-CSS (“Without sufficient factual allegations, a complaint cannot go forward.”); *In the re the Complaint of Paul Goldsberry v. United Telephone Co.* (January 9, 2008 Entry), Case No. 07-559-TP-CSS (“Without disclosure of underlying facts in a complaint, the Commission cannot determine whether reasonable grounds are present to entitle a complainant to a hearing and must dismiss the complaint.”).

The underlying claim in the Complaint is that the Complainant’s privacy was allegedly breached because a number associated solely with DSL service being provided by Cavalier was published in the white pages telephone book.

The number associated with DSL service is altogether different from the Complainant’s telephone number. The “pseudo” telephone number associated with DSL service is used solely for the purpose of providing DSL service. Calling the DSL number will not result in connection to the Complainant or anyone else for that matter.

In addition, and despite the Complainant’s best efforts to keep her contact information private, they are a matter of public record. The Complainant appears to be active politically, and her name, address and precinct are readily available from the Cuyahoga County Board of Elections ([http://boe.cuyahogacounty.us/pdf\\_boe/en-US/RepublicanOfficialsListforweb.xls](http://boe.cuyahogacounty.us/pdf_boe/en-US/RepublicanOfficialsListforweb.xls)).

Further, the Cuyahoga County Auditor's website provides the Complainant's name and address (see Exhibit 1 attached hereto). And, most importantly, the Complainant herself placed her contact information in the public domain by filing this Complaint.

For the reasons stated above, Complainant lacks standing to bring this Complaint as there is no justiciable controversy.

WHEREFORE, having fully answered the Complaint, Cavalier respectfully requests that the Commission dismiss the Complaint with prejudice.

Respectfully submitted on behalf of,  
CAVALIER TELEPHONE CORPORATION



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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion to Dismiss of Respondent Cavalier Telephone Corporation was served upon the Complainant listed below via regular U.S. Mail this 6<sup>th</sup> day of September 2011.



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Thomas J. O'Brien

Ella Mae Bowman  
1264 East 146 Street  
East Cleveland, OH 44112

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**9/6/2011 3:51:29 PM**

**in**

**Case No(s). 11-4785-TP-CSS**

Summary: Motion to Dismiss Complaint electronically filed by Teresa Orahood on behalf of  
Talk America Inc. dba Cavalier Telephone