

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>RICHARD KAWIECKI,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 17-2325-EL-CSS</b>
	)	
<b>OHIO EDISON COMPANY,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

---

**OHIO EDISON COMPANY’S MOTION TO DISMISS FOR  
LACK OF SUBJECT MATTER JURISDICTION**

---

Respondent Ohio Edison Company (“Ohio Edison”) respectfully moves the Public Utilities Commission of Ohio (“Commission”) to dismiss Richard Kawiecki’s (“Complainant”) complaint against Ohio Edison. The Commission lacks jurisdiction over the pure tort claim asserted by Complainant, namely that Ohio Edison (through its agent, Asplundh) negligently caused damage to Complainant’s property. Accordingly, Ohio Edison respectfully requests that the Commission dismiss this complaint. The particular basis for this motion is fully set forth in the attached Memorandum in Support.

Respectfully submitted,

/s/ Robert M. Endris  
Robert M. Endris (0089886)  
Counsel of Record  
Joshua R. Eckert (0095715)  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
Telephone: 330-384-5728  
Facsimile: 330-384-3875  
rendris@firstenergycorp.com  
jeckert@firstenergycorp.com

*Attorneys for Ohio Edison Company*

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>RICHARD KAWIECKI,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 17-2325-EL-CSS</b>
	)	
<b>OHIO EDISON COMPANY,</b>	)	
	)	
<b>Respondent.</b>	)	
	)	

---

**MEMORANDUM IN SUPPORT OF OHIO EDISON COMPANY’S MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

---

**I. INTRODUCTION AND FACTS ALLEGED IN THE COMPLAINT**

The Public Utilities Commission of Ohio (“Commission”) lacks subject matter jurisdiction over the pure tort claim asserted in the complaint by Richard Kawiecki (“Complainant”) and, therefore, must dismiss the complaint. According to the complaint, Ohio Edison Company (“Ohio Edison”) contracted with Asplundh Tree Expert, LLC (“Asplundh”), a vegetation management and utility-related services company, to perform vegetation management work in the vicinity of Complainant’s property in or about January 2014.<sup>1</sup> Complainant alleges that, while performing this work on behalf of Ohio Edison, Asplundh damaged Complainant’s “drain and septic system.”<sup>2</sup> This is the sole issue raised in the complaint, and, therefore, this case presents only an issue of pure tort law, which the Commission’s expertise is not required to resolve. Accordingly, the Commission lacks subject matter jurisdiction over the complaint and it must be dismissed in its entirety, with prejudice.

---

<sup>1</sup> See Complaint at 2.

<sup>2</sup> *Id.*

## **II. LAW AND ARGUMENT**

### **A. Standard Of Review**

The Commission may exercise only the jurisdiction conferred upon it by statute.<sup>3</sup> While the Commission has the exclusive right to adjudicate customer complaints involving customer rates and services, the Commission has no authority to decide claims of “pure common-law tort.”<sup>4</sup> The Ohio Supreme Court has endorsed a two-part test to determine whether an action falls within the initial, exclusive jurisdiction of the Commission.<sup>5</sup> First, it must be determined whether the Commission’s expertise is required to resolve the dispute.<sup>6</sup> Second, it must be evaluated whether the act complained of is normally authorized by the utility.<sup>7</sup> “If the answer to either question is in the negative, the claim is not within the [Commission’s] exclusive jurisdiction.”<sup>8</sup> Here, the sole issue raised in the complaint pertains to the alleged negligent actions of Asplundh, which allegedly caused damage to Complainant’s property. As set forth below, such an action does not require the Commission’s expertise to resolve, and the complaint, therefore, is outside the Commission’s jurisdiction.

### **B. The Commission’s Expertise Is Not Required To Resolve The Claim Raised In The Complaint.**

The sole claim in the complaint is that a contractor used by Ohio Edison to provide vegetation management services caused damage to Complainant’s property due to its failure to

---

<sup>3</sup> *Lucas County Com’rs v. Pub. Util. Com’n of Ohio*, 80 Ohio St. 3d 344, 347, 686 N.E. 2d 501 (1997).

<sup>4</sup> *State ex rel. Columbus Southern Power Co. v. Fais*, 117 Ohio St. 3d 340, 2008-Ohio-849, 884 N.E. 2d 1, ¶ 28; *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 151, 573 N.E. 2d 655 (1991); *see also In re the Complaint of Charles Kittinger v. Ohio Edison Company*, Pub. Util. Comm. No. 15-1134-El-CSS, 2016 Ohio PUC LEXIS 455, at 6 (May 11, 2016) (“We find that the complaint in this case contains pure common-law tort claims. Accordingly, the Commission finds that Ohio Edison’s motion to dismiss this case for lack of subject matter jurisdiction is reasonable and should be granted.”).

<sup>5</sup> *Allstate ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E. 2d 824, ¶ 9.

<sup>6</sup> *Id.* at ¶ 12.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at ¶ 13.

exercise reasonable care. This claim does not fall within the Commission's jurisdiction. As discussed above, the threshold question to be answered is whether the Commission's expertise is required to resolve the dispute. The Commission has routinely held that its expertise is not required to resolve such issues of "pure common-law tort."

The Commission's recent decision in *In re the Complaint of Jim and Heidi Humphrey v. The East Ohio Case Co.* (hereinafter, *Humphrey*), is instructive.<sup>9</sup> In that case, the Complainants alleged that a subcontractor used by Dominion East Ohio ("DEO") to facilitate the replacement of a gas line caused damage to their driveway by replacing portions of it with a color of concrete that did not match the original driveway.<sup>10</sup> Prior to hearing, DEO moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the Commission's expertise was not required to resolve the claim that DEO's contractor failed to use reasonable care, resulting in damage to the Complainants' property.<sup>11</sup> The Commission agreed, holding that "the Commission's expertise is not required to resolve the dispute, as the question posed appears to be a pure tort."<sup>12</sup> Moreover, the Commission noted that "[b]ecause no utility service-related or rate-related issues are raised, the Commission's administrative expertise is not required to resolve the single claim that is presented, and the first prong of the *Corrigan* two-part test has not been met."<sup>13</sup>

As in *Humphrey*, the Complainants here have not alleged a claim that is "service-related or rate-related." Rather, the sole question posed by the complaint is whether Ohio Edison's

---

<sup>9</sup> See *In re the Complaint of Jim and Heidi Humphrey v. The East Ohio Gas Co.*, Pub. Util. Comm. No. 16-0765-GA-CSS, 2016 Ohio PUC LEXIS 1074, Opinion (Nov. 30, 2016).

<sup>10</sup> *Id.* at ¶4.

<sup>11</sup> See *id.* at ¶7.

<sup>12</sup> *Id.* at ¶14.; see also *In the Matter of the Complaint of Garrabrandt v. Ohio Power Company*, Pub. Util. Comm. No. 15-0401-EL-CSS, Entry (July 20, 2016) (holding that the Commission lacked jurisdiction over Complainant's claim that a subcontractor used by AEP Ohio caused damage to the Complainant's back-up generator when replacing his utility service meter because "[i]n order to determine this claim, the Commission would have to examine if AEP Ohio committed a tort in replacing Complainant's utility service meter, which caused damages."

<sup>13</sup> *Id.*

contractor failed to exercise reasonable care in performing vegetation management services for the Company, causing damage to Complainants' drain and septic system. This is a question of pure tort that the Commission's expertise is not required to resolve. Accordingly, the first prong of the *Allstate* test is not met, and the Commission must dismiss the complaint for lack of subject matter jurisdiction.

### **III. CONCLUSION**

For these reasons, Ohio Edison respectfully requests that the Commission dismiss the complaint in its entirety, with prejudice.

Respectfully submitted,

/s/ Robert M. Endris  
Robert M. Endris (0089886)  
Counsel of Record  
Joshua R. Eckert (0095715)  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
Telephone: 330-384-5728  
Facsimile: 330-384-3875  
rendris@firstenergycorp.com  
jeckert@firstenergycorp.com

*Attorneys for Ohio Edison Company*

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Answer of Ohio Edison Company was served upon the following by U.S. mail on this 1<sup>st</sup> day of February, 2018.

Richard Kawiecki  
23731 Emmons Rd.  
Columbia Station, Ohio 44028

/s/ Robert M. Endris  
An Attorney for Ohio Edison  
Company

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

**Commission of Ohio Docketing Information System on**

**2/1/2018 4:44:08 PM**

**in**

**Case No(s). 17-2325-EL-CSS**

Summary: Motion Ohio Edison Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction electronically filed by Mr. Robert M. Endris on behalf of Endris, Robert Mr.