

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Ed Browning,)	
)	
Complainant,)	
)	
v.)	Case No. 20-1002-EL-CSS
)	
Ohio Power Company,)	
)	
Respondent.)	

**REPLY MEMORANDUM OF OHIO POWER COMPANY
IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

Mr. Browning’s response to the motion to dismiss filed by Ohio Power Company (“AEP Ohio”) does not rebut any of AEP Ohio’s arguments. Mr. Browning does not deny that his claims are stale; he simply blames the Commission for not holding a hearing before they became stale.¹ He does not deny that he asserted tort claims that the Commission lacks jurisdiction to hear; he simply argues that he is also asserting claims regarding AEP Ohio’s rights under a prescriptive rights easement,² which this Commission also lacks jurisdiction to hear.³ Lastly, he does not deny that the Commission lacks the authority to award damages; he simply asks that the Commission let his stale tort- and property-based claims move forward anyways, so that he can attempt to recover damages later in common pleas court.⁴

¹ See Browning Response at 2 (Aug. 3, 2021).

² Browning Response at 2.

³ See *Wilkes v. Ohio Edison Co.*, 131 Ohio St.3d 252, 2012-Ohio-609, 963 N.E.2d 1285, ¶ 9 (“As a general matter, the commission ‘does not possess judicial power and may not adjudicate controversies between parties as to property rights.’”).

⁴ See Browning Response at 2.

In short, Mr. Browning admits that he is asking the Commission to determine matters outside of its jurisdiction regarding a dispute that is no longer active. But it is not the Commission's charge to hear stale cases concerning tort and property issues. For the reasons stated in this Reply and in AEP Ohio's previous filing, the Commission should grant AEP Ohio's motion to dismiss.

II. LAW AND ARGUMENT

The Commission is not a court of law, and does not have the power to determine legal rights and liabilities.⁵ But that is exactly what Mr. Browning is requesting. Mr. Browning has stated that he is seeking monetary damages for alleged tortious interference and negligence.⁶ He now further requests that the Commission interpret AEP Ohio's prescriptive easement.⁷ Each of these claims, and the remedies requested, fall outside of the Commission's jurisdiction.⁸ Notwithstanding the clear jurisdictional issues, moreover, Mr. Browning's claims are stale. Mr. Browning has sold his property, the wire at issue has since been moved, and there is no active dispute between the parties left for the Commission to decide. Mr. Browning's claims do not state "reasonable grounds for complaint"⁹ and, for that reason, should not be set for hearing.

A. The Commission lacks jurisdiction to interpret easements.

Mr. Browning does not deny that his July 7th letter asserted tort claims – specifically, that AEP Ohio had been “negligen[t in] allowing a hazardous condition [i.e., the hanging of his neighbor's wire over his property] to be prolonged without correction” and had “interfered with [his] contractual relationships * * * with a home designer, architect, and builder.”¹⁰ Instead, Mr.

⁵ See *In the Matter of the Complaint of Culinary Vegetable Institute v. Ohio Edison Company*, Case No. 16-1686-EL-CSS, Entry, ¶ 13 (Jan. 25, 2017) (dismissing complaint due to lack of jurisdiction over property disputes).

⁶ See Amended Complaint at 1.

⁷ See Browning Response at 2.

⁸ See Motion to Dismiss, at 6-9.

⁹ R.C. 4905.26.

¹⁰ Browning Letter at 1 (July 7, 2021).

Browning asserts that this case “involves more than just tort claims.”¹¹ He explains that it also “involves a Prescriptive Rights Easement owned by AEP.”¹² Mr. Browning requests that the Commission also decide whether the “easement allows [AEP Ohio] to charge fees to anyone who requests a wire change, for any reason.”¹³ But the Commission lacks jurisdiction to determine issues based in property rights, either.¹⁴

As cited in the motion to dismiss, the Commission uses *Allstate*’s two-part test to determine jurisdiction.¹⁵ Under that test, the Commission must first determine whether its expertise is required to resolve the dispute and, second, whether the act complained of is normally authorized by the utility.¹⁶ If the answer to either question is in the negative, the matter is not within the Commission’s exclusive jurisdiction.¹⁷

Mr. Browning’s concern with AEP Ohio’s prescriptive easement fails to pass this test. The Commission has explained that it “has no special expertise with respect to interpreting easements.”¹⁸ And it is well-settled law that the Commission has no jurisdiction to determine property rights.¹⁹ Courts of common pleas are better suited than the Commission to apply the equitable and legal principles needed to resolve such property issues.²⁰

¹¹ Browning Response at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Wilkes*, 131 Ohio St.3d 252, at ¶ 9.

¹⁵ See *Allstate Ins. Co v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio -3917, 893 N.E.2d 824.

¹⁶ *Id.* at ¶ 11-13.

¹⁷ *Id.*

¹⁸ *In the Matter of the Complaint of Thomas & Derrell Wilkes, v. Ohio Edison Company*, Case No. 09-682-EL-CSS, Entry, ¶ 19 (Feb. 23, 2011) (“we must answer in the negative the question of whether the Commission’s administrative expertise is needed to resolve issues relating easements.”).

¹⁹ See *New Bremen, et. al. vs. Pub.Util.Comm.*, 103 Ohio St. 23, 30-31, 132 N.E. 162, 164 (1921) (holding that the Commission has no power to judicially ascertain and determine legal rights and liabilities, or to adjudicate controversies between parties as to property rights and claims based on tort liability); see also *In the Matter of the Complaint of Robert and Kathleen Smith v. Ohio Power Company*, Case No. 13-2109-EL-CSS, Opinion and Order (Dec. 3, 2014) (declining jurisdiction for complainant’s request to declare a private easement invalid).

²⁰ *In the Matter of the Complaint of Ron Jackson v. Duke Energy Ohio, Inc.*, Case No. 15-1517-EL-CSS, Entry (Nov. 14, 2018) (dismissing complaint requesting the Commission to adjudicate legal rights under an easement).

In *Wilkes*, the Ohio Supreme Court applied the *Allstate* test and upheld the Commission's dismissal of the Wilkes' request to order Ohio Edison Company to remove a power line from the Wilkes' property.²¹ In so holding, the Supreme Court acknowledged that the Commission's expertise was not needed to resolve the easement dispute and therefore was not within the Commission's exclusive jurisdiction.²²

Just like the complainant in *Wilkes*, Mr. Browning requests that this Commission interpret AEP Ohio's prescriptive easement rights. But the Ohio Supreme Court has expressly held that the Commission lacks authority to do so. As explained in *Wilkes*, the court of common pleas is the proper venue to hear such property rights disputes. Because the Commission does not have jurisdiction over the tort or property based claims Mr. Browning alleges, the Commission should dismiss this case.

B. Mr. Browning's claims are stale due to changed circumstances.

Additionally, Mr. Browning has not disputed that he sold the property in question or that the relevant power wire has since been moved. Instead, he asserts that he "had a present tense, legitimate claim" when he filed his *original* complaint.²³ He further blames the Commission for not "setting a reasonable trial date" so that his claims could be heard before they became stale.²⁴ But the fact remains that Mr. Browning sold the property in question, and his ex-neighbor moved the power line in question so that it is no longer in the position Mr. Browning alleges is "dangerously low." At this point, Mr. Browning is asking the Commission to address issues that have already been resolved.

²¹ See *Wilkes*, 131 Ohio St.3d 252, at ¶ 16 (upholding dismissal where the complaint was based on easement property rights, even though complainants also urged the Commission to "enforce the National Electric Safety Code").

²² *Id.* at ¶ 9-10.

²³ Browning Response at 2.

²⁴ *Id.*

In a recent case regarding similar issues, the Commission held that changed circumstances may render a case moot.²⁵ In that case, the complainant argued that Ohio Edison Company had violated its easement and the National Electric Safety Code (NESC) in allowing power lines to be placed above a car sales lot.²⁶ The Commission dismissed the complainant's property rights claims and all claims regarding violations of the right-of-way.²⁷ During the hearing, complainant testified that the car dealership no longer parked its cars directly under the transmission line.²⁸ Although ultimately holding in favor of Ohio Edison, the Commission explained, "[w]hile Complainant's testimony may render his Complaint moot, we nevertheless continue to address the merits of his claims, as the actions he describes - parking cars near the transmission line - are not disputed and are capable of reoccurrence in the future."²⁹

Here, on the other hand, the Commission need not address Mr. Browning's claims because they are stale, and the issues he raises are moot. Unlike the cars parked under the transmission line, Mr. Browning's allegations are not capable of reoccurrence in the future. Unless Mr. Browning purchases the property again, and the ex-neighbor moves the line back to its original position, the issues presented in the amended complaint will not arise again for Mr. Browning. Because changed circumstances render Mr. Browning's claims both stale and moot, the Commission should dismiss this case.

²⁵ See *In the Matter of the Complaint of Donald Clark, v. Ohio Edison Company*, Case No. 19-293-EL-CSS, Opinion and Order (Mar. 10, 2021).

²⁶ *Id.* at ¶ 4.

²⁷ *Id.* at ¶ 8.

²⁸ *Id.* at ¶ 36.

²⁹ *Id.*

III. CONCLUSION

For all of these reasons provided above and in AEP Ohio's Motion to Dismiss, the Commission should dismiss Mr. Browning's complaint.

Respectfully submitted,

/s/ Spencer C. Meador

Steven T. Nourse (0046705), Counsel of Record
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1915
Email: cmblend@aep.com

Eric B. Gallon (0071465)
Spencer C. Meador (0099990)
Porter, Wright, Morris & Arthur LLP
41 South High Street, 30th Floor
Columbus, Ohio 43215
Telephone: (614) 227-2190
(614) 227-2209
Email: egallon@porterwright.com
smeador@porterwright.com

(willing to accept service by e-mail)

Counsel for Ohio Power Company

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 10th day of August, 2021.

Ed Browning
1292 Berlin Station Rd.
Delaware, Ohio 43015

/s/ Spencer C. Meador
Spencer C. Meador

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Summary: Reply Memorandum of Ohio Power Company in Support of Motion to Dismiss
electronically filed by Ms. Spencer C Meador on behalf of Ohio Power Company