

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
ANTUAN BURRESS-EL,**

COMPLAINANT,

v.

CASE NO. 21-298-GA-CSS

DUKE ENERGY OHIO, INC.,

RESPONDENT.

ENTRY

Entered in the Journal on September 7, 2022

I. SUMMARY

{¶ 1} The Commission grants the motion to dismiss, with prejudice, filed by Duke Energy Ohio, Inc.

II. DISCUSSION

A. *Procedural Background*

{¶ 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} Duke Energy Ohio, Inc. (Duke, or Respondent) 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 March 31, 2021, Antuan Burress-El (Complainant) filed a complaint against Duke in which he alleges, among other things, that negligence on the part of Duke and/or its contractor KS Energy, caused Complainant to lose use of his furnace for an extended period and, as a result, to incur damages which he believes entitle him to compensation. As explained by Complainant, Complainant's natural gas service was temporarily shut off and

restored during a procedure conducted by Duke through its contractor KS Energy in order to facilitate completion of a scheduled local township street repair project. Complainant alleges that, during that process, his furnace was irreparably damaged. The complaint also alleges that insurance companies for Duke and KS Energy (respectively, Sedgwick Claims Management Services, Inc., and Gallagher Basset) improperly failed to reimburse Complainant for claimed damages, both for alleged damage to his furnace and for alleged damages consequent to his being left without a furnace.

{¶ 5} On April 20, 2021, Duke filed its answer, in which it denies all the complaint's allegations, asserts its own allegations of fact, and sets forth several affirmative defenses.

{¶ 6} By Entry issued May 14, 2021, a settlement teleconference was scheduled to occur on June 2, 2021. The settlement teleconference was held, as scheduled, on June 2, 2021. Later, on August 23, 2021, the settlement teleconference was resumed. On neither occasion did the parties arrive at a settlement of the case.

{¶ 7} On May 18, 2021, Duke filed a motion to dismiss this case. In its motion, Duke argues that the case should be dismissed because the Commission lacks subject matter jurisdiction over the claims asserted in the complaint, lacks personal jurisdiction over certain entities named in the complaint, and because, argues Duke, the complaint fails to state a claim upon which relief can be granted.

{¶ 8} Complainant did not, within the time parameters established in Ohio Adm.Code 4901-1-12, file a memorandum contra Respondent's motion to dismiss. However, on January 26, 2022, Complainant filed a motion by which he sought an extension of time for filing a formal response to Duke's motion to dismiss. By Entry issued on February 16, 2022, Complainant was granted an extension of time, until March 3, 2022, to file his memorandum contra, if any, Duke's motion to dismiss. By the same Entry, Duke was granted seven days from the date of filing of any such memorandum contra, to file a reply to it.

{¶ 9} Even after requesting, and receiving, a time extension of more than nine months for doing so, Complainant has never filed a pleading addressed to the arguments set forth in Duke’s motion to dismiss. On March 14, 2022, after the granted time extension expired, Complainant filed a pleading in which he purports to move for hearing and contends that he is entitled to oral arguments, yet in this March 14, 2022, pleading, Complainant wholly fails to even mention Respondent’s motion to dismiss, or to address the arguments raised in it.

{¶ 10} Meanwhile, on February 17, 2022, Duke filed a pleading by which it has reiterated the arguments set forth in its motion to dismiss.

B. Duke’s Motion to Dismiss

{¶ 11} In support of its motion to dismiss, Duke points out that the complaint alleges certain causes of action over which the Commission lacks subject matter jurisdiction, among them “insurance fraud,” “negligence and immoral acts,” “defamation of character,” “intentional [infliction of] emotional distress,” and violation of both U.S. and Ohio constitutional law.

{¶ 12} Additionally, Duke submits that, to determine whether the Commission has subject matter jurisdiction, the Commission must apply a two-part test established by the Ohio Supreme Court in *Allstate Ins. V. Cleveland Electric Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824 (*Allstate*). The first prong of the *Allstate* test requires the Commission to determine whether its expertise is required to resolve the dispute. Second, the Commission must evaluate whether the act complained of is normally authorized by the utility. If the response is negative to either question, the claim is not within the Commission’s jurisdiction.

{¶ 13} Continuing, Duke argues that the Commission should, in the instant case, apply the same analysis and reach the same holding as it did in *In re Anthony W. Garrabrant*, Case No. 15-401-EL-CSS, Entry (July 20, 2016) at 4, citing *State ex rel. Illum Co. Pleas*, 97 Ohio

St.3d 60, 2002-Ohio-5312, 776 N.E.2d, ¶ 21 (*Garrabrant*). In *Garrabrant*, the Commission, citing *Allstate* among other cases, determined that it lacked subject matter jurisdiction over a complaint which alleged that negligence by a utility's contractor, in performance of a job normally authorized by the utility, caused damage to a back-up generator which, as such, comprised customer-owned equipment over which the utility company exercised neither control nor responsibility. Duke contends that, similarly here, the case at hand presents the question of whether the Commission's jurisdiction extends to a complaint which alleges that negligence by Duke's contractor has caused damage to a furnace (and consequential damages resulting from loss of the furnace), given that the involved furnace comprises customer-owned equipment over which Duke exercises neither control nor responsibility.

{¶ 14} Duke posits that the Complainant's claims in this case, like those raised in *Garrabrant*, fail to present jurisdictional questions concerning Duke's provision of utility service to Complainant, nor concerning Duke's restoration of utility service to Complainant's service address—but rather, at best, present the question of “whether a contractor exercised reasonable care” in attempting to accomplish “one particular” service connection to one particular piece of equipment outside of the utility's responsibility and control, namely Complainant's furnace (Duke's Motion to Dismiss at 5). Duke, relying on case law, submits that the Commission has no power to determine negligence claims that do not require the Commission's regulatory expertise to resolve and, as such, are suited to be adjudicated by courts of law, rather than by the Commission. Finding no basis for the Commission's jurisdiction, Duke urges the Commission to dismiss the complaint in this case for lack of subject matter jurisdiction.

{¶ 15} Moreover, in addition to these arguments pertaining to the Commission's subject matter jurisdiction, Duke, in its motion to dismiss, presents arguments intended to show that the Commission lacks personal jurisdiction over utility contractors and insurers (Duke's Motion to Dismiss at 5, 6).

III. COMMISSION CONCLUSION

{¶ 16} Upon review of the whole record, the Commission finds that Duke's motion to dismiss should be granted. Complainant asks the Commission to adjudicate an issue over which it has no subject matter jurisdiction. The case law cited by Duke articulates the breadth of the Commission's jurisdiction. It is by the standard found in the case law that we shall decide whether to allow this case to proceed.

{¶ 17} In *Allstate*, the court adopted a two-part test to determine whether the Commission, as opposed to a court, has adjudicatory jurisdiction over claims sounding in, among other causes of action, negligence. The first part of the *Allstate* test is whether the Commission's expertise is required to resolve the case. The second part is whether the act complained of is a practice normally authorized by the utility. If the response is negative to either inquiry, the matter is not within the Commission's subject matter jurisdiction.

{¶ 18} Pursuant to R.C. 4905.26, the Commission has exclusive jurisdiction over utility service-related matters. However, nothing in the complaint at hand raises utility service issues, such as, for example, the reasonableness of utility customer rates, services, or claims relating to utility conduct covered by Commission rules and/or by tariffs which a utility files with the Commission.

{¶ 19} The Commission's expertise is likely required to determine whether a utility's contractor, responsible for a temporary gas utility service shut off to a customer's service premises, acted reasonably in the efforts it made to restore such service after the purpose underlying the temporary shut-off event had been accomplished. However, that issue is not presented in this case, given Complainant admissions that, during the events which form the basis of his complaint, Duke successfully restored gas utility service to his premises. Such admissions include Complainant's statements, made within his complaint, that, before the contractor left his premises on the day of the involved temporary utility service shut-off, "the gas was back on," the furnace's pilot light reportedly "came on," and "my hot water heater was working" (Complaint, at third unnumbered page).

{¶ 20} Instead, within this same sentence of the complaint, Complainant identifies the real issue presented in this case. This case revolves around whether Duke, in its capacity as a Commission-regulated public utility – once natural gas utility service admittedly was restored to the premises following a planned temporary shut-off – bears liability for the inability of its contractor, in Complainant’s own words, “to get my furnace to work.” The matter of whether a reasonable and appropriate standard of care has been exercised by a person undertaking to work on a furnace is a matter over which the Commission has no expertise.

{¶ 21} The Commission is not a court of law. Consequently, it does not have the power, and the Commission’s expertise is not required, to determine whether a utility, or its contractor, having demonstrably achieved utility service restoration to a premises, has exercised a reasonable and appropriate standard of care in attempting to get “one particular” piece of customer-owned equipment over which the utility exercises neither control nor responsibility “to work” correctly or at all, following the service restoration. *Garrabrant*, Entry (July 20, 2016) at 4-5.

{¶ 22} Having decided that the first part of the *Allstate* subject matter jurisdictional test must be answered in the negative, we do not reach to apply the second part of test. Nor do we need to address the other arguments Duke has made in support of its motion to dismiss. It suffices, and we conclude, that the Commission does not have jurisdiction over the subject matter of the complaint because the Commission expertise is not needed to adjudicate the standard of care which must be exercised by persons trying to repair a furnace, even if that furnace exists within a premises where utility gas service restoration has been achieved following upon a planned temporary utility service shut-off.

IV. ORDER

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That the motion to dismiss filed by Duke be granted and that the complaint be dismissed for lack of subject matter jurisdiction. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

DEF/hac

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Case No(s). 21-0298-GA-CSS

Summary: Entry granting the motion to dismiss, with prejudice, filed by Duke Energy Ohio, Inc. electronically filed by Heather A. Chilcote on behalf of Public Utilities Commission of Ohio