

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

CHARLES KITTINGER)	
)	
Complainant,)	
)	Case No. 15-1134-EL-CSS
v.)	
)	
OHIO EDISON COMPANY)	
)	
Respondent.)	
)	

**RESPONDENT OHIO EDISON COMPANY’S MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT**

Respondent, Ohio Edison Company, moves to dismiss Complainant Charles Kittinger’s Complaint against Ohio Edison Company. The Commission lacks jurisdiction over the property damage claim asserted in this case. Furthermore, Complainant’s Complaint fails to state reasonable grounds for relief in that it fails to allege any facts supporting a claim of inadequate service and does not allege that Ohio Edison Company has violated any statute, tariff provision, or any rule, regulations, or order of the Commission. For all these reasons, explained in detail in the attached Memorandum in Support, the Commission should dismiss this case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. FACTS ALLEGED IN THE COMPLAINT

This case appears to involve Complainant's request for damages as a result of an alleged accident whereby a utility pole "broke off about 9 feet before the cross head, hitting my Chevrolet pick-up truck on the driver side roof...." (Complaint at p. 2.) The Complaint also appears to request damages for "a lawn mower [that] was damaged when it fell into a large hole in the ground which was caused by your boom truck gouging the yard" and also for certain bodily injuries. (Complaint at p. 2.) The Complaint further alleges that Ohio Edison Company ("Ohio Edison") has wrongfully failed to accept Complainant's claim. Although the Complaint is not entirely clear as to which incident the Complainant is seeking damages, it is clear that the Complainant is seeking property or bodily injury damages as a result of Ohio Edison's alleged negligence. As discussed below, the Commission lacks subject matter jurisdiction over the Complaint requiring its dismissal.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW

Under R.C. 4905.26, a complaint that fails to set forth reasonable grounds must be dismissed. The mere act of filing a complaint does not automatically trigger a hearing before the Commission. Rather, "[r]easonable grounds for the complaint must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing, pursuant to R.C. 4905.26 . . ." *Ohio Util. v. Pub. Util. Com'n* (1979), 58 Ohio St.2d, 153, paragraph 2 of the syllabus. Moreover, the Commission may exercise only the jurisdiction conferred upon it by statute. *Lucas County Com'rs. V. Pub. Util. Com'n of Ohio* (1997), 80 Ohio St.3d 344, 347.

In this case, Complainant's property and/or bodily damage claim does not relate to customer-rates and is not a service-related complaint. Rather, the Complaint, at best, sounds in negligence. Negligence is a common-law tort for which jurisdiction lies with the common pleas court. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶16. The Commission lacks the authority to judicially determine legal rights and liability under such claims. *Id.* (citing *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31 (1923)). The Complaint at issue here is, therefore, outside of the jurisdiction of the Commission. Additionally, Complainant has failed to show reasonable grounds for his Complaint. Accordingly, Complainant's Complaint should be dismissed.

B. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THIS DISPUTE.

As an initial matter, Complainant brings a claim that is outside of the jurisdiction of the Commission. The General Assembly created the Public Utilities Commission of Ohio to regulate all utility services. This includes the exclusive right to adjudicate customer complaints involving customer rates and services. *State ex rel. Columbus Southern Power Co. v. Fais*, 117 Ohio St.3d 340, 2008-Ohio-849, ¶ 28; *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 151.

In determining whether a matter falls within the exclusive, initial jurisdiction of the Commission, it is the substance of the claim that controls rather than the nature of the allegations. *Allstate Ins. Co.*, 2008-Ohio-3917 at ¶9. In explaining the Commission's exclusive jurisdiction, the Ohio Supreme Court has held that:

“The General Assembly has created a broad and complete statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. **As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49.**”

(Emphasis added). *Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 96, 2006-Ohio-3666, ¶ 15 (quoting *Kazmaier*, 61 Ohio St.3d 147, 150-153).

R.C. 4905.26 provides, in part, that:

“Upon complaint in writing against any public utility by any person, firm, or corporation, * * * that any * * * charge * * * or service * * * 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, or that any service is, or will be, inadequate or cannot be obtained**, and upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for the complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served no less than fifteen days before hearing and shall state the matter complained of. The commission may adjourn such hearing from time to time. (Emphasis added). R.C. 4905.26.

Thus, the Commission has exclusive, initial jurisdiction over claims involving customer rates and services, and all claims relating to conduct covered by a tariff filed with the Commission. *Kazmaier*, 61 Ohio St.3d at 153; *Fais*, 2008-Ohio-849, ¶28 (citing *Hull*, 2006-Ohio-3666, at ¶¶40-41).

Moreover, the Ohio Supreme Court adopted the following two-part test for evaluating jurisdiction. *Allstate*, 2008-Ohio-3917 at ¶11. The first part asks whether the Commission’s expertise is required to resolve the dispute. *Id.* at ¶12. The second part evaluates whether the act complained of is normally authorized by the utility. *Id.* If the answer to either question is in the negative, the claim is not within the Commission’s jurisdiction. *Id.* at ¶13.

Complainant’s complaint can only be reasonably interpreted as a complaint for negligence. Complainant seeks to recover for alleged property and/or bodily injury damage which he claims was caused from one of two alleged incidents: 1) either the breaking of a utility pole; or 2) a hole caused by utility equipment. Such allegations, even accepted as true, do not

relate to customer rates and services. Moreover, the Commission has no jurisdiction over the claims in the Complaint since the first part of the *Allstate* test must be answered in the negative. There is no question that the Commission's expertise is not required to resolve disputes involving property or bodily injury damages as a result of simple negligence. The Commission has previously ruled that it lacks subject matter jurisdiction over complaints seeking recovery for alleged property damage as a result of negligence and where the complaint does not allege a failure to provide adequate service or the violation of any statute, rule, regulation or Commission order. See *In the Matter of the Complaint of John Campolieti v. The Cleveland Electric Illuminating Company*, (August 15, 2012), PUCO Case No. 12-1184-EL-CSS, Entry at ¶ 13. The Commission should do the same here.

Moreover, to the extent that Complainant is requesting that the Commission award him damages for Ohio Edison's alleged negligence, he seeks a form of relief beyond the jurisdiction of the Commission. See, *In the Matter of the Complaint of Bart's Cleaners, Inc. v. Cinergy Communications Co.* (July 22, 2004), PUCO Case No. 04-127-TP-CSS, Entry ¶9 (holding that "a request for damages...is beyond the jurisdiction of this Commission"). Therefore, the Complaint must be dismissed, because the Commission lacks jurisdiction over the claims asserted in the Complaint.¹

C. THERE ARE NO REASONABLE GROUNDS FOR COMPLAINANT'S COMPLAINT.

Complainant also fails to state reasonable grounds for relief because his Complaint neither alleges any facts which would support a finding of inadequate service nor alleges that the Company has violated any statute, tariff provision, or any rule, regulation, or order of the

¹ Ohio Edison recognizes that the Commission is authorized under R.C. 4928.16(B)(1) to order "damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2)" of the statute. Given that the Complaint in this case contains no reference or allegation concerning any alleged "fluctuations" or surges in power, R.C. 4928.16 does not apply.

Commission. “Reasonable grounds” under this standard necessarily requires that the complaint contain sufficient allegations of facts which could support a finding of inadequate service. *In the Matter of Petition of J. Earl McCormick, et al. v. The Ohio Bell Tel. Co., et. al.* (Sept. 27, 1990), PUCO Case No. 90-1256-TP-PEX, Entry ¶3; *In the Matter of Complaint of Ohio CARES v. FirstEnergy Corp.* (May 19, 1999), PUCO Case No. 98-1616-EL-CSS, Entry ¶7. A complaint that does not allege specific incidents of inadequate service must be dismissed. *Id.* Additionally, a complaint that fails to allege a violation of any statute, Commission rule, or order fails to state reasonable grounds and should be dismissed. *In the Matter of Complaint of Ohio CARES v. FirstEnergy Corp.* (May 19, 1999), PUCO Case No. 98-1616-EL-CSS, Entry ¶¶6-7.

Here, the Complaint neither contains any allegation that Ohio Edison violated any statute, Commission rule, or order, nor sets forth any facts which would support a finding of inadequate service on the part of Ohio Edison. Complainant merely alleges Ohio Edison’s alleged negligence caused him property and/or bodily injury damages. Complainant does not contend that this contact resulted from inadequate service from Ohio Edison or that a violation of any statute, rule or order was violated. Therefore, there are no reasonable grounds for this Complaint to be heard before the Commission and it should be dismissed.

III. CONCLUSION

Based on the foregoing reasons, Respondent, Ohio Edison Company, respectfully requests that the Commission dismiss Complainant, Charles Kittinger's Complaint.

Respectfully submitted,

/s/ Carrie M. Dunn

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss and Memorandum in Support was served by U.S. mail to the following person on this 22nd day of July 2015.

Charles Kittinger
1860 Massillon Road
Akron, Ohio 44312

/s/ Carrie M. Dunn

Attorney for The Ohio Edison Company

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Summary: Motion to Dismiss and Memorandum in Support electronically filed by Ms. Carrie M Dunn on behalf of Ohio Edison Company