

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FLEX TECHNOLOGIES,  
  
Plaintiff - Appellant

-vs-

AMERICAN ELECTRIC POWER COMPANY,  
INC.,  
  
Defendant - Appellee

: JUDGES:  
:  
: Hon. W. Scott Gwin, P.J.  
: Hon. Sheila G. Farmer, J.  
: Hon. Craig R. Baldwin, J.

: Case No. 2015 AP 01 0004  
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: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County  
Court of Common Pleas, Case No.  
2014 CV 08 0470

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

August 21, 2015

APPEARANCES:

For Plaintiff-Appellant

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*Baldwin, J.*

{¶1} Plaintiff-appellant Flex Technologies appeals from the January 6, 2015 Judgment Entry of the Tuscarawas County Court of Common Pleas granting the Motion to Dismiss filed by defendant-appellee Ohio Power Company dba AEP (Incorrectly Named as American Electric Power, Inc.).

#### STATEMENT OF THE FACTS AND CASE

{¶2} On August 4, 2014, appellant Flex Technologies filed a complaint against American Electric Power Company, Inc. ("AEP"). Appellant, in its complaint, alleged that in the course of restoring power to appellant's facilities, AEP created "power surges" that damaged equipment at appellant's plant. Defendant Ohio Power Company dba AEP (Incorrectly Named as American Electric Power, Inc.) filed an answer to the complaint on September 5, 2014 and, on the same date, filed a Motion to Dismiss pursuant to Civ.R. 12(B)(1) and 12 (H)(3). In its Motion to Dismiss, it alleged that appellant's "claims fall within the exclusive jurisdiction of the Public Utilities Commission of Ohio" and that the trial court, therefore, lacked jurisdiction to hear appellant's claims.

{¶3} Pursuant to a Judgment Entry filed on January 6, 2015, the trial court granted the Motion to Dismiss and dismissed appellant's complaint with prejudice.

{¶4} Appellant now raises the following assignments of error on appeal:

{¶5} THE TRIAL COURT ERRED BY DISMISSING THIS CASE FOR WANT OF SUBJECT MATTER JURISDICTION.

{¶6} THE TRIAL COURT ERRED BY DEPRIVING PLAINTIFF OF ITS RIGHT TO A TRIAL BY JURY AS GUARANTEED BY [SECTION] 5 ARTICLE 1 OF THE OHIO CONSTITUTION.

I

{¶7} Appellant, in its first assignment of error, argues that the trial court erred in granting the Motion to Dismiss for lack of subject matter jurisdiction.

{¶8} A Civ.R. 12(B)(1) motion allows a trial court to dismiss a complaint when the trial court lacks subject-matter jurisdiction at the time the complaint was filed. The issue under Civ.R. 12(B)(1) is “whether any cause of action cognizable by the forum has been raised in the complaint.” *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989), citing *Avco Fin. Servs. Loan, Inc. v. Hale*, 36 Ohio App.3d 65, 67, 520 N.E.2d 1278 (10th Dist.1987). Appellate courts review a decision to dismiss under such a motion de novo, employing the same standard as the trial court. *Howard v. Supreme Court of Ohio*, 10th Dist. Franklin Nos. 04AP–1093, 04AP–1272, 2005–Ohio–2130, ¶ 6, citing *Kramer v. Installations Unlimited, Inc.*, 147 Ohio App.3d 350, 352, 2002-Ohio-1844, 170 N.E.2d 632 (5th Dist.).

{¶9} In turn, Civ.R. 12(H)(3) provides that “[w]hensoever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

{¶10} At issue in the case sub judice is whether or not the Public Utilities Commission of Ohio (“PUCO”) had exclusive jurisdiction over appellant’s claims. R.C. 4905.26 confers exclusive jurisdiction on the PUCO to review any service rendered by a

public utility to determine if it is unjust or unreasonable, or violates the law. PUCO also has exclusive jurisdiction over complaints regarding the termination of service by public utilities. The Supreme Court has held, however, that courts retain limited subject matter jurisdiction over a matter that is pure common-law tort or contract action involving utilities that are regulated by the PUCO. *State ex rel. Illuminating Company v. Cuyahoga County Court of Common Pleas*, 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92. In cases involving public utilities, jurisdiction is not conferred based solely on the pleadings. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004–Ohio–3208, 810 N.E.2d 953, ¶ 19.

{¶11} As noted by the court in *Valentin v. Edison*, 7th Dist. Mahoning No. 11 MA 93, 2012-Ohio-2437 at paragraph 13:

The Ohio Supreme Court has interpreted R.C. 4905.26 to confer jurisdiction on PUCO to hear all complaints pertaining to rates and/or service provided by a public utility. *Higgins*<sup>1</sup>, 136 Ohio App.3d at 201, 736 N.E.2d 92, citing *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 573 N.E.2d 655 (1991). Casting the allegations in the complaint to sound in tort or contract does not confer jurisdiction upon a trial court when the basic claim is one relating to service, which only PUCO has jurisdiction to resolve. *Higgins*, 136 Ohio App.3d at 202, 736 N.E.2d 92. See, also, *DeLost v. First Energy Corp.*, 7th Dist. No. 07–

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<sup>1</sup> The complete citation is *Higgins v. Columbia Gas of Ohio*, 136 Ohio App.3d 198, 736 N.E.2d 92 (7th Dist. 2000).

MA-194, 2008-Ohio-3086, ¶ 21; *Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 45, 764 N.E.2d 1098 (7th Dist.2001).

{¶12} The Ohio Supreme Court has set out a two-part test courts should apply to determine whether the PUCO has exclusive jurisdiction. “First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?’ If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction.” *Allstate Insurance Company v. Cleveland Electric Illuminating Company*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824 ¶ 12-13.

{¶13} The *Allstate* opinion sets out examples of common law claims over which the common pleas court has jurisdiction: *Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St.2d 191, 195, 383 N.E.2d 575 (1978) (claim that the telephone company invaded its customer's privacy was actionable in common pleas court); *Kohli v. Pub. Util. Comm.*, 18 Ohio St.3d 12, 14, 479 N.E.2d 840 (1985) (failure to warn landowners of dangers regarding voltage can be litigated in common pleas court.) The Supreme Court also cautioned that the PUCO is not a court and has no power to judicially ascertain and determine legal rights and liabilities.

{¶14} Thus, we must first determine whether or not PUCO's administrative expertise is required to resolve the issue in dispute. We find that it is. The Eighth District Court of Appeals, in examining a power-surge claim against an electric company, has stated, in relevant part, as follows:

Here, the plaintiffs argue that CEI is responsible for damages stemming from two alleged power surges. Plaintiffs' claim calls into question the manner by which CEI provided electrical service. In addressing the power surges, it will be necessary to determine whether CEI's response and correction of the problem complied with industry standards. The answers to these questions require the expertise of the PUCO administration because jurors do not have the experience or understanding regarding the distribution of electricity. The determination of issues related to applicable laws and regulations, industry practices and standards, is best accomplished by PUCO with its expert staff technicians familiar with the utility commission provisions.

*Pro Se Commercial Properties v. Illuminating Co.*, 8th Dist. No. 92961, 2010–Ohio-516, ¶ 11.

{¶15} Based on the forgoing, we find that PUCO's administrative expertise is required to resolve the issue in dispute.

{¶16} The next issue for consideration is whether or not the act complained of constitutes a practice normally authorized by the utility. Appellant, in its complaint, alleged that in the course of restoring power to its facilities, AEP created “power surges” that damaged its equipment. In *Pro Se Commercial Properties*, supra., the landlord and commercial tenants brought a negligence action against the electric service provider for

damages to office equipment caused by power surges. The court, in *Pro Se Commercial Properties*, found that that damage to office equipment caused by the power surges was service-related and under PUCO's jurisdiction, holding that "[w]hen one suffers damages related to events that are purely electrical, like here, the claim is service-related and under PUCO's jurisdiction." *Id.* at paragraph 15. See also *Valentin v. Edison, supra*, in which the court held, in relevant part, as follows at paragraphs 20-22:

Appellant's complaint alleges that appellee's "wire was faulty" causing it to send "a power surge" through his property, which damaged his electronics.

What appellant alleges falls under the broad category of "service," which is within PUCO's jurisdiction. Quality of service complaints fall under PUCO's jurisdiction. *Miles Management Corp. v. First Energy Corp.*, 8th Dist. No. 84197, 2005–Ohio–1496, ¶ 12, citing *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004–Ohio–3208, 810 N.E.2d 953, ¶ 20. A power surge is a service-related complaint. *Hiener v. Cleveland Elec. Illuminating Co.*, 11th Dist. No. 95–G1948, 1996 WL 495092 (Aug. 9, 1996). Likewise, a period of low voltage, commonly called a "brownout," is also service-related. *LaForge*<sup>2</sup>, 115 Ohio App.3d at 741, 686 N.E.2d 311. "When one suffers

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<sup>2</sup> The complete citation is *LaForge v. Cleveland Elec. Illuminating Co.*, 115 Ohio App.3d 740, 686 N.E.2d 311 (11th Dist. 1996).

damages related to events that are purely electrical, \* \* \* the claim is service-related and under PUCO's jurisdiction.” *Pro Se Commercial Properties*, at ¶ 15.

Appellant claims that at one point in time, too much power was provided to his home causing damages. In other words, he claims there was a problem with his service that resulted from a faulty wire and a power surge. Thus, the answer to the second question (does the act complained of constitute a practice normally authorized by the utility?) also is yes.

{¶17} We find, based on the foregoing, that the act complained of constituted a practice normally authorized by the utility.

{¶18} Because the two-part *Allstate* test has been met, we find that the trial court did not err in determining that the PUCO had exclusive jurisdiction over appellant's claims.

{¶19} Appellant's first assignment of error is, therefore, overruled.

## II

{¶20} Appellant, in its second assignment of error, argues that the dismissal of its complaint deprived it of the right to trial by jury.

{¶21} The same argument was raised in *Miles Mgmt. Corp. v. First Energy Corp.*, 8th Dist. No. 84197, 2005-Ohio-1496. The court, in such case, held, in relevant part, as follows:



Plaintiffs further argue that forcing them to submit their claims before PUCO denies them their right to a jury trial. “There is no right to a jury trial, however, unless that right is extended by statute or existed at common law prior to the adoption of our state Constitution.” *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 356, 533 N.E.2d 743.

As observed by defendants, plaintiffs have not shown that there was or is a common law right to a jury trial in a case against a public utility that has allegedly violated its service obligation to the public. Accordingly, we do not agree that plaintiffs have a constitutional right to a jury trial.

{¶22} Id. at paragraphs 31-32.

{¶23} Appellant’s second assignment of error is, therefore, overruled.

{¶24} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Baldwin, J.

and Farmer, J. concur.

W. Scott Gwin, P.J. concurs separately

*Gwin, P.J., concurs separately*

{¶25} I concur in the majority's disposition of appellant's first and second assignments of error. I write separately to clarify that appellant would have a right to a jury trial in the court of common pleas to hear a complaint for treble damages under R.C. 4905.61. In *Lahke v. Cincinnati Bell, Inc.*, the Hamilton County Court of Appeals noted,

PUCO has no power to grant money damages, but, under R.C. 4905.61, a common pleas court may. The statute provides that if a public utility violates any one of a series of statutes, including R.C. 4905.22, it is liable to the injured party “ \* \* \* in treble the amount of damages sustained in consequence of such violation \* \* \*.” We believe that this statute extends subject matter jurisdiction to the courts only after a violation of one of the designated statutes has been established before PUCO pursuant to R.C. 4905.26. *State, ex rel. Dayton Power & Light Co. v. Kistler* (1979), 57 Ohio St.2d 21, 385 N.E.2d 1076, 11 O.O.3d 108; *Milligan v. Ohio Bell Telephone Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575, 10 O.O.3d 352; *North Ridge Investment Corp. v. Columbia Gas of Ohio, Inc.* (1973), 49 Ohio App.2d 74, 359 N.E.2d 443, 3 O.O.3d 131. By reason of PUCO's finding that Bell had violated R.C. 4905.22, the Court of Common Pleas had jurisdiction to hear Lahke's complaint and to award damages.

1 Ohio App.3d 114, 115-116, 439 N.E.2d 928(1st Dist. 1981)(footnote omitted); *Accord*, *Federal Reserve Bank of Cleveland v. Purolator Courier Corp.*, 13 Ohio App.3d 296, 300, 469 N.E.2d 542 (8th Dist. 1983).