THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF JIM AND HEIDI HUMPHREY,

COMPLAINANTS,

V. CASE NO. 16-765-GA-CSS

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO,

RESPONDENT.

ENTRY

Entered in the Journal on November 30, 2016

I. SUMMARY

{¶ 1} This Entry grants The East Ohio Gas Company d/b/a Dominion East Ohio's motion to dismiss this complaint for lack of jurisdiction, pursuant to *Corrigan v. The Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, as the Commission's expertise is not required to resolve this complaint.

II. DISCUSSION

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

{¶ 3} The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined in R.C. 4905.03 and a public utility as defined in R.C. 4905.02 and, as such, is subject to the jurisdiction of this Commission.

{¶ 4} On April 11, 2016, Jim and Heidi Humphrey (Complainants) filed a complaint against DEO, alleging that, in order to facilitate the replacement of the gas line

to a neighbor's residence, DEO (through a subcontractor)[1] removed the top two sections of their driveway and replaced them with a color of concrete that does not match the color of the original driveway, resulting in a two-toned, mismatched driveway. Complainants also allege that the cover to their water meter was sealed in when DEO's subcontractor poured the concrete for their driveway and that, in order to replace the water meter, workers from the city of Marietta had to chip the concrete around the water meter cover, leaving multiple areas of damage. Referring to an Ohio Department of Insurance requirement that, according to Complainants, requires a reasonable match be affected on all repairs completed to real property in the state, Complainants request that their driveway be replaced in order to allow for a proper match of the color and texture of the concrete.

{¶ 5} Complainants seek to be compensated for the total cost of replacing their driveway, as well as any other supplemental costs that might be required to complete the replacement operation.

{¶ 6} On May 2, 2016, DEO filed its answer, denying all of the allegations of the complaint and raising several affirmative defenses, including (a) that the complaint fails to set forth reasonable grounds for complaint; (b) that a third-party subcontractor replaced the disturbed portion of Complainants' driveway; and (c) that the Commission lacks jurisdiction over the subject matter of the complaint. The answer also incorporates a motion to dismiss.

{¶ 7} On July 29, 2016, DEO filed a renewed motion to dismiss the complaint. DEO asserts in its renewed motion that this dispute does not belong before the Commission and that damage claims involving property, which are unrelated to utility service, and where the connection to a utility company is merely incidental, fall outside the Commission's jurisdiction. In support of this contention, DEO notes that the Ohio Supreme Court established a two-part test to determine if the allegations in a complaint

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1 In one of the filings submitted as part of the complaint, a letter from a DEO representative to Complainants, DEO's subcontractor is identified as R&R Pipeline, Inc. (Complaint at 2).

fall within the Commission's exclusive jurisdiction, or amount to a tort claim that does not require the Commission's administrative expertise. *Corrigan v. The Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009.

{¶ 8} As noted by DEO, under *Corrigan*, the Supreme Court of Ohio has adopted a two-part test to determine whether the issues raised in a complaint are within the exclusive jurisdiction of the Commission or whether the issues are tort or contract claims appropriate for the Ohio courts. The first part of the test asks whether the Commission's administrative expertise is required to resolve the issue in dispute. The second part of the test asks whether the act complained of constitutes a practice normally authorized by the utility. *Corrigan* at ¶ 11, citing *Pacific Indemn. Ins. Co. v. Illum. Co.*, Cuyahoga App. No. 82074, 2003-Ohio-3954, ¶ 15. If the answer to either question is in the negative, the test is not passed and the claim is not within the Commission's jurisdiction. *Corrigan* at ¶ 12, citing *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d. 824, ¶ 12-13.

{¶ 9} DEO contends that the two-part test found in *Corrigan* is not met in this case. Instead, according to DEO, the facts alleged do not relate to regulated service, but to the replacement of a segment of Complainants' driveway during property restoration.

{¶ 10} DEO also notes that the Commission recently issued a decision in *In re Garrabrant v. Ohio Power Company d/b/a AEP Ohio*, Case No. 15-401-EL-CSS (*Garrabrant*), Entry (July 20, 2016), dismissing the complaint for lack of jurisdiction under the authority of *Corrigan*. DEO states that, in *Garrabrant*, the complainant alleged that a utility "caused major property damage to a back-up generator during a meter change out." *Garrabrant* at 4. The Commission, however, pointed out that the facts alleged by the complainant in *Garrabrant* did not involve AEP Ohio's meter service, but whether the contractor exercised reasonable care in replacing the meter. DEO states that the issue in *Garrabrant* thus was not inadequate service, but whether AEP Ohio committed a tort. DEO contends that the alleged facts of the present case are even further from the Commission's expertise, because

the alleged facts do not relate to regulated service, or even to damage to utility equipment (as in *Garrabrant*), but to the replacement of a segment of Complainants' driveway during property restoration. Further, the complaint in this case does not allege that any rate or service was unjust or unreasonable. DEO, therefore, argues that the result in *Garrabrant* should apply similarly in this matter.

{¶ 11} On August 23, 2016, Complainants filed a response to DEO's renewed motion to dismiss. In the pleading, Complainants reiterate the allegations in their complaint. In addition, Complainants state that the sections of concrete in the driveway, below the two sections that were replaced, have shifted significantly since repairs were completed. Complainants note that, while there was a small pre-existing crack in a lower driveway section, that entire section has shifted substantially since the removal and replacement of the top sections. In conclusion, Complainants again request that DEO be held to the same standards that the Ohio Department of Insurance would apply to an insurance claim and that their property be restored by replacing the entirety of the driveway.

{¶ 12} On August 31, 2016, DEO filed a reply in support of its motion to dismiss. In the reply, DEO states that the test set forth in *Corrigan* determines whether a claim is within or outside the Commission's jurisdiction. DEO explains that the Commission asserts jurisdiction in cases where, for instance, the transportation of natural gas and the appropriateness of rates charged for such service are in question, *In re Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co.*, Case No. 14-1654-GA-CSS, Opinion and Order (June 15, 2016) at 16-18; or when the question of fixed rates versus variable rates arises, *In re Bd. Of Commissioners of Lucas Cty. v. FirstEnergy Solutions Corp.*, Case No. 15-896-EL-CSS, Entry (Feb. 3, 2016) at 8-11; or when the decision rests on evaluating a utility's distribution system and policies and practices associated with the operation of that system, *In re Pro Se Commercial Properties v. Cleveland Elec. Illum. Co.*, Case No. 07-1306-EL-CSS, Opinion and Order (Sept. 10, 2008) at 8.

{¶ 13} DEO states, however, that the Commission does not have jurisdiction when claims bear, at best, an incidental relationship to utility service. For instance, according to DEO, the Commission lacks jurisdiction over property damage issues occurring during a meter change-out, as in *Garrabrant*; or during excavation to install a gas line for a residential block, *In re Anne Eishen v. Columbia Gas of Ohio, Inc.*, Case No. 01-885-GA-CSS, Entry (Nov. 20, 2001) at 7; or during the installation of houseline piping at a complainant's rental property, *In re Mervyn Berger v. The East Ohio Gas Co.*, Case No. 88-958-GA-CSS, Entry (Aug. 2, 1988) at 3.

{¶ 14} DEO states that, regardless of whether Complainants' claim requesting the replacement of their entire driveway has merit, the dispute does not belong at the Commission. DEO argues that the claim has nothing to do with the regulated services provided by DEO, and the Complainants' response does not show otherwise. Moreover, DEO argues that the response misapprehends DEO's motion, because it is not the connection between the driveway and damage that is incidental; it is the connection between the claim and the utility. DEO maintains that any other person or entity could be subject to precisely the same claim, which confirms that the claim does not fall within the Commission's expertise; therefore, it is not for the Commission to resolve.

{¶ 15} In this case, the jurisdictional question is whether the claims made by Mr. and Ms. Humphrey in their complaint are within the Commission's exclusive jurisdiction or, instead, are tort claims that should be adjudicated in a court of law. In making this determination, the Commission must review the substance of the claims to determine if utility service-related or rate-related issues are involved. *Corrigan* at ¶ 10.

{¶ 16} The Commission finds that the answer to the first question presented under the *Corrigan* two-part test is negative. Our administrative expertise is not required to resolve the issue in dispute. As noted by DEO, in *Garrabrant*, we found that our administrative expertise, which relates to a utility's regulated service or the rates charged by a utility, was not required to resolve the complaint, because the alleged facts applied to

whether a contractor damaged the complainant's backup generator by failing to use reasonable care in replacing the complainant's meter and not to a matter within our jurisdiction, the utility's meter service. In this case, as with the damaged backup generator in *Garrabrant,* the allegation is that a utility's subcontractor damaged property owned y a customer, i.e., Complainants' driveway. Complainants allege, in their original complaint, that reasonable care was not used to match texture and tone of the cement used in the driveway sections and to protect their water meter cover from being sealed with concrete. In addition, in Complainants' August 23, 2016 filing, there appears to be a further allegation that Complainants' driveway has suffered additional damage, because adjacent sections have cracked and shifted. However, there are no allegations in this complaint that DEO's service or rates, which the Commission regulates, were unjust or unreasonable. Indeed, we note that Complainants state in a letter to DEO, which was filed as part of the complaint, that they are not customers of DEO (Complaint at 9); consequently, DEO has no regulated service or rates that are being provided to Complainants.

{¶ 17} The Commission also answers the second question presented under the *Corrigan* two-part test in the negative. We find that the act constituting the substance of the complaint, pouring concrete – resulting in mismatched sections of Complainants' driveway, a water meter cover being sealed, and Complainants' adjacent driveway sections becoming cracked and shifted - does not constitute a practice normally authorized by the utility. Stated more concisely, the particulars of concrete contracting work, so as to avoid the issues raised by Complainants, are not within the normal purview of a utility company.

{¶ 18} In order for the Commission to have jurisdiction, both parts of the *Corrigan* test must be affirmatively satisfied. Here, the Commission's expertise is not required to resolve the dispute, as the dispute between Complainants and DEO appears to resound solely in tort law and belongs before a court of law. Further, the act constituting the complaint, the concrete work on Complainants' driveway, is not a practice normally

authorized by the utility; thus, both parts of the *Corrigan* test have not been met. Consequently, for the reasons set forth in this Entry, the Commission finds that we lack jurisdiction over the complaint and, therefore, it should be dismissed.

III. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That, in accordance with the above findings, the complaint in this case be dismissed for lack of jurisdiction. It is, further,

{¶ 21} ORDERED, That a copy of this Entry be served upon each party and interested person of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman

Lynn Slaby

M. Beth Trombold

Thomas W. Johnson

M. Howard Petricoff

KKS/vrm

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Barcy F. McNeal

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Secretary