

PUBLIC UTILITIES COMMISSION OF OHIO

Lynne Gwynn,

Complainant,

v.

The Cleveland Electric Illuminating Company,

Respondent.

) Case No. 13-666-EL-CSS
)
) **RESPONDENT, THE CLEVELAND**
) **ELECTRIC ILLUMINATING**
) **COMPANY'S, MOTION TO DISMISS**
) **WITH MEMORANDUM IN**
) **SUPPORT**
)
)
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Respondent, The Cleveland Electric Illuminating Company (incorrectly referred to in the Complaint as "Illuminating Company"), moves to dismiss Complainant Lynne Gwynn's Complaint for the reason that the Commission lacks jurisdiction over the property damage claim

asserted in this case. Furthermore, the Complaint fails to state reasonable grounds for relief in that it fails to allege any facts supporting a claim of inadequate service and does not allege that The Cleveland Electric Illuminating Company has violated any statute, tariff provision, or any rule, regulations, or order of the Commission. For all these reasons, explained in detail in the attached Memorandum in Support, the Commission should dismiss this case.

Respectfully submitted,

/s/ Denise M. Hasbrook

Denise M. Hasbrook (0004798)

Emily Ciecka Wilcheck (0077895)

Carrie M. Dunn (0076952)

*Counsel for The Cleveland Electric
Illuminating Company*

MEMORANDUM IN SUPPORT

I. FACTS ALLEGED IN THE COMPLAINT

This case involves Complainant, Lynne Gwynn's request for damages to cover the cost of repairing her driveway. Complainant alleges that Respondent, The Cleveland Electric Illuminating Company ("CEI" or "the Company"), notified her in June of 2011 that three trees in her back yard would need to be cut. Complainant claims that Eco Tree Service came to her property and removed one tree in November of 2011. Complainant further alleges that Eco Tree Service returned in January of 2012 and removed the remaining two trees when the ground was wet and it was raining. Complainant alleges that her driveway was damaged by Eco Tree. Specifically, Complainant contends that her driveway cracked and sunk by the house, causing water to puddle. Complainant estimates the cost to repair such damages in the range of \$7,500.00 to \$8,120.00. The Commission lacks jurisdiction to decide this claim.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW

Under R.C. 4905.26, a complaint that fails to set forth reasonable grounds must be dismissed. The mere act of filing a complaint does not automatically trigger a hearing before the Commission. Rather, "[r]easonable grounds for the 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. v. Pub. Util. Com'n* (1979), 58 Ohio St.2d, 153, paragraph 2 of the syllabus. Moreover, the Commission may exercise only the jurisdiction conferred upon it by statute. *Lucas County Com'rs. V. Pub. Util. Com'n of Ohio* (1997), 80 Ohio St.3d 344, 347.

In this case, the Commission lacks jurisdiction because Complainant's property damage claim does not relate to rates and is not service related. Rather, the Complaint at best sounds in pure tort. The Commission lacks the authority to judicially determine legal rights and liability under such claims for which jurisdiction lies with the common pleas court. *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶16 (citing *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31 (1923)). Furthermore, the Complaint should be dismissed because the Complainant has failed to show reasonable grounds to pursue the action.

B. THE COMMISSION DOES NOT HAVE JURISDICTION OVER THIS DISPUTE.

The General Assembly created the Public Utilities Commission of Ohio to regulate all utility services. This includes the exclusive right to adjudicate customer complaints involving customer rates and services. *State ex rel. Columbus Southern Power Co. v. Fais*, 117 Ohio St.3d 340, 2008-Ohio-849, ¶ 28; *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 151.

In determining whether a matter falls within the exclusive, initial jurisdiction of the Commission, it is the substance of the claim that controls rather than the nature of the allegations. *Allstate Ins. Co.*, 2008-Ohio-3917 at ¶9. In explaining the Commission's exclusive jurisdiction, the Ohio Supreme Court has held that:

“The General Assembly has created a broad and complete statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. **As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49.**” (Emphasis added). *Hull v. Columbia Gas of Ohio*, 110 Ohio St.3d 96, 2006-Ohio-3666, ¶ 15 (quoting *Kazmaier*, 61 Ohio St.3d 147, 150-153).

R.C. 4905.26 provides, in part, that:

“Upon complaint in writing against any public utility by any person, firm, or corporation, * * * that any * * * charge * * * or service * * * 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 the 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 no less than fifteen days before hearing and shall state the matter complained of. The commission may adjourn such hearing from time to time. (Emphasis added). R.C. 4905.26.

Thus, the Commission has exclusive, initial jurisdiction over claims involving customer rates and services, and all claims relating to conduct covered by a tariff filed with the Commission. *Kazmaier*, 61 Ohio St.3d at 153; *Fais*, 2008-Ohio-849, ¶28 (citing *Hull*, 2006-Ohio-3666, at ¶¶40-41). The Ohio Supreme Court adopted a two-part test in the form of two questions to determine whether the Commission has jurisdiction to decide a cause of action. *Allstate*, 2008-Ohio-3917 at ¶11. The first question is whether the Commission’s expertise is required to resolve the dispute. *Id.* at ¶12. The second question is whether the act complained of is normally authorized by the utility. *Id.* If the answer to either question is in the negative, the claim is not within the Commission’s jurisdiction. *Id.* at ¶13.

Here, Complainant seeks to recover for alleged property damage to her driveway which she claims occurred when Eco Tree Service came to her house to remove trees in January of 2012 while the ground was wet. Such allegation, even accepted as true, does not relate to customer rates and services and instead alleges liability on the part of CEI for the property damage allegedly caused by Eco Tree Service.

Referring to the two jurisdictional questions set forth in *Allstate*, neither inquiry results in a positive answer to confer the Commission's jurisdiction in this case. First, the Commission's specialized expertise is not required to resolve this dispute. This claim at best involves an allegation that the Company's tree contractor caused damage to Complainant's driveway. This issue does not require consideration of any statutes and regulations administered and enforced by the Commission. As such, the expertise of the PUCO is not necessary to resolve this dispute. See also, *In re Matter of the Complaint of Campolieti v. The Cleveland Electric Illuminating Company* (Aug. 15, 2012), PUCO Case No. 12-1184-EL-CSS, Entry ¶13. Thus the answer to the threshold jurisdictional question as to whether the Commission's specialized expertise is required is "no" and the second question as to whether the act was authorized by the utility need not be reached.

Even if this were not the case, the answer to the second question is also "no" because this claim does not involve an act that is normally authorized by the utility. Complainant fails to rely or cite to any tariffs, guidelines or regular practices of the Respondent that caused the alleged damage to the driveway here. Accepting the allegations as true, at most, Complainant has asserted that a contractor (no a utility) caused damage to her driveway. Such claim sounds in tort and does not fall within the Commission's jurisdiction.

Recently, the Commission dismissed a similar claim alleging property damage for lack of subject matter jurisdiction. In *In re Matter of the Complaint of Campolieti v. The Cleveland Electric Illuminating Company* (Aug. 15, 2012), PUCO Case No. 12-1184-EL-CSS, the complainant sought to recover for alleged property damage to a building which he claimed was caused by the Company's failure to properly maintain a guy pole on the property which caused damage to his gutter. The Commission held that such claim "sounds of pure tort." *Id.* In so

holding, the Commission reasoned that “the act complained of” was the Company’s alleged failure to reasonably act in a manner so as to prevent the guy pole from touching the gutter. *Id.* at Entry ¶13.

Applying the two-part test adopted by the Ohio Supreme Court in *Allstate*, the Commission in the *Campolieti* case concluded that its administrative expertise was not required because the complainant failed to allege that the contact between the pole and the gutter resulted from the Company’s failure to provide adequate service. *Id.* Moreover, there was no allegation that the contact between the pole and the gutter resulted in a violation of any statute, rule, regulation or Commission order. *Id.* As a result, the first part of the Supreme Court’s two-part test was not met, and the claim was not within the Commission’s jurisdiction. *Id.* Having answered this first question in the negative, the Commission held that there was no need to address the second question of whether the act complained of constitutes a practice normally authorized by the utility.

Complainant’s claim in this case likewise sounds of pure tort. The Complaint fails to allege inadequacy of service provided by the Company or that the rates charged by the Company are unjust, unreasonable, or unlawful. As such, the Commission’s administrative expertise is not required to resolve the issue presented in this case. Accordingly, the first part of the Supreme Court’s two-part test for jurisdiction must be answered in the negative, and this case should be dismissed for lack of subject matter jurisdiction.

C. THERE ARE NO REASONABLE GROUNDS FOR COMPLAINANT’S COMPLAINT.

The Complaint must also be dismissed because Complainant fails to state reasonable grounds for relief. The Complaint neither alleges any facts to support a finding of inadequate service nor alleges that the Company has violated a statute, tariff provision, or any rule,

regulation, or order of the Commission. “Reasonable grounds” under this standard necessarily requires that the complaint contain sufficient allegations of facts which could support a finding of inadequate service. *In the Matter of 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; *In the Matter of Complaint of Ohio CARES v. FirstEnergy Corp.* (May 19, 1999), PUCO Case No. 98-1616-EL-CSS, Entry ¶7. A complaint that does not allege specific incidents of inadequate service must be dismissed. *Id.* Additionally, a complaint that fails to allege a violation of any statute, Commission rule, or order fails to state reasonable grounds and should be dismissed. *In the Matter of Complaint of Ohio CARES v. FirstEnergy Corp.* (May 19, 1999), PUCO Case No. 98-1616-EL-CSS, Entry ¶¶6-7.

Here, the Complaint contains no allegations that the Company violated any statute, Commission rule, or order. Nor does it set forth any facts which would support a finding of inadequate service on the part of the Company. Complainant merely alleges that a contractor damaged her driveway in January of 2012. Complainant does not contend that such conduct resulted from inadequate service or that any statute, rule or order of the Commission was violated by such conduct. Therefore, there are no reasonable grounds for this Complaint to be heard before the Commission and it should be dismissed.

III. CONCLUSION

Based on the foregoing reasons, Respondent, The Cleveland Electric Illuminating Company, respectfully requests that the Commission dismiss Complainant, Lynne Gwynn's Complaint.

Respectfully submitted,

/s/ Denise M. Hasbrook

Denise M. Hasbrook (0004798)

Emily Ciecka Wilcheck (0077895)

Carrie M. Dunn (0076952)

*Counsel for The Cleveland Electric
Illuminating Company*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ordinary U.S. Mail and electronically, this 4th day of April, 2013, to the following:

Lynne Gwynn
4494 Silverdale Rd.
North Olmsted, OH 44070

Respectfully submitted,

/s/ Denise M. Hasbrook
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Summary: Motion to Dismiss with Memorandum in Support electronically filed by Mrs. Denise M. Hasbrook on behalf of The Cleveland Electric Illuminating Company