

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
PATRICIA WILDMAN,**

**COMPLAINANT,**

**CASE NO. 18-336-EL-CSS**

**v.**

**OHIO EDISON COMPANY,**

**RESPONDENT.**

**ENTRY**

Entered in the Journal on March 13, 2019

**I. SUMMARY**

{¶ 1} The Commission dismisses the complaint pursuant to the motion filed by Ohio Edison Company.

**II. DISCUSSION**

{¶ 2} Ohio Edison Company (Ohio Edison or the Company) is a public utility, pursuant to R.C. 4905.02, and is, therefore, subject to the jurisdiction of this Commission.

{¶ 3} 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.

{¶ 4} On February 26, 2018, Patricia Wildman, through counsel, (Complainant) filed a complaint against Ohio Edison alleging that Ohio Edison contaminated her property with hazardous materials and damaged her property though the resulting cleanup.

{¶ 5} On March 19, 2018, Ohio Edison filed its answer to the complaint, denying many of the allegations contained therein. Additionally, Ohio Edison raised several *affirmative defenses*, including, but not limited to, the following: Complainant fails to set forth reasonable grounds for complaint as required by R.C. 4905.26; Complainant fails to state a claim upon which relief can be granted; and Ohio Edison has complied with all applicable rules, regulations, and orders of the Commission, and its tariffs.

{¶ 6} A settlement conference was held on May 30, 2018. However, the parties were unable to settle the matter.

{¶ 7} On August 28, 2018, Ohio Edison filed a motion to dismiss the complaint. In its memorandum in support, Ohio Edison argues that the Commission lacks jurisdiction over the property damage claim asserted by the Complainant. Ohio Edison contends that the complaint does not relate to customer-rates and is not a service related complaint; rather it is a negligence issue and the proper venue is the common pleas court. Additionally, Ohio Edison argues that Complainant failed to state reasonable grounds for relief because her complaint does not allege facts which would support a finding of inadequate service or allegation that the Company has violated any statute, tariff provision, or any rule, regulation or order of the Commission.

{¶ 8} On September 27, 2018, the attorney examiner granted Complainant's motion for continuance to respond to the Company's motion to dismiss.

{¶ 9} On October 4, 2018, Complainant filed its memorandum in opposition to the Company's motion to dismiss. Complainant argues that the Company took the position in the Trumbull County Common Pleas Court that the Court had no jurisdiction over this matter and persuaded that the Court of Common Pleas was not the proper venue but rather the Commission. Complainant states that there is a judicial finding in this matter from the Court of Common Pleas of Trumbull County, which is attached to its October 4, 2018 filing, that clearly sets forth the jurisdiction of the subject matter of the

damages by the discharge of hazardous substances over Complainant's land and the consequential interference with her property and damage to the watercourse are properly remedied before the Commission.

{¶ 10} On October 11, 2018, Ohio Edison filed its reply to complainant's memorandum in opposition to Ohio Edison's motion to dismiss. Ohio Edison argues that environmental remediation, as requested by the Complainant, is not a utility service within the Commission's exclusive jurisdiction and is a common law property tort claim. The Company reiterates its previous argument that the claim must be dismissed because the claim cannot be remedied by the Commission. Further, Ohio Edison argues that the Commission's jurisdiction is separate and distinct from that of the Court of Common Pleas and the two cases must be treated as such.

{¶ 11} The Commission finds that Ms. Wildman's complaint should be dismissed for lack of jurisdiction. The General Assembly enacted R.C. Chapter 49 to regulate the business activities of public utilities and created this Commission to administer and enforce these provisions. *Corrigan v. Illum. Co.*, 122 Ohio St. 3d 265, 266, 2009-Ohio-2524, 910 N.E. 2d 1009 (*Corrigan*). 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. This "'jurisdiction specifically conferred by statute upon the Public Utilities Commission over public utilities of the state \* \* \* is so complete, comprehensive and adequate as to warrant the conclusion that it is exclusive.'" *Corrigan* at ¶ 8 (2009), citing *State ex rel. N. Ohio Tel. Co. v. Winter*, 23 Ohio St.2d 6, 9, 260 N.E.2d. 827 (1970), quoting *State ex rel. Ohio Bell Tel.Co. v. Cuyahoga Cty. Court of Common Pleas*, 128 Ohio St. 553,557, 192 N.E. 787 (1934); see also *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, at 152, 573 N.E.2d 655 (1991). However, the broad jurisdiction of the Commission over service-related matters does not affect "the basic jurisdiction of the

court of common pleas in other areas of possible claims against utilities, including pure tort and contract claims” *State ex rel. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 21, quoting *Higgins v. Columbia Gas of Ohio, Inc.*, 136 Ohio App.3d 198, 202, 736 N.E.2d 92 (2000). Thus, in this case, the jurisdictional question presented is whether the claims made by Ms. Wildman are within the Commission's exclusive jurisdiction or, instead, are pure tort claims, sounding in negligence, that do not require a consideration of statutes and regulations administered and enforced by the Commission. In making this determination, we must review the substance of the claims to determine if service-related issues are involved. In other words, casting the allegations to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court when the basic claim is one that the Commission has exclusive jurisdiction to resolve. *Corrigan* at 267.

{¶ 12} The Commission observes that the Supreme Court of Ohio has adopted a two-part test to determine whether the Commission has jurisdiction to decide a cause of action. *Allstate Ins. Co. v. The Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 893 N.E.2d 824, 2008-Ohio-3917. 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. If the answer to either question is in the negative, the claim is not within the Commission's jurisdiction. *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d. 824, ¶ 12-13.

{¶ 13} The Commission notes that simply 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. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶¶ 18-19 (2004) ¶ 18-19; *State ex rel. the Illuminating Company v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92, ¶ 21 (2002). Rather, the Supreme Court of Ohio has

instructed that an analysis of the claims be undertaken to determine whether the substance of the complaint is manifestly service-related. *Henson* at ¶ 20; *Corrigan I* at ¶ 10. The Commission must determine if each of the Complainants' alleged claims is within our exclusive jurisdiction or, instead, are pure tort claims that should be adjudicated in a court of law using the *Allstate* test. The Commission notes that it is not bound by the jurisdictional analysis set forth by the Trumbull County Common Pleas Court and that our analysis is determined by the allegations set forth in the complaint, as well as Commission precedent.

{¶ 14} Applying the two-part *Allstate* test to determine whether the Commission has jurisdiction over the complaint, the first question is whether the Commission's administrative expertise is required to resolve the issue in dispute. The answer to this question is no. The Commission's administrative expertise lies, among other things, in evaluating whether rates and tariffs are unjust or unreasonable and in evaluating utility programs to promote reliability. Our administrative expertise is not necessary in evaluating the impact of hazardous substances on soil and waterways. We find that, because the complaint fails to allege inadequacy of the service provided by the Company, and whether the rates charged by Ohio Edison for its utility service are unjust, unreasonable, or unlawful, the Commission's administrative expertise is not required to resolve the issue presented in this case. The complaint fails to allege that any damage that occurred was either caused or resulted from the company's failure to provide adequate service. Nor is there any allegation that the release of hazardous substances resulted in violation of any statute, rule, regulation, or Commission order. Because no service-related issues are presented, the first prong of the Supreme Court's two-part test has not been met, and the claim presented in this case is not within this Commission's jurisdiction. Rather, the claim presented sounds of pure tort. The Commission lacks subject matter jurisdiction and authority to award monetary damages. However, common law tort claims against a public utility may be brought in a common pleas court even though brought against corporations subject to the authority of the Commission.

*Milligan v. Ohio Bell Tel Co.*, 56 Ohio St.2d 191 (1978). The first question having been answered in the negative, there is no need to address the second question of whether the act complained of constitutes a practice normally authorized by the utility. Although maintaining transformers are a practice normally authorized by the utility, in this present action, the leaking transformer created hazardous contamination of Ms. Wildman's property and damage resulting from the cleanup. The Commission's administrative expertise is not necessary in estimating damages to render Complainant whole. Such an evaluation is not a service-related matter that is within the Commission's exclusive jurisdiction. Instead, this is a tort claim over which the courts of common pleas have jurisdiction. See, e.g., *In re James and Jerry Ross v. American Electric Power Company*, Case No. 14-1935-EL-CSS, (Jan. 21, 2015) at 2. In order for the Commission to have jurisdiction, both parts of the *Allstate* test must be affirmatively satisfied, which is not the case here. The Supreme Court of Ohio has long held that the Commission has no power to judicially ascertain and determine legal rights and liabilities or to adjudicate controversies between parties as to property rights and claims based on tort liability. *New Bremen, et al. vs. Pub. Util. Comm.*, 103 Ohio St. 23, 30-31, 132 N.E. 162, 164 (1921). Consequently, this case should be dismissed for lack of subject matter jurisdiction.

{¶ 15} While we understand why the Complainant may believe this case is properly before us, given Ohio Edison's filing of motions to dismiss in both venues arguing the other maintains jurisdiction, the Commission is bound by the powers which it has been conferred by the General Assembly. Ohio Edison's practice of arguing inconsistent theories of jurisdiction before the Common Pleas Court and the Commission, and successfully employing that approach to keep a complainant from getting her grievance heard anywhere, raises legitimate concerns about the fairness of this corner of our legal system. While we are not able to correct this unfairness in this case, we will be examining what steps we can take to mitigate the risks of such outcomes in the future.

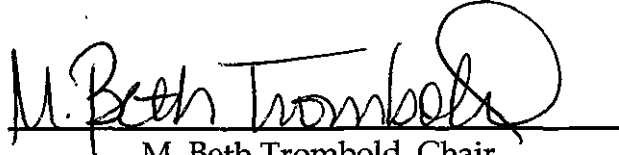
**III. ORDER**

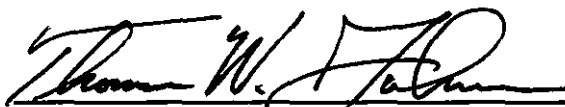
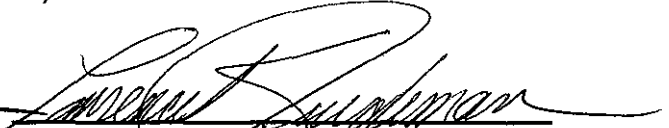
{¶ 16} It is, therefore,

{¶ 17} ORDERED, That this matter be dismissed in accordance with Paragraph 14.

{¶ 18} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
M. Beth Trombold, Chair

   
Thomas W. Johnson Lawrence K. Friedeman

  
Daniel R. Conway

SEC/sc

Entered in the Journal

MAR 13 2019



Tanowa M. Troupe  
Secretary