

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>Robert Smith and Kathleen Smith,</b>	)	
	)	
<b>Complainants,</b>	)	
	)	
<b>v.</b>	)	<b>Case No: 13-2109-EL-CSS</b>
	)	
<b>Ohio Power Company,</b>	)	
	)	
<b>Respondent.</b>	)	

**REPLY BRIEF OF OHIO POWER COMPANY**

**I. INTRODUCTION**

Complainants ask the Commission to do something it has no jurisdiction to do – adjudicate controversies between parties as to property rights. Because a court of common pleas is the appropriate venue in which to adjudicate the property rights of the parties with regard to the easement at issue in this case, the Complaint should be dismissed for lack of jurisdiction and for failure to state reasonable grounds for complaint. If the Commission nevertheless chooses to exercise jurisdiction over the Complaint, it should reject Complainants’ arguments for terminating AEP Ohio’s easement and find that Complainants are responsible for the total costs of their requested relocation.

**II. ARGUMENT**

**A. The Complaint should be dismissed for lack of jurisdiction and for failure to state reasonable grounds for complaint.**

Complainants argue that the Commission should terminate AEP Ohio’s easement because it is no longer valid. Complainants’ Brief at unnumbered pp. 4-6; *See, also* Amended Complaint at ¶17. However, Complainants’ claim exceeds the scope of the Commission’s jurisdiction.

Revised Code 4905.26 sets forth the types of claims over which the Commission has exclusive jurisdiction and provides that Commission 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, or unjustly preferential.

R.C. 4905.26. But the broad jurisdiction of the Commission 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.” *Corrigan v. Illuminating Co.*, 2009-Ohio-2524, 122 Ohio St. 3d 265, 267, 910 N.E.2d 1009, 1011 (internal quotations omitted); *See, also, In re Complaint of Wilkes v. Ohio Edison Co.*, 2012-Ohio-609, 131 Ohio St. 3d 252, 253, 963 N.E.2d 1285, 1287 (“As a general matter, the commission does not possess judicial power and may not adjudicate controversies between parties as to property rights.”); *Ranft v. Columbia Gas of Ohio, Inc.*, 12 O.O.3d 56, 388 N.E.2d 759, 761 (Ohio Ct. App. 1978) (“The Public Utilities Commission is not a court, much less a court of general jurisdiction, and has no power to determine legal rights and liabilities with respect to contract rights or property rights, even though a public utility be involved.”).

Consequently, the Supreme Court of Ohio has established a two-part test for determining whether the Commission has exclusive jurisdiction over a claim. A claim is within the exclusive

jurisdiction of the Commission if: (1) the Commission's administrative expertise is required to resolve the issue in dispute, and (2) the act complained of is a practice normally authorized by the utility. *Wilkes*, 131 Ohio St. 3d at 253; *See, also, Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 2008-Ohio-3917, 119 Ohio St. 3d 301, 304, 893 N.E.2d 824, 828. If the answer to either part of the test is in the negative, the claim is not within the exclusive jurisdiction of the Commission. *Allstate*, 119 Ohio St. 3d at 304. The *Allstate* test was recently applied in *Wilkes*, where property owners filed a complaint with the Commission seeking removal of an electric utility's transmission line from their property. *Wilkes*, 131 Ohio St. 3d at 252. The Commission dismissed the complaint for lack of jurisdiction and the property owners appealed. *Id.* In upholding the Commission's dismissal of the complaint, the Court found that the *Wilkes* had not shown that the Commission's expertise was required to resolve the disputed issue – *i.e.*, that the first prong of the *Allstate* test had not been met. *Id.* at 254. The *Allstate* test was also recently applied in *Corrigan*. In that case, a property owner filed a complaint for injunctive relief to prevent an electric company from removing a tree located within its easement. *Corrigan*, 122 Ohio St. 3d at 265. While the Court ultimately answered both parts of the *Allstate* test in the affirmative, it specifically noted that the case before it was not about an easement, which would be a pure contract matter that would confer subject-matter jurisdiction in the court of common pleas. *Id.* at 269.

Here, Complainants' claim does not pass the *Allstate* test and should therefore be dismissed for lack of jurisdiction. Specifically, Complainants have not shown that the Commission's expertise is required to resolve the dispute at issue. Indeed, Complainants have failed to set forth reasonable grounds alleging that any rate charged or service provided is unjust, unreasonable, or unlawful, as required under R.C. 4905.26 in order to state a claim for relief over

which the Commission has jurisdiction. Like in *Wilkes*, the lack of explanation and citation of authority on this point is fatal to Complainants' claim. Moreover, the Court in *Corrigan* specifically noted that a dispute regarding an easement was an example of a dispute in which the Commission's expertise would not be required. Finally, in dismissing the Wilkes' complaint for lack of jurisdiction, the Commission itself confirmed that it has no special expertise with respect to interpreting easements, saying: "We agree with [the utility] that the Commission has no special expertise with respect to interpreting easements. Courts of common pleas are better suited to apply equitable and legal principles to resolve competing property rights. Consequently, we must answer in the negative the question of whether the Commission's administrative expertise is needed to resolve issues relating to easements." *In the matter of the Complaint of Thomas and Derrell Wilkes*, Case No. 09-682-EL-CSS, Entry (February 23, 2011) at ¶19.

Complainants ask the Commission to find that the easement granted to AEP Ohio in 1937 is not necessary and should be terminated. Hearing their claim would have the Commission apply equitable and legal principles to resolve competing property rights in the easement – which is precisely the type of dispute over which the Commission has no jurisdiction. The Complainants have not shown that the Commission's administrative expertise is needed to resolve the dispute. Thus, the first prong of the *Allstate* test must be answered in the negative. Complainants' only jurisdictional theory appears to be merely that AEP Ohio is an electric utility, which is insufficient; they have alleged no service-related claims under R.C. 4905.26 against AEP Ohio in this case (a point which the Company initially raised in its Answer and Motion to Dismiss). Therefore, under the *Allstate* test and the holding in *Wilkes* the Complaint should be dismissed for lack of jurisdiction and for failure to state reasonable grounds for

complaint. Assuming Complainants have a claim for relief, jurisdiction over such claim is vested in the court of common pleas, not with the Commission.

**B. If the Commission nevertheless chooses to exercise jurisdiction over the Complaint, it should not terminate AEP Ohio's easement and find that Complainants are responsible for the total costs of their requested relocation.**

1. The terms of the easement are clear and AEP Ohio continues to use it in a manner that is consistent with the easement's purpose and scope; the Commission should not terminate AEP Ohio's easement.

The terms of the easement granted to AEP Ohio in 1937 are unambiguous. The Recorded Deed of Easement from John Rock and Josephine Rock to Ohio Power Company dated September 15, 1937, and recorded November 9, 1937, in the Jefferson County Deed Records Volume 172, Page 168, provides AEP Ohio, "its successors and assigns forever, a right of way and easement with the right, privilege and authority . . . to construct, erect, operate and maintain . . . poles and wires for the purpose of transmitting electric or other power, . . . in, on, along, over, through or across" Complainants' properties. In arguing that the easement is no longer necessary and should be terminated, Complainants ignore the unambiguous language of the easement and suggest that the Commission may look beyond the unambiguous language to arrive at an alternative interpretation of the easement's purpose and duration. However, it is axiomatic that in interpreting an easement or other contract a court should not seek to substitute its judgment for the intent of the parties when the instrument is unambiguous. *See, e.g., Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St. 3d 397, 404, 953 N.E.2d 285, 292 ("When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties."). Even the *Columbia Gas* case cited by Complainants (Complainants' Brief at unnumbered p. 4) holds that a court can look to other circumstances to ascertain the intent of the

parties and determine the scope of an easement, *only if* the instrument does not contain a specific delineation.

Here, the intent of the parties to the easement is clear, both as to the easement's purpose ("to construct, erect, operate and maintain . . . poles and wires for the purpose of transmitting electric or other power") and scope (provides AEP Ohio, "its successors and assigns forever, a right of way and easement"). In such an instance, it is unnecessary, indeed impermissible, for the Commission to look beyond the writing itself. Thus, Complainants' arguments for interpreting an alternative meaning behind the unambiguous language of the easement should be rejected. The parties' intent and the easement's purpose and scope are clear and should not be disturbed.

In addition to advocating a strained interpretation that goes beyond the four corners of the easement, Complainants argue that AEP Ohio's easement should be invalidated because, "[b]ased on Ohio Power's relocation of their power line in the 1980s, it is clear that the purpose for which they obtained their easement is no longer relevant." (Complainants' Brief at unnumbered p. 5). However, Complainants have failed to explain how work done on the line more than thirty years ago is relevant to this case or how it obviates the need for the easement today. What is relevant and undisputed is the fact that AEP Ohio continues to use the easement today in a manner that is consistent with the easement's purpose and scope. At the hearing, Ms. Jeunelot testified that AEP Ohio often maintains private easements like the one at issue here despite the availability of public easements in order to avoid additional costs and burdens associated with placing facilities within the public right of way. Tr. at 34-35. Ms. Jeunelot explained that with a right of way easement the Company is exposed to the additional obligation

and expense of moving facilities during roadwork or road redesign. *Id.* Although the record contains no evidence as to the cause of the 1980s relocation, it is possible that only a portion of the line was rerouted at that time because only a portion of the line needed to be rerouted to serve additional customers. In any event, the fact that the line was rerouted in the 1980s has no bearing on the use of the easement today and cannot form the basis for concluding that the easement should be terminated.

If the Commission chooses to assert jurisdiction over Complainants' claim despite it failing the *Allstate* test and raising no service-related issues under R.C. 4905.26, the Commission should not and cannot terminate or otherwise disturb AEP Ohio's easement. The terms of the easement are unambiguous and AEP Ohio continues to use the easement in a manner that is consistent with the easement's purpose and scope. The fact that AEP Ohio will sometimes rearrange its facilities to connect new customers cannot form the basis for terminating a valid and occupied easement.

## 2. Complainants are responsible for the total costs of their requested relocation.

If the relocation is to go forward, the Complainants should pay for all costs to relocate the line, including but not limited to overhead and taxes. As discussed in AEP Ohio's initial brief, Paragraph 12 of AEP Ohio's terms and conditions of service – titled "Work Performed on the Company's Facilities at Customer's Request" – provides that the Complainants should bear the costs of the relocation since they are requesting the work to be performed on the Company's facilities:

Whenever, at the request of a customer and solely to suit the convenience of the customer, work is performed on the Company's facilities or the Company's facilities are relocated, the customer

shall pay to the Company, in advance, the estimated total cost of such work. This cost shall be itemized by major categories and shall include the Company's standard overheads and be credited with the net value of any salvageable material. The actual costs for the work performed will be determined after its completion and the appropriate additional charge or refund will be made to the customer.

Ohio Power Company Tariff P.U.C.O. No. 20 at Para. 12.

It is clear that Complainants are not requesting premium service and that the applicable provision of the Company's Tariff is Paragraph 12. At the hearing, AEP Ohio witness Jeunelot confirmed that Complainants' request to have the line relocated would be governed by Paragraph 12. Tr. at 25. Pursuant to Paragraph 12, the Company's standard overheads are to be included as part of the costs of performing a customer -requested relocation. Taxes are a component of the Company's standard overheads and were therefore included in the estimate of the relocation costs. Contrary to Complainants' contentions, the reason or motivation for the requested relocation is irrelevant under Paragraph 12. The paragraph simply states that "***Whenever, at the request of a customer and solely to suit the convenience of the customer,*** work is performed on the Company's facilities or ***the Company's facilities are relocated, the customer shall pay to the Company, in advance, the estimated total cost of such work.***" That is the exact scenario here – a customer (Mr. Smith) is requesting a relocation of the Company's facilities solely to suit his convenience. Paragraph 12 clearly applies.

Requiring the Company to move the line at its cost, as Complainants contend, would lead to unwarranted expense to the Company's ratepayers and no measurable benefits. If the Complainants wish for the relocation to go forward, AEP Ohio is willing to relocate its lines to accommodate Complainants' request – but Paragraph 12 of the Company's terms and conditions



of service and fundamental cost causation principles dictate that Complainants should bear all costs to relocate the line.

### III. CONCLUSION

Under the *Allstate* test and the holding in *Wilkes* the Complaint should be dismissed for lack of jurisdiction. Complainants have not shown that the Commission's expertise is required to resolve the dispute at issue – a property dispute regarding an easement. Accordingly, a court of common pleas is the appropriate jurisdiction in which to adjudicate the property rights of the parties with regard to the easement at issue in this case. If the Commission chooses to assert jurisdiction over the Complaint nonetheless, the Commission should not (indeed cannot) terminate the easement. For the intent of the parties and the easement's terms are unambiguous and AEP Ohio continues to use the easement in a manner that is consistent with the easement's purpose and scope. Finally, neither the Company nor its customers should be required to pay for a relocation made solely to suit the convenience of the Complainants. If the relocation is to go forward, the Complainants should pay for all costs to relocate the line, including but not limited to overhead and taxes.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via electronic mail upon the individuals identified below on this 15<sup>st</sup> day of August, 2014.

/s/ Yazen Alami

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