

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

DONALD AND JOANNE LEIPPLY,	)	
	)	
Complainants,	)	
	)	Case No. 17-1958-EL-CSS
v.	)	
	)	
OHIO EDISON COMPANY,	)	
	)	
Respondent.	)	
	)	

**SUPPLEMENTAL MOTION TO DISMISS OF OHIO EDISON COMPANY**

Pursuant to Rule 4901-9-01(C)(1) of the Ohio Administrative Code, Respondent, Ohio Edison Company (“Ohio Edison” or “the Company”), hereby files this Supplemental Motion to Dismiss the Complaint brought forth by Donald and Joanne Leipply (the “Complainants”). As set forth more fully in the attached Memorandum in Support, the Complaint is not ripe for adjudication by the Public Utilities Commission of Ohio (the “Commission”) and should be dismissed in its entirety for failure to state a claim upon which relief can be granted.

Respectfully submitted

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## **MEMORANDUM IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS**

Pursuant to Rule 4901-9-01(C)(1) of the Ohio Administrative Code, Respondent, Ohio Edison, hereby files this Memorandum in Support of Supplemental Motion to Dismiss the Complaint (the “Supplemental Motion”).

### **I. Background**

Complainants filed the Complaint in this matter on September 7, 2017. The Complaint arises out of a dispute regarding Ohio Edison’s<sup>1</sup> exercise of its rights under a valid easement (the “Easement”)<sup>2</sup> on Complainants’ property and the reasonableness of the Company’s actions under its Commission-approved vegetation management plan.<sup>3</sup> Complainants also challenge the validity of Ohio Edison’s Easement.<sup>4</sup> Specifically, the Complainants assert that Ohio Edison has “abandoned” the Easement and therefore “has no rites [sic] to dictate any tree removal.”<sup>5</sup> Ohio Edison filed its Answer on September 28, 2017, denying Complainants’ allegations.

On September 28, 2017, Ohio Edison also filed a Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction (the “Partial Motion”). In the Partial Motion, Ohio Edison asked the Commission to dismiss the portions of the Complaint in which Complainants challenge the validity of Ohio Edison’s Easement, because the Commission “does not possess judicial power and may not adjudicate controversies between parties as to property rights.”<sup>6</sup> The Commission has not yet ruled on the Partial Motion.

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<sup>1</sup> Complainants brought their complaint against "FirstEnergy," an entity which does not exist; however, as explained in its Answer, Ohio Edison Company (a subsidiary of FirstEnergy Corp.) owns the easement referenced in the Complaint. Accordingly, Ohio Edison Company responded to the Complaint as Respondent and hereby files this Supplemental Motion to Dismiss in accordance with Rule 4901-9-01(C)(1), Ohio Administrative Code.

<sup>2</sup> See Exhibit A to Ohio Edison’s Answer (Copy of Ohio Edison Company’s Easement).

<sup>3</sup> Complaint at 2.

<sup>4</sup> Complaint at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *In re Complaint of Wilkes v. Ohio Edison Co.*, 131 Ohio St.3d 252, 2012-Ohio-609, ¶ 9 (quoting *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 303-304 (1980)).

This Supplemental Motion renews the Partial Motion and converts it into a full Motion to Dismiss the Complaint. As explained below, the Commission lacks subject matter jurisdiction to adjudicate disputes over property rights, and the validity of Ohio Edison’s Easement is a threshold issue that must be decided *before* the Commission obtains jurisdiction to rule on the reasonableness of Ohio Edison’s actions under its Commission-approved vegetation management plan. Therefore, the Complaint must be dismissed as it is not ripe for adjudication by the Commission at this time.

## **II. Law and Argument**

### **A. The Commission lacks subject matter jurisdiction over claims related to property rights.**

The Commission may only exercise the jurisdiction conferred upon it by statute.<sup>7</sup> The Commission is not a court and has no power to ascertain and determine legal rights and liabilities.<sup>8</sup> Pursuant to R.C. 4905.26, the Commission has exclusive jurisdiction over claims pertaining to service related matters.<sup>9</sup> It is well-settled law that the Commission lacks jurisdiction over claims related to property rights.<sup>10</sup>

In *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, the Ohio Supreme Court adopted a two-part test to determine whether an action falls under this exclusive jurisdiction granted to the Commission.<sup>11</sup> The first part asks whether the Commission's expertise is required to resolve the dispute.<sup>12</sup> The second part evaluates whether the act complained of is normally authorized by the utility.<sup>13</sup> “If the answer to either question is in the negative, the claim is not within the

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<sup>7</sup> *Lucas County Commissioners v. Pub. Util. Commission of Ohio* (1997), 80 Ohio St.3d 344, 347.

<sup>8</sup> *DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144 (2012).

<sup>9</sup> *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, ¶ 16.

<sup>10</sup> *See In re Complaint of Wilkes v. Ohio Edison Co.*, 131 Ohio St.3d 252, 2012-Ohio-609, ¶ 9 (quoting *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 303-304 (1980)) (“As a general matter, the commission ‘does not possess judicial power and may not adjudicate controversies between parties as to property rights.’”).

<sup>11</sup> *Id.* at ¶ 11.

<sup>12</sup> *Id.* at ¶ 12.

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

[Commission's] exclusive jurisdiction.”<sup>14</sup> In such a case, the claim must be dismissed for lack of subject matter jurisdiction, as jurisdiction properly lies with the court of common pleas.<sup>15</sup>

Here, the Commission has no jurisdiction over Complainants’ claim that Ohio Edison has abandoned its easement and, therefore, has no right to “dictate any tree removal”, because the first part of the *Allstate* test must be answered in the negative. The determination whether Ohio Edison has abandoned its easement and the parties’ respective rights in such a circumstance is a question of property law that does not require the Commission's expertise to resolve. This issue is not properly before the Commission and should be dismissed.

**B. The validity of Ohio Edison’s easement is a threshold issue that requires adjudication before the Commission obtains jurisdiction to consider the reasonableness of Ohio Edison’s actions under its Commission-approved vegetation management plan.**

The Complainants’ challenge to the validity of Ohio Edison’s Easement is only one part of their Complaint. But it is clear from the Commission’s precedent that the validity of a utility’s easement must be established, either informally by agreement of the parties or formally by a court of competent jurisdiction, *before* the Commission obtains jurisdiction to determine the reasonableness of the utility’s actions under its vegetation management plan.<sup>16</sup>

Ohio courts hold that “[j]urisdiction and justiciability are threshold considerations in every case, without exception.”<sup>17</sup> Indeed, “[e]ven where a court possesses subject matter jurisdiction

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<sup>14</sup> *Id.* at ¶ 13.

<sup>15</sup> *Id.* at ¶ 11.

<sup>16</sup> See *In re Wimmer et al. v. Ohio Edison Company*, PUCO Case No. 09-777-EL-CSS, 2011 Ohio PUC LEXIS 100 (Jan. 27, 2011), *affirmed*, *Wimmer v. Commission*, 131 Ohio St. 3d 283, 2012-Ohio-757; *In re Jeffers et al. v. Toledo Edison Company*, PUCO Case No. 10-430-EL-CSS, 2013 Ohio PUC LEXIS 13 (Jan. 23, 2013); *Corrigan v. Illuminating Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009; *Corrigan, et al. v. The Cleveland Electric Illuminating Co.*, PUCO Case No. 09-492-EL-CSS, 2014 Ohio PUC LEXIS 71, Opinion and Order (Mar. 26, 2014). *C.f. Berry v. Ohio Edison Co.*, 70 N.E.3d 634, 2016-Ohio-8442, ¶¶ 16-18.

<sup>17</sup> *Barrow v. New Miami*, 2016-Ohio-340, 58 N.E.3d 532, ¶ 12 (Ohio App. 12) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

over a matter, it shall refuse to hear a case that is not justiciable.”<sup>18</sup> Examples of “issues affecting justiciability are ripeness, mootness, and standing.”<sup>19</sup> The Complaint in this matter must be dismissed because it is not ripe for adjudication by the Commission, since the Complainants have challenged the validity of Ohio Edison’s Easement.

The Commission has decided many cases like the Complainants’. However, it has done so only *after* the validity of the easement in question was established.<sup>20</sup> For instance, in *Corrigan v. Illuminating Co.*, the Supreme Court of Ohio remanded a customer’s complaint regarding the reasonableness of The Cleveland Electric Illuminating Company’s vegetation management practices to the Commission<sup>21</sup>, but only *after* finding “no question that the company has a valid easement and that the tree is within the easement.”<sup>22</sup> Similarly, in *Wimmer, et al. v. Ohio Edison Company*, the Commission did not obtain jurisdiction to decide the reasonableness of Ohio Edison’s vegetation management practices until *after* a court of common pleas, a court of appeals, and the Supreme Court of Ohio all affirmed the validity of the easement in question.<sup>23</sup> And in *Jeffers, et al. v. The Toledo Edison Company*, the Commission retained jurisdiction over the complaint because complainants admitted that Toledo Edison held a valid easement on their property in their complaint,<sup>24</sup> and reiterated at the Commission hearing that they were “not contesting the validity of the easement or that all of the trees were within the boundaries of the easement.”<sup>25</sup>

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<sup>18</sup> *Id.* (citing *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 11).

<sup>19</sup> *Id.*

<sup>20</sup> See *supra* footnote 16.

<sup>21</sup> *Corrigan, et al. v. The Cleveland Electric Illuminating Co.*, PUCO Case No. 09-492-EL-CSS, 2014 Ohio PUC LEXIS 71, Opinion and Order (Mar. 26, 2014).

<sup>22</sup> *Corrigan v. Illuminating Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 12.

<sup>23</sup> *Wimmer v. PUC*, 131 Ohio St. 3d 283, 2012-Ohio-757, 964 N.E.2d 411 (affirming *Wimmer, et al. v. Ohio Edison Company*, PUCO Case No. 09-777-EL-CSS, 2011 Ohio PUC LEXIS 100 (Jan. 27, 2011)).

<sup>24</sup> *Jeffers, et al. v. The Toledo Edison Company*, PUCO Case No. 10-430-EL-CSS, Complaint, ¶¶ 4-10 (Apr. 2, 2010).

<sup>25</sup> *Jeffers, et al. v. The Toledo Edison Company*, PUCO Case No. 10-430-EL-CSS, 2013 Ohio PUC LEXIS 13, \*6 (Jan. 23, 2013).

The Supreme Court of Ohio summed up this distinction in *Berry v. Ohio Edison Co.*, when it affirmed that the trial court had subject matter jurisdiction over the plaintiff's claim because the plaintiff alleged Ohio Edison had no valid easement, and was trespassing on his property in performing vegetation management.<sup>26</sup> The Court held that "[i]f there was an easement or right-of-way in the challenged area, then under *Corrigan*, the reasonableness of Appellants' tree trimming would properly be before PUCO."<sup>27</sup> In other words, once it is established that an easement exists, only then does the Commission have jurisdiction to review whether a company's vegetation management practices are reasonable. In *Berry* there was no easement, so the matter was properly before the court of common pleas.

Here, while Ohio Edison maintains its Easement is valid and has not been abandoned, the Complainants have challenged the Easement's validity. The Commission has no jurisdiction over this Complaint until the validity of the Easement is established by a court of common pleas. In complaint proceedings, the burden of proof is on the complainant,<sup>28</sup> and here the Complainants have not met that burden. In order to prosecute this Complaint, Complainants must obtain a judgment on the validity of the Easement from a court of common pleas. If the Easement is found invalid, then Complainants must obtain relief from a civil court.<sup>29</sup> If the Easement is found valid, then the Complainant may file a Complaint with the Commission contesting the reasonableness of Ohio Edison's vegetation management practices.<sup>30</sup> However, at this time, the Complaint is not ripe for Commission adjudication and must be dismissed given the contested nature of the property interest in question.

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<sup>26</sup> *Berry v. Ohio Edison Co.*, 70 N.E.3d 634, 2016-Ohio-8442, ¶¶ 16-18.

<sup>27</sup> *Id.* at ¶ 18.

<sup>28</sup> *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

<sup>29</sup> *See Berry v. Ohio Edison Co.*, 70 N.E.3d 634, 2016-Ohio-8442, ¶ 18.

<sup>30</sup> *Id.*

### **III. Conclusion**

For the foregoing reasons, Respondent Ohio Edison respectfully requests that its motion be granted.

Respectfully submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appearance and Substitution of Counsel of Record was served by U.S. mail to the following person on this 18<sup>th</sup> day of January, 2019.

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