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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

AT&T OHIO,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. 07-755-TP-CSS**
	)	
UNITED TELEPHONE COMPANY OF OHIO D/B/A EMBARQ,	)	
	)	
Respondent.	)	

REPLY MEMORANDUM IN SUPPORT OF EMBARQ'S MOTION TO DISMISS AT&T'S COMPLAINT

Joseph R. Stewart
Senior Counsel
EMBARQ
50 W. Broad Street, Suite 3600
Columbus, OH 43215
(614) 220-8625

John R. Harrington (pro hac vice pending)
Joseph A. Schouten (pro hac vice pending)
JENNER & BLOCK LLP
330 North Wabash Avenue
Chicago, IL 60611
(312) 222-9350

Dated: October 18, 2007

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Respondent United Telephone Company of Ohio, d/b/a Embarq ("Embarq"), respectfully submits its Reply Memorandum in Support of Embarq's Motion to Dismiss AT&T's Complaint.

INTRODUCTION

In its opening memorandum, Embarq demonstrated that the parties' dispute in this case does not implicate this Commission's regulatory oversight over public utilities. Resolution of this dispute turns squarely and exclusively on whether AT&T complied with its obligations under the plain terms of the parties' February 1, 1996 contract (the "Subcontractor Agreement"). The Subcontractor Agreement was never filed with the Commission, and it is no longer in effect. This dispute does not implicate this Commission's ratemaking expertise, nor does it implicate any concerns the Commission might have had in other cases regarding public utility service quality. This is a simple dispute over the interpretation of an unfiled, expired contract.

AT&T's response concedes, as it must, that its complaint "does contain numerous allegations concerning the appropriate interpretation[] of the parties' Subcontractor Agreement," and that "certain of the counts in [AT&T's] [c]omplaint are couched in terms of breach of contract[.]" (AT&T's Mem. Contra, at 2, 12.) However, AT&T asks this Commission to ignore the true nature of its complaint by arguing that this dispute really is about "tariff services and rates." (*Id.*, at 1.) AT&T's arguments should be rejected for several reasons.

First, this case is not a dispute about "tariff services and rates." It is undisputed that AT&T and Embarq agreed to prices in the Subcontractor Agreement that ***differed*** from Embarq's tariffed rates for the same services, and the parties agreed that the contracted-for rates would remain in place for ten years. It also is undisputed that AT&T and Embarq agreed in the Subcontractor Agreement that "[i]n the event of any conflict, inconsistency or incongruity between this Agreement and [Embarq's] tariff(s), ***this Agreement shall govern and control***."

(Ex. 1 to Embarq's Mem., ¶¶ 3(b), 5(b)) (emphasis added). The express terms of the Subcontractor Agreement -- terms which AT&T asks the Commission to ignore -- make plain that the parties' dispute here is not a dispute over Embarq's tariffs.

Second, AT&T's reliance on *AT&T Ohio v. The Dayton Power & Light Co.*, Case No. 06-1509-EL-CSS (Ohio Pub. Utils. Comm'n March 28, 2007) ("*DP&L*") is misplaced. AT&T hangs its hat almost entirely on the *DP&L* decision, describing it as "dispositive" in AT&T's favor, and claiming that the Commission in *DP&L* "took jurisdiction over precisely the same types of claims that [AT&T's] [c]omplaint raises in this case." (AT&T's Mem. Contra, at 3, 11.)

Contrary to AT&T's misreading, *DP&L* is readily distinguishable from this case. Unlike this case, *DP&L* involved a dispute that directly implicated not only the Commission's statutory ratemaking responsibility, but also its need to ensure consistent utility service quality. Indeed, as described below, the *DP&L* decision actually underscores why an assertion of Commission jurisdiction, while entirely appropriate in the *DP&L* matter, is not appropriate here.

Third, as Embarq showed in its opening memorandum, the Subcontractor Agreement was an agreement to provide the State of Ohio with services at reduced rates under R.C. § 4905.34. Thus, even if the parties' dispute over the Subcontractor Agreement implicated the Commission's regulatory oversight over public utilities (which it does not), R.C. § 4905.34 makes clear that the Subcontractor Agreement was not subject to the requirements of Chapter 4905. AT&T's attempts to "dispute" Embarq's showing that the Subcontractor Agreement is subject to R.C. § 4905.34 are utterly without basis or record support and should be rejected.

At bottom, AT&T's complaint seeks to involve this Commission in a dispute over an unfiled and expired contract that, unlike the contract at issue in *DP&L*, has nothing to do with ratemaking, service quality, or any other issues requiring regulatory oversight. AT&T's

complaint should be dismissed, and this dispute can and should be resolved by a court of competent jurisdiction in Ohio.

ARGUMENT

I. THE PARTIES' DISPUTE DOES NOT IMPLICATE THE COMMISSION'S REGULATORY OVERSIGHT UNDER CHAPTER 4905.

Embarq's opening memorandum established that, in substance, AT&T's complaint raises issues of contract interpretation that do not implicate this Commission's regulatory oversight over public utilities. AT&T's response does not dispute the controlling legal principles cited by Embarq. For example, Embarq pointed out in its opening memorandum that, under Ohio law, the Commission "should look beyond the plaintiff's characterization of its claim," and instead consider the substance of AT&T's claim, in determining whether it has jurisdiction. (Embarq's Mem., at 9.) In response, AT&T acknowledges that "just because a complainant identifies a cause of action in a particular manner does not necessarily mean that such a claim is or is not within the exclusive jurisdiction of the Commission." (AT&T's Mem. Contra, at 12) (quotation omitted). Thus, AT&T has acknowledged that the ***substance*** of its claim, not the mere fact that AT&T ***purports*** to bring a claim under Chapter 4905, controls whether this Commission has jurisdiction.

Embarq also has pointed out that this Commission "has no power to determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility is involved." (Embarq's Mem., at 7) (quoting *Mkt. Research Servs. v. Pub. Utils. Comm'n*, 517 N.E.2d 540, 544 (Ohio 1987)). AT&T again acknowledges this principle, but it claims that "the crux" of its complaint implicates this Commission's regulatory oversight under Chapter 4905. (AT&T's Mem. Contra, at 10-12.) AT&T is wrong for several reasons.

First, AT&T's reliance on cases in which Ohio courts have affirmed Commission jurisdiction over disputes, based on the unobjectionable proposition that the Commission has exclusive jurisdiction over claims that public utilities violated a provision of Chapter 4905, is misplaced. (*Id.*, at 10-14.) AT&T ignores the fact that ***each and every one of these cases*** involved a dispute that either implicated the Commission's ratemaking power and/or oversight of public utility service quality, or involved a contract that had been approved by the Commission. *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas,* 776 N.E.2d 92, 97-98 (Ohio 2002) (finding Commission jurisdiction proper because plaintiffs' fraud claims were entirely dependent on whether there were violations of public utilities laws); *Hull v. Columbia Gas of Ohio, Inc.,* 850 N.E.2d 1190, 1195 (Ohio 2006) (finding Commission jurisdiction over complaint that "involved an alleged breach of a contract by conduct that was ... expressly approved by the PUCO").[1] As described in more detail below, the Subcontractor Agreement does not implicate any of these concerns, and it is undisputed that the Subcontractor Agreement was not filed with or approved by the Commission.

Second, AT&T's overbroad jurisdictional theory cannot be reconciled with the Ohio Supreme Court's decision in *Mkt. Research Servs., Inc. v. PUCO,* 517 N.E.2d 540 (Ohio 1987).

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[1] *See also S.G. Foods, Inc. v. FirstEnergy Corp.,* Case Nos. 04-28-EL-CSS et al, ¶ 47 (Ohio Pub. Utils. Comm'n March 7, 2006) (finding that "all of the claims ar[o]se from complainants' assertions that respondents failed to provide appropriate service or facilities at the time of the blackout"); *State ex rel. Columbia Gas of Ohio, Inc. v. Henson,* 810 N.E.2d 953, 957 (Ohio 2004) (holding that "the substance of Prime Business's claims involve Columbia Gas's termination and restoration of natural-gas service. These claims are manifestly *service*-related complaints, which are within the exclusive jurisdiction of the commission."); *Ayers-Sterrett, Inc. v. Am. Telcomm. Sys., Inc.,* 833 N.E.2d 348, 352 (Ohio Ct. App. 2005) (finding that "[b]oth claims [were] based on the manner in which ATS began providing *service* to Ayers-Sterrett"); *Higgens v. Columbia Gas of Ohio, Inc.,* 736 N.E.2d 92, 93 (Ohio Ct. App. 2000) (involving a claim that the public utility "had wrongfully terminated the gas service to [plaintiff's] apartment building"); *Milligan v. Ohio Bell Telephone Co.,* 383 N.E.2d 575, 577 (Ohio 1978) (holding that plaintiff could not bring action in civil court prior to seeking relief at the PUCO where action was directly predicated on adjudication of plaintiffs' complaint under R.C. § 4905.22).

Like this case, *Marketing Research Services* involved a dispute regarding a utility's services and charges under a contract, in which the plaintiff attempted (like AT&T does here) to characterize the utility's conduct under the contract as a violation of R.C. § 4905.22. 517 N.E.2d at 540. Notwithstanding the plaintiff's characterization of its claim as alleging a violation of Chapter 4905, the Supreme Court affirmed dismissal based on the principle that the Commission "has no power to determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility may be involved." *Id.* at 544.

AT&T's overbroad theory that ***any*** contractual dispute having ***anything*** to do with a utility's services or rates automatically triggers Commission jurisdiction cannot be reconciled with the Supreme Court's decision in *Marketing Research Services*.[2] Rather, the touchstone for whether a complaint properly invokes this Commission's jurisdiction is whether, ***in substance***, the complaint either implicates this Commission's ratemaking authority and/or its oversight over utility service quality, or involves a contract that has been filed with and approved by the Commission. *See, e.g., Senchisin v. Ameritech*, No. 96-T-5539, 1997 WL 590151, *2 (Ohio Ct. App. Aug. 22, 1997) (finding that PUCO did not have jurisdiction over a breach of contract claim where the complaint "does not involve a review of the quality of service rendered, does not broach the subject of [defendant's] tariffed rates and does not require the technical expertise of

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[2] AT&T tries to distinguish *Marketing Research Services* on the ground that certain of the services at issue were interstate. (AT&T's Mem. Contra, at 14.) That ignores the fact that the Supreme Court plainly found, as a ***separate and independent ground for dismissal***, that the PUCO correctly concluded that the claims were contractual in nature. 517 N.E.2d at 544. The holding in *Marketing Research Services* also underscores that AT&T's reliance on dicta from *Hull* that "[a] pure contract case is one having nothing to do with the utility's service or rates -- such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier," is misplaced. (AT&T's Mem. Contra, at 11.) As discussed above, unlike this case, *Hull* involved a contract dispute that directly implicated the Commission's regulatory oversight. *Hull* did not purport to disagree with or overrule *Marketing Research Services*, and its citation to an example of a contract that would not implicate the Commission's jurisdiction cannot be read to exclude other examples, such as the one presented in this case.

the PUCO") (Exhibit 1); *Village of McComb v. Suburban Nat. Gas Co.*, 619 N.E.2d 1109, 1112 (Ohio Ct. App. 1993); *In the Matter of the Complaint of Lou Wenzowski v. Columbia Gas, Inc.*, Case No. 06-568-GA-CSS, ¶¶ 7-9 (Ohio Pub. Utils. Comm'n Sept. 27, 2006); *In the Matter of the Complaint of Anne Eishen v. Columbia Gas,* Case No. 01-885-GA-CSS, ¶¶ 6-7 (Ohio Pub. Utils. Comm'n Nov. 20, 2001). AT&T's complaint does none of these things.[3]

Third, any remaining doubt that this case does not implicate the Commission's jurisdiction is dispelled by AT&T's futile suggestion that, in the event the Commission agrees with Embarq's interpretation of the Subcontractor Agreement, the Commission can simply "reform" the Subcontractor Agreement pursuant to the Commission's authority under R.C. § 4905.31. (AT&T Mem. Contra, at 5, 7.) To be sure, R.C. § 4905.31 allows public utilities to enter into "other financial device[s] that may be practicable or advantageous to the parties interested," and it makes such arrangements subject to "change, alteration, or modification" by the Commission. R.C. § 4905.31(E). However, as Embarq pointed out in its opening Memorandum, this provision applies only to contracts that have been "filed with and approved by" the Commission. *Id.* (*See also* Embarq's Mem., at 11 n.1.) It is undisputed that the Subcontractor Agreement was ***not*** filed with or approved by the Commission.[4] Thus, rather than

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[3] AT&T notably relegates to a footnote the "two-step" approach adopted by the court in *Ayers-Sterrett, Inc. v. Am. Telecomm. Sys., Inc.*, 833 N.E.2d 348 (Ohio Ct. App. 2005), and for good reason. Under this approach, the party seeking to establish PUCO jurisdiction must show both that "the PUCO's administrative expertise is required to resolve the dispute" and that "the act complained of constitutes a practice normally engaged in by the utility." *Id.* at 351. Under this approach, PUCO jurisdiction is not appropriate "[i]f the answer to ***either question*** is in the negative[.]" *Id.* (quotation omitted) (emphasis added). This approach does not support an assertion of Commission jurisdiction here. The Commission's expertise plainly is not necessary, as nothing in this case requires the Commission either to establish rates or otherwise pass on service quality issues. Again, this is a simple dispute regarding the interpretation of a now-expired contract.

[4] Moreover, as established in Embarq's Motion to Dismiss and discussed further below, the Subcontractor Agreement was a contract to provide the State with services at reduced rates. Under R.C. § 4905.34, such contracts need not be filed and are not subject to the Commission's oversight.

demonstrating that this Commission has the power to "reform" the Subcontractor Agreement to fit AT&T's liking, R.C. § 4905.31 merely underscores the fundamentally private, contractual nature of the parties' dispute regarding the Subcontractor Agreement.

II. THE *DP&L* DECISION DOES NOT SUPPORT AN ASSERTION OF JURISDICTION OVER AT&T'S COMPLAINT.

AT&T's response makes little attempt to hide its belief that the Commission's decision to assert jurisdiction in the *DP&L* matter compels it to assert jurisdiction in this case as well. AT&T claims that the DP&L decision is "dispositive" in AT&T's favor, that "the Commission in *DP&L* rejected the same jurisdictional arguments Embarq makes in this case," that *DP&L* involved "precisely the same types of claims that [AT&T's] [c]omplaint raises in this case," and that *DP&L* "compels rejection of Embarq's arguments" in this case. (AT&T's Mem. Contra, at 3, 11, 12, 15.) Contrary to AT&T's claims, not only is *DP&L* not "dispositive" in AT&T's favor, there are several reasons why the Commission's assertion of jurisdiction in that case actually underscores why an assertion of jurisdiction would not be proper here.

First, *DP&L* involved an entirely different type of contract, and an entirely different statutory scheme, both of which directly implicated the Commission's ratemaking authority. *DP&L* involved a dispute between AT&T and Dayton Power regarding a "joint use" contract. Under this contract, the parties agreed to allow each other to attach lines and equipment to their poles. Case No. 06-1509-EL-CSS at ¶ 4. Under the contract, if one party maintained more poles than the other, the party with fewer poles would pay a "rental fee" to the party with more poles. *Id.* If the parties were unable to reach agreement regarding the rate for the "rental fee," the contract provided that the fee would be set at "one half the then average total cost per pole of providing and maintaining the standard joint poles." *Id.*

Critically, the dispute in *DP&L* centered on the methodology Dayton Power used to unilaterally calculate the "rental fee" it charged AT&T under the contract. *Id.* In other words, *DP&L* involved a dispute between the parties regarding the proper methodology for calculating the rates to be charged under the contract. By contrast, there is no dispute in this case regarding the rates to be charged under the Subcontractor Agreement -- the rates are set forth in the contract, and the contract squarely provides that those rates will be firm for ten years. (Ex. 1 to Embarq's Mem., ¶ 3(b).)

In addition, the statutory provisions at issue in *DP&L* specifically direct the Commission to set terms and conditions for the joint use of poles. Specifically, R.C. § 4905.51 provides that "the commission ***shall*** direct that such use or joint use be permitted and ***prescribe reasonable conditions and compensation for such joint use***" where "public convenience, welfare, and necessity require such use or joint use and that it would not result in irreparable injury to the owner...." R.C. § 4905.51 (emphasis added). There is no analogous statutory provision at issue in this case that would authorize the Commission to set rates, terms and conditions for the services provided between Embarq and AT&T under the Subcontractor Agreement.

Second, *DP&L* involved a dispute which directly implicated the Commission's oversight of public utility service quality. In that case, Dayton Power had used the "rental fee" dispute as a basis for "suspend[ing] AT&T's right to attach to additional [Dayton Power] poles while permitting AT&T Ohio to remain on existing poles." Case No. 06-1509-EL-CSS at ¶ 4. In other words, as a result of the dispute in *DP&L*, one public utility was refusing to allow another public utility to attach lines to its poles. This sort of dispute plainly (and urgently) implicated the Commission's ongoing supervision of public utility service quality. By contrast, this case does not in any way implicate service quality issues. Indeed, the Subcontractor Agreement is no

longer in effect, so resolution of the parties' dispute in this case will have no impact on their service in any way.

Third, *DP&L* involved a contract that was subjected to Commission approval under both 4905.31 and 4905.48, Revised Code. *Id.* at ¶ 5. Again, it is undisputed that the Subcontractor Agreement was neither filed with nor approved by the Commission.

Simply put, *DP&L* provides no support whatsoever for AT&T's claim that the Commission has jurisdiction in this case. *DP&L* provides an excellent illustration of the principle that the Commission has jurisdiction to address disputes regarding a contract involving public utilities when those disputes implicate the Commission's ratemaking authority and/or its oversight over service quality, and when the contract at issue has been filed with the Commission. None of these factors is present in this case.

III. THE SUBCONTRACTOR AGREEMENT WAS AN AGREEMENT TO PROVIDE SERVICES TO THE STATE OF OHIO AT REDUCED RATES.

Embarq showed in its opening memorandum that, even if the Commission otherwise would have had jurisdiction over AT&T's complaint (which it does not), the Subcontractor Agreement was a contract to provide services to the State of Ohio at reduced rates. Under R.C. § 4905.34 and the Ohio Supreme Court's decision in *Ohio Edison Co. v. Pub. Utils. Comm'n*, 678 N.E.2d 922 (Ohio 1997), such contracts are not subject to the requirements of Chapter 4905, including review by this Commission. *Id.* at 926. As the Ohio Supreme Court held in *Ohio Edison*, "[o]nce the commission determines that the complaint pending before it involves an R.C. 4905.34 contract, ***the commission's jurisdiction is at an end and the case must be dismissed***." *Id.* (emphasis added). AT&T raises several arguments in response, none of which has merit.

First, the Commission should dismiss out-of-hand AT&T's claim that R.C. § 4905.34 does not apply because the State of Ohio was not a direct party to the Subcontractor Agreement.

(AT&T's Mem. Contra, at 16.) On its face, R.C. § 4905.34 applies to "[a]ll contracts and agreements" to provide the State with services at a reduced rate. Nothing in R.C. § 4905.34 requires the State of Ohio to be a named party to a contract in order for the statute to apply. As Embarq has shown, there can be no serious dispute that the purpose of the Subcontractor Agreement was to provide services to the State of Ohio. (Embarq's Mem., at 12.) Notably, AT&T cites no authority in support of its restrictive reading of R.C. § 4905.34 on this point.

Second, AT&T's suggestion that the Subcontractor Agreement "does not govern the rates for Embarq's telecommunications services for the SOMACS project" also should be dismissed out-of-hand. (AT&T's Mem. Contra, at 16.) AT&T and Embarq expressly agreed that the Subcontractor Agreement would "set forth their respective rights and obligations ***with respect to the SOMACS Project***." (Ex. 1 to Embarq's Mem., at 1) (emphasis added). They also made clear that the specific pricing in the Subcontractor Agreement would remain in place for ten years and that "[i]n the event of any conflict, inconsistency or incongruity between this Agreement and [Embarq's] tariff(s), ***this Agreement shall govern and control***." (*Id.*, at ¶¶ 3(b), 5(b)) (emphasis added). AT&T's claim that the Subcontractor Agreement did not control the parties' obligations with respect to the services Embarq provided underscores the lengths to which AT&T will go to try to avoid its freely-negotiated contractual commitments.

Third, AT&T's claim that R.C. § 4905.34 does not apply because Embarq's tariffed rates eventually fell below the rates in the Subcontractor Agreement is a red herring that has no basis in fact or law. (AT&T's Mem. Contra, at 16.) As a factual matter, Embarq has established that, at the time of contracting, the rates in the Subcontractor Agreement were lower than Embarq's tariffed rates for the same services, and that the intent of the Subcontractor Agreement was to provide the State with services at reduced rates. (Ex. 2 to Embarq's Mem.; Embarq's Mem., at

12-13.) As a legal matter, Embarq has pointed out that "[i]t is black-letter law that, when ascertaining a party's intention under a contract, the relevant inquiry is what the party's intentions were at the time the contract was signed, not at some subsequent date." (Embarq's Mem., at 13 n.2) (citing *Pool v. Insignia Residential Group,* 736 N.E.2d 507, 509 (Ohio Ct. App. 1999).) That Embarq's tariffed rates subsequently decreased does not undermine the fact that the Subcontractor Agreement was an agreement to provide services to the State at reduced rates.

Finally, AT&T's claim that Embarq is asking the Commission to "prejudge the issue" of the applicability of R.C. § 4905.34 based on an insufficient "evidentiary record" is meritless. (AT&T's Mem. Contra, at 16-17.) As noted above, the Ohio Supreme Court had made clear that, when faced with a claim that a case involves a contract subject to R.C. § 4905.34, this Commission has only "limited authority to determine the extent of its jurisdiction and whether a complaint pending before it actually involves an R.C. 4905.34 contract." *Ohio Edison*, 678 N.E.2d at 926.

As also noted above, Embarq provided evidentiary support for its motion, in the form of an affidavit from Emily Binder, the Embarq business person most directly responsible for this issue within Embarq. (Ex. 2 to Embarq's Mem.) Ms. Binder's affidavit demonstrates that the rates set forth in the Subcontractor Agreement were, at the time the agreement was made, lower in the aggregate than the prices for the same services in Embarq's tariffs. (*Id.*, at ¶ 5.) Her affidavit further demonstrates that, even though Embarq's tariffed rates subsequently decreased, the purpose of the Subcontractor Agreement, at the time it was made, was to provide services to the State of Ohio at reduced rates. (*Id.*, at ¶¶ 5-6.)

AT&T has had ample opportunity to submit its own evidence in opposition to Embarq's factual submissions, but it has chosen not to do so. Instead, AT&T simply asserts that it

"disputes the factual assertions that Embarq makes[.]" (AT&T's Mem. Contra, at 16-17.) As a matter of law, AT&T cannot defeat Embarq's motion to dismiss for lack of jurisdiction based on conclusory and unsupported assertions that it "disagrees with" or "disputes" facts that Embarq affirmatively has established. *See, e.g., Linkous v. Mayfield,* No. CA1894, 1991 WL 100358, * 4 (Ohio Ct. App. June 4, 1991) (noting that "it has been consistently held that once the existence of subject matter jurisdiction has been challenged, the burden of establishing it always rests on the party asserting jurisdiction" and finding that plaintiff failed to establish jurisdiction where he failed to "offer any evidence") (Exhibit 2); *see also Collins v. Hamilton County Dept. of Human Servs.,* No. 01-AP-1194, 2002 WL 433671, *2 (Ohio Ct. App. March 21, 2002) (Exhibit 3).

The Supreme Court has directed this Commission to determine as a threshold matter whether R.C. § 4905.34 divests it of jurisdiction it otherwise would have. As a matter of law, AT&T has had ample opportunity to present evidence disputing the evidentiary submissions Embarq made with its motion to dismiss. *See Shockey v. Fouty,* 666 N.E.2d 304, 306 (Ohio Ct. App. 1995) (noting that, when ruling on a motion to dismiss for lack of jurisdiction, the Commission "is not confined to the allegations of the complaint and it may consider material pertinent to [the motion] without converting the motion into one for summary judgment"). Given that AT&T has chosen not to submit any such evidence, the Commission can and should dismiss AT&T's complaint based on the record already developed.

CONCLUSION

For the reasons set forth above and in its Motion to Dismiss and Memorandum in Support, Embarq respectfully requests that the Commission dismiss AT&T's Complaint in its entirety.

Dated: October 18, 2007

Respectfully submitted,

UNITED TELEPHONE COMPANY OF OHIO
D/B/A EMBARQ

By: Joseph R. Stewart /RGS

Joseph R. Stewart
Senior Counsel
EMBARQ
50 W. Broad Street, Suite 3600
Columbus, OH 43215
(614) 220-8625

John R. Harrington (pro hac vice pending)
Joseph A. Schouten (pro hac vice pending)
JENNER & BLOCK LLP
330 North Wabash Avenue
Chicago, IL 60611
(312) 222-9350

CERTIFICATE OF SERVICE

I, Joseph R. Stewart, hereby certify that I caused a true and correct copy of Reply Memorandum in Support of Embarq's Motion to Dismiss AT&T's Complaint to be served this 18th day of October, 2007 via Electronic Mail and U.S. mail, prepaid postage, delivery on:

Daniel R. Conway
Andrew C. Emerson
Eric B. Gallon
Porter, Wright, Morris & Arthur LLP
41 S. High St., Suite 3100
Columbus, Ohio 43215

Jon F. Kelly
Mary Ryan Fenlon
AT&T OHIO
150 East Gay Street, Rm. 4-A
Columbus, OH 43215

Joseph R. Stewart

EXHIBIT 1

C
Senchisin v. Ameritech
Ohio App. 11 Dist.,1997.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.
George H. SENCHISIN, Plaintiff-Appellee,
v.
AMERITECH, Defendant-Appellant.
NO. 96-T-5539.

Aug. 22, 1997.

GEORGE H. SENCHISIN P.O. Box 371 Brookfield, OH 44403 (Plaintiff-Appellee).
ATTY. THOMAS A. LINTON Room 1424 45 Erieview Plaza Cleveland, OH 44114 (For Defendant-Appellant).

Judith A. CHRISTLEY, P.J., Robert A. NADER, J., William M. O'NEILL, J.
NADER, J.
*1 On June 19, 1996, plaintiff-appellee, George H. Senchisin, filed a small claims complaint in the Trumbull County Court, Eastern Division, alleging that "Ameritech," the registered trade name of the Ohio Bell Telephone Company ("Ohio Bell") billed him for long distance telephone calls he did not make, stating: "The telephone bill was sent to a different address * * *[,] so the telephone was used for long distance calls that [were] not made by * * * my wife or [me]." Counsel for Ohio Bell elaborated on these allegations in a footnote to a brief filed later with the trial court:
"According to plaintiff's wife, the plaintiff is actually disputing A.T. & T. long-distance charges which appear on his bill pursuant to tariff provisions which allow long distance carriers to enter into arrangements for their billings to appear on bills of local telephone companies such as Ohio Bell. Those tariffs also presently allow local telephone companies to discontinue service if the long distance charges are not paid. The plaintiff believes that the disputed amounts billed by A.T. & T. were fraudulently accrued by a third party who used the plaintiff's former telephone number without his consent to make long-distance calls. Ohio Bell is investigating these claims and will notify A.T. & T. to contact the plaintiff if the calls were made from a location other than the plaintiff's home."

The trial court set a hearing on the complaint for July 15, 1996, but counsel for Ohio Bell did not appear. The court reset the matter for a default hearing on July 29, 1996, but counsel for Ohio Bell again failed to appear. The court entered default judgment against Ohio Bell on July 29, 1996.

The next day, counsel for Ohio Bell filed a motion to dismiss the complaint for lack of subject-matter jurisdiction. The trial court overruled the motion, and Ohio Bell appealed, asserting one assignment of error:
"The trial court erred to the prejudice of the defendant-appellant in exercising jurisdiction over plaintiff-appellee's claim that he was improperly charged for telephone service."

Counsel for Ohio Bell argues that appellee Senchisin has essentially asserted a complaint regarding the rate which Ohio Bell has charged him. Under R.C. 4905.26 complaints alleging that a "fare, charge, [or] toll * * * charged, demanded, or exacted * * * is in any respect unjust, unreasonable, * * * or in violation of law" must be brought before the Public Utilities Commission of Ohio ("PUCO"). Senchisin has not filed a response brief.

The PUCO has exclusive jurisdiction over utility customer complaints related to rates or services of the utility. *E.g.*, *State ex rel. The Ohio Bell Telephone Co. v. Court of Common Pleas of Cuyahoga Cty.* (1934), 128 Ohio St. 553, 557, 192 N.E. 787. "The purpose of providing PUCO with such jurisdiction is that the resolution of such claims 'is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions.' " *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 228, 648 N.E.2d 72, quoting *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 153, 573 N.E.2d 655.

*2 However, "[t]he Public Utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or

adjudicate controversies between parties as to contract rights or property rights." *New Bremen v. Public Utilities Comm.* (1921), 103 Ohio St. 23, 30-31, 132 N.E. 162. The Supreme Court has consistently held that the PUCO has no jurisdiction to consider breach of contract claims, even though a public utility may be involved. *Id.*; *Marketing Research Services, Inc. v. Public Utilities Comm.* (1987), 34 Ohio St.3d 52, 517 N.E.2d 540; *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9, 412 N.E.2d 395; *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, 373 N.E.2d 385.

We disagree with Ohio Bell's contention that the instant action was really a complaint regarding its rate. Senchisin did not claim that Ohio Bell applied the wrong rate to his calls, as was the allegation in *Kazmaier, supra,* upon which Ohio Bell relies. Nor did he claim that his bill was too high because of the utility's failure to make certain repairs, as was the case in *Cleveland Electric Illuminating Co. v. Lake Underground Storage Corp.* (Sept. 30, 1993), Lake App. No. 93-L-039, unreported. Senchisin also did not claim that the utility charged him an amount in excess of that which is permitted under its tariffs, as essentially were the cases in *Thomas v. Public Utilities Comm.* (1986), 24 Ohio St.3d 167, 493 N.E.2d 1328 and *Dayton Street Transit Co. v. Dayton Power & Light Co.* (1937), 57 Ohio App. 299, 13 N.E.2d 923, upon which Ohio Bell also relies. Senchisin specifically claimed that Ohio Bell charged him for making long-distance calls that he and his wife did not actually make or authorize.

It has been said that the tariff constitutes the service contract between a telephone company and a member of the general public who applies for telephone service. *Sonstegard v. General Telephone Co.* (C.P.1969), 27 Ohio Misc. 112, 273 N.E.2d 151, 56 O.O.2d 342, 342. One of the fundamental features of this service agreement is that the phone company may charge the customer only for services that he actually ordered. If the phone company bills the customer for services he never actually ordered,[FN1] it has breached the tariff contract.

> FN1. This case is distinguishable from *Weiler v. Ohio Bell Telephone Co.* (Feb. 14, 1997), Montgomery App. No. 15983, unreported, 1997 WL 101929, where the customer ordered that a second line be installed in his barn. Sometime after installation, the line went dead. For eights years, Ohio Bell charged him for the second line notwithstanding the fact that the customer did not (and could not) use it. The customer sued in the court of common pleas, alleging that the phone company's "negligent and fraudulent conduct" in billing him for a service line that was perpetually out of order caused him mental anguish and loss of business and otherwise violated his right to "peace of mind and contentment of his home and property." The customer asked for $150,000 in compensatory damages and triple that amount in statutory damages under R.C. 4905.61. It is unclear whether the prayer for compensatory damages was intended to include the $1,632.80 that he paid for the phone line over the eight year period. After a default judgment was entered against Ohio Bell, counsel appeared and filed a motion to dismiss for lack of subject matter jurisdiction. The trial court granted the motion, and the appeals court affirmed, holding that the customer's allegations of damages due to the phone line to his barn being dead were in essence a "service" complaint under R.C. 4905.26 and should have been brought before the PUCO.
> The customer in *Weiler* actually ordered the phone line, but experienced problems with his service. Here, Senchisin entered into an arrangement with a long-distance carrier whereby A.T. & T. would bill him for calls he either made himself or authorized. The simple allegation that he was wrongly billed for calls he did not actually make does not raise the same concerns with the phone *service* as in *Weiler,* but with the phone *contract* itself.

The situation becomes much more complex when the dispute is over long-distance charges that the local company bills to one of its customers on behalf of a long-distance carrier. Generally, the same contractual principles apply-that the customer may only be billed for calls that he actually made or authorized, and charging a customer for calls that he did not actually make or authorize is, in essence, a breach of the contract. See *Sonstegard, supra.*[FN2] The PUCO has no jurisdiction over breach of contract claims. Senchisin's complaint raises very simple issues, such as whether he actually placed or authorized a long-distance telephone call from a given location on a given day, the resolution of which does not involve a review of the quality of service

rendered, does not broach the subject of Ohio Bell's tariffed rates and does not require the technical expertise of the PUCO.

> FN2. In *Sonstegard, supra,* the customer filed suit against the local telephone company for failing to block unauthorized long-distance calls placed by the customer's son from a military school in Kentucky. A close reading of the case suggests that the action sounded in contract. Judge Kessler, of the Montgomery County Court of Common Pleas, held a bench trial and issued an opinion rendering judgment for the phone company. The local phone company had no knowledge of the phone calls being placed from a location in another state, which was served by Southern Bell, to another exchange serviced by a different division of the then-monopolous Bell system. Further, it was impossible for the defendant, General Telephone Co., to require Southern Bell to block calls from Sonstegard's son.

*3 Fortunately, whether the long-distance carrier becomes a party to the existing contract between the customer and the local phone company by virtue of the tariff provisions whereby the local company (i) grants the long-distance carrier access to its existing telecommunications hardware, and (ii) agrees to act as a collections agent, and whether the local phone company is therefore a proper party defendant in an action over improper long-distance charges, are questions not before this court. These issues should have been litigated below. The only question we need answer is whether a court of law is the proper forum for such an action. We conclude that it is.

The judgment is affirmed.

CHRISTLEY, P.J., dissents with dissenting opinion.
O'NEILL, J., concurs.

CHRISTLEY, P.J.
I respectfully dissent from the opinion of the majority

First, although not relevant to the merits of the appeal, I believe the following issue worthy of discussion. In the instant matter, a small claim was filed and served against appellant. Appellant neither filed a response nor made any appearance prior to the trial scheduled by the court.[FN1] Appellant also failed to appear at the first hearing. A second notice was sent, and again appellant failed to answer or appear. The trial court entered a *default* judgment against appellant as a result. Beyond several references by the court to a *default* judgment, the limited record does not reflect whether the *default* was one contemplated under Civ.R. 55(A) or was a *default* only in the sense that appellant failed to appear for trial. I perceive the distinction to be important.[FN2]

> FN1. This matter was heard directly by a judge and not a magistrate.
>
> FN2. I do not, however, see this as plain error, thus, it can be waived.

In a small claim's action maintained under R.C. Chapter 1925, no answer is required as the defendant can simply appear at trial to defend. However, if a defendant fails to appear at trial, R.C.1925.05(A) provides, without further direction, that a *default* judgment may be entered. R.C.1925.16 also provides that "[e]xcept as inconsistent procedures are provided in this chapter * * * " the Rules of Civil Procedure are applicable to small claims proceedings. Thus, any silence on a procedural issue can be addressed by the Rules. Here, the "silence" is what procedure must be used by the court in rendering the *default* judgment referred to in the statute.

A comparison to what would occur to a "non-small claim" action on the civil docket is helpful. In a matter filed under the regular civil docket, a defendant must appear in the action or answer or be subject to *default* judgment under Civ.R. 55(A). In that situation, the court can proceed, after proper notice, to take evidence as to damages only. It can then render a *default* judgment. However, under Civ.R. 55(A), when a defendant has made an appearance or has answered in the matter, but then fails to show up for the trial or hearing, the court must proceed with an *ex parte* trial by taking evidence as to all issues. Only then can it determine if the plaintiff has met its burden of proof as to the merits. After assessing weight, credibility, etc., the court can render the appropriate judgment, not a *default* judgment. See Staff Notes, Civ.R. 55.

*4 The problem in applying Civ.R. 55(A) with a small claim's matter is that if a defendant in a R.C. Chapter 1925 action is *not* required to answer prior to the hearing, he obviously cannot ever be in *default* in the sense that *default* is contemplated by Civ.R. 55(A). This is because the rule specifically requires

a failure of appearance or answer by the defendant in order to set the *default* process in motion under the rule. Further, Civ.R. 55(A) requires that specific notice be sent to the defendant indicating that a *default* judgment is being sought. As a result, Civ.R. 55(A) is inapplicable to a Chapter 1925 small claim's matter, and, the reference to *default* in R.C.1925.05(A) cannot be a Civ.R. 55(A) reference.

That being the case, the only other theory which is harmonious with both the rules and the statute is that the defendant is in *default* only in the sense of not showing up for trial. Thus, as in the regular civil docket, the trial court must proceed *ex parte* on the merits as explained earlier. See Staff Notes, Civ.R. 55. However, in the instant matter, subsequent to the first hearing in which appellant failed to appear, the trial court specifically notified appellant that it had fourteen days to show cause why *default* judgment should not be granted. The final judgment entry also talks in terms of a *default* judgment. Normally if the record is neutral on the issue and if there is an absence of a transcript and/or findings of fact and conclusions of law, we would presume that the trial court did the right thing and conducted an *ex parte* proceeding on the merits and not a Civ.R. 55(A) proceeding on damages only. Unfortunately, the instant record is not neutral, rather it is specifically to the contrary, as it plainly designates that a *default* judgment was contemplated and granted. Thus, the judgment is voidable. However, no objection was raised and the appeal taken in this matter does not address this issue. Because this was a voidable rather than a void judgment, the issue is waived.

Next, turning to the merits of this appeal, appellant raises some arguable reasons as to why there is a lack of subject matter jurisdiction. However, the determination of subject matter jurisdiction as between PUCO and the Ohio courts is often highly fact dependent. In the instant matter, there is no record of any trial court proceedings before this court which contains the necessary facts. The facts relied upon to support appellant's claim of a lack of subject matter jurisdiction are only found in appellant's trial and appellate briefs. Such claimed facts do not exist as evidence when they are presented in that format. Nevertheless, the majority opinion relies heavily on these facts in reaching its conclusion that there was no subject matter jurisdiction.

I contend that because of the lack of evidence in the record, we do not know what the critical facts were. However, I would agree that appellant has made an adequate suggestion of a lack of subject matter jurisdiction. That being the case, further investigation was warranted and the trial court should have held an evidentiary hearing to determine its own jurisdiction. Despite the fact that the issue of subject matter jurisdiction can be raised at any level of the proceeding, the trial court is the most logical place for the issue to be resolved.

*5 Thus, contrary to the majority's opinion, I do not believe that the record is sufficient for this court to resolve the merits of the subject matter jurisdiction issue. As a result, I dissent with the majority's decision which was based on the merits of the jurisdictional determination.

My opinion would be to reverse and remand this matter to the trial court in order for it to determine its own jurisdiction by conducting an evidential hearing.

Accordingly, I dissent.

Ohio App. 11 Dist.,1997.
Senchisin v. Ameritech
Not Reported in N.E.2d, 1997 WL 590151 (Ohio App. 11 Dist.)

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EXHIBIT 2

C

Linkous v. Mayfield
Ohio App.,1991.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Scioto County.
William LINKOUS, Plaintiff-Appellant,
v.
James L. MAYFIELD, Admr., Bureau of Workers' Compensation, et al., Defendants-Appellees.
No. CA1894.

June 4, 1991.

James C. Ayers, and Larrimer & Larrimer, Columbus, for appellant.
Anthony J. Celebrezze, Ohio Attorney General, and Sandra Becher, Assistant Attorney General, Columbus, for appellees Mayfield and the Industrial Commission of Ohio.[FN1]

HARSHA, Judge.
*1 This is an appeal from judgments entered by the Scioto County Court of Common Pleas dismissing the complaint of William Linkous, plaintiff-appellant, seeking additional workers' compensation for a psychological condition, on the basis that the court lacked subject matter jurisdiction and further overruling his motion for a mistrial or a new trial.

Appellant assigns the following errors:

ASSIGNMENT OF ERROR NO. 1

THE COURT ERRED AS A MATTER OF LAW WHEN IT CONSIDERED EVIDENCE PRESENTED BY DEFENDANT-APPELLEE IN SUPPORT OF HIS MOTION TO DISMISS WITHOUT CERTIFICATION, AUTHENTICATION OR CROSS-EXAMINATION.

ASSIGNMENT OF ERROR NO. 2

THE COURT ERRED AS A MATTER OF LAW WHEN IT SUSTAINED A MOTION TO DISMISS FOR LACK OF JURISDICTION BY DEFENDANT-APPELLEE WITHOUT ALLOWING PLAINTIFF-APPELLANT TO PRESENT REBUTTAL EVIDENCE.

ASSIGNMENT OF ERROR NO. 3

THE COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT PLAINTIFF-APPELLANT KNEW OR SHOULD HAVE KNOWN OF HIS INDUSTRIALLY CAUSED PSYCHIATRIC CONDITION AT LEAST TWO YEARS PRIOR TO HIS FILING A MOTION WITH THE COMMISSION FOR AN ALLOWANCE OF THE CONDITION.

ASSIGNMENT OF ERROR NO. 4

THE COURT ERRED AS A MATTER OF LAW WHEN IT OVERRULED PLAINTIFF-APPELLANT'S MOTION FOR A MISTRIAL OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL.

On or about July 2, 1964, appellant, while an employee of Andrew Bihl & Sons, was injured during the course of and arising out of his employment. Appellant filed a workers' compensation claim based upon the 1964 injury and the Industrial Commission of Ohio allowed benefits for the following condition::

Laceration of right lower leg below knee; deep venous damage with chronic venostasis, right leg.

On May 4, 1987, appellant filed an application requesting workers' compensation for an additional psychiatric/psychological condition which he claimed to have been caused by his 1964 leg injury. On October 27, 1987, a district hearing officer for the Bureau of Workers' Compensation denied appellant's claim for additional benefits on the basis that there was an insufficient causal connection between his leg injury and his alleged psychological condition. The Regional Board of Review affirmed the district hearing officer's decision and the Industrial Commission denied appellant's further appeal. Appellant then filed a timely notice of appeal to the trial court from the adverse administrative determination, and on July 18, 1988, appellant filed a complaint which essentially set forth the aforementioned facts and prayed for the right to

workers' compensation benefits for the alleged psychological condition.[FN2] Appellees admitted the allegations concerning the prior administrative proceedings.

Subsequently, a jury trial was held at which the following pertinent evidence was introduced. Appellant testified that he had completed six years of school when he started working for Andrew Bihl & Sons in the 1940's. On July 2, 1964, he injured his right leg with a circular saw while working. Sometime following his return to work, he left Andrew Bihl & Sons because of a dispute with its new owners and since he could no longer do the hard labor required. Appellant eventually worked as a truck driver for Phoenix Pie Company, until the company closed in 1983. In 1984, appellant suffered a light heart attack and received six months of psychological counseling. Appellant testified that at the time of his heart attack in 1984, he felt that the attack was caused by or brought on because of anxiety and depression that he had been experiencing because of his leg injury. On cross-examination of appellant, the following exchange occurred:

*2 Q. And in 1984 when you were going through the psychological counseling with the doctor at Shawnee Hospital, did you tell the doctor then that that was the cause of your anxiety and depression?

A. I believe I did. I can't remember for sure.

Q. But in your mind at that time, in 1984, when you were receiving the counseling, you felt that your problems were directly caused by the accident in 1964, is that correct?

A. Yes, ma'am.

When asked whether he felt depressed about his leg condition and whether he suffered any psychological problems before 1984, appellant testified affirmatively although he further noted that he was "no doctor."

Dr. David H. Proctor, appellant's treating physician since November 2, 1984, testified that appellant had suffered from anxiety and depression since the first time he had treated him and that appellant's anxiety and depression were directly and causally related to his 1984 leg injury. Dr. Proctor further testified that he was aware that appellant had been admitted on April 6, 1984, to the Portsmouth Receiving Hospital for what appellant had thought was a heart attack and that there was nothing contained in that narrative report indicating that appellant had been depressed about the condition of his right leg at the time of his admission.

Following appellant and Dr. Proctor's testimony as well as the introduction into evidence of a 1986 photograph of appellant's leg, appellant rested his case, and appellees moved to dismiss the case on the basis that the trial court lacked subject matter jurisdiction. Appellees based their motion to dismiss on appellant's admission during cross-examination that he knew in 1984 that his psychological problems were caused by his 1964 accident, and that appellant failed to file his additional psychological claim until May 4, 1987. Appellant's counsel was afforded the opportunity by the trial court to be heard on appellees' dismissal motion and he argued: (1) lack of subject matter jurisdiction is an affirmative defense upon which appellees had the burden of proof; (2) there was conflicting evidence about whether appellant knew or should have known in 1984 about his psychological condition and its connection to his leg injury; and (3) the date the Industrial Commission received written notice of appellant's additional claim for his psychological condition might have been prior to the May 4, 1987 date appellant filed his claim, and only the administrative file would include that information. The trial court then ordered appellees' counsel to get the administrative file. After further argument and following appellant's counsel's statement to the trial court that he had "nothing further to add," the trial court granted appellees' motion to dismiss for lack of subject matter jurisdiction. The trial court subsequently overruled appellant's motion for a mistrial or in the alternative, motion for a new trial.

Appellant's first assignment of error asserts that the trial court erred when it considered evidence presented by appellees in support of his motion to dismiss without certification, authentication, or cross-examination. Appellant asserts that the trial court's viewing of the appellant's Industrial Commission claim file without certification, authentication, or cross-examination constituted error.

*3 It should be emphasized that appellant's counsel initially referred to the administrative file in arguing against appellees' dismissal motion. Furthermore, appellant did not object to the trial court's consideration of the claim file in determining appellees' dismissal motion. Finally, in appellant's March 9, 1990 motion for a mistrial or, in the alternative, motion for a new trial, the following is stated:

Defendant, without opening his case and out of the hearing of the jury, produced the Commission file. All parties and the Court had an opportunity to view the file. Technically, the file was never before the Court, but *Plaintiff* has an objection of substance and merit and *will admit that the Commission's first notice was May 4, 1987.*

(Emphasis added).

A party is not permitted to take advantage of an error which he himself invited or induced the trial court to make. *Center Ridge Ganley, Inc. v. Stinn* (1987), 31 Ohio St.3d 310, 313; *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153, 156. Moreover, the general rule is that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170. In the case at bar, appellant's counsel advised the trial court that the administrative file was necessary for the determination of the dismissal motion, and appellant failed to object to the trial court's procedure in this regard. Therefore, any error by the trial court in viewing the Industrial Commission file was waived.

Appellant additionally relies upon *Rustin v. Prudential Ins. Co.* (1928), 27 Ohio App. 466, which held that the trial court erred in considering evidence introduced by the defendant after the plaintiff rested his case in determining the defendant's motion for a directed verdict. In determining a motion for a directed verdict, it is the duty of the trial court to submit an essential issue to the jury when there is sufficient evidence, if believed, relating to that issue to permit reasonable *minds* to reach different conclusions on that issue; however, if all the evidence relating to an essential issue is sufficient to permit only a conclusion by reasonable minds against a party, after construing the evidence most favorable to that party, it is the duty of the trial court to instruct a finding or direct a verdict on that issue against that party. *Helmick v. Republican-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 74-75; *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 219-220; Civ.R. 50(A)(4). A directed verdict motion is made at trial and decided on the evidence that has been admitted. *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 95. In the context of a directed verdict motion, the trial court cannot rely upon evidence that has not been admitted at trial. Civ.R. 50(A)(4); *Rustin, supra.*

*4 Appellant essentially argues that by considering the Industrial Commission file, which had not been introduced into evidence at trial, the trial court committed reversible error. However, the motion in the case at bar was not one for a directed verdict pursuant to Civ.R. 50(A)(4) but was a motion to dismiss for lack of subject matter jurisdiction, see, e.g., discussion in appellant's third assignment of error, *infra.* In determining a motion to dismiss for lack of subject matter jurisdiction, the court is not restricted to the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to hear the action. 2A Moore's Federal Practice (1985) 12-45-12-46, Para. 12.07[2.-1]; Cf., also, *American Greetings Corp. v. Cohn* (6th Cir.1988), 839 F.2d 1164. Based upon the foregoing, the trial court arguably did not err in considering the administrative claim file. Furthermore, as previously noted, to the extent that this constituted error, such error was waived by appellant's counsel's actions. Appellant's first assignment of error is overruled.

Appellant's second assignment of error asserts that the trial court erred when it granted appellees' motion to dismiss for lack of subject matter jurisdiction without allowing appellant to present "rebuttal" evidence. Appellant contends that: (1) lack of subject matter jurisdiction is an affirmative defense pursuant to Civ.R. 12(B)(1) which appellees had the burden of proving; (2) appellees failed to introduce any evidence to support the affirmative defense; and (3) the trial court erred in failing to afford appellant the opportunity to present rebuttal evidence on the subject matter jurisdiction issue.

We initially note that appellant's contention that lack of subject matter jurisdiction is an affirmative defense is without merit since such defense is not listed among those in Civ.R. 8 and it has been consistently held that once the existence of subject matter jurisdiction has been challenged, the burden of establishing it always rests on the party asserting jurisdiction. See, 2A Moore's Federal Practice (1985) 12-46, Para. 12.07[2.-1], analyzing the analogous Fed.R.Civ.P. 12(b)(1). We will consider appellant's second contention regarding appellees' alleged failure to introduce evidence in the context of appellant's third assignment of error.

Appellant argues that the trial court erred in failing to afford him the opportunity to present "rebuttal"

evidence on the jurisdiction issue. Once lack of jurisdiction is raised by a party, the party asserting jurisdiction must be given an opportunity to be heard before dismissal is ordered. 2A Moore's Federal Practice (1985) 12-45, Para. 12.07[2.-1]. In the case at bar, appellant was afforded the opportunity to argue against the dismissal. Moreover, at trial, appellant's counsel did not offer any evidence even though it was appellant's burden to establish that the trial court had jurisdiction over his claim for an additional psychological condition. Instead, appellant's counsel explicitly advised the trial court that he had "nothing further to add." There is nothing in the record of the trial to indicate that the trial court precluded appellant from offering evidence. Appellant's second assignment of error is overruled.

*5 Appellant's third assignment of error asserts that the trial court erred when it found that he knew or should have known of his industrially caused psychiatric condition at least two years prior to his filing a motion with the Industrial Commission for an allowance of the condition. R.C. 4123.84 provides, in pertinent part, as follows:

(A) In all cases of injury or death, claims for compensation or benefits for the specific part or parts of the body injured shall be forever barred unless, within two years after the injury or death:

(1) Written notice of the specific part or parts of the body claimed to have been injured has been made to the industrial commission or the bureau of workers' compensation:

The commission has continuing jurisdiction as set forth in section 4123.52 of the Revised Code over a claim which meets the requirement of this section, including jurisdiction to award compensation or benefits for loss or impairment of bodily functions developing in a part or parts of the body not specified pursuant to division (A)(1) of this section, if the commission finds that the loss or impairment of bodily functions was due to and a result of or a residual of the injury to one of the parts of the body set forth in the written notice filed pursuant to division (A)(1) of this section.

R.C. 4123.84 requires a claimant to file a motion for an additional allowance within two years of the time the claimant knew or should have known of the additional condition. *Clementi v. Wean United, Inc.* (1988), 39 Ohio St.3d 342, syllabus; *Edwards v. AT & T Technologies, Inc.* (1989), 42 Ohio St.3d 119. At first glance, R.C. 4123.84 appears to be in the form of a statute of limitations. Indeed, it is included under the Revised Code heading "LIMITATION OF ACTION." It has been held that where the bar of the statute of limitations is not presented as a defense either by motion before pleading pursuant to Civ.R. 12(B), or affirmatively in a responsive pleading pursuant to Civ.R. 8(C), or by amendment made under Civ.R. 15, then the defense is waived under Civ.R. 12(H), and a motion raising the defense at trial is not timely made. *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, syllabus; *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1; *Spies v. Gibson* (1982), 8 Ohio App.3d 213. Therefore, if R.C. 4123.84 is a statute of limitations under the circumstances of the case at bar, appellees arguably waived such defense by waiting to raise it at trial.

Conversely, if failure of an employee to comply with R.C. 4123.84 for so-called "flow-through" conditions addresses subject matter jurisdiction, such dismissal motion could be properly raised at anytime. Civ.R. 12(H)(3); *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236; *State, ex rel. Lawrence Development Co., v. Weir* (1983), 11 Ohio App.3d 96. R.C. 4123.52 provides as follows:

The jurisdiction of the industrial commission over each case shall be continuing, and the commission may make such modification or change with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made ... unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84... of the Revised Code.

*6 The essential requirement of R.C. 4123.84 and 4123.52 is that an injured employee must give written notice within two years of the specific part or parts of the body he claims to have been injured. *Mikoch v. Sherwin-Williams Co.* (1988), 45 Ohio App.3d 1. These sections of the Revised Code appear to qualify the right of the action for allowances of additional conditions rather than merely provide a time limitation on the remedy since it is the continuing *jurisdiction* of the Industrial Commission as well as the *jurisdiction* of trial courts to hear the action *de novo* that are limited. Cf., e.g., *Taylor v. Black & Decker Mfg. Co.* (1984), 21 Ohio App.3d 186; *Sechler v. Krouse* (1978), 56 Ohio St.2d 185; see, also, Basics of Ohio Workers' Compensation Law (1990), Ohio CLE Institute, 4.7-8(B), describing R.C.

4123.84's requirement for additional condition claims as an "element" of a compensable injury. Based upon the foregoing, appellees' motion to dismiss was properly raised on the basis of lack of subject matter jurisdiction.

Contrary to appellant's contention that no evidence was introduced by appellees to support their dismissal motion, we again emphasize that appellant bore the burden of proving compliance with R.C. 4123.52 and 4123.84 once appellees raised the issue. Moore's Federal Practice, *supra*. Moreover, contrary to appellant's argument that the trial court could not have granted appellees' motion to dismiss for lack of subject matter jurisdiction where the evidence was "conflicting" concerning appellant's knowledge about causation, any factual dispute upon which the existence of jurisdiction may turn is for the court alone, and not a jury, to determine. 2A Moore's Federal Practice (1985) 12-49, Para. 12.07[2.-1]. Appellate review of such a factual determination is generally on a clearly erroneous basis. *Id.; Eaton v. Dorchester Development, Inc.* (11th Cir.1982), 692 F.2d 727 (both treatise and case analyzing analogous Fed.R.Civ.P. 12(b)(1).

In the instant case, appellant's own notice of appeal as well as his counsel's admission in his March 9, 1990 motion for a mistrial or, in the alternative, motion for a new trial, that the Industrial Commission's first "written notice" of appellant's claim of additional psychological conditions flowing from his 1964 leg injury was his May 4, 1987 application for additional compensation. Additionally, appellant explicitly testified at trial that in 1984, he knew that his anxiety and depression were caused by his 1964 leg injury. Therefore, the trial court had sufficient evidence before it to conclude that it lacked subject matter jurisdiction in that appellant had failed to comply with the requirements of R.C. 4123.84.[2] *Clementi, supra.* Hence, we find that the trial court did not commit error, let alone "clear" error, in granting appellees' motion to dismiss. Appellant's third assignment of error is overruled.

*7 Appellant's fourth assignment of error asserts that the trial court erred in overruling his motion for a mistrial or, in the alternative, motion for a new trial. A motion for a mistrial as well as a motion for a new trial based other than upon legal error are committed to the discretion of the trial court, and an appellate court will not reverse the trial court's rulings on these motions absent an abuse of discretion. See, e.g., *Krejci v. Halak* (1986), 34 Ohio App.3d 1; *State v. Scott* (1986), 26 Ohio St.3d 92, 96. The term "Abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

Appellant incorporates his prior arguments under his first three assignments of error in support of his fourth assignment of error. For the reasons set forth in our disposition of appellant's first three assignments of error, the trial court did not abuse its sound discretion in overruling appellant's motion for a mistrial or, in the alternative, motion for a new trial. Furthermore, we discern no error of law committed by the trial court in granting appellees' dismissal motion. Accordingly, for the foregoing reasons, appellant's fourth assignment of error is overruled, and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

STEPHENSON, P.J., and STAPLETON, J., concur in judgment and opinion.
Hon. WILLIAM B. STAPLETON, Judge of the Brown County Court of Common Pleas sitting by assignment in the Fourth District Court of Appeals.

FN1. Appellee Andrew Bihl & Sons, the employer of appellant when he suffered his leg injury, did not file an appellate brief.

FN2. Appellant relies upon inferences drawn from filed physician's depositions as well as the 1984 Portsmouth Receiving Hospital narrative summary to suggest that since appellant did not complain of depression and anxiety from his 1964 leg injury but merely depression and anxiety associated with his unemployment, he lacked the requisite subjective or objective knowledge that his additional psychological conditions were caused by his 1964 leg injury in 1984.

Ohio App.,1991.
Linkous v. Mayfield
Not Reported in N.E.2d, 1991 WL 100358 (Ohio App. 4 Dist.)

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EXHIBIT 3

H

Collins v. Hamilton County Dept. of Human Services
Ohio App. 10 Dist.,2002.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Terence COLLINS, Appellant-Appellee,
v.
HAMILTON COUNTY DEPARTMENT OF HUMAN SERVICES, Appellee-Appellant.
No. 01AP-1194.

March 21, 2002.

Employee of county department of human services appealed State Personnel Board of Review's (SPBR) order that affirmed his termination. The Court of Common Pleas, Franklin County, reversed. Department appealed. The Court of Appeals, Bryant, J., held that jurisdiction was lacking over employee's appeal.

Judgment vacated and case remanded with instructions.

West Headnotes

Officers and Public Employees 283 ⇐72.41(1)

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(H) Proceedings for Removal, Suspension, or Other Discipline
283I(H)3 Judicial Review
283k72.41 Decisions Reviewable; Forum for Review
283k72.41(1) k. In General. Most Cited Cases

Court of Common Pleas lacked jurisdiction over classified civil service employee's appeal of State Personnel Board of Review's (SPBR) order that affirmed his termination from county department of human services, as employee did not file appeal in county of his residence. R.C. § 124.34(A), (B).

Appeal from the Franklin County Court of Common Pleas.

Newman & Meeks Co., L.P.A., and Robert B. Newman, for Terence Collins.

Michael K. Allen, Hamilton County Prosecuting Attorney, and Kathleen H. Bailey, for Hamilton County Department of Human Services.

OPINION

BRYANT, J.

*1 Appellee-appellant, Hamilton County Department of Human Services ("HCDHS"), appeals from a judgment of the Franklin County Court of Common Pleas that reversed an order of the State Personnel Board of Review ("SPBR") affirming the termination from employment of appellant-appellee, Terence Collins, and modified the discipline the SPBR imposed. Because the common pleas court lacked jurisdiction over Collins' appeal, we vacate the judgment of the common pleas court.

Effective July 24, 1999, HCDHS, pursuant to former R.C. 124.34, removed Collins from his supervisory position with HCDHS due to alleged gross misconduct, neglect of duty, failure of good behavior, inefficiency, immoral conduct, malfeasance and nonfeasance. HCDHS alleged that during normal working hours Collins accessed inappropriate websites, including pornographic and sexually explicit sites and horse racing sites, unrelated to his job and in violation of HCDHS policy. According to HCDHS, Collins' access to the websites was excessive, not occasional or incidental.

Collins timely appealed to the SPBR. Following a hearing, the hearing officer issued a report and recommended that Collins' appeal be denied. Collins filed objections to the report and recommendation. In an order *nunc pro tunc*, dated September 20, 2000, the SPBR adopted the report and recommendation, and affirmed Collins' removal.

Collins timely appealed to the Franklin County Court of Common Pleas. The common pleas court reversed the SPBR's order affirming Collins' termination, modified the sanction to sixty days without pay, and ordered Collins to be reinstated after the sixtyday period with all back pay and any other benefits to which Collins was entitled. HCDHS appeals, and assigns two errors:

First Assignment of Error

THE LOWER COURT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER COLLINS' APPEAL[.]

Second Assignment of Error

THE LOWER COURT ERRED BY REVERSING IN PART THE ORDER OF THE STATE PERSONNEL BOARD OF REVIEW AND IN MODIFYING THE DISCIPLINE IMPOSED BECAUSE SAID ORDER IS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND IS IN ACCORDANCE WITH LAW[.]

HCDHS' first assignment of error asserts the common pleas court lacked subject matter jurisdiction over Collins' appeal. "Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits. * * * "*Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 290 N.E.2d 841. See, also, *Valmac Industries, Inc. v. Ecotech Mach., Inc.* (2000), 137 Ohio App.3d 408, 411-412, 738 N.E.2d 873 ("Subject matter jurisdiction refers to the authority that a court has to hear the particular claim brought to it and to grant the relief requested"). If a court lacks subject matter jurisdiction and renders a judgment, that judgment is void *ab initio*. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus. Moreover, "[w]here a court has no jurisdiction over the subject matter of an action or an appeal, a challenge to jurisdiction on such ground may effectively be made for the first time on appeal in a reviewing court."*Jenkins v. Keller* (1966), 6 Ohio St.2d 122, 123, 216 N.E.2d 379, paragraph five of the syllabus. See, also, Civ.R. 12(H)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action").

*2 R.C. 124.34 addresses the removal of an employee in the classified service of a county. Former R.C. 124.34 provided that an employee who is removed may appeal to the SPBR and may appeal the SPBR's decision to the court of common pleas of the county in which the employee resides. See former R.C. 124.34(A) and (B).

The Ohio Supreme Court in *Davis v. Bd. of Review* (1980), 64 Ohio St.2d 102, 413 N.E.2d 816, syllabus, interpreted its earlier decision of *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 321 N.E.2d 603 and construed R.C. 119.12 with 124.34. It held that "[a] member of the classified civil service, aggrieved by a decision of the State Personnel Board of Review affirming his removal or reduction in pay for disciplinary reasons, must bring his appeal, if at all, in the Court of Common Pleas of the county of his residence."HCDHS contends Collins resides in Hamilton County, not Franklin County, making Hamilton County the appropriate forum for an appeal of the SPBR's decision.

"[I]t has been consistently held that once the existence of subject matter jurisdiction has been challenged, the burden of establishing it always rests on the party asserting jurisdiction."*Linkous v. Mayfield* (June 4, 1991), Scioto App. No. CA1894, unreported. As the party who sought relief in Franklin County Common Pleas Court, Collins had the burden of establishing proper jurisdiction.

The record does not support Collins' residence is in Franklin County. Former Ohio Adm.Code 124-5-01(A)(1) required that the notice of appeal to the SPBR should include an appellant's name, address, and telephone number. Here, in a written notice of appeal to the SPBR dated July 28, 1999, Collins' attorney advised that "Mr. Collins' address/phone number is 2704 East Towers Drive # 203, Cincinnati, OH 45238."See, also, Notice of Appeal to Franklin County Court of Common Pleas (indicating in handwritten notation that Collins' address is "2704 E. Towers Dr[.] Apt 203[,] Cincinnati, 45238"). Because Collins is not a Franklin County resident, Collins properly could not have appealed the decision of the SPBR to the common pleas court of Franklin County.

We recognize that "[o]nce lack of jurisdiction is raised by a party, the party asserting jurisdiction must be given an opportunity to be heard before dismissal is ordered."*Linkous, supra*.Here, Collins responded to HCDHS' jurisdictional contentions in his brief. Collins stated "[n]o motion to dismiss was made in the trial court. The record is complete in this court. There are no factual predicates in support of Appellant's arguments relating to Appellee Mr. Collins' residency. The record is silent as to his residency of Mr. Collins' appeal to Franklin County or now. This court cannot decide this issue based on the speculation of counsel. The Appellant has elected not to raise this issue and has no factual basis in the record for doing so now."(Collins' Brief, 4.)

As noted, however, the record establishes Collins' residency outside Franklin County. Because Collins

does not dispute that fact, but instead responds based on a misinterpretation of the record, his arguments are not well-taken. By contrast, had Collins responded with a basis for finding the requisite jurisdiction in the Franklin County Common Pleas Court, then a remand for a hearing on the issue arguably may have been appropriate. In the absence of any indication from Collins that he may have resided in Franklin County, remanding the matter for a hearing on the issue would be a vain act. Accordingly, HCDHS' first assignment of error is sustained. Moreover, because the Franklin County Court of Common Pleas lacked subject matter jurisdiction, rendering its judgment void *ab initio*, HCDHS' second assignment of error is moot.

*3 Having sustained HCDHS' first assignment of error, rendering moot its second assignment of error, we vacate the judgment of the common pleas court and remand this matter to the Franklin County Common Pleas Court with instructions to dismiss the case for lack of subject matter jurisdiction.

Judgment vacated and case remanded with instructions.

LAZARUS and PETREE, JJ., concur.
Ohio App. 10 Dist.,2002.
Collins v. Hamilton County Dept. of Human Services
Not Reported in N.E.2d, 2002 WL 433671 (Ohio App. 10 Dist.), 2002 -Ohio- 1325

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