

FILE

**FirstEnergy**

76 South Main Street  
Akron, Ohio 44308

Carrie M. Dunn  
Attorney

330-761-2352  
Fax: 330-384-3875

January 21, 2011

*Via Federal Express  
and Facsimile (614-466-0313)*

Ms. Renee J. Jenkins  
Director, Administration Department  
Secretary to the Commission  
Docketing Division  
The Public Utilities Commission of Ohio  
180 Broad Street  
Columbus, OH 43215-3793

PUCO

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RECEIVED DOCKETING DIV

Dear Ms. Jenkins:

**Re: *Motion to Dismiss and Memorandum in Support of Ohio Edison Company  
Case No. 08-0949-TP-CSS***

Enclosed for filing, please find the original and twelve (12) copies of the *Motion to Dismiss and Memorandum in Support of Ohio Edison Company* regarding the above-referenced case. Please file the enclosed *Motion and Memorandum*, time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,



Carrie M. Dunn

CMD/jhp  
Enclosures  
cc: Parties of Record

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

Frank Klanac	)	
	)	
Complainant,	)	
	)	
vs.	)	Case No. 08-949-TP-CSS
	)	
CenturyTel of Ohio, Inc.	)	
	)	
Respondent.	)	

**MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF  
OHIO EDISON COMPANY**

Pursuant to O.A.C. §4901-9-01(C), Respondent Ohio Edison Company ("Ohio Edison") respectfully moves the Public Utilities Commission of Ohio ("Commission") for a dismissal of Ohio Edison as a party respondent in this case based on a failure of reasonable grounds against Ohio Edison in the complaint and lack of subject matter jurisdiction. On August 19, 2009, a hearing was held in this case. Complainant Frank Klanac and Respondent CenturyTel of Ohio, Inc. participated in the hearing. (August 19, 2009 transcript.) On December 20, 2010, the Attorney Examiner found that, "according to the testimony of the parties at hearing, items of physical plant belonging to Ohio Edison, including the power pole in backyard of the complainant's residence, have a direct or indirect bearing on the issue to be decided in the complaint." (December 20, 2010 Order at ¶2.) Therefore, the Attorney Examiner joined Ohio Edison as a party respondent. (*Id.*) The Attorney Examiner ordered Ohio Edison to file an answer to the Complaint as well as a response to a data request requesting "all entities with attachment on its power pole in the backyard of the complainant's residence." (*Id.* at ¶3.) The

Attorney Examiner also ordered a reopening of the hearing in this matter for February 17, 2011. (*Id.* at ¶4.) Because the Complaint fails to state reasonable grounds against Ohio Edison and because the Commission lacks subject matter jurisdiction over the relief requested in the Complaint, the Commission should dismiss Ohio Edison from this case and not require Ohio Edison to appear or present witnesses at the February 17, 2011 hearing.

## **I. STANDARD OF REVIEW**

A complaint under R.C. Section 4905.26 that fails to set forth reasonable grounds must be dismissed. R.C. § 4905.26. Filing a complaint does not automatically trigger a hearing under the statute. “Reasonable grounds for complaint must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing, pursuant to R.C. 4905.26 . . . .” *Ohio Util. Co. v. Pub. Util. Comm’n* (1979), 58 Ohio St.2d 153, syl. ¶ 2. If the facts alleged, even assuming they are true, do not set forth a cognizable claim, the complaint must be dismissed. *E.g., Lucas Cty. Comm’ns v. Pub. Util. Comm’n* (1997), 80 Ohio St.3d 344, 347.

## **II. THE COMPLAINT FAILS TO STATE REASONABLE GROUNDS AGAINST OHIO EDISON.**

The Commission should dismiss the Complaint against Ohio Edison because it fails to state reasonable grounds against it. The Commission “view[s] ‘reasonable grounds’ as necessarily containing allegations of the receipt of inadequate service.” *In the Matter of the Petition of J. Earl McCormick, et al. v. The Ohio Bell Tel. Co., et al.* (Sept. 27, 1990), PUCO Case No. 90-1256-TP-PEX, Entry ¶ 3. A complaint that “fails to allege any facts which would support a finding of inadequate service” does “not state reasonable grounds” and therefore “should be dismissed.” *Id.* To state reasonable grounds, a complaint must allege “specific incidents of inadequate service” or “that a customer or group of customers has/have been

provided inadequate service as a result of particular actions/inactions on the part of a public utility.” *In the Matter of the Complaint of Ohio CARES v. FirstEnergy Corp.* (May 19, 1999), PUCO Case No. 98-1616-EL-CSS, Entry ¶ 7. Similarly, complaints containing “no allegation of a violation of any statute, Commission rule, or order” are also subject to dismissal. *Id.*

The Complaint alleges that CenturyTel’s “anchor from their two down guys that are attached [to the pole] is drilled through [complainant’s drain tile].” (Complaint.) The Complaint fails to state reasonable grounds in that it fails to allege any facts supporting a claim of inadequate service and does not allege that Ohio Edison has violated any statute, tariff provision, or any rule, regulation, or order of the Commission. While Ohio Edison does own the pole referenced (by implication) in the Complaint, there is no allegation in the Complaint that the anchor or down guys belong to Ohio Edison. Indeed, as demonstrated by the response to the Attorney Examiner’s data request contained in the December 20, 2010 Order, Ohio Edison does not own the anchor referenced in the Complaint and also does not have knowledge as to who owns the anchor referenced in the Complaint. Also, based on the transcript from the August 19, 2009 hearing, there is no evidence that Ohio Edison owns the anchor at issue in this case. Lastly, the Complaint seeks damages against CenturyTel, not Ohio Edison. Therefore, the Complaint fails to state reasonable grounds for complaint against Ohio Edison. As such, the Commission should dismiss Ohio Edison from this case.

### **III. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO GRANT THE RELIEF REQUESTED IN THE COMPLAINT.**

The Complaint asserts that CenturyTel is liable to Complainant for damages. Complainant seeks a form of relief beyond the jurisdiction of this Commission because the Commission is without jurisdiction to award damages. *See In the Matter of the Complaint of Bart’s Cleaners, Inc. v. Ctenergy Communications Co.* (July 22, 2004),

PUCO Case No. 04-127-TP-CSS, Entry ¶ 9 (holding that "a request for damages . . . is beyond the jurisdiction of this Commission"). Thus, the Complaint against Ohio Edison should be dismissed for lack of subject matter jurisdiction.

#### IV. CONCLUSION

For all of those foregoing reasons, Ohio Edison respectfully requests that the Commission dismiss Complainant Frank Klanac's Complaint against it.

Respectfully submitted,



Carrie M. Dunn (#0076952)  
Attorney  
FirstEnergy Service Company  
76 South Main Street  
Akron, Ohio 44308  
Phone: 330-761-2352  
Fax: 330-384-3875  
On behalf of Ohio Edison Company

#### CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Answer of Ohio Edison Company was served by regular U.S. Mail, postage prepaid, upon Frank Klanac, 45695 North Ridge Road, Amherst Twp., Ohio 44001 and Joseph R. Stewart, counsel for Respondent CenturyTel of Ohio, Inc., 50 W. Broad St., Ste. 3600, Columbus, Ohio 43215.



Carrie M. Dunn  
Attorney