

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
K. HOVNANIAN FOREST LAKES, LLC,**

**COMPLAINANT,**

**CASE NO. 20-1726-WS-CSS**

**v.**

**AQUA OHIO, INC., ET AL.,**

**RESPONDENTS.**

**ENTRY**

Entered in the Journal on May 3, 2023

**I. SUMMARY**

{¶ 1} The Commission grants in part, and denies in part, the motion to dismiss filed in this case on October 5, 2022. We grant that portion of the motion seeking dismissal of an individual, named Respondent Jacob Flanary, as a party to this case. However, we deny that portion of the motion seeking complete case dismissal based on an alleged failure of the complaint to state reasonable grounds for hearing under R.C. 4905.26. Consequently, we direct that an evidentiary hearing be scheduled and held for the purpose of adjudicating whether the Respondent's operating practice at issue -- of requiring use of ductile iron piping exclusively for construction of the main extension project involved -- conforms with generally accepted utility engineering practices pursuant to Ohio Adm.Code 4901:1-15-30(F), or, otherwise, is unreasonable or unlawful.

**II. DISCUSSION**

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 3} Aqua Ohio, Inc. (Aqua) is a public utility as defined in R.C. 4905.02 and a waterworks company as defined in R.C. 4905.03. As such, Aqua is subject to the jurisdiction of this Commission.

{¶ 4} On November 18, 2020, K. Hovnanian Forest Lakes, LLC (Complainant) filed, in the above-captioned case, a complaint against Aqua and an employee of Aqua named Jacob Flanary (Respondents). Complainant is engaged in developing approximately 51 undeveloped acres in Green, Summit County, Ohio into approximately 223 fee simple lots (the Project). The complaint alleges that Aqua is requiring the use of only ductile iron piping on the Project. Complainant acknowledges that Aqua has claimed that Ohio Adm.Code 4901:1-15-30 allows Aqua to impose this requirement. However, Complainant posits that, under such circumstances as are presented by the Project, the use of ductile iron pipe is not the generally accepted utility engineering practice.

{¶ 5} On December 21, 2020, Respondents filed their answer to the complaint. In their answer, Respondents admit some, and deny others, of the complaint's allegations and set forth several affirmative defenses. Among other things, Respondents claim that they have at all times complied with R.C. Title 49, the applicable rules, regulations, and orders of the Commission, and Aqua's tariffs. Further, Respondents deny that Complainant is entitled to any relief whatsoever from the Commission.

{¶ 6} A settlement teleconference was scheduled by Entry issued September 9, 2021, and held, as scheduled, on September 28, 2021. The parties were unable to reach a settlement or resolution of the case at the settlement conference.

{¶ 7} Ohio Adm.Code 4901:1-15-30 is the Commission rule pertaining to waterworks company main extensions and related facilities. Ohio Adm.Code 4901:1-15-30(E) states:

The size, type, quality of material, and location of main extensions and related facilities shall be specified by [the] waterworks company \* \* \* and

construction shall be done by the company or by contractors acceptable to the company.

{¶ 8} Ohio Adm.Code 4901:1-15-30(F) states, in pertinent part:

The design and route of main extensions shall be determined by the waterworks company \* \* \* in accordance with generally accepted utility engineering practices.

{¶ 9} On October 13, 2021, Complainant filed a pleading which it entitled “Complainant’s Motion to Determine Jurisdiction” by which it sought a formal determination that the Commission lacks subject jurisdiction over the dispute in this case. In that pleading, Complainant argued that, despite the specific language of the two above-cited rule provisions, it is not within the Commission’s jurisdiction, but rather is a question that should be determined in a court of law, whether the Respondents insistence on use of ductile iron piping, under the circumstances presented, conforms with generally accepted utility engineering practice, as provided for in Ohio Adm.Code 4901:1-15-30(F). On October 28, 2021, Respondents filed a memorandum contra Complainant’s Motion to Determine Jurisdiction.

{¶ 10} On September 7, 2022, the Commission issued an Entry by which it found that the Commission has jurisdiction to determine whether Aqua’s practice of requiring use of only ductile iron piping in construction of the Project’s main extensions and related facilities conforms with generally accepted utility engineering practices pursuant to Ohio Adm.Code 4901:1-15-30(F), or, otherwise, is unreasonable or unlawful. Based on this jurisdictional determination, the September 7, 2022 Entry scheduled a settlement conference, for October 25, 2022, as well as an evidentiary hearing which, the Entry provided, should commence on November 22, 2022, if no settlement is achieved prior to that date. Subsequently, by Entry issued October 20, 2022, both the settlement conference and the evidentiary hearing were postponed on an indefinite basis, based on a finding that neither

should proceed until after disposition is reached on the motion to dismiss which Respondents filed on October 5, 2022.

{¶ 11} As previously indicated, on October 5, 2022, Respondents filed a motion to dismiss this case, along with a memorandum in support of that motion. Respondents make two arguments: (1) that the Commission lacks jurisdiction over Jacob Flanary; and (2) that case dismissal is appropriate because reasonable grounds for complaint have not been stated.

{¶ 12} On October 18, 2022, Complainant filed its response in opposition to Respondents' motion to dismiss (Complainant's Memorandum Contra). On November 14, 2022, Complainant filed a motion seeking to have Complainant's Memorandum Contra be considered as timely filed. Briefly stated, Complainant's position is that the complaint against Mr. Flanary should not be dismissed, and Mr. Flanary should remain a party to this case because, in Complainant's view, Mr. Flanary was "the sole decision-maker" regarding whether, per Aqua's tariff, ductile iron pipe, as opposed to PVC piping, should be used. Secondly, Complainant argues that its complaint against Aqua presents reasonable grounds for the Commission to hold a hearing on the issue of whether only ductile iron is acceptable in projects or if PVC piping is just as generally acceptable in utility engineering practices (Complainant's Memorandum Contra at 4).

{¶ 13} On October 25, 2022, Complainant filed a "supplement" to its Memorandum Contra. In this "supplemental" pleading, Complainant tweaks its Memorandum Contra's original phrasing of, and makes substantive arguments concerning its position on, an issue Complainant identifies as presenting reasonable grounds for the holding of a Commission hearing, namely, whether only ductile iron is acceptable in projects or if PVC piping - being a much cheaper alternative - is just as generally acceptable and commercially reasonable under utility engineering practices.

{¶ 14} On November 9, 2022, Respondents filed a motion to strike, in its entirety, Complainant's "supplement," on grounds that it is procedurally improper.

{¶ 15} Upon consideration of the pleadings described in Paragraphs 13 and 14, the Commission finds that Complainant's filing of a "supplement" is not a procedural step contemplated within the pleading cycle established under Ohio Adm.Code 4901-1-12. Moreover, no showing has been made that any argument made in the supplement could not have been previously included, within Complainant's earlier-filed response to Aqua's motion to dismiss. For these reasons, Aqua's motion to strike Complainant's "supplement" is granted and Complainant's presentation of arguments set forth in the "supplement" will not be further considered or addressed.

{¶ 16} Upon review of all pleadings pertaining to it, the Commission finds that Respondents' motion to dismiss should be granted in part and denied in part.

{¶ 17} First, we find that the Commission lacks jurisdiction over Aqua employee Mr. Flanary and, accordingly, we grant that portion of Respondents' motion which seeks to dismiss Mr. Flanary as a party to this case. As Aqua has pointed out, the Commission has previously held, and should abide by precedent which establishes, that while the Commission's regulatory jurisdiction extends to a public utility as an entity, it does not extend to the individual employees of that utility. *In re Randustrial v. The Ohio Bell Telephone Co.*, Case No. 82-921-TP-CSS, *et seq.*, 1984 WL 992121 at ¶13, Report (June 25, 1984). Moreover, Complainant's argument that Mr. Flanary should be considered as "the sole decision maker" regarding whether to require use of ductile iron piping is without merit. Even Complainant, in making such a claim, admits that the basis for any such decision stems from the need confronting whoever on Aqua's part makes such a decision to, in doing so, comply with Aqua's tariff. Any decision maker acting on Aqua's behalf, with a responsibility to uphold Aqua's tariff, could have just as easily reached the same decision as did Mr. Flanary, as regards to the use of ductile iron piping. For this reason, then, Mr. Flanary is not an indispensable party to this case.

{¶ 18} Second, the Commission finds that all portions of Respondents' motion which seek case dismissal on the premise that reasonable grounds for complaint have not been stated, should be denied.

{¶ 19} Aqua acknowledges that it is obligated, under Ohio Adm.Code 4901:1-15-30(F), to conform with generally accepted utility engineering practices when it engages in the practice of determining the design and route of its main extensions. However, submits Aqua, Ohio Adm.Code 4901:1-15-30(E) contains no language requiring conformity with this same utility engineering standard by waterworks companies as they engage in the practice of specifying the size, type, and quality of material which must be used in their main extensions and related facilities. Thus, argues Aqua, reasonable grounds for complaint have not been presented in this case because, according to Aqua, Complainant's sole purpose in bringing this case is to pursue Commission enforcement of a regulatory utility engineering standard that, as a matter of proper statutory construction, is simply absent from the regulatory framework which governs a waterworks company's specification of the type of pipe to be used in its main extensions and related facilities. According to Aqua, if the Commission intended to include a limitation that the "size, type, and quality of material" used in main extensions must be "in accordance with generally accepted utility engineering practices," then it would have included in Section (E) of the rule, the same language it specifically chose to include in Section (F) of the rule. Proper application of the rules of statutory construction, claims Aqua, "inevitably" leads to a recognition of the fact that the Commission, in promulgating the rule, chose not to do so.

{¶ 20} The Commission finds no merit in these arguments by Aqua. As just noted, Aqua admittedly acknowledges that it is obligated, under Ohio Adm.Code 4901:1-15-30(F), to conform with generally accepted utility engineering practices when it engages in the practice of determining the design of its main extensions. According to the 2023 Meriam-Webster Dictionary<sup>1</sup> the definition of "design," used as a verb, includes: (1) "to create,

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<sup>1</sup> This dictionary is found at the website "<https://www.merriam-webster.com>."

fashion, execute, or construct according to plan,” (2) “to devise for a specific function or end,” and (3) “to draw the plans for.” The same dictionary defines “design,” used as a noun, as “a plan or protocol for carrying out or accomplishing something.” In the Commission’s view, “determining the design” of any system that has “a specific function” entails “drawing the plans for” that system in such a manner as to ensure that constructing it “according to plan” will ensure adherence to the “specific function” for which the system has been devised.

{¶ 21} Applying this definition to the situation at hand, in the Commission’s view, “determining the design” of a water main extension necessarily entails specifying the size, type, and quality of material which must be used for the purpose of extending an existing waterworks distribution system. It is arbitrary and serves no useful regulatory purpose to pretend that the Commission, in requiring that generally accepted utility engineering practices be followed in determining the design of water distribution systems, should be understood as, at the same time, permitting any use of pipes within a system’s design made of materials that may not comply with this same engineering standard. For this reason, those portions of Aqua’s motion seeking case dismissal on the premise that reasonable grounds for complaint have not been stated, are denied.

{¶ 22} The Commission finds that reasonable grounds for complaint have been presented. Accordingly, the hearing previously scheduled for November 22, 2022, should be rescheduled to commence on June 14, 2023, at 10:00 a.m. at the offices of the Commission, Hearing Room 11-D, 180 East Broad Street, Columbus, Ohio 43215-3793. All parties should register at the building’s lobby desk and then proceed to the 11th floor to participate in the hearing. As before, the purpose of the hearing will be to establish the evidentiary record upon which the Commission may adjudicate the issue of whether Aqua’s practice to require use of only ductile iron piping in construction of the Project’s main extensions and related facilities conforms with generally accepted utility engineering practices pursuant to Ohio Adm.Code 4901:1-15-30(F), or, otherwise, is unreasonable or unlawful.

{¶ 23} Notwithstanding this determination, at the upcoming hearing, the Commission intends to allow into the record in this case, evidence, to the extent that any is offered by either party, concerned with whether use of PVC piping in construction of the Project's main extensions and related facilities conforms with generally accepted utility engineering practices pursuant to Ohio Adm.Code 4901:1-15-30(F), or, otherwise, is unreasonable or unlawful. This will be done only to obviate any potential need for the holding of any separate, future hearing on that question. However, the parties are hereby put on notice that, while such PVC pipe-related evidence will be permitted, all evidence relating to the suitability of PVC piping will become relevant, and will come under consideration by the Commission, only in the event that the Commission ultimately finds, based on the record adduced at hearing in this case, that Aqua's current practice of using only iron ductile pipe fails to conform with generally accepted utility engineering practices pursuant to Ohio Adm.Code 4901:1-15-30(F), or, otherwise, is unreasonable or unlawful. In short, if the evidentiary record adduced at hearing is sufficient to warrant a formal determination by the Commission in the affirmative on the question of whether use of iron ductile pipe exclusively complies with the existing applicable legal standard, an outcome conforming with that affirmative answer will be dispositive, regardless of whether use of PVC piping might, coincidentally, also happen to be, as Complainant contends, "just as compliant with generally accepted utility engineering practices."

{¶ 24} Any party intending to present direct expert testimony should comply with Ohio Adm.Code 4901-1-29(A)(1)(h), which requires that all such testimony to be offered in this type of proceeding be filed and served upon all parties no later than seven days prior to commencement of the hearing.

{¶ 25} In complaint proceedings before the Commission, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Pub. Util. Comm.* 5 Ohio St.2d 189, 214 N. E. 2d 666 (1966). Therefore, at the hearing, it shall be Complainant's responsibility to appear and present evidence in support of the complaint.



### III. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That, in accordance with the above paragraphs, that an evidentiary hearing be scheduled to commence on June 14, 2023, at 10:00 a.m. at the offices of the Commission, Hearing Room 11D, 180 East Broad Street, Columbus, Ohio 43215-3793. It is, further,

{¶ 28} ORDERED, That Respondents' motion to dismiss is granted in part and denied in part, in accordance with Paragraphs 16 through 20. It is further,

{¶ 29} ORDERED, That a copy of this Enty be served upon all parties of record.

#### COMMISSIONERS:

##### *Approving:*

Jenifer French, Chair  
Daniel R. Conway  
Lawrence K. Friedeman  
John D. Williams

DEF/dmh

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