

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Ed Browning,

Complainant,

v.

Ohio Power Company,

Respondent.

Case No. 20-1002-EL-CSS

**OHIO POWER COMPANY’S MOTION TO DISMISS
THE AMENDED COMPLAINT OF MR. BROWNING**

The claims that Mr. Browning has raised in his Amended Complaint against Ohio Power Company (“AEP Ohio”) are stale, as they relate to discussions that occurred 16 months ago, regarding a power line that has since been moved, next to a house Mr. Browning no longer owns. His tortious interference claim is outside the jurisdiction of the Public Utilities Commission of Ohio (“Commission”), because it is based in tort and would require the Commission to determine Mr. Browning’s legal rights and obligations under the contracts with which AEP Ohio purportedly interfered. Mr. Browning is also seeking a form of relief, monetary damages, that the Commission cannot grant. For these reasons, as more fully discussed in the attached Memorandum in Support, AEP Ohio respectfully requests that the Commission dismiss Mr. Browning’s Amended Complaint.

Respectfully submitted,

/s/ Spencer C. Meador

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On May 7, 2020, Ed Browning filed a Complaint against AEP Ohio, alleging that his neighbor's overhead power line was over-hanging his property and preventing him from adding a second-story addition.¹ Mr. Browning asserted that he had owned his property (at 1587 S. Fourth Street) since 2002 and that his neighbor's power line had not bothered him "or the previous owner" until, apparently, late March 2020, when he decided that his neighbor's power line was "dangerously too low to [his] house and prevent[ed him] from making necessary home improvements."² Mr. Browning requested that AEP Ohio move his neighbor's overhead power line at the Company's expense.³ AEP Ohio filed its Answer on May 27, 2020.

On June 23, 2021, AEP Ohio filed a letter with the Commission requesting a telephonic conference. AEP Ohio noted that it had obtained information indicating that Mr. Browning had sold his property and that his ex-neighbor had moved the attachment point for his or her power line so that it no longer crossed the property Mr. Browning used to own.⁴ For both those reasons, AEP Ohio suggested that Mr. Browning's claims were moot, and that a hearing on those claims might no longer be in order.

Mr. Browning's response, which was filed in the Commission's docket on July 7, 2021, admitted that he had sold the property in question and that the relevant power line had been moved. Nonetheless, Mr. Browning argued that his complaint should proceed to hearing on grounds different from those expressed in his Complaint. Mr. Browning now asserted that his neighbor's

¹ Complaint at 1.

² *Id.*

³ *Id.* at 2.

⁴ Meador Letter to Attorney Examiner Schabo at 1 (June 23, 2021).

power line had been “hazardous” because it “did not meet City or NESC codes for ‘vertical clearance’ for above ground wires where walkout balconies are present.”⁵ Mr. Browning also newly stated that he “is not seeking injunctive relief” and, instead, is seeking “monetary damages as a result of AEP [Ohio]’s negligence” in “allowing a hazardous condition to be prolonged without correction” and for AEP Ohio’s purported interference with his “contractual relationships * * * with a home designer, architect, and builder.”⁶

By Entry dated July 9, 2021, the Commission recognized that “Mr. Browning’s original complaint * * * contained no allegations that would put [AEP Ohio] on notice of the claims asserted in the July 7, 2021 letter” and held that Mr. Browning’s July 7th letter should be construed as an amended complaint. Accordingly, the Commission directed AEP Ohio to file its answer to the amended complaint, as well as any relevant motions, on or before July 23, 2021.⁷ The Commission also vacated the current expert testimony deadline and scheduled hearing date.

AEP now brings this motion to dismiss on the basis that: (1) the newly established facts render Mr. Browning’s Complaint stale and outdated; (2) the Commission lacks jurisdiction over the tort claims Mr. Browning alleges; and (3) the Commission has no authority to award the remedy that Mr. Browning seeks in his Amended Complaint. For these reasons, as explained in detail below, dismissal of this action pursuant to Ohio Adm.Code 4901-9-01(F) is appropriate.

⁵ Browning Letter at 1 (July 7, 2021).

⁶ *Id.*

⁷ Entry ¶ 9 (Jul. 9, 2021).

II. LAW AND ARGUMENT

1. The Commission should dismiss Mr. Browning's complaint because his claims are stale.

By Entry dated May 18, 2021, the Commission determined that Mr. Browning had stated reasonable grounds for his complaint and that a hearing should be set for this matter.⁸ However, circumstances have changed. Mr. Browning no longer owns the home in question, and the power line that was the subject of his original request has been moved, effectively resolving that request. Mr. Browning's Amended Complaint now appears to assert that AEP Ohio should have moved his ex-neighbor's power line earlier than it did because the power line posed a hazard to his neighbor, and that the Company's failure to move the power line earlier was negligent and tortious.

The Commission's complaint case process is not designed for complaints about public utilities' past actions. As the Supreme Court of Ohio has recognized, "R.C. 4905.26 * * * is stated in the present tense[.]"⁹ Section 4905.26 allows a person to bring a complaint case at the Commission if "any * * * 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, [or] insufficient * * *."¹⁰ Where the Commission determines that a public utility's "rules, regulations, measurements, or practices * * * with respect to its public service *are* unjust or unreasonable," R.C. 4905.37 authorizes the Commission to "determine the regulations, practices, and service *to be* installed, observed, used, and rendered * * *."¹¹ But Mr. Browning's Amended Complaint does not relate to any current or future practice of AEP Ohio. And Mr. Browning expressly disavows

⁸ Entry ¶ 6 (May 18, 2021).

⁹ *Lucas Cty. Cmms. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 1997-Ohio-112, 686 N.E.2d 501.

¹⁰ (Emphasis added.) R.C. 4905.26.

¹¹ (Emphasis added.) R.C. 4905.37.

that he is “seeking injunctive relief.”¹² Accordingly, his new claims fall outside the scope of R.C. 4905.26 and R.C. 4905.37.

This Commission has held that, where a party’s claims have grown “stale” because of the “age and outdated nature of the allegations,” then “reasonable grounds do not exist to support further consideration of [the complaint].”¹³ And Mr. Browning’s claims are stale. Mr. Browning’s original complaint may have stated a proper claim under R.C. 4905.26, but the power line that was purportedly preventing him from adding a second-story addition to his home has been moved, and the house that Mr. Browning said he wanted to remodel was sold three months ago. The Commission, therefore, should dismiss this case in its entirety.

2. The Commission should dismiss Mr. Browning’s tortious interference claim because it lacks jurisdiction over pure tort claims.

In addition to being stale, the Commission also lacks jurisdiction over Mr. Browning’s second claim. The Commission exercises exclusive jurisdiction over most matters concerning public utilities.¹⁴ However, the Common Pleas Courts retain “limited subject matter jurisdiction over a matter that is pure common-law tort and or contract actions involving utilities that are regulated by the [Commission].”¹⁵ This is because the Commission ““is not a court and has no power to * * * determine legal rights and liabilities.””¹⁶ As such, pure tort claims do not fall within the Commission’s jurisdiction.¹⁷

¹² Browning Letter at 1 (July 7, 2021).

¹³ *In the Matter of the Complaint of Richards Ltd., Inc. v. Ameritech Mobile Communications, Inc.*, Case No. 05-190-RC-CSS, Entry on Rehearing, at 9 (Dec. 7, 2005); *see also Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, at ¶¶ 54-56.

¹⁴ *Infinite Vision USA, LLC v. Duke Energy, Inc.*, 12th Dist. Warren No. CA2020-01-005, 2021-Ohio-1986, at ¶ 21.

¹⁵ *Flex Technologies v. Am. Elec. Power Co.*, 2015-Ohio-3456, 41 N.E.3d 174 (5th Dist.).

¹⁶ *Infinite Vision USA, LLC* at ¶ 22 (quoting *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 2012-Ohio-5445, ¶ 20).

¹⁷ *See, e.g., Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶ 6, *citing, inter alia, State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St.3d 209, 211, 625 N.E.2d 608 (1994).

The manner in which a complainant pleads his case does not determine the proper forum for his claims. Instead, under the Supreme Court of Ohio’s *Allstate* test, the Commission must ask “(1) whether the PUCO's administrative expertise is required to resolve the issue in dispute and (2) whether the act complained of constitutes a practice normally authorized by the utility. If the answer to either question is ‘No,’ the claim is not within the PUCO's exclusive jurisdiction.”¹⁸ For example, the Commission has granted utility motions to dismiss under the first part of the *Allstate* test where the complaint in question “fails to allege inadequacy of the service provided by the [public utility], * * * that the rates charged by [the public utility] for its utility service are unjust, unreasonable, or unlawful,” or that the public utility “violat[ed] any statute, <https://advance.lexis.com/document/?pdmfid=1000516&crid=0c446aa0-9eec-4dfe-abc6-268f28a314fc&pddocfullpath=%2Fshared%2Fdocument%2Fadministrative-materials%2Furn%3AcontentItem%3A5VRK-MCR0-00T9-82R4-00000-00&pdcontentcomponentid=139844&pdteaserkey=sr5&pdtab=allpods&ecomp=ydgpk&earg=sr5&prid=0a06348d-6633-476a-9507-d0d10a4bfa43> rule, regulation, or Commission order.”¹⁹

Here, Mr. Browning has not alleged that AEP Ohio provided inadequate service to the property he used to own at 1587 S. Fourth Street, or that his rates were unjust, unreasonable, or unlawful. Mr. Browning asserts that AEP Ohio was negligent for “allowing a hazardous condition [at his neighbor’s property] to be prolonged without correction * * * .”²⁰ Mr. Browning further asserts that AEP Ohio “interfered with contractual relationships [he] had with a home designer, architect, and builder[,]” because AEP Ohio “was fully aware that [his] intentions were to remodel

¹⁸ *DiFranco v. FirstEnergy Corp.*, 134 Ohio St.3d 144, 2012-Ohio-5445, 980 N.E.2d 996, at ¶ 28 (citing *Allstate*, 119 Ohio St.3d 301, at ¶ 11-13).

¹⁹ *Doug Kurcsak DL Towing v. Ohio Edison Co.*, Case No. 18-1437-EL-CSS, Entry at ¶ 13 (Mar. 13, 2019).

²⁰ Amended Complaint at 1.

[his] home * * * and sell it” and “AEP’s harmful actions and NESC violations prevented [him] from adding a needed addition to [his] home to enhance its market value.”²¹

Mr. Browning’s tortious interference claim is a pure tort claim. “In order to recover for a claim of intentional interference with a contract, one must prove (1) the existence of a contract, (2) the wrongdoer’s knowledge of the contract, (3) the wrongdoer’s intentional procurement of the contract’s breach, (4) the lack of justification, and (5) resulting damages.”²² The Commission’s expertise is not required to determine whether Mr. Browning had a contract with a home designer, architect, or builder; whether AEP Ohio knew of those contracts; whether AEP Ohio intentionally procured the breach of those contracts; or whether Mr. Browning was damaged from that breach. To the contrary: weighing Mr. Browning’s tortious interference claim would require the Commission to determine whether he did, in fact, have enforceable contracts with a home designer, architect, and builder, and whether AEP Ohio’s actions caused him to breach those contracts – determinations that are outside the Commission’s authority. “The PUCO is not a court of general jurisdiction, and therefore has no power to determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility is involved.”²³ The Commission has

²¹ *Id.*

²² *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 418, 1995-Ohio-61, 650 N.E.2d 863, paragraph two of the syllabus.

²³ (Citations omitted.) *Marketing Research Servs. v. PUC of Ohio*, 34 Ohio St.3d 52, 56, 517 N.E.2d 540 (1987). *See also In the Matter of the Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Approval of a New Rider and Revision of Existing Rider*, Case No. 10-176-EL-ATA, Second Entry on Rehearing, ¶9 (Apr. 15, 2010) (holding, “the Commission has no power to determine legal rights and liabilities in cases solely involving contract rights even though a public utility is involved.”).

previously dismissed tortious interference claims for lack of jurisdiction²⁴ and should do so again here.²⁵

3. The Commission should dismiss Mr. Browning's claims because it cannot grant the relief he is seeking.

Finally, Mr. Browning's request for monetary damages is not properly before the Commission. The Commission lacks the authority to grant monetary damages as a remedy.²⁶ Mr. Browning would be required to file a suit in the Courts of Common Pleas to recover monetary damages, if the Commission were to find that AEP Ohio had violated "Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code" or an order of the Commission.²⁷ Because the Commission is statutorily restricted from granting the remedy sought by Mr. Browning, and the remainder of his claims are not otherwise properly before the Commission, AEP Ohio respectfully requests that the Commission dismiss the Complaint.

III. CONCLUSION

For all of these reasons, AEP Ohio respectfully requests the Commission dismiss the Complaint for failure to state reasonable grounds for a complaint, failure to request grantable damages, and failure to establish the Commission's jurisdiction in this proceeding.

²⁴ See *Casciato-Northrup v. Dominion East Ohio Gas Co.*, Case No. 03-2372-GA-CSS, Entry at ¶ 3 (dismissing "claims for slander, tortious interference with contracts and business relations, and violations of state and federal antitrust statutes * * * as they are not within the jurisdiction of the Commission.").

²⁵ To the extent that the Commission reads Mr. Browning's other claim as broadly alleging that AEP Ohio was negligent, that claim too would be subject to dismissal for the reasons articulated in this section.

²⁶ *Doug Kurcsak DL Towing v. Ohio Edison Co.*, Case No. 18-1437-EL-CSS, Entry at ¶ 13 (Mar. 13, 2019).

²⁷ R.C. 4905.61; see *State ex rel. Ohio Edison Co. v. Trumbull Cty. Court of Common Pleas*, 11th Dist. Trumbull No. 2019-T-0062, 2019-Ohio-5313, ¶ 33.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served upon Complainant at the address listed below by regular U.S. mail, postage prepaid, on this 23rd day of July, 2021.

Ed Browning
1292 Berlin Station Rd.
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/s/ Spencer C. Meador
Spencer C. Meador

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