

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Complaint of)
Frank Khunac,)
Complainant,)
v.)
CenturyTel of Ohio, Inc.,)
Respondent.)

Case No. 08-949-TP-CSS

RESPONDENT'S ANSWER AND MOTION TO DISMISS

Respondent CenturyTel of Ohio, Inc. (CenturyTel) for its answer to the Complaint, states as follows:

First Defense

1. CenturyTel denies the allegations contained in the sole paragraph of the Complaint.

Second Defense

2. The Commission lacks jurisdiction to hear this case.

Third Defense

3. Complainant fails to state reasonable grounds for his Complaint under R.C. 4905.26.

Fourth Defense

4. Complainant fails to state a claim for which relief can be granted.

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Fifth Defense

5. The Commission cannot award monetary damages as requested in the Complaint.

Motion to Dismiss

CenturyTel moves that the Complaint be dismissed because (1) the Commission lacks jurisdiction over this Complaint; (2) the Complainant fails to state a claim for which relief can be granted; and (3) the Commission does not award monetary damages as requested in the Complaint. The following is a memorandum in support of the Respondent's Motion to Dismiss, pursuant to Rule 4901-1-12, O.A.C.

Memorandum in Support

1. The Commission lacks jurisdiction over this Complaint.

The Ohio Supreme Court recently set forth the following two-part test to determine whether a claim is within the Commission's exclusive jurisdiction: "First, is [the] PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility? If the answer to either question is in the negative, the claim is not within [the] PUCO's exclusive jurisdiction." *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, Slip Opinion No. 2008-Ohio-3917, at ¶¶ 12-13 (Aug. 12, 2008).

Here, the Complainant alleges that CenturyTel caused property damage when it allegedly installed an anchor on Complainant's property. At issue are the following questions: Who installed the anchor?; Was the anchor negligently installed?; And whether Complainant's property sustained damage as a result of the alleged negligent installation? The PUCO's

administrative expertise is *not* required to resolve these issues; thus, the claim is not within the PUCO's exclusive jurisdiction. The issues in dispute are elements of a tort law claim that is within the exclusive jurisdiction of a relevant Ohio civil court.

The Commission does not have jurisdiction to review tort claims. The Ohio Supreme Court stated "that the commission has no power to judicially ascertain and determine legal rights and liabilities, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Ohio Constitution. Thus, claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission."¹

The Ohio Supreme Court settled the question of whether the Commission can hear tort or contract causes of action in 1921. The court ruled that, even in instances where one of the litigants is a public utility regulated by the Commission, the Commission does not have the power to decide tort and contract claims.² In *Village of New Bremen*, a gas company, after exhausting its supply of natural gas, sought to withdraw gas service to the municipalities of New Bremen and Minster. The parties, however, had entered into a contract, which set the rate for the price of gas in exchange for the gas company's commitment to supply gas for three years and to

1 *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 195, 383 N.E.2d 575 (Ohio 1978) (summarizing Ohio Supreme Court's decision in *Village of New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31, 132 N.E. 162).

2 See *Village of New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 132 N.E. 162 (Ohio 1921). This decision is still good law, and it has been cited numerous times in support of the proposition that the Commission does not have the power to rule on tort and contract claims. See also *Kohli v. Pub. Util. Comm'n of Ohio*, 479 N.E.2d 840, 842, 18 Ohio St.3d 12, 14 (Ohio 1985); *Dayton Communications Corp. v. Pub. Util. Comm'n of Ohio*, 414 N.E.2d 1051, 1052, 64 Ohio St.2d 302, 304 (Ohio 1980); *State ex rel. OhioPower Co. v. Harnishfeger*, 412 N.E.2d 395, 396, 64 Ohio St.2d 9, 10 (Ohio 1980); *Milligan v. Ohio Bell Tel. Co.*, 383 N.E.2d 575, 578, 56 Ohio St.2d 191, 195 (Ohio 1978); *State ex rel. Dayton Power & Light Co. v. Riley*, 373 N.E.2d 385, 386, 53 Ohio St.2d 168, 169 (Ohio 1978).

sell the village portions of its pipe lines if the it was released from its duty to furnish gas by either acts of the parties or by judgment or decree of a court of competent jurisdiction.

Once the village learned of the gas company's desire to withdraw service, it brought suit in the Court of Common Pleas of Auglaize County to enjoin the gas company and its owner from discontinuing the gas service and dismantling its equipment. One month later, the gas company filed an application to withdraw service with the Commission, pursuant to the Miller Act.³ The Commission ruled in favor of the gas company and authorized the permanent abandonment of the facilities in and about the village. The gas company contended that the Commission's order amounted to a judicial decree releasing the gas company from furnishing gas to the village. The village appealed the Commission's order to the Ohio Supreme Court, which reversed the Commission.

The Ohio Supreme Court stated in no uncertain terms, "The Public Utilities Commission is an administrative board, and only has such authority as the statute creating it has given it. This court has repeatedly declared that the powers of the commission are conferred by statute, and that it has no other authority than that thus vested in it." *Village of New Bremen* at 30. The court continued, "The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the Constitution (article 4). The Public Utilities [C]ommission is in no sense a court." *Id.* Further, the court stated, "It has no power to

3 Section 504-3 of the Miller Act "provided that any public utility desiring to abandon or close, or have abandoned, withdrawn, or closed for service, all or any part of any such line or lines, shall first make application to the Public Utilities Commission in writing; that upon the hearing of the application the commission shall ascertain the facts and make its finding thereon, and, if such facts satisfy the commission that the proposed abandonment, withdrawal, or closing of service is reasonable, having due regard for the welfare of the public and the cost of operating the service, they may allow the same." *Village of New Bremen* at 29-30.

judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights. The Miller Act does not purport to confer such power upon the Public Utilities Commission, and if it did so in any of its terms it would be to that extent invalid.” *Id.* at 30-31. Here, similar to *Village of New Bremen*, the Commission lacks the statutory and constitutional power to hear Complainant’s property-related tort claim.

In sum, the Ohio Supreme Court has recognized that “it is readily apparent that the General Assembly has provided for commission oversight of [public utilities], including the right to adjudicate complaints involving customer rates and services.”⁴ The entire statutory scheme of Chapter 4905 expresses the intention of the General Assembly that the Commission’s expertise be utilized when there is a dispute concerning customer service or rates.⁵ Consequently, complaints as to service and rates should come before the exclusive jurisdiction of the Commission, not common pleas court judges. *See* 4905.26. It follows that courts should ferret out complaints concerning rates and service to the Commission, which the General Assembly determined has the expertise to properly resolve these types of disputes, not tort and contract claims that are better dealt with by judges. Similarly, the Commission must dismiss tort and contract claims from complaint cases and only exercise jurisdiction over customer complaints concerning rates and service. Complainant’s property-related tort claim, which is the sole basis for his complaint, must be dismissed.

⁴ *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 151, 573 N.E.2d 655 (Ohio 1991).
⁵ *See Northern Ohio Tel. Co., v. Winter*, 23 Ohio St.2d 6, 9, 260 N.E.2d 827, 829 (Ohio 1970).

2. Complainant Fails to State a Claim for Which Relief Can Be Granted.

Complainant presumably files this Complaint pursuant to section 4905.26, Ohio Rev. Code.⁶ But as broad as section 4905.26 is as to the type of complaint the Commission will hear, Complainant fails to allege any connection between his property damage claim and CenturyTel's rates or service. As a result, the Complaint fails to state a claim for which relief can be granted, and the Complaint should be dismissed.

3. The Commission Cannot Award Money Damages As Requested In the Complaint.

The Commission has established a long-standing precedent that it will not entertain claims for money damages or civil damages. It has been repeatedly stated that "the Commission is without jurisdiction to order relief in the form of monetary damages, to the extent the complaints seek monetary damages." *Allied Roofing Co., Inc. v. Ameritech*, Case No. 95-1150-EL-CSS, 1996 PUC LEXIS 3, * 2, Entry (Jan. 22, 1996); "In regards to the complainant's request for treble damages, the Attorney Examiner notes that the Commission has no power to grant such money damages." *City of Parma v. Cleveland Elec. Illuminating Co.*, Case No. 95-579-EL-CSS, 1994 PUC LEXIS 924, *3, Entry (Dec. 4, 1995); "Complainant requests monetary damages for destruction of his property The Commission does not have that authority to award such

⁶ In relevant part, Section 4905.26, Ohio Rev. Code, states: "Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of."

civil damages as that requested." *McDaniel v. Dayton Power and Light Co.*, Case No. 94-1634-EL-CSS, 1994 PUC LEXIS 913, *2, Entry (Nov. 8, 1994); *see also*, *Kohli v. Pub. Util. Comm'n*, 18 Ohio St.3d 12 (1985) (stating PUCO was not the appropriate forum for a damage action). Therefore, the Complainant's claims for monetary damages must be dismissed.

WHEREFORE, CenturyTel respectfully answers and requests that this matter be dismissed with prejudice and that CenturyTel be given such other relief that the law, equity, and justice require.

Dated: August 22, 2008

Respectfully submitted,

Andrew C. Emerson /DRC

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CERTIFICATE OF SERVICE

I certify that I served a copy of CenturyTel of Ohio, Inc.'s Answer and Motion to Dismiss on Mr. Frank Klunac, 45695 North Ridge Rd., Amherst Twp., Ohio 44001, by ordinary U.S. mail, postage prepaid, on August 22, 2008.


Daniel R. Conway