IN THE SUPREME COURT OF OHIO

Allstate Insurance Company, as subrogee of Margaret Harris and Anna Kaplan,	:	CASE NO: 07-0452
Appellant,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
Cleveland Electric Illuminating Company,	:	Court of Appeals Case No. CA-06-087781
Appellee.	:	

MERIT BRIEF OF APPELLANT ALLSTATE INSURANCE COMPANY

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STATEMENT OF FACTS

Plaintiff-Appellant Allstate Insurance Company (hereinafter referred to as "Allstate") at all pertinent times herein was the property insurer for Margaret Harris and Anna Kaplan, who resided in a side-by-side duplex residence located at 1500-1502 East 250th Street, Euclid, Ohio. (TR. 419, 431.) Upon arriving home from church around approximately 11:00 a.m. on July 20, 2003, Ms. Harris and her daughter, Lisa Little, noticed that a tree limb had fallen onto the electric utility company power line that connected to the house from an adjacent utility pole. (Supp. 1, TR. 103.) At that time the weight of the tree limb was causing the service mast to pull away from the house, and it appeared that the power line was ready to snap. (Supp. 3, TR. 105.)

Ms. Harris immediately determined this dangerous situation required that Cleveland Electric Illuminating Company (hereinafter referred to as "CEI") be contacted to report the emergency. (Supp. 4, TR. 106.) After locating a bill with the pertinent emergency phone number, Ms. Little called on her mother's behalf. CEI records indicate that the first call regarding this emergency was placed at 11:42 a.m. Ms. Little answered a series of automated telephonic prompts, including a "yes" as to whether she was calling to report an emergency, and advised CEI customer service representative Pamela Warford that a tree limb had fallen on the CEI power line and that the line was about to snap. (Supp. 23, TR. 172.) Although Ms. Warford promised that someone would "be out shortly" to remedy the problem and noted that the line was ready to snap, the call was routed internally at CEI as low priority. (Supp. 25, TR. 174.)

To ensure that CEI had noted the emergency situation and that it had her proper address, Ms. Harris called back and engaged the automated prompting system, but did not speak to an actual person at that time. (Supp. 7, TR. 109.)

Ms. Harris called CEI again after waiting anxiously during the balance of the afternoon

for CEI to respond to and rectify the emergency situation at hand. CEI records indicate that this call was placed at 4:36 p.m., and was again routed to Ms. Warford. After repeating the nature of the emergency, Ms. Harris was told that CEI was still attempting to locate someone to come out to fix the problem. (Supp. 11, TR. 113.) Ironically, it was later revealed in pre-trial discovery that Robert Meyers, a trouble lineman with CEI, had reported to work at 4:00 p.m. on that date and did not receive any assignments until he was dispatched to Ms. Harris's home at 5:49 p.m. (Supp. 38, TR. 463.)

Shortly after the final call to CEI, Ms. Harris heard a noise in her backyard and, upon investigation, found live wires sparking and jumping on the ground. (Supp. 13, TR. 115.) The service mast and the electrical meter had been pulled completely off the house by the weight of the tree limb, and the rear area of Ms. Harris's home was consumed by flames. (Supp. 31, TR. 250.) A call was placed to 911, and the fire department subsequently arrived and extinguished the blaze.

Experts opined at trial within a reasonable degree of scientific certainty that the fire was caused by the weight of the tree limb pulling the service mast away from the home. (TR. 364.) Specifically, the electrical wire's insulation was abraded by friction until the hot conductor was allowed to contact the meter box, causing a fire around the electrical panels mounted on the north wall of the basement of Ms. Harris's house. (TR. 365.)

As a result of the June 20, 2003 fire, Allstate paid a total of $149.357.34 to or on behalf of Margaret Harris and $12,435.13 to or on behalf of Anna Kaplan. (TR. 433, 426.) Allstate filed suit against CEI in the Cuyahoga Court of Common Pleas. CEI filed a Motion to Dismiss and a subsequent Motion for Summary Judgment, both of which argued that the Court of Common Pleas did not have jurisdiction over Allstate's claim. Both motions were denied. After

hearing all of the evidence, the jury found CEI to be 100% negligent and further found CEI's negligence to be the proximate cause of the damages sustained by Allstate. The jury awarded Allstate the full amount of its claim, $161,798.47. (Appx. 17.)

CEI appealed the verdict to the Cuyahoga County Court of Appeals, arguing, *inter alia*, that jurisdiction was proper only before the Public Utilities Commission of Ohio (hereinafter referred to as "PUCO") and that the trial court erred in failing to dismiss the action for lack of subject matter jurisdiction. The Court of Appeals reversed the judgment of the trial court, determining that Allstate's negligence claim was "service related", thus exclusive jurisdiction resided with PUCO. (Appx. 4.)

Allstate filed their Notice of Appeal to the Supreme Court on March 14, 2007. (Appx. 1.) On June 20, 2007, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

In support of its position that the Court of Appeals erred in ruling that PUCO had exclusive jurisdiction over Allstate's claim of negligence against CEI, Allstate presents the following argument.

ARGUMENT

Proposition of Law

A negligence claim arising from a utility company's failure to respond to a customer's emergency call, resulting in a fire at that customer's home, is a pure common law tort claim subject to jurisdiction in the Court of Common Pleas, rather than a "service related" claim subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio under R.C. 4905.26.

It is well established in Ohio jurisprudence that PUCO "has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except this [C]ourt) any jurisdiction over such matters."

State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga County Ct. of C.P. ("State ex rel. CEI"), 88 Ohio St. 3d 447, 450 (2000). The extent of PUCO's jurisdiction over a dispute between an individual and a regulated utility is defined by statute, which states in pertinent part:

> Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, 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 complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.

Ohio Rev. Code ("R.C.") § 4905.26. "The purpose of providing PUCO with such jurisdiction is that the resolution of such claims 'is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions.'" *Gayheart v. Dayton Power & Light Co.*, 98 Ohio App. 3d 220, 228 (2 Dist., 1994) (quoting *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 153 (1991)).

Because PUCO "is in no sense a court . . . . [and] has no legal power to judicially ascertain and determine legal rights and liabilities," common-law tort claims are properly heard in the Court of Common Pleas "although brought against corporations subject to the authority of the commission." *State ex rel. Ohio Power Co. v. Harnishfeger*, 64 Ohio St. 2d 9, 10 (1980). Allstate's claim is based purely on an isolated act of negligence by CEI, a corporation otherwise subject to PUCO's authority. Because this claim did not arise from inadequacies in the quality, classification, or costs of electrical service provided by CEI to Allstate's insureds, was not based upon an unreasonable practice relating to such electrical service, and is not otherwise within the

circumstances that would reasonably have been contemplated by the Ohio Legislature in enacting section 4905.26, Allstate asserts that the decision of the Eighth District Court of Appeals should be overruled and further asserts the trial court properly exercised its jurisdiction over this matter.

A. Allstate Asserts a Pure Common-Law Negligence Claim Against CEI.

Title 49 contains "a broad and comprehensive statutory scheme for regulating the business activities of public utilities" such as CEI. *Kazmaier*, 61 Ohio St. 3d at 150. Because of the complexity of both Title 49 and the regulation of utilities in general, PUCO was created by the General Assembly as a quasi-judicial body with the expertise and authority necessary to enforce the provisions of Title 49, its own orders, and tariffs filed by public utilities. *See, id.* at 150-53. By requiring some actions to be brought before PUCO, the Ohio legislature created a schism amongst legal disputes with regulated utilities that would otherwise simply "sound in tort": if a plaintiff's claim is essentially rate[1] or service oriented, it must be adjudicated by PUCO; if a customer asserts a pure common-law tort claim, jurisdiction is properly exercised by the Court of Common Pleas. *See, id.* at 153-54.

In some cases, PUCO's jurisdiction over a dispute is so "patent and unambiguous" that the face of the complaint is sufficient to settle the issue. *See, State ex rel. CEI*, 88 Ohio St. 3d at 452 (PUCO's jurisdiction over a dispute concerning rates charged by an electric utility is "patent and unambiguous"); *Suleiman v. Ohio Edison Co.*, 146 Ohio App. 3d 41, 45-46 (7 Dist., 2001) (damage caused by interruption of electrical service during the removal of a meter is a service related complaint "regardless of how it is articulated"); *and, State ex rel. Columbia Gas of Ohio, Inc. v. Henson ("Henson")*, 102 Ohio St. 3d 349, 352 (2004) (noting PUCO's exclusive

[1] It is undisputed that Allstate's claim does not concern rates.

jurisdiction over any "complaints regarding termination of service by public utilities"). Ohio jurisprudence, however, distinguishes those cases from Allstate's instant claim.

This Court has previously heard and dismissed the argument by a power utility company that a complaint asserting the failure to take steps to correct an emergency situation "actually alleges inadequate service." *State ex rel. Ohio Edison Co. v. Shaker ("Shaker")*, 68 Ohio St. 3d 209, 211 (1994). In *Shaker*, a lawsuit was filed against an electrical utility company based on its failure to take steps to correct a problem with a traffic light that ceased functioning due to an interruption of electrical power. *Id.* at 209-10. Unsurprisingly, the utility argued that "although plaintiffs' complaint sounds in tort and nuisance, it actually alleges inadequate service."[2] *Id.* at 211. This Court declined the power utility company's prompting to rule that such facts "clearly place[d] the dispute outside the court's jurisdiction." *Id.* at 210-11 (citing *State ex rel. Bd. of County Comm'rs of Butler County v. Ct. of C.P. of Butler County*, 54 Ohio St. 2d 354, 356 (1978)). The Seventh District Court of Appeals likewise has ruled that the failure to investigate and correct a known dangerous condition of a customer's electrical service lines was not, as a matter of law, subject to PUCO's exclusive jurisdiction. *Harris v. Ohio Edison Co.*, 1995 WL 494584 (Ohio App. 7 Dist.) (not reported in N.E.2d).

In contrast to claims patently and unambiguously within the jurisdiction of PUCO, Allstate alleged a typical negligence claim against CEI based on its common-law duty to exercise due care for the safety of Allstate's insureds' real and personal property, breach of that duty, and damages caused by that breach. When analyzing how a duty may arise it is important to note that the "range of [a utility's] responsibility to the public is not limited solely by industry

[2] The plaintiffs therein also claimed that the utility failed to take "precautions to protect or warn the general public" about the situation, but that argument was not addressed on appeal. *Shaker*, 68 Ohio St. 3d at 210.

standards and commission regulations." *Kohli v. PUCO*, 18 Ohio St. 3d 12, 14 (1985) (citing *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903)). In fact, an electric utility is required to exercise "the highest degree of care" even if the pertinent activity is not directly regulated by the appropriate authority. *Id.* This is the common-law duty which CEI breached to Ms. Harris, Allstate's insured. This is the common-law duty CEI would conceptually breach in any like situation involving damages to property of others, customers or not, resulting from a negligent failure to timely rectify a known dangerous condition of its property.

Like the proverbial ostrich coined by Pliny the Elder, CEI seems to take a "head in the sand" approach to this common-law claim. For example, CEI asserts, "***everyone*** agreed that no action or inaction of CEI caused the fire." (CEI's Memorandum in Response to Appellant's Memorandum in Support of Jurisdiction (hereinafter referred to as "CEI's Memorandum"), p. 3 (emphasis in original).) This claim is unsupportable on its face, as it is a matter of record that the jury members did not so agree when they determined that CEI's actions and/or inactions not only amounted to negligence but also were in fact the legal cause of the fire. Similarly, CEI may continue to argue that there is "no evidence that CEI breached any duty of care." (CEI's Memorandum, p.1.) Again, the verdict and trial record speak strongly otherwise.

Unlike complaints alleging the breach of a duty codified in Title 49, or a complaint regarding electrical service or practices related to that service, any of which would be within PUCO's exclusive jurisdiction, Allstate alleged a breach of a legal duty existing at common-law in Ohio. *See, Mid-American Fire & Cas. Co. v. Gray ("Mid-American")*, 1993 WL 211651 (Ohio App. 2 Dist.) (not reported in N.E.2d) (the "failure to respond to [the customer's] request for assistance ... was an isolated individual act of negligence falling within the jurisdiction of the court of common pleas"). Since PUCO is unable to determine the legal rights and liabilities of

the parties in relation to the breach of this common-law duty, jurisdiction can only be proper in the Court of Common Pleas. *See, Milligan v. Ohio Bell Tel. Co.*, 56 Ohio St. 2d 191, 195 (1978). Allstate has proven that the breach of a common-law duty was the cause of the damages sustained by its insureds, and Allstate has properly invoked the jurisdiction of the Court of Common Pleas over its tort claim, even though it complained against a regulated public utility. Accordingly, Allstate's common-law tort claim was not neither about "service" nor a "practice affecting or relating to any service" as reasonably might have been contemplated by the General Assembly in enacting section 4905.26.

B. Allstate Does Not Complain that Any "Service" as Reasonably Contemplated by Section 4905.26 Was Unreasonable, Inadequate, or in Violation of Law.

As CEI correctly argues, it is the substance of Allstate's claim, rather than its characterization in the Complaint, that ultimately determines whether accepting jurisdiction over this dispute was proper. *Henson*, 102 Ohio St. 3d at 352; *see, e.g.*, CEI's Memorandum, p. 6. CEI's arguments in this case, however, sidestep the flip-side of this admonition: a utility's determination that a claim is "service related" does not control the jurisdictional scope of section 4905.26. Several courts have rejected the notion that simply asserting that a claim is "service related" is sufficient to invoke PUCO's jurisdiction because essentially "every negligence claim brought against a public utility will be one involving some aspect of 'service.'" *See, e.g., Gayheart*, 98 Ohio App. 3d at 229. In order to avoid this potential semantic trap, determination of the scope of section 4905.26 is essential to this Court's jurisdictional analysis.

Typical of CEI's stance in this dispute is its assertion that "[t]he broad scope of §4905.26 encompasses any practices relating to any services or practices of a public utility." (CEI's Memorandum, p. 4.) Notwithstanding that "practices relating to any...practices of a public

utility" are not contemplated by the statute[3], it would seem as though CEI misinterprets the nature of the referenced "service". By referring to "any services...of a public utility", CEI seems to imply that section 4905.26 uses the term in its popular sense.[4] As applied to CEI under the facts of this case, "service" refers strictly to the provisioning of electrical service to a customer, and not the less than pedestrian usage of the term CEI seeks to employ in its argument that Allstate's complaint is properly within PUCO's jurisdiction.[5]

For example, CEI refers to Allstate's insured's call as a "service call". (*See, e.g.*, CEI's Memorandum, pp. 1 and 7.) Under a general definition of "service", this would still only be half accurate, as Ms. Harris and Ms. Little made their calls to CEI in hopes that it would perform the useful act of remedying the imminent danger to their home, albeit without a fee charged. However, Title 49 most certainly does not grant PUCO jurisdiction over every negligence claim pertaining to CEI's attempts to "do something useful" for customers, but rather, for purposes of this dispute, only over issues with the quality of the *electrical service* provided by CEI. *See, e.g.*,

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[3] The practices referenced by section 4905.26 are only those "affecting or relating to any *service furnished by the public utility*". (Emphasis added.) Given the portions of the statute that CEI chose to emphasize in its Memorandum, it is possible that CEI intended to refer to the phrase, "any matter affecting its own *product* or service". R.C. § 4905.26 (emphasis altered); *see* CEI's Memorandum, p. 4. However, this clause does not refer to a complaint by a customer, but rather a "complaint of a public utility". *Id.*

[4] Black's Law Dictionary defines "service" generically as "[t]he act of doing something useful for a person or company for a fee". (8th ed. 2004.)

[5] This stance may have come from language used in a decision by the Seventh District Court of Appeals, which states, "State Farm alleges that *the service provided by CEI in inspecting the meter* was negligently performed. Thus, although sounding in tort, State Farm's claim primarily relates to service." *State Farm Fire & Cas. Co. v. Cleveland Electrical Illuminating Co.*, 2004 WL 1486664 at *2 (Ohio App. 11 Dist.) (not reported in N.E.2d) (emphasis added). However, the cases cited in support of this proposition (and the parenthetical summaries of the associated holdings) clearly refer to *utility service* – i.e. electrical service, telephone service, and electric and gas service – rather than an "inspection service" or other activity of a utility company as a "service". *See, id.*

R.C. §4928.01(11) ("'Electric utility' means an electric light company that is engaged on a for-profit basis in the business of supplying a noncompetitive retail *electric service* in this state...." (emphasis added)); *and* R.C. §§ 4933.12 – 4933.123 (regulating "Disconnection of *Services*" (emphasis added)). Moreover, "[e]very public utility in Ohio is required to file, for commission review and approval, tariff schedules that detail rates, charges, and classifications for every *service* offered." *Kazmaier*, 61 Ohio St. 3d at 150 (citing R.C. §4905.30; emphasis added). Notably, CEI has offered no evidence identifying any tariff schedule applicable to the purported "service" of responding to Mrs. Harris's emergency call.[6]

Similarly, although parties and the courts use the phrase "service related" to refer to a class of customer complaints, the jurisdictional reach of PUCO is not so expansive as to cover every claim that is in any conceivable way related to a customer's electrical service. *See*, *Gayheart*, 98 Ohio App. 3d at 229. If this were a case of inadequate electrical service, wrongful termination of Ms. Harris's electrical service, or unlawful rates charged in connection with electrical service, Allstate would agree that PUCO's jurisdiction would be appropriate. *See*, *Henson*, 102 Ohio St. 3d 349. However, the electrical service to Allstate's insureds' homes was more than adequate. If anything, the *electrical service* to the duplex was exemplary given the homes were provided with uninterrupted power up to the time of the fire, even though the service connection mast had been nearly pulled off the structure. The three phone calls Ms. Harris and her daughter placed that Sunday afternoon to CEI were never based upon a complaint regarding the electrical service received but rather concerned an immediate danger CEI's power line presented to person and property. It is CEI's negligence in responding to this event – not in

[6] While CEI does assert that "the manner by which CEI classifies its trouble calls, and how quickly it responds to them, is a matter within the exclusive jurisdiction of PUCO" (CEI's Memorandum, p. 3.), this unsupported position is addressed in section C, *infra*.

providing an inadequate or discriminatory electrical service – which the jury agreed caused this fire.

Lawko v. Ameritech Corp. and *State Farm Fire & Cas. Co. v. Cleveland Electrical Illuminating Co.* ("*State Farm*"), the two cases CEI has argued are on point, are excellent examples of the distinction between the facts presently before this Court and those relating to "service" as used in section 4905.26. (*See*, CEI's Memorandum, pp. 6-7.) *Lawko* involved various damages to a law firm's business assertedly caused by the poor quality of the firm's telephone service. 2000 WL 1800753 at *1 (Ohio App. 8 Dist.) (not reported in N.E.2d). Specifically, the customer brought suit against a telephone company based on the breach of its "duty to provide *adequate telephone service*" and its failure "to correct the problems with [the] *telephone service*, despite numerous complaint regarding the *service* from [the plaintiff] and her clients." *Id.* at *3 (emphasis added). This was clearly a case where the damages complained of flowed directly from the inadequate *telephone service* received by the firm. In contrast, Allstate's insureds neither complained nor had reason to complain about the quality of the electrical service received. Damages in this case resulted from the failure of CEI to respond appropriately to notice of the dangerous condition of its power lines, not from its failure to provide adequate electrical service to the duplex in which Ms. Harris resided.

State Farm was a subrogation action arising from a fire purportedly caused by the utility's negligent inspection of a customer's electric meter. 2004 WL 1486664 at *1 (Ohio App. 11 Dist.) (not reported in N.E.2d). The court found that a complaint about the routine inspection of an electric meter, like the replacement of a meter, was "primarily relate[d] to service." *Id.* at *2; *see* fn. 5, *supra*. Again, the damages resulted from inadequate – even dangerous – *electrical service* to the home, as the utility's equipment did not perform as expected and the utility's

routine inspection failed to detect the danger. Furthermore, the court explicitly found that because "State Farm's claim requires an interpretation of CEI's tariffs, as well as Ohio Adm. Code 4901:1-10-01 et seq., it is best accomplished by PUCO and its expert technicians who are familiar with these provisions." *State Farm,* 2004 WL 1486664 at *3. The case presently before this Court, in contrast, does not involve claims that any CEI equipment functioned improperly, or claims of any failure by CEI to perform a routine inspection defined by utility tariffs and the administrative code provisions. Here, the claim is based on standards of care defined under the common law.

Allstate asserts that this Court should determine the appropriate question to not be whether a lawsuit concerns a customer complaint about *any* "service" performed by a utility, but whether the complaint is, in essence, about the actual utility service received by a customer. If, and only if, a plaintiff's claim is about the actual utility service received by a customer, as defined by statute, then jurisdiction would lie with PUCO and not the Court of Common Pleas. Allstate's tort claim does not relate to the quality or legality of the electrical service CEI provided to its insureds' homes, does not fall within an area regulated by statute, tariff, or PUCO order, and is not otherwise "best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions." *Kazmaier*, 61 Ohio St. 3d at 153. CEI would seem to agree, as it argued in its appeal to the Eighth District Court of Appeals, that "Allstate does not allege, and there is no evidence, that CEI's equipment failed or malfunctioned, or that CEI failed to construct, maintain, or inspect its equipment. To the contrary, the equipment was located and performed as is required and designed." (Brief of Defendant-Appellant Cleveland Electric Illuminating Company (filed July 21, 2006), p.1.) CEI's statement would seem to acknowledge that there was in fact no complaint about the electrical service

received by Allstate's insureds, and that this dispute is not related to matters subject to PUCO's jurisdiction.

In this respect the claim against CEI is no different than damages resulting from the failure of *any* business or individual to correct a known dangerous condition of its property; i.e., the claim is properly resolved using common-law negligence principles which PUCO by design is not destined to adjudicate. Therefore, PUCO should not have jurisdiction over CEI's isolated act of negligence in dealing with the imminent danger its power line presented to others on July 20, 2003.

C. Allstate Does Not Complain that Any "Practice Affecting or Relating to Any Service Furnished by the Public Utility" as Reasonably Contemplated by Section 4905.26 Was Unreasonable, Inadequate, or Otherwise in Violation of Law.

Just as CEI will argue that Allstate's complaint is essentially about the electrical service received by its insureds, CEI will alternatively argue that Allstate complains about a practice relating to said electrical service. CEI has asserted on several occasions that its practice involving the classification of and response to trouble calls "is a matter within the exclusive jurisdiction of the PUCO." (CEI's Memorandum, pp. 3 and 8.) Notwithstanding the lack of support for these self-serving allegations, Allstate has never claimed that CEI's procedures for classifying and responding to emergency calls – or any customer calls, for that matter – are in any respect unreasonable or insufficient. Because Allstate complains of an isolated act of negligence, rather than a faulty procedure for processing customer calls, the complaint is not fairly categorized as involving a practice related to service under section 4905.26.

The Second District Court of Appeals dealt with a factual situation much like the current dispute. *See, Mid-American*, 1993 WL 211651. *Mid-American* was also a subrogation action in which the insureds suffered fire damage to their home as a result of the failure of the electric

company to respond to an emergency call. 1993 WL 211651 at *1. The emergency arose early one afternoon when tree trimmers accidentally cut into the electric line servicing the insureds' home. *Id.* Although the utility was immediately informed of the danger, "no repairmen responded", and power was not disconnected from the insureds' home until "approximately ten o'clock, but not before the ceiling joists of the [insureds'] residence ignited, resulting in fire damage to the building". *Id.* The court determined that these facts gave rise to a pure common-law tort claim, rather than a complaint involving a "practice affecting or relating to service" as contemplated by section 4905.26. *Id.* at *2-*3.

The court noted that "[a] 'practice' is defined as 'a repeated or customary action; habitual performance; a succession of acts of similar kind; custom.'" *Id.* at *2 (citing Black's Law Dictionary (5th ed. rev., 1979)). Accordingly, the court found that

> there is no evidence in this case that the servicemen's failure to timely respond to [the insureds'] request for assistance was at the direction of [the power company]. Therefore, this failure to act did not constitute a "practice related to service" as contemplated by the statute ... but was an isolated individual act of negligence falling within the jurisdiction of the court of common pleas.

Id. at *3. The court contrasted those facts with a "similar fact situation" which it previously determined was properly under the exclusive jurisdiction of PUCO. *Id.* at *2 (citing *Farra v. Dayton*, 62 Ohio App.3d 487 (2 Dist., 1989), *jurisdictional motion overruled*, 43 Ohio St. 3d 712 (1989)). *Farra* involved a tort claim arising from trespass and destruction of property that occurred when an electrical serviceman removed a customer's electrical and gas meters. *Id.* Because "the meters were related to [the utility's] service, and [because] the trespass and destruction of the door and lock were incidental to [the utility's] removal of the meters," the incident involved a "'practice affecting and relating to service,' albeit an unjust and unreasonable practice." *Id.* This holding was specifically predicated on the fact that the utility "directed its

serviceman to enter Farra's building and remove the gas and electric meters." *Mid-American,* 1993 WL 211651 at *3.

The current dispute is substantially identical to the facts of *Mid-American* and lacks any of the features of *Farra* that placed that complaint within PUCO's exclusive jurisdiction. Allstate's insureds and the customers in *Mid-American* both notified their power company of a dangerous condition of the electric lines leading to their homes. In both cases it is undisputed that neither the power companies nor the quality of the electrical service received by the utilities' customers were responsible for creating the dangerous condition. Also, there is no evidence either that CEI's failure to respond to the emergency calls placed by or on the behalf of Mrs. Harris was consistent with a practice of the utility or that CEI directed its servicemen not to respond to the call. CEI has never argued that its custom or practice is to ignore or delay responding to calls indicating an imminent danger to property. Both *Mid-American* and the facts before this Court fail to indicate a "practice related to service" but rather describe isolated individual acts of negligence properly adjudicated by the Court of Common Pleas.

Farra, on the other hand, involved a utility company that specifically directed its serviceman to remove the meters of a building where services had been terminated. PUCO retains exclusive jurisdiction over not only "complaints regarding termination of service by public utilities" but also disputes based upon negligence in the installation and inspection of utility meters. *Henson*, 102 Ohio St. 3d at 352; *Suleiman*, 146 Ohio App. 3d at 45-46 (cited by *Henson*, 102 Ohio St. 3d at 352); *State Farm*, 2004 WL 1486664 at *2-*3. It follows that the negligent removal of utility meter would also be a "service related" complaint. Also, the damages were directly attributable to the utility's practice of removing a meter when electric service is terminated. As stated above, in this case there is no evidence that CEI directed its

service personnel not to take action to rectify the dangerous condition of the electric lines attached to Allstate's insureds' homes. This dispute does not involve negligence in installing, inspecting, or removing an electric meter or other equipment. The damages sustained by Allstate and its insureds were not attributable to any practice of CEI related to providing electric service to the duplex, but were caused solely by an isolated act of negligence. Because Allstate's claim does not involve a practice and furthermore is substantially the same as the facts in *Mid-American* and substantially inapposite to the facts in *Farra*, Allstate requests this Court find that jurisdiction over its claim is proper in the Court of Common Pleas rather than PUCO.

D. A Finding that Allstate's Complaint Is "Service Related" Would Effectively Immunize Electric Companies from Their Negligence in Responding to Notification of the Dangerous Condition of Their Electrical Wires Leading to a Customer's Home.

If the matter before this Court is found to be essentially "service related" – i.e., within the categories set forth in section 4905.26 – Ohio residents and business would find themselves without redress under the common-law when an electric company fails to respond or is otherwise negligent in its response to notification that one of its power lines poses an imminent threat to life and property. If an action based upon such negligence, like the current dispute, cannot be brought in the Court of Common Pleas, an injured party's sole option would be to file an action before PUCO, a commission not competent to determine legal rights and liabilities, and one not empowered to award monetary damages caused by the utility's negligence. *See*, *Milligan*, 56 Ohio St. 2d at 195.

If CEI were to have its way here, it would have this Court require every Plaintiff, before recovering any damages in the Court of Common Pleas, to first obtain a finding by PUCO "that there was in fact a violation of a specific statute, or noncompliance with a commission order." *Kazmaier*, 61 Ohio St. 3d at 152 (citing R.C. §4905.61). CEI is well aware that "there is perhaps

no field of business subject to greater statutory and governmental control than that of a public utility" and should be charged with intimate knowledge of the statutes, tariffs, and PUCO orders under which it must operate. (CEI's Memorandum, p. 4 (citing *Kazmaier*, 61 Ohio St. 3d at 151).) Oddly enough, CEI has at no point in this litigation cited a single statute[7], tariff, or PUCO order applicable to this factual situation. It should be assumed that if PUCO's expertise were in fact needed, the pertinent provision would have been cited by CEI in its Motion to Dismiss, its Motion for Summary Judgment, in its appeal to the Eighth District Court of Appeals, or in its memorandum opposing accepting jurisdiction over the instant appeal. Instead, CEI merely declares in conclusory fashion that this dispute "necessitate[s] an interpretation of CEI's service tariffs". (*See, e.g.*, CEI's Memorandum, p. 7.)

Because disputes such as this one do not involve the violation of a statute, tariff, or PUCO order, Allstate, or any resident or business in Ohio, will have no redress under section 4905.61 when a utility's negligence in responding to an emergency call such as the one complained of herein results in the destruction of their property or worse even still, personal injury or loss of life. Since the injured party would not otherwise be able to bring suit in the Court of Common Pleas, an electric utility company will effectively be free of any liability for its negligence. For this reason, and all the others articulated above, Appellant Allstate respectfully requests that this Court find that the facts of this dispute are essentially a pure common-law tort claim and do not constitute a "service related" complaint as reasonably contemplated by the legislature when enacting utility regulation statutes, including section 4905.26.

[7] Excepting, of course, its argument that Allstate's complaint is "service related" under section 4905.26.

E. Adopting the Two-Part Test Articulated by the Eighth District Court of Appeals in *Pacific Indemnity Insurance Company v. Illuminating Company* Would Result in Less Uncertainty for Litigants and the Courts.

Ohio case law and the dispute before this Court show that the ambiguities inherent in terms and phrases like "service", "practice related to service", or "service related" result in both litigants and courts coming to different conclusions as to whether PUCO's jurisdiction is proper. To some extent, ambiguity in the regulatory framework is necessary. For example, it is undisputed that complaints based on "inadequate service" are properly heard by PUCO. *See*, R.C. §§ 4905.22 and 4905.26; *see also, Ohio Bell Tel. Co. v. PUCO*, 14 Ohio St. 3d 49 (1984). From a jurisdictional standpoint a statutory (or judicial) definition of "inadequate service" would be extremely helpful in determining the proper forum for a grievance. However, because a PUCO determination that a utility company provided inadequate service is ultimately dependent upon the facts of each case, it does not seem possible to define the term without creating more confusion.

Accordingly, the Eighth District Court of Appeals articulated a two-part test, which Allstate asserts properly incorporates all of the statutory jurisdictional requirements without relying on terms capable of such varied interpretations:

> In deciding whether an action is service-related and belongs under PUCO's exclusive jurisdiction, some courts approach the issue by posing two questions. 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, courts routinely find that those claims fall outside PUCO's exclusive jurisdiction.

Pacific Indem. Ins. Co. v. Illuminating Co., 2003 WL 21710787 at *3 (Ohio App. 8 Dist.) (not reported in N.E.2d).

These questions serve to distinguish "service related" claims from pure common-law tort claims by invoking the legislative rationale for the creation PUCO and the grant of jurisdiction

over certain classes of customer complaints. For example, under this test, complaints regarding rates, equipment inspection, service classifications, termination or interruption of service, adequacy of utility service, installation and removal of meters, and any other item aptly described as an "arcane regulatory issue which requires the services of the commission with its expert staff technicians to resolve" would necessitate affirmative responses to both questions. *Kazmaier*, 61 Ohio St. 3d at 661 (Brown, J., dissenting in part) (internal quotes removed). Because these sorts of complaints not only require PUCO's administrative expertise but also involve activities normally authorized by the utility, both this two-part test and the traditional statutory analysis described above properly point to PUCO as the appropriate forum for redress. The second question further serves to distinguish an isolated act of negligence from an inadequate "practice affecting or relating to any service furnished by the public utility" consistent with the argument presented in section C, *supra*. R.C. §4905.26.

Under this test, Allstate's complaint was properly heard by the Court of Common Pleas. First, PUCO's expertise was not required to resolve the issue in dispute. The complaint did not involve rates, the quality of Allstate's insureds' electric service, or any other matter covered government by Title 49, PUCO orders, or CEI's tariffs. This was a simple common-law tort claim no different than those brought against any individual or business that negligently fails to correct the known dangerous condition of its property. Second, it has never been argued that CEI's practice for handling a customer's (or any person's, for that matter) emergency calls was deficient or otherwise inadequate. Rather, Allstate asserted a simple, isolated act of negligence not attributable to any "practice" of CEI. Therefore, jurisdiction was and is proper in the Court of Common Pleas.

Allstate respectfully requests this Court consider adopting this test, not to supplant the

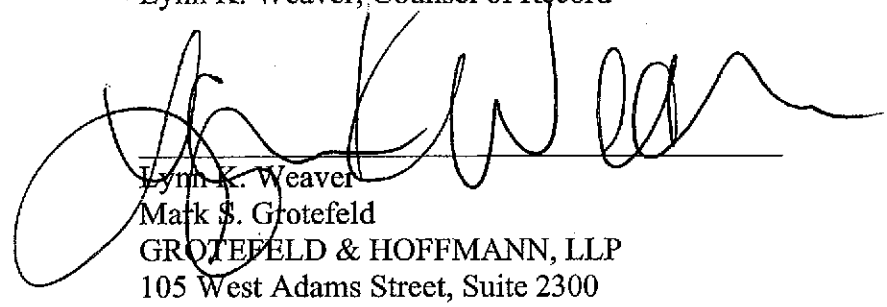
statutory grant of jurisdiction contained in the language of section 4905.26, but rather to clarify PUCO's role and to avoid exploitation of PUCO's limitations. Such a gloss on the statute will encourage judicial economy by allowing parties and courts to better assess the appropriate forum for presenting (or defending) a claim involving a regulated utility company's wrongful acts *before* using valuable court resources for a trial (and appeals).

CONCLUSION

For all the reasons and arguments discussed above, Appellant Allstate Insurance Company respectfully requests this Court find that under the facts of this case, a negligence claim arising from a utility company's failure to respond to a customer's emergency call, resulting in a fire at that customer's home, is a pure common law tort claim subject to jurisdiction in a Court of Common Pleas, rather than a "service related" claim subject to the exclusive jurisdiction of the Public Utilities Commission of Ohio under to R.C. 4905.26.

Respectfully submitted,

Lynn K. Weaver, Counsel of Record



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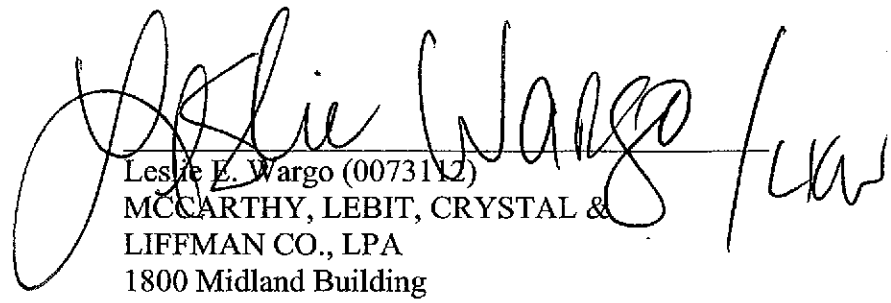

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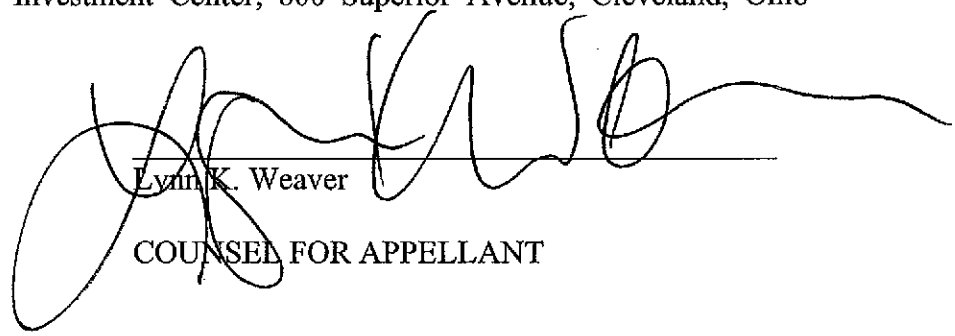
Certificate of Service

I certify that a copy of this Merit Brief was sent by U.S. mail to counsel of record for appellees, Thomas L. Michals, Deneen Lamonica, Anthony F. Stringer, Calfee, Halter & Griswold, LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114 on August 27, 2007.



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Appendix

IN THE SUPREME COURT OF OHIO

Allstate Insurance Company, as subrogee of Margaret Harris and Anna Kaplan,	:	CASE NO: 07-0452
Appellant,	:	On Appeal from the Cuyahoga County Court of Appeals, Eight Appellate District
v.	:	
Cleveland Electric Illuminating Company,	:	Court of Appeals Case No. CA-06-087781
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT, ALLSTATE INSURANCE COMPANY

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FILED
MAR 14 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Notice of Appeal of Appellant Allstate Insurance Company

Appellant, Allstate Insurance Company, hereby gives its Notice of Appeal to the Supreme Court of Ohio from the judgment of the Eighth District Court of Appeals, entered in Case No. CA-06-087781 on January 29, 2007. (See, Judgment attached hereto as Exhibit "A")

Pursuant to Supreme Court Practice Rule II, Section 1(A)(3), this is an appeal that raises a question of public or great general interest. A Memorandum in Support of Jurisdiction has been simultaneously filed with this Notice of Appeal.

Respectfully submitted,

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I certify that a copy of the Notice of Appeal of Appellant, Allstate Insurance Company was sent by regular U.S. mail on the 13th day of March, 2007, to Thomas I. Michals, Esq., Deneen Lamonica, Esq., and Anthony F. Stringer, Esq., Counsel for Appellee, at Calfee, Halter & Griswold, LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688.

Leslie Wargo

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87781

ALLSTATE INSURANCE COMPANY

PLAINTIFF-APPELLEE

vs.

CLEVELAND ELECTRIC ILLUMINATING COMPANY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-554692

BEFORE: Calabrese, P.J., Kilbane, J., and Blackmon, J.

RELEASED: January 18, 2007

JOURNALIZED: JAN 2 9 2007

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FILED ... ...ZED
PER APP. R. ..2(E)

JAN 29 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

JAN 18 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

ANTHONY O. CALABRESE, JR., P.J.:

Defendant-appellant, Cleveland Electric Illuminating Company ("CEI"), appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we reverse and remand to the lower court.

I.

According to the case, this subrogation action was filed by plaintiff-appellee, Allstate Insurance Company ("Allstate"), as subrogee of Margaret Harris and Anna Kaplan, against CEI on February 14, 2005, alleging negligence for a fire that damaged the duplex residences of Harris and Kaplan on July 20, 2003. Both Harris and Kaplan submitted a claim for damages under their respective homeowner's insurance policies. Allstate paid Harris $149,357.34 and paid Kaplan $12,435.13 for damages.

On July 20, 2005, CEI filed a motion to dismiss, asserting that the Public Utilities Commission of Ohio (PUCO) possessed exclusive subject matter jurisdiction over Allstate's negligence claim. Allstate filed its memorandum in opposition to CEI's motion to dismiss on August 5, 2005. The trial court denied CEI's motion on August 10, 2005, ruling that it did have subject matter jurisdiction over Allstate's claim. After engaging in written and oral discovery, CEI filed its motion for summary judgment, alleging in part that it owed no duty to affirmatively act in the protection of the Harris and Kaplan properties, and

that there is not evidence as to the standard of care or breach thereof to establish it as a proximate cause of the fire.

Allstate filed its response and memorandum in opposition to CEI's motion for summary judgment on December 15, 2005. The trial court denied CEI's motion on December 16, 2005. On December 28, 2005, CEI filed a motion for reconsideration of the trial court's denial of its motions to dismiss and for summary judgment, which the trial court denied on December 30, 2005.

A final pretrial conference was held on January 4, 2006, and the parties were ordered to file any motions in limine by January 9, 2006. The trial court issued a ruling on the motions in limine on January 12, 2006, including granting Allstate's motion in limine to exclude CEI from presenting evidence that it was not liable because the customer's tree limb fell on the wire, pulling the service mast away from the house. Jury trial began on January 17, 2006.

On January 19, 2006, Allstate rested its case in chief and CEI moved for a directed verdict, which the trial court denied. CEI presented its case, concluding on January 20, 2006. After closing arguments, the case was submitted to the jury who returned a verdict on January 20, 2006, finding CEI 100 percent negligent and awarding Allstate the full $161,792.47 in damages. This appeal ensued.

According to the facts, on July 20, 2003, Allstate insureds Margaret Harris and Anna Kaplan sustained property damage at their side-by-side duplex residences located at 1500-1502 East 250th Street in Euclid. Sometime between 10:30 a.m. and 11:00 a.m., Harris and her daughter, Lisa Little, walked into the backyard garden and noticed that a large tree limb had fallen from Harris' tree onto the utility wires. The apparent width of the limb caused the electrical service mast to pull away from the house. Little immediately called CEI and spoke to customer service representative Pamela Warford, advising her that a tree limb had fallen on the service wire and that it was ready to snap. Warford categorized the call as a low priority.

After several hours passed with no response, Harris again called CEI to make certain that it had the proper address. She remained in the automated system when reporting the accident and was never connected to a customer service representative.

At approximately 5:00 p.m., Harris noticed that the problem still had not been repaired. Since the lights on her home were still operative, Harris made another call to CEI. Ten minutes after her call, Harris heard a noise and saw wires sparking on the ground. Realizing that the sparks had set the house on fire, she called 9-1-1. The fire department subsequently arrived and extinguished the blaze.

II.

First assignment of error: "The trial court erred in failing to dismiss the action for lack of subject matter jurisdiction."

Second assignment of error: "The trial court erred in failing to grant summary judgment in favor of CEI."

Third assignment of error: "The trial court erred in failing to grant a directed verdict in favor of CEI."

Fourth assignment of error: "The trial court erred in prohibiting counsel for CEI from arguing that CEI owed no duty to Allstate's insured to prevent the fire caused by her tree and her equipment."

Fifth assignment of error: "The trial court failed to correctly instruct the jury on the lack of duty owed by CEI to Allstate's insureds."

Sixth assignment of error: "The trial court erred in precluding CEI's expert, Ralph Dolence, from offering opinion testimony concerning CEI's handling of the trouble calls at issue."

Seventh assignment of error: "The trial court erred in admitting damages summary sheets into evidence without any foundation or supporting testimony and preventing CEI's counsel from demonstrating that the documents were not prepared in the ordinary course and not properly authenticated."

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Eighth assignment of error: "The trial court erred in failing to admit Allstate's insured's insurance application into evidence on the basis that there was testimony on that document."

III.

Appellant argues in its first assignment of error that the lower court erred in failing to dismiss the action for lack of subject matter jurisdiction.

PUCO has jurisdiction to adjudicate utility customer complaints related to rates or services of the utility. The Supreme Court of Ohio has determined that when a claim is related to service, as defined by R.C. 4905.26, the Commission has exclusive jurisdiction. Section 4905.26 is the statute authorizing and explaining the procedure for filing service complaints. *Miles Mgmt. Corp. v. FirstEnergy Corp.*, Cuyahoga App. No. 84197, 2005-Ohio-1496.

There are, however, exceptions to PUCO'S exclusive jurisdiction over utility complaints. Contract and pure common-law tort claims may be brought in a court of common pleas, rather than submitted to PUCO. *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas,* 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E.2d 92.

Nonetheless, "claims [that] are manifestly service-related complaints *** are 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, at p. 20, 810

N.E.2d 953, citing *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575, ("a court of common pleas is without jurisdiction to hear a claim alleging that a utility has violated R.C. 4905.22[1] by *** wrongfully terminating service, since such matter [is] within the exclusive jurisdiction of the Public Utilities Commission"), paragraph two of the syllabus. Quality of service complaints are under PUCO's jurisdiction. Id., citing *Tongren v. D & L Gas Marketing, Ltd.*, 149 Ohio App.3d 508, 2002-Ohio-5006, 778 N.E.2d 76, p. 20; *Ippolito v. First Energy Corporation*, Cuyahoga App. No. 84267, 2004-Ohio-5876.

In the case at bar, we must determine whether plaintiff's claims are common-law tort claims or whether they primarily relate to service. We review the substance of the claims rather than plaintiff's assertions that they are tort claims. See *Milligan v. Ohio Bell Telephone Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575.

Following the Ohio Supreme Court and other state appellate courts, this court has repeatedly held that tort claims alleging disruption in service or the adequacy of utility service fall under the exclusive jurisdiction of PUCO. *Pac. Indem. Ins. Co. v. Illuminating Co.*, Cuyahoga App. No. 82074, 2003-Ohio-3954; *Lawko v. Ameritech Corp.* (Dec. 7, 2000), Cuyahoga App. No. 78103, (negligence

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[1]R.C. 4905.22 states that "every public utility shall furnish necessary and adequate service ***."

claim alleging inadequate telephone service and failure to remedy the telephone service "are clearly service-oriented" and, therefore, "the exclusive jurisdiction for disposition of such claims lies with the PUCO"); *Assad v. Cleveland Elec. Illuminating Co.* (May 19, 1994), Cuyahoga App. No. 65532; *Ohio Graphco v. Ohio Bell Tel. Co.* (May 12, 1994), Cuyahoga App. No. 65466; *Pacific Chemical Products Co. v. Teletronics Services, Inc.* (1985), 29 Ohio App.3d 45, 29 Ohio B. 47, 502 N.E.2d 669; *State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.*, Lake App. No. 2003-L-032, 2004-Ohio-3506, (plaintiff's negligent inspection claim was primarily related to service); *Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 2001-Ohio-3414, 764 N.E.2d 1098, (negligence claim for defendant's replacement of an electrical meter relates to service and is within the exclusive jurisdiction of PUCO); *Cochran v. Ameritech Corp.* (July 26, 2000), Summit App. No. 19832, (tort and civil rights claims related to telephone company's discontinuation of plaintiff's service and, therefore, fell under PUCO); *Heiner v. Cleveland Elec. Illuminating Co.* (Aug. 9, 1996), Geauga App. No. 95-G-1948, (power surge was service related); *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807, (claim brought as negligence concerning removal of electric and gas meters is service related).

The case at bar involves a tort claim concerning the adequacy of utility service to Harris' and Kaplan's duplex. Specifically, it is expected and required

that CEI respond to customer service inquires concerning emergency situations in an adequate and expedient manner. Clearly, CEI failed to provide adequate utility service in this case. If CEI's customer service department would have responded adequately to repeated customer warnings, the resulting fire in this case could have been avoided all together. Accordingly, we find that Ohio law, as well as the evidence in the record, mandates that this case falls under the exclusive jurisdiction of the PUCO.

Appellant's first assignment of error is sustained.

Based on the disposition of appellant's first assignment of error, we find appellant's remaining assignments of error to be moot. This case is to be remanded to the lower court with instructions to dismiss for lack of subject matter jurisdiction. Proper venue for this case is with the PUCO.

It is ordered that appellant recover from appellee costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, J., DISSENTING:

I respectfully dissent from the majority's opinion and would find that PUCO did not have exclusive jurisdiction over this claim.

In deciding whether an action is service-related and belongs under PUCO's exclusive jurisdiction, some courts approach the issue by posing two questions: Is PUCO's administrative expertise required to resolve the issue in dispute? Does the act complained of constitute a "practice" normally authorized by the utility? If the answer to either question is in the negative, courts routinely find that those claims fall outside PUCO's exclusive jurisdiction. *Pacific Indemn. Ins. Co. v. The Illuminating Co., et al.*, Cuyahoga App. No. 82074, 2003-Ohio-3954.

In some circumstances, however, courts "retain limited subject-matter jurisdiction over pure common-law tort and certain contract actions involving utilities regulated by the commission." Id. In *State ex rel. Cleveland Elec. Illuminating Co.*, 97 Ohio St.3d 69,75, 2002-Ohio-5312, respondent asserted that its contract with the relator/utility was void because of indefiniteness and lack of consideration. The Ohio Supreme Court determined that respondent's contract claims against relator/utility did *not* fall within the exclusive jurisdiction of PUCO.

Further, in the instant case, there is nothing in the record to evidence that PUCO's administrative expertise was required to resolve Allstate's claim. There

is also no indication that CEI's failure to promptly act constitutes an act "normally authorized" by the utility. See *Pacific Indemn. Ins. Co.,* supra.

Finally, PUCO does not have exclusive jurisdiction over every claim brought against a public utility. As the majority recognizes, contract and pure common-law tort claims against a public utility *may* be brought in a common pleas court. *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191; *Steffen v. Gen. Tel. Co.* (1978), 60 Ohio App.2d 144.

In *Pacific Indemn. Ins. Co. v. Illuminating Co.*, supra, this court cited to *State ex rel. Ohio Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 708, in outlining several tort and contract cases in which various courts determined PUCO did not have exclusive jurisdiction. The Supreme Court found that:

> **"Other courts retain limited subject matter jurisdiction over tort and some contract claims involving utilities regulated by the commission. See, e.g., *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, supra, 61 Ohio St.3d at 154, (pure common-law tort claims may be brought in common pleas court); *Kohli v. Pub. Utilities. Comm.* (1985), 18 Ohio St.3d 12 (failure to warn landowners of dangers regarding voltage actionable in common pleas court); *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, paragraph three of the syllabus (invasion of privacy actionable in common pleas court); *Marketing Research Serv., Inc. v. Pub. Utilities Comm.* (1987), 34 Ohio St.3d 52, (commission has no jurisdiction to resolve breach of contract dispute concerning provision of interstate telecommunications service). But, see, *Gallo Displays, Inc. v. Cleveland Pub. Power* (1992), 84 Ohio App.3d 688 (common-**

law nuisance claim against utility not actionable in common pleas court)."

As the court in *Gayheart v. Dayton Power & Light Co* (1994), 98 Ohio App.3d 220, 229 found, "[i]n essence, every negligence claim brought against a public utility will be one involving some aspect of 'service.'" Therefore, the mere fact that a case involves some aspect of service, does not automatically place it within PUCO's exclusive jurisdiction.

I would find that the circumstances in the instant case were not ones that would reasonably have been contemplated by the legislature in enacting R.C. 4905.26 as being within PUCO's exclusive jurisdiction. Moreover, there is no evidence to suggest that CEI's failure to respond to Ms. Harris' call was a "practice related to service" as contemplated by the statute. Instead, it can be interpreted as an isolated act of negligence. For these reasons, this is a case that is appropriate for resolution by a jury, and jurisdiction was properly before Common Pleas Court.

I would therefore find that jurisdiction was properly before the Common Pleas Court and overrule CEI's first assignment of error.

3755-

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALLSTATE INS. CO.
Plaintiff

THE CLEVELAND ELECT. ILL. CO.
Defendant

Case No: CV-05-554692

Judge: BRIDGET M MCCAFFERTY

JOURNAL ENTRY

81 DISP.JURY TRIAL - FINAL

THE JURY IN THIS ACTION HAVING ON THE TWENTIETH DAY OF JANUARY 2006 RENDERED A VERDICT IN FAVOR OF PLAINTIFF IN THE SUM OF ONE HUNDRED SIXTY-ONE THOUSAND SEVEN HUNDRED NINETY-TWO DOLLARS AND FORTY-SEVEN CENTS ($161,792.47) AGAINST DEFENDANT CLEVELAND ELECTRIC ILLUMINATING COMPANY, JUDGMENT IS HEREBY RENDERED IN FAVOR OF PLAINTIFF AGAINST AND AT THE COST OF DEFENDANT CLEVELAND ELECTRIC ILLUMINATING COMPANY, FOR WHICH EXECUTION SHALL ISSUE.
COURT COST ASSESSED TO THE DEFENDANT(S).

1/20/06

Judge Signature Date

RECEIVED FOR FILING
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GERALD E. FUERST, CLERK
By _____ Deputy

Harris v. Ohio Edison Co.
Ohio App. 7 Dist.,1995.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Seventh District, Mahoning County
Steven HARRIS and Sandra Harris (Jones), andSTATE FARM INSURANCE CO., Plaintiffs-Appellants,
v.
OHIO EDISON COMPANY, Defendant-Appellee.
94 C.A. 84.

Aug. 17, 1995.

Civil Appeal from the Common Pleas Court, No. 94 CV 114.

Matthew C. Giannini, Youngstown, for plaintiffs-appellants.
Neil D. Schor, Youngstown, for defendant-appellee.

OPINION

COX, Judge.
*1 This matter presents a timely appeal from a decision of the Mahoning County Common Pleas Court dismissing the complaint of plaintiffs-appellants, Steven Harris and Sandra Harris (Jones) and State Farm Insurance Co., pursuant to Civ.R. 12(B)(1).

Appellants-Harrises allege that they began experiencing flickering lights and a significant drop in electricity at their residence in 1992. After repeated attempts to urge appellee, Ohio Edison Company, to complete an investigation into the problem to no avail, appellants-Harrises upgraded their electrical service to 100 AMP, installed their own voltage meter (which apparently verified voltage surges in their system) and hired an electrician to check their electrical service lines.

In late January 1993, appellants-Harrises' satellite receiver, answering machine and cordless phone were destroyed by a power surge. Their water pump and furnace also failed to operate properly. They again contacted appellee and were advised that it was not appellee's problem. An electrician hired by appellants-Harrises confirmed that there was a bad neutral tap, made temporary repairs and then sent one of appellee's repairmen out to make full repairs. Appellant-State Farm paid for the majority of damages to appellants-Harrises' property.

Appellants-Harrises and appellant-State Farm, through a right of subrogation, filed a complaint for negligence and intentional tort on January 14, 1994 against appellee. Appellee filed an answer and counterclaim and thereafter, a motion to dismiss appellants' complaint pursuant to Civ.R. 12(B)(1). On April 18, 1994, the trial court granted appellee's motion to dismiss.

Appellants' sole assignment of error alleges:
"That the trial court erred in determining that Ohio Edison's failure to investigate and to correct a known dangerous condition for which it was directly responsible to the public constituted the mere inadequate performance of a service' rather than a negligent omission to act where a reasonable person in the position of defendant would have acted for the safety of the plaintiffs."

Appellants submit that the jurisdiction of the Public Utilities Commission of Ohio (PUCO) is not exclusive as to all issues and R.C. 4905.26 does not vest in the PUCO exclusive jurisdiction over common law torts committed by public utilities. *Steffen v. General Telephone Co.* (1978), 60 Ohio App.2d 144. Appellants cite *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, for the proposition that the PUCO is in no sense a court and it has no power to judicially ascertain and determine legal rights and liabilities.

Appellants contend that the real issue in controversy here is one of negligence, not one of mere denial of service. Furthermore, appellants maintain that the standard of care for appellee is not merely reasonable prudence but is "the highest degree of care." *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347.

*2 Appellants urge that in one sense every claim against a public utility could be considered a claim involving the service of such utility as set forth in and thus subject to R.C. 4905.26, since even a common

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law tort could not arise in the absence of some form of service-oriented contact with a consumer. Therefore, appellants state that prior to dismissing a complaint against a public utility for lack of jurisdiction under R.C. 4905.26, a trial court should have before it sufficient factual information to make a determination as to the genuine issue in controversy underlying the service which brought the parties into contact.

In the case at bar, appellants claim to have sustained serious damage to property under potentially dangerous circumstances when a power surge occurred as a direct and proximate result of a negligently connected neutral tap. Even after actual and repeated notice of such condition, appellee recklessly and intentionally failed to investigate the neutral tap connection in a total disregard of public health and safety.

In *Milligan v. Ohio Bell Telephone Co.* (1978), 56 Ohio St.2d 191, the Ohio Supreme Court determined the subject matter jurisdiction issue should be resolved upon the substance of the claim rather than upon mere allegations of "provision of services". In *Kohli, et al. v. Public Utilities Commission of Ohio* (1985), 18 Ohio St.3d 12, where the utility company was aware of the potential danger of neutral-to-earth stray voltage and failed to warn the homeowners of same, the court held that a court of competent jurisdiction and not the PUCO was the appropriate forum for common law tort actions.

The trial court relied upon *Kazmaier Supermarket Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147 and *Wehr, et al. v. Ohio Edison Company* (Dec. 15, 1993), Mahoning County App. No. 92 C.A. 24, unreported, in its decision.

The case at bar is factually distinguishable from *Kazmaier, supra,* in that the complaint in *Kazmaier* involved a dispute over the correct rate to be assessed. The court in *Kazmaier, supra* held that whether expressly alleged or not, *Kazmaier's* claim involved an alleged unjust and unreasonable rate under the utility rate schedule in violation of R.C. 4905.22 and such claim was one which was within the PUCO's exclusive jurisdiction pursuant to R.C. 4905.26.

Wehr, supra, is also distinguishable from the case at bar in that although it involved a dismissal for jurisdictional reasons, said dismissal occurred after discovery, which provided sufficient evidence to support the trial court's interpretation of the jurisdictional issues.

Appellee argues that as a general rule, appellants' complaint herein for property damage "due to a faulty neutral tap" is within the exclusive original jurisdiction of the PUCO because it is a complaint premised upon an allegation of inadequate or improper service. Appellee continues that as appellants' complaint does not constitute a pure common law tort claim proper for common pleas court jurisdiction, such as those in *Kazmaier, supra* and *Wehr, supra,* appellants' cause of action falls within the PUCO's exclusive original jurisdiction.

***3** Appellants submit that the risk of death and public safety remove a mere service call to a higher plane of a negligent act or omission to act.

Allegations were made that not only did appellee fail to properly install the neutral tap connection, but it negligently, recklessly and intentionally failed to investigate and correct this dangerous and potentially deadly breach in its system, despite repeated and urgent requests to do so.

A trial court has the authority to exercise discretion in determining subject matter jurisdiction. However, where circumstances determining jurisdiction may be subject to more than one interpretation, then the basis of the complaint alone is insufficient to support a dismissal in absence of additional inquiry.

Appellants' sole assignment of error is found to be with merit.

The judgment of the trial court is reversed and this cause is remanded for further proceedings.

O'NEILL, P.J., and DONOFRIO, J., concur.
Ohio App. 7 Dist.,1995.
Harris v. Ohio Edison Co.
Not Reported in N.E.2d, 1995 WL 494584 (Ohio App. 7 Dist.)

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Lawko v. Ameritech Corp.
Ohio App. 8 Dist.,2000.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio, Eighth District, Cuyahoga County.
Susan M. LAWKO, Plaintiff-Appellant,
v.
AMERITECH CORPORATION, et al., Defendants-Appellees.
No. 78103.

Dec. 7, 2000.

Civil appeal from Common Pleas Court, No. CV-399174.

Susan M. Lawko, Esq., pro se, Lawko & Lawko, Cleveland, OH, for Plaintiff-Appellant.
Thomas A. Linton, Esq., Chagrin Falls, OH, for Defendants-Appellees.

JOURNAL ENTRY AND OPINION
MCMONAGLE.
*1 Plaintiff-appellant, Susan M. Lawko, Esq., appeals pro se the order of the Cuyahoga Court of Common Pleas granting the motion to dismiss of defendants-appellees, Ameritech Corporation and The Ohio Bell Telephone Company. The facts giving rise to this appeal are as follows.

On December 29, 1999, appellant commenced this action by filing a complaint against Ameritech Corporation. On February 11, 2000, appellant filed an amended complaint, naming The Ohio Bell Telephone Company as a new party defendant. In the amended complaint, appellant alleged that appellees had entered into an oral contract with appellant to provide efficient, ongoing phone service, but had breached the contract by virtue of [appellees'] failure to provide telephone service to [appellant]. Appellant also alleged that by virtue of [appellees'] willful, wanton disregard for its duty to correct [appellant's] phone service, various of her clients were unable to contact her for legal advice. Finally, appellant alleged that although she and her clients had repeatedly advised appellees of the problems with appellant's telephone service, appellees did nothing to correct the problems with appellant's phone lines. Appellant characterized her claims as breach of contract (Count One), tortious interference with contractual relations (Count Two) and negligence (Count Three).

On March 13, 2000, appellees moved the trial court to dismiss the Amended Complaint for lack of subject matter jurisdiction, arguing that the Public Utilities Commission of Ohio (PUCO) had exclusive jurisdiction of the claims raised against appellees. The trial court granted the motion to dismiss and this appeal followed.

Appellant's single assignment of error provides:
THE TRIAL COURT ERRED IN GRANTING DISMISSAL OF APPELLANT'S CLAIMS BY DETERMINING THAT THE PUCO HAS EXCLUSIVE JURISDICTION OF THE CONTRACT AND TORT CLAIMS ASSERTED BY APPELLANT PER ORC SECTION 4905.26.

Appellant contends that the jurisdiction of the PUCO is not exclusive as to all issues and that R.C. 2905.26 does not vest in the PUCO exclusive jurisdiction over common law torts committed by public utilities. She also contends that the PUCO is not a court of general jurisdiction and has no power to judicially ascertain and determine legal rights and liabilities with regard to contract rights or property rights, even though a public utility is involved.

Appellees, on the other hand, assert that R.C. 4905.26 gives the PUCO exclusive jurisdiction to determine liability involving claims of a utility's failure to supply or properly supply regulated public utility service. Thus, appellees contend, because appellant's claims are, in essence, claims that appellees failed to supply an adequate quality of service, the PUCO has exclusive jurisdiction of appellant's claims.

Chapter 4905 of the Revised Code vests the PUCO with the authority to supervise all public utilities within its jurisdiction. To that end, R.C. 4905.06 provides, in relevant part:
*2 The public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and keep informed as to their general condition,

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capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service,the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises and charter requirements. * * * (Emphasis added.)

R.C. 4905.26 requires, among other things, that the PUCO set for hearing a complaint against a public utility whenever reasonable grounds appear that service is insufficient or inadequate. It states, in relevant part:
Upon complaint in writing against any public utility by any person, firm, or corporation, * * * that any * * * service, * * * or service rendered, * * * 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 justly preferential, or that any service is, or will be, inadequate or cannot be obtained, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. * * * (Emphasis added.)

Appellees are telephone companies as defined in R.C. 4905.03(A)(2)and public utilities as defined in R.C. 4905.02. As such, they are subject to the jurisdiction of the PUCO under authority of R.C. 4905.04 and 4905.05.

In *State, ex rel. Northern Ohio Telephone Co. v. Winter* (1970), 23 Ohio St.2d 6, 260 N.E.2d 827, the Supreme Court of Ohio held that by the enactment of statutory provisions providing a detailed procedure for service and rate complaints, the General Assembly lodged exclusive jurisdiction regarding such matters in the PUCO, subject to review by the Ohio Supreme Court. *Id.*, paragraph one of the syllabus. The Ohio Supreme Court stated:
The General Assembly has enacted an entire chapter of the Revised Code dealing with public utilities, requiring, inter alia, adequate service, and providing for permissible rates and review procedures. E.g., R.C. 4905.04, 4905.06, 4905.22, 4905.231 and 4905.381. Further, R.C. 2905.26 provides a detailed procedure for filing service complaints. This comprehensive scheme expresses the intention of the General Assembly that such powers were to be vested solely in the commission.

Id. at 9, 260 N.E.2d 827.

***3** Consistent with the holding announced in Winter, in *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 153-54, 573 N.E.2d 655, the Supreme Court of Ohio determined that the PUCO has exclusive jurisdiction to hear and determine matters which are in essence rate and service-oriented. The Supreme Court noted, however, that the courts of common pleas retain jurisdiction over pure common law tort claims and pure contract claims not involving tariffs brought against public utilities. *Id.*, citing *Marketing Research Services, Inc. v. Pub. Util. Comm.* (1987), 34 Ohio St.3d 52, 517 N.E.2d 540; *Kohli v. Pub. Util. Comm.* (1985), 18 Ohio St.3d 12, 479 N.E.2d 840; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575. The question, therefore, is whether appellant's claims are, in essence, service-oriented or pure common law tort or contract claims. See *Ohio Graphco, Inc. v. The Ohio Bell Telephone Co.* (May 12, 1994), Cuyahoga App. No. 65466, unreported.

Appellant's complaint raises three claims: 1) appellees breached a duty to provide adequate telephone service to appellant; 2) appellees disregarded their duty to fix appellant's telephone service, thereby interfering with appellant's business relationships with her clients; and 3) appellees did nothing to correct the problems with appellant's telephone service, despite numerous complaints regarding the service from appellant and her clients.

Although characterized as claims for breach of contract, tortious interference with contractual relations and negligence, appellant's claims are clearly service-oriented. In essence, appellant claims that appellees provided less than adequate service and repair of her telephone service. Such allegations are actionable pursuant to R.C. 4905.26 and the exclusive jurisdiction for disposition of such claims lies with the PUCO.

Appellant argues, however, that *McComb v. Suburban Natural Gas Co.* (1993), 85 Ohio App.3d 397, 619 N.E.2d 1109, in which the Third Appellate District held that the common pleas court had jurisdiction of the plaintiff's complaint that the gas company breached its lease agreement with the plaintiff, is controlling because its facts are strikingly similar to this case. We disagree.

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In McComb, the plaintiff Village of McComb filed suit against Suburban Natural Gas Company, alleging that the gas company had breached its lease agreement with the Village by requesting a rate determination from the PUCO even though the lease agreement specified that rates were to be fixed by the Village. The Village sought to have the lease agreement declared null and void. The Village did not assert, as appellant does in this case, that the utility had supplied defective service. Rather, the Village asserted that the gas company had breached the lease agreement by raising its rates through a procedure that was contrary to the terms of the parties' lease agreement. The Court of Appeals held that such a dispute is within the jurisdiction of the common pleas court. Appellant's dispute with appellees, however, concerns the quality of service rendered by appellees, not the terms of a private agreement between the parties. Accordingly, McComb is not persuasive.

Appellant also cites three cases-*State ex rel. Ohio Edison Co. v. Morris* (Dec. 3, 1984), Stark App. No. CA-6432; *Harris v. Ohio Edison Co.* (Aug. 17, 1995), Mahoning Cty.App. No. 94 C.A. 94, unreported; and *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 648 N.E.2d 72-as proof that appellant's complaint in tort and contract lies within the jurisdiction of the common pleas court, not the PUCO. We disagree.

*4 In Morris, supra, the plaintiffs filed a complaint in the court of common pleas alleging that Ohio Edison Company had installed improperly grounded electrical service to the plaintiffs' premises and that the premises, including plaintiffs' livestock, were severely affected by the resulting stray voltage. In response to the plaintiffs' complaint, Ohio Edison filed a complaint for writ of prohibition with the Fifth Appellate District, arguing that the PUCO had exclusive jurisdiction of the plaintiffs' complaint. In determining whether the trial court had subject matter jurisdiction of the plaintiffs' complaint, the Fifth Appellate District noted that the PUCO had failed to act by way of standard or regulation regarding the specific phenomenon alleged in the plaintiffs' complaint, thereby suggesting that the issue raised in the plaintiffs' complaint was not one of those contemplated by the legislature in granting significant administrative authority to the PUCO. In the absence of any standard or regulation regarding stray voltage, the Fifth Appellate District found that the plaintiffs' complaint was not a complaint about service, but rather, a tort claim unrelated to the provision of services by a utility. Therefore, it held that the trial court had subject matter jurisdiction of the plaintiffs' complaint. Unlike Morris, however, appellant's negligence claim is clearly a claim regarding appellees' alleged inadequate service and, therefore, subject to the exclusive jurisdiction of the PUCO.

In Harris, supra, also cited by appellant, the plaintiffs alleged that they sustained significant property damage when a power surge occurred in their electrical system as a result of a negligently connected neutral tap. In considering whether the trial court had properly granted defendant Ohio Edison's motion to dismiss the plaintiffs' complaint, the Seventh Appellate District noted Ohio Edison's argument that the plaintiffs' complaint was premised upon an allegation of inadequate or improper service and, therefore, was subject to the exclusive jurisdiction of the PUCO. The Appeals Court also found, however, that there were also allegations that not only did [Ohio Edison Company] fail to properly install the neutral tap connection, it negligently, recklessly and intentionally failed to investigate and correct this dangerous and potentially deadly breach in its system, despite repeated and urgent requests to do so. *Id.* Accordingly, the Seventh Appellate District held that where circumstances determining jurisdiction may be subject to more than one interpretation, then the basis of the complaint alone is insufficient to support a dismissal in absence of additional inquiry. The Court reversed the judgment of the trial court, therefore, and remanded the case for further proceedings. Unlike Harris, however, in this case the circumstances determining jurisdiction are subject to only one interpretation: that appellees failed to provide adequate service to appellant. Accordingly, appellant's complaint is service-oriented and subject to the exclusive jurisdiction of the PUCO.

The third case cited by appellant as proof that the common pleas court has jurisdiction of her claims is similarly unpersuasive. In Gayheart, supra, the Second Appellate District held that a complaint asserting that a power surge created by the defendant power company's negligence had caused a fire on the plaintiffs' property was a common law tort claim, rather than a claim related to service. The Court of Appeals reasoned that a power surge was not a practice engaged in regularly by the power company and that the crucial issue in the case involved whether a power surge or faulty wiring caused the fire, not whether any service provided by the power company was unsatisfactory. Accordingly, because the expertise of the PUCO in interpreting its resolutions

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was not necessary to the resolution of the case, the Second Appellate District held that common pleas court properly exercised jurisdiction over the claim. *Id.*

*5 We do not find the analysis in Gayheart persuasive. As the Supreme Court of Ohio noted in Kazmaier Supermarket, supra, the basis for determining whether PUCO has exclusive jurisdiction is a determination regarding whether a matter involves claims which are in essence rate or service-oriented-not whether a claim involves a common practice of the utility or whether resolution of the claim requires the expertise of the PUCO in interpreting its resolutions. Thus, because appellant's claims in this case are service-oriented, they fall under the exclusive jurisdiction of the PUCO.

Appellant's assignment of error is overruled. The action filed by appellant was very clearly a complaint that the service rendered by appellees was not adequate. These allegations are actionable pursuant to R.C. 4905.06 and the jurisdiction for disposition of such a complaint rests exclusively with the PUCO. The trial court, therefore, was without jurisdiction to consider the case and properly granted appellees' motion to dismiss.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLACKMON and KILBANE, JJ., concur.
N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2000.
Lawko v. Ameritech Corp.
Not Reported in N.E.2d, 2000 WL 1800753 (Ohio App. 8 Dist.)

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C

Mid-American Fire P Cas. Co. v. Gray
Ohio App. 2 Dist.,1993.
Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Second District, Montgomery County.
MID-AMERICAN FIRE & CASUALTY COMPANY, et al., Plaintiffs-Appellants
v.
Curt GRAY, dba Curt & Teddy's Tree Service, et al., Defendants-Appellees.
No. 13763.

June 15, 1993.

Larry G. Crowell, Englewood, OH.
James R. Greene, Dayton, OH.
Don E. Kovich, Dayton, OH.
BROGAN.

***1** Mid-American Fire & Casualty Company and Evelyn G. Pegg appeal from the judgment of the Montgomery County Court of Common Pleas finding that the Public Utilities Company of Ohio has exclusive subject matter jurisdiction over their complaint against the Dayton Power and Light Company.

Mid-American Fire & Casualty Company ("Mid-American") and Evelyn Pegg advance one assignment of error, asserting that the trial court erred in holding that the Public Utilities Commission of Ohio (PUCO) possessed exclusive original subject matter jurisdiction pursuant to R.C. 4905.26.

The facts of this case are as follows.

Evelyn Pegg owns the residence located at 232 Stubbs Drive, in Trotwood, Ohio, which is insured against fire damages by Mid-American. The residence adjacent to her property is owned by Dollie Morgan and occupied by her son, Steven Morgan.

On January 27, 1990, at approximately one o'clock, Curt Gray and Teddy Combs, dba Curt & Teddy's Tree Service, arrived to trim two trees located in the backyard of the Morgan property. While trimming the trees, the trimmers made several cuts in the "hot" line of the electrical drop line cable leading to the Pegg residence.

Morgan immediately telephoned the Dayton Power and Light repair service to report the cut line; however, no repairmen responded. As a result of the cut "hot" line, the "neutral line shorted out and partially melted onto the wire connectors of the "hot lines." Power was disconnected from the Pegg residence at approximately ten o'clock, but not before the ceiling joists of the Pegg residence ignited, resulting in fire damage to the building in the amount of $14,810.49. Pegg submitted her claim for fire damage to Mid-American and received $14,710.49, which reflected a one hundred dollar deductible. Pursuant to the policy, Mid-American acquired subrogation rights against Curt & Teddy's Tree Trimming Service and Dayton Power and Light.

Consequently, on February 4, 1992, Mid-American and Pegg filed a complaint against Curt Gray, seeking compensatory damages. An amended complaint was filed on May 15, 1992 to add Dayton Power and Light as a party defendant.

On July 22, 1992, Dayton Power and Light filed a motion for a protective order and for judgment on the pleadings, asserting, *inter alia,* that the complaint constituted a service complaint for which the PUCO had exclusive original jurisdiction. The trial court sustained the motion for judgment on the pleadings on October 20, 1992, holding that because Mid-American and Pegg were seeking damages for acts relating to service, PUCO must hold a hearing and make a determination before the court of common pleas has jurisdiction to hear the complaint.

On November 17, 1992, Mid American and Pegg filed a notice of appeal.

In their sole assignment of error, Mid-American and Pegg assert that the trial court erred in holding that their complaint sought damages for acts relating to service for which the PUCO, pursuant to R.C. 4905.26, possessed exclusive original subject matter jurisdiction.

***2** Specifically, the appellants argue that their complaint asserts that Dayton Power and Light failed to provide reasonable service and was careless and negligent in failing or refusing to investigate the

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trouble call, and therefore does not constitute a practice or service pursuant to R.C. 4905.26.

R.C. 4905.26 provides, in pertinent part, that:
Upon complaint in writing against any public utility by any person, firm or corporation * * * that any rate, fare, charge, toll, rental, schedule, classification or service, or any joint rate, fare, charge, toll rental, schedule, classification, 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 said 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, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof * * *. (Emphasis added).

Thus, PUCO has exclusive jurisdiction to hear and determine matters which involve "practice[s] *affecting or relating to any service* furnished by said public utility, or in connection with such service * * *." (Emphasis added). See *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 153; *Farra v. Dayton* (1989), 62 Ohio App.3d 487, jurisdictional motion overruled (1989), 43 Ohio St.3d 712. A "practice" is defined as "a repeated or customary action; habitual performance; a succession of acts of similar kind; custom." Black's Law Dictionary (5 Ed.Rev.1979) 1055.

However, pure common-law tort claims may be brought against utility companies in the common pleas court. *Kazmaier, supra* at 154. See, also, *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 195 (claim against public utility for invasion of privacy may be brought in the common pleas court); *Kohli v. Pub. Util. Comm.* (1985), 18 Ohio St.3d 12 (a utility's failure to warn landowners of the dangers of neutral-to-earth voltage constituted a tort claim for the courts).

This court recently considered a similar fact situation in *Farra, supra.*

In *Farra,* Farra claimed that a Dayton Power and Light serviceman intentionally and without permission broke into his property, destroying the door and lock, in order to remove gas and electric meters. The trial court found, and we agreed, that PUCO, rather than the court of common pleas, had subject matter jurisdiction over the matter. Specifically, we found that the meters were related to Dayton Power and Light's service, and that the trespass and destruction of the door and lock were incidental to Dayton Power and Light's removal of the meters, thereby constituting a "practice affecting and relating to service," albeit an unjust and unreasonable practice. The characterization of those acts as intentional, malicious, and without Farra's consent did not alter the subject matter of the allegations or remove them from the embrace of R.C. 4905.26.

***3** We find these facts to be distinguishable from the present case. In *Farra,* Dayton Power and Light directed its serviceman to enter Farra's building and remove the gas and electric meters. Thus, the serviceman's act constituted a "practice affecting or relating to service."

Conversely, there is no evidence in this case that the servicemen's failure to timely respond to Morgan's request for assistance was at the direction of Dayton Power & Light. Therefore, this failure to act did not constitute a "practice related to service" as contemplated by the statute, or as interpreted in *Farra, supra,* but was an isolated individual act of negligence falling within the jurisdiction of the court of common pleas.

The appellant's assignment of error is sustained.

The judgment of the Montgomery County Court of Common Pleas is reversed and this cause is remanded for proceedings consistent with this opinion.

WOLFF and FAIN, JJ., concur.
Ohio App. 2 Dist.,1993.
Mid-American Fire & Cas. Co. v. Gray
Not Reported in N.E.2d, 1993 WL 211651 (Ohio App. 2 Dist.)

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Pacific Indem. Ins. Co. v. Illuminating Co.
Ohio App. 8 Dist.,2003.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Eighth District, Cuyahoga County.
PACIFIC INDEMNITY INSURANCE COMPANY, Plaintiff-Appellant,
v.
The ILLUMINATING COMPANY, et al., Defendants-Appellees.
No. 82074.

Decided July 24, 2003.

Property loss and fire damage insurer filed lawsuit, in subrogation of insured's rights, against power lines repairs business for negligence in failing to use due care at insured's property and for breach of oral contract to perform work in workmanlike manner, predicated on damage to insured's property caused by jerry-rigging of cable during storm related repairs. The Court of Common Pleas, No. CV-476495, granted business' motion to dismiss for lack of subject matter jurisdiction premised on assertion by business that Public Utility Commission (PUC) had exclusive jurisdiction over claims. The Court of Appeals, Cuyahoga County, Diane Karpinski, J., held that trial court could not dismiss claims on face of complaint and without further inquiry, as claims could be characterized as tort and contract claims, rather than type of service claims within PUC's exclusive jurisdiction.

Reversed and remanded.
West Headnotes
Pretrial Procedure 307A 643

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)5 Particular Actions or Subject Matter, Defects in Pleading
307Ak643 k. Contracts; Sales. Most Cited Cases

Pretrial Procedure 307A 649

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)5 Particular Actions or Subject Matter, Defects in Pleading
307Ak649 k. Negligence, Personal Injuries, and Death; Products Liability. Most Cited Cases
Trial court could not dismiss for lack of subject matter jurisdiction on face of complaint claims asserted by property insurer against power lines repairs business for negligence in failing to use due care at insured's property and for breach of contract to perform work in workmanlike manner, predicated on damage to insured's property caused by jerry-rigging of cable, although movant business alleged Public Utility Commission (PUC) had exclusive jurisdiction; without further inquiry claims could be characterized as tort and contract claims, rather than type of service claims within PUC's jurisdiction. R.C. § 4905.26.

Civil appeal from Common Pleas Court, Case No. CV-476495.

Andrew R. Kasle, Esq., Hazelwood & Kasle, Cleveland, OH, for plaintiff-appellant.
Ernest L. Wilkerson, Jr., Esq., Scott J. Wilkerson, Jr., Esq., Wilkerson & Associates Co., LPA, Cleveland, OH, for defendants-appellees.
KARPINSKI, J.
*1 {¶ 1} This cause came on to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

{¶ 2} Plaintiff-appellant, Pacific Indemnity Insurance Company appeals the trial court granting a motion to dismiss for lack of subject matter jurisdiction filed by defendant-appellee, The Illuminating Company ("CEI"). In February 2001, plaintiff insured Harriet Leedy against property loss and fire damage to her property located in the city of Gates Mills, Ohio. On February 28, 2001, after a severe storm, CEI attempted to restore electrical service to Leedy's property. According to plaintiff, during the course of CEI's work, a power surge occurred when CEI jerry-rigged an electric service cable without Leedy's knowledge or consent.

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{¶ 3} Plaintiff filed a complaint [FN1] against CEI in which it alleges the power surge caused more than $40,000 personal property damage. Plaintiff asserts two claims in its complaint: first, that CEI was negligent in failing to use due care at Leedy's property; second, that CEI breached an oral contract to perform its work in a workmanlike manner.

> FN1. Plaintiff is asserting its rights to subrogation in this case after paying Leedy's claim under an insurance policy it issued to her.

{¶ 4} CEI responded to plaintiff's complaint by filing a motion to dismiss pursuant to Civ.R. 12(B)(1). In its motion, CEI argued the trial court lacked subject matter jurisdiction because The Public Utilities Commission of Ohio ("PUCO") has exclusive jurisdiction over plaintiff's claims. CEI argued plaintiff's claims are governed by R.C. 4905.26 [FN2] because they ultimately relate to electrical service at Leedy's property. The trial court granted CEI's motion and plaintiff now appeals. Plaintiff presents one assignment of error for review:

> FN2. R.C. 4905.26 provides the procedure for filing service complaints. It states as follows: "Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, 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 said 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 complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. Such notice shall be served and publication made not less than fifteen days nor more than thirty days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time."

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S COMMON LAW TORT CLAIM AND COMMON LAW CONTRACT CLAIM SINCE THE PUCO DOES NOT HAVE EXCLUSIVE JURISDICTION OVER THESE CLAIMS AND THE CLAIMS NEITHER INVOLVED A "SERVICE-ORIENTED" CLAIM, A FILED TARIFF NOR CONCERNED A "PRACTICE" OF THE PUBLIC UTILITY.

{¶ 5} Plaintiff maintains that PUCO does not have exclusive jurisdiction over its claims because they are not related to the type of service problems included in R.C. 4905.26. According to plaintiff, its claims are common-law tort and contract claims and, therefore, do not fall under PUCO's exclusive jurisdiction. We agree.

{¶ 6} Once a party files a Civ.R. 12(B)(1) motion to dismiss, the trial court determines whether the complaint contains a cause of action that it has authority to decide. *Brethauer v. Federal Express Corporation, et al.* (2001), 143 Ohio App.3d 411, 758 N.E.2d 232. When the motion involves the issue of a court's subject matter jurisdiction, that issue "cannot be waived and judgment entered without such jurisdiction is void ab initio." *Reynolds v. Clark*, Cuyahoga App. No. 80210, 2002-Ohio-5464 citing *Brethauer*, at 413, 758 N.E.2d 232; *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus. On appeal, we conduct a de novo review of a Civ.R. 12(B)(1) motion.

*2 {¶ 7} "[W]here circumstances determining jurisdiction may be subject to more than one interpretation, then the basis of the complaint alone is insufficient to support a dismissal in absence of additional inquiry." *Harris v. Ohio Edison Co.* (Aug. 17, 1995), Mahoning App. No. 94 C.A. 84, 1995 Ohio App. LEXIS 3381, at *7.

{¶ 8} In the case at bar, CEI's motion to dismiss plaintiff's complaint was based entirely on the face of that complaint. CEI did not attach any evidentiary materials to its motion. CEI simply argued that

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plaintiff's two claims, negligence and breach of contract, were subject to PUCO's exclusive jurisdiction because both of them were unambiguously related to the type of utility service described in R.C. 4905.26.

{¶ 9} R.C. 4901.01 et seq. is Ohio's statutory framework for regulating the business activities of public utilities. "The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission ." *Kazmaier Supermarket, Inc. v. Toledo Edison Company* (1991), 61 Ohio St.3d 147, 150-151, 573 N.E.2d 655.

{¶ 10} "The commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except this court) any jurisdiction over such matters." *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2002), 97 Ohio St.3d 69, 72, 776 N.E.2d 92, 2002-Ohio-5312, quoting *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St.3d 447, 450, 727 N.E.2d 900.

{¶ 11} In some circumstances, however, courts "retain limited subject-matter jurisdiction over pure common-law tort and certain contract actions involving utilities regulated by the commission." *Id.* In *Cuyahoga Cty. Court of Common Pleas, supra,* the Ohio Supreme Court determined that respondent's contract claims against relator utility did not fall within the exclusive jurisdiction of PUCO. In that case, respondent had asserted that its contract with relator was void because of indefiniteness and lack of consideration. *Id.*, at 75, 727 N.E.2d 900.

{¶ 12} In 1995, the Ohio Supreme Court listed several tort and contract cases in which various courts determined PUCO did not have exclusive jurisdiction. The Court stated as follows: "Other courts retain limited subject matter jurisdiction over tort and some contract claims involving utilities regulated by the commission. See, e.g., *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, supra, 61 Ohio St.3d at 154, 573 N.E.2d at 660 (pure common-law tort claims may be brought in common pleas court); *Kohli v. Pub. Util. Comm.* (1985), 18 Ohio St.3d 12, 18 OBR 10, 479 N.E.2d 840 (failure to warn landowners of dangers regarding voltage actionable in common pleas court); *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 10 O.O.3d 352, 383 N.E.2d 575, paragraph three of the syllabus (invasion of privacy actionable in common pleas court); *Marketing Research Serv., Inc. v. Pub. Util. Comm.* (1987), 34 Ohio St.3d 52, 517 N.E.2d 540 (commission has no jurisdiction to resolve breach of contract dispute concerning provision of interstate telecommunications service). But, see, *Gallo Displays, Inc. v. Cleveland Pub. Power* (1992), 84 Ohio App.3d 688, 618 N.E.2d 190 (common-law nuisance claim against utility not actionable in common pleas court)." *State ex rel. Ohio Edison Co. v. Parrott* (1995), 73 Ohio St.3d 705, 708, 654 N.E.2d 106; see also, *Richard A. Berjian, D.O. Inc., v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 375 N.E.2d 410 (common-law negligence and contract).

***3** {¶ 13} In *State ex Rel. Ohio Edison Co. v. Morris* (Dec. 3, 1984), Stark App. No. CA 6432, 1984 Ohio App. LEXIS 11825, plaintiff filed in common pleas court a complaint alleging damage to his livestock as a result of stray voltage after the utility company had installed electrical service. The court determined that because plaintiff's claim was not a "service" complaint as described in R.C. 4905.26, it did not fall under PUCO's exclusive jurisdiction.

{¶ 14} The court explained:
It is apparent that the P.U.C.O. has adopted no specific regulations dealing with the phenomenon of neutral-to-earth voltage or stray voltage. There is a sense in which every claim against a public utility of negligence (be it violation of a common law or statutory duty), is a complaint involving the "service" of such utility. A person injured as a result of the negligent operation of a utility's vehicle on the public highway, in a sense, has a complaint about the service of the utility. If utility lines are strung sufficiently close to a building that in a wind shingles are knocked off, the claim is arguably a complaint about the service rendered by the public utility.

Id., at *11-12.

{¶ 15} In deciding whether an action is service-related and belongs under PUCO's exclusive jurisdiction, some courts approach the issue by posing two questions. 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, courts routinely find that those claims fall outside PUCO's exclusive jurisdiction.[FN3]

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FN3. We note some cases in which the defendant utility company never raised the jurisdictional issue. See, *Kohli,* supra; *Thompson v. Ohio Fuel Gas Co.* (1967), 9 Ohio St.2d 116, 224 N.E.2d 131; *Miami Valley Regional Transit Auth. v. Dayton Power & Light Co.* (Nov. 19, 1999), Montgomery App. No. 17652, 1999 Ohio App. LEXIS 5498; *Dames v. Cleveland Elec. Illuminating Co.* (Mar. 29, 1996), Ashtabula App. No. 95A0045, 1996 Ohio App. LEXIS 1211.

{¶ 16} In *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 648 N.E.2d 72, plaintiffs claimed the utility company was negligent in allowing a power surge to enter their property. Determining that the case did not come under PUCO's exclusive jurisdiction, the court stated: "In the present case, there is no evidence to suggest that DP & L authorized a power surge or that such a power surge was a 'practice' engaged in regularly by DP & L. Instead, the power surge alleged is an isolated act of negligence. In fact, the crucial question presented in this case involved deciding which of two possible causes of the fire occurred-the power surge or faulty wiring-not deciding whether any 'service' rendered by DP & L was unreasonable. The expertise of PUCO in interpreting regulations is not necessary to the resolution of this case. Rather, this is a case that is particularly appropriate for resolution by a jury. Thus, the trial court properly exercised jurisdiction over the claim." *Id.*, at 229, 648 N.E.2d 72; see, *Senchisin v. Ameritech* (Aug. 22, 1997), Trumbull App. No. 96-T-5539, 1997 Ohio App. LEXIS 3788 (breach of contract action did not require PUCO's technical expertise).

{¶ 17} We reject CEI's reliance upon the case of *Lawko v. Ameritech Corporation*, (Dec. 7, 2000), Cuyahoga App. No. 78103, 2000 Ohio App. LEXIS 5687. First, *Lawko* is inapposite to the facts before us because, contrary to CEI's characterization of the case, *Lawko* did not involve a power surge. Moreover, *Lawko* rejected *Gayheart's* use of a "practice" standard in determining whether plaintiff's claim was related to the type of service described in R.C. 4905.26.

*4 {¶ 18} In *Lawko,* supra, this court stated: "We do not find the analysis in *Gayheart* persuasive. As the Supreme Court of Ohio noted in *Kazmaier Supermarket,* supra, the basis for determining whether PUCO has exclusive jurisdiction is a determination regarding whether a matter involves claims which are in essence rate or service-oriented-not whether a claim involves a common "practice" of the utility * * *." *Id.*, at *12, 573 N.E.2d 655.

{¶ 19} In the present case, we comfortably rely on Judge Brogan's use of a "practice" standard in *Gayheart* because that standard is expressly part of the legislative scheme under 4905.26.[FN4] Accordingly, CEI's reliance on *Lawko* is misplaced.

FN4. In part, R.C. 4905.26 states, " * * * or *practice* affecting or relating to any service furnished by said public utility * * *."

{¶ 20} In *Harris,* supra, plaintiffs sustained property damage as a result of a power surge. Plaintiffs argued their electrical system surged because of the utility company's negligence in connecting a neutral tap. The court held that because plaintiff's claims-failure to investigate and failure to correct a dangerous condition-were subject to more than one interpretation, the action constituted a common-law negligence matter and thus PUCO did not have jurisdiction.

{¶ 21} In *Mid-American Fire & Cas. Co. v. Gray* (June 15, 1993), Montgomery App. No. 13763, 1993 Ohio App. LEXIS 3036, the court determined the utility company's serviceman had failed to respond promptly to repeated requests for assistance after a tree-cutting service severed utility lines at the insured's property. The court determined that PUCO did not have exclusive jurisdiction because the serviceman's "failure to act did not constitute a 'practice related to service' as contemplated by the statute * * * but was an isolated individual act of negligence falling within the jurisdiction of the court of common pleas." at *7.

{¶ 22} In the case at bar, we find the analysis and facts of the above-cited cases applicable to the events described in this case. From the face of plaintiff's complaint alone, we cannot say the substance of its claims fall unequivocally within PUCO's exclusive jurisdiction. CEI has failed to present any evidence that jerry-rigging utility service lines is one of its regular "practices." Further, CEI has not shown why the decision to jerry-rig Leedy's service line requires PUCO's administrative expertise.

{¶ 23} Plaintiff's claims can be easily characterized as pure tort and contract claims rather than the type of service claims described in R.C. 4905.26. Without additional inquiry into these questions, we conclude

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that plaintiff's claims are subject to more than one interpretation. Under these circumstances, dismissing plaintiff's complaint under Civ.R. 12(B)(1) was error. *Harris,* supra.

{¶ 24} For all the foregoing reasons, plaintiff's sole assignment of error is sustained. The judgment of the trial court is reversed and this matter remanded for proceedings consistent with this opinion.

*5 Judgment accordingly.

This cause is reversed.

It is, therefore, ordered that appellant recover of appellees its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, P.J., and ANN DYKE, J., concur.
N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2003.
Pacific Indem. Ins. Co. v. Illuminating Co.
Not Reported in N.E.2d, 2003 WL 21710787 (Ohio App. 8 Dist.), 2003 -Ohio- 3954

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C
State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.
Ohio App. 11 Dist.,2004.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio,Eleventh District, Lake County.
STATE FARM FIRE & CASUALTY COMPANY, Plaintiff-Appellant,
v.
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al., Defendant-Appellee.
No. 2003-L-032.

Decided July 2, 2004.

Background: Insurer brought subrogation action against electric company, claiming that fire and resulting damage to insured's home was caused by company's negligence. The Court of Common Pleas, Lake County, No. 02 CV 000420, granted company's motion for dismiss for lack of subject-matter jurisdiction. Insurer appealed.

Holding: The Court of Appeals, Diane V. Grendell, J., held that Public Utilities Commission of Ohio (PUCO) had exclusive jurisdiction over action.

Affirmed.

William M. O'Neill, J., filed dissenting opinion.
West Headnotes
[1] Electricity 145 ⚿19(.5)

145 Electricity
145k12 Injuries Incident to Production or Use
145k19 Actions
145k19(.5) k. In General. Most Cited Cases
Public Utilities Commission of Ohio (PUCO) had exclusive jurisdiction over insurer's subrogation action alleging that electric company's negligent inspection of meter base affixed to insured's home was cause of fire and resulting damage to home, and thus Court of Common Pleas did not have subject-matter jurisdiction regarding action; claim primarily related to service, claim required extensive interpretation of company's service tariff, and claim required interpretation of sections of administrative code concerning electrical service and safety standards. OAC 4901:1-10-01 et seq.

[2] Appeal and Error 30 ⚿170(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(2) k. Constitutional Questions. Most Cited Cases
Insurer waived for appellate review its claim that statutes governing powers of Public Utilities Commission of Ohio (PUCO) were unconstitutional as applied to insurer in insurer's subrogation action alleging that electric company's negligence caused fire and resulting damage to insured's home, where claim was not raised in trial court. R.C. § 4905.01 et seq.

Civil Appeal from the Lake County Court of Common Pleas, Case No. 02 CV 000420.

Patrick J. O'Malley, Uhlinger, Keis & George, Cleveland, OH, for plaintiff-appellant.
Ernest L. Wilkerson, Jr. and Scott J. Robinson, Wilkerson & Associates Co., L.P.A., Cleveland, OH, for appellee, Cleveland Electric Illuminating Company.
DIANE V. GRENDELL, J.
***1** {¶ 1} State Farm Fire & Casualty Co. ("State Farm") appeals the January 24, 2003 judgment entry of the Lake County Court of Common Pleas granting Cleveland Electric Illuminating Company's ("CEI") motion to dismiss for lack of jurisdiction. For the reasons set forth below, we affirm the decision of the trial court in this matter.

{¶ 2} On April 4, 1999, a fire occurred at the residence of Curtis Petersen ("Petersen"). State Farm was the insurer of Petersen's residence. On March 2, 2002, State Farm filed an insurance subrogation

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action against CEI [FN1] claiming that the "fire and resulting damage were the direct and proximate result of the negligence of [CEI]."

> FN1. The complaint also named First Energy Corporation as a defendant, but State Farm eventually dismissed its claims against First Energy.

{¶ 3} Subsequent discovery, via deposition testimony of Barbara Larkin, a State Farm claims representative, revealed that the basis of State Farm's negligence claim was the meter base affixed to the residence. Thus, it was State Farm's contention that CEI negligently inspected the meter, resulting in the fire.

{¶ 4} On November 12, 2002, CEI filed a motion to dismiss for lack of subject matter jurisdiction. On January 23, 2003, the trial court found that this matter was in the exclusive jurisdiction of the Public Utilities Commission of Ohio ("PUCO") and, therefore, the trial court granted CEI's motion to dismiss for lack of jurisdiction.

{¶ 5} State Farm timely appealed and raised the following assignment of error:

{¶ 6} "The trial court erred to the prejudice of plaintiff-appellant in granting the defendant-appellee's motion to dismiss."

[1] {¶ 7} In its sole assignment of error, State Farm argues that a court of common pleas retains jurisdiction over common law tort claims against a public utility. Thus, State Farm claims that its negligence claim properly was before the Lake County Court of Common Pleas. State Farm further asserts that the trial court's dismissal of the complaint denies State Farm access to the courts in violation of the Ohio Constitution.

{¶ 8} The standard of review regarding a claimed lack of subject matter jurisdiction "is whether any cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (citations omitted). When determining its subject matter jurisdiction, "the trial court is not confined to the allegations of the complaint." *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus. The trial court can consider material beyond the complaint "without converting the motion into one for summary judgment." *Id.*

{¶ 9} The PUCO has exclusive jurisdiction over service and rate complaints, see *State ex rel. N. Ohio Tel. Co. v. Winter* (1970), 23 Ohio St.2d 6, 260 N.E.2d 827, paragraph one of the syllabus, "effectively denying to all Ohio courts (except [the Supreme Court of Ohio]) any jurisdiction over such matters." *State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 447, 450, 727 N.E.2d 900, 2000-Ohio-379. The PUCO, however, is not a court and, therefore, it does not have the "power to judicially ascertain and determine legal rights and liabilities." *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St.2d 9, 10, 412 N.E.2d 395, citing *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31, 132 N.E. 162. Thus, courts "retain limited subject-matter jurisdiction over pure common-law tort and certain contract actions involving utilities regulated by the commission." *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69, 776 N.E.2d 92, 2002-Ohio-5312, at ¶ 20 (citations omitted).

***2** {¶ 10} We must, therefore, determine whether State Farm's claim is a pure common-law tort or whether it primarily relates to service. See *id.* at ¶ 21, 776 N.E.2d 92. In doing so, "we must review the substance of the claim rather than mere allegations that the claims sound in tort." *Id.* (citation omitted). Moreover, since review and determination of PUCO's provisions "is best accomplished by the commission with its expert staff technicians familiar with the utility commission provisions," *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 153, 573 N.E.2d 655, we must determine whether a review of the claim requires an interpretation of tariffs filed with and approved by PUCO or of PUCO's own provisions. *Id.* at 154, 573 N.E.2d 655.

{¶ 11} In this case, State Farm's negligence complaint alleges that CEI negligently inspected the meter base affixed to Petersen's residence. In essence, State Farm alleges that the service provided by CEI in inspecting the meter was negligently performed. Thus, although sounding in tort, State Farm's claim primarily relates to service. See *Suleiman v. Ohio Edison Co.*, 146 Ohio App.3d 41, 46, 764 N.E.2d 1098, 2001-Ohio-3414 (a negligence claim regarding the defendant's replacement of an electrical meter "affect[s] or relat[es] to service" and, thus, "falls within the exclusive jurisdiction of PUCO"); *Lawko v. Ameritech Corp.* (Dec. 7, 2000), 8th Dist. No.

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78103, 2000 Ohio App. LEXIS 5687, at *7-*8 (a negligence claim alleging inadequate telephone service and failure to remedy the telephone service "are clearly service-oriented" and, therefore, "the exclusive jurisdiction for disposition of such claims lies with the PUCO"); *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 493-494, 576 N.E.2d 807 (a claim regarding the removal of electric and gas meters, "in essence, sought damages for acts affecting and relating to service" and, thus, is within the exclusive jurisdiction of PUCO).

{¶ 12} Moreover, State Farm's claim rests on a determination of the respective rights and responsibilities of CEI and Petersen regarding the meter. This clearly would necessitate an extensive interpretation of CEI's service tariff, PUCO No. 13, Regulation XI, which provides:

{¶ 13} "The customer shall supply all wiring on the customer's side of the point of attachment as designated by the Company. All of the customer's wiring and electrical equipment should be installed so as to provide not only for immediate needs but for reasonable future requirements and shall be installed and maintained by the customer to at least meet the provisions of the National Electrical Code, the regulations of the governmental authorities having jurisdiction and the reasonable requirements of the Company. As required by the Ohio Administrative Code, all new installations shall be inspected and approved by the local inspection authority or, where there is not local inspection authority, by a licensed electrician, before the Company connects its service. Changes in wiring on the customer's premises shall also be inspected and approved by the local inspection authority or, where there is no local inspection authority, by a licensed electrician."

*3 {¶ 14} The determination of liability would also necessitate an interpretation of Ohio Adm.Code 4901:1-10-01 et seq. regarding the "Electrical Service and Safety Standards" of the meter's installation, inspection and maintenance. Since State Farm's claim requires an interpretation of CEI's tariffs, as well as Ohio Adm.Code 4901:1-10-01 et seq., it is best accomplished by PUCO and its expert technicians who are familiar with these provisions. *Kazmaier*, 61 Ohio St.3d at 153, 573 N.E.2d 655. Thus, this is a matter within the exclusive jurisdiction of PUCO and "review by any other court other than the Supreme Court would amount to usurpation of authority ." *Hiener v. Cleveland Elec. Illuminating Co.* (Aug. 9, 1996), 11th Dist. No. 95-G-1948, 1996 Ohio App. LEXIS 3358, at *4-*5; see, also, *Illuminating Co.*, 2002-Ohio-5312, at ¶ ¶ 25-31, 97 Ohio St.3d 69, 776 N.E.2d 92 (an interpretation of Ohio Adm.Code 4901:1-10-24 is within the exclusive jurisdiction of PUCO); *Kazmaier*, 61 Ohio St.3d at 154, 573 N.E.2d 655 ("determin[ing] the mutual rights and responsibilities of the parties" regarding the defendant's tariffs is a matter within the exclusive jurisdiction of PUCO).[FN2]

FN2. The dissent cites to *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 229, 648 N.E.2d 72, in support of its position that State Farms' claim does not fall within the exclusive jurisdiction of PUCO. *Gayheart* is factually distinctive. In *Gayheart,* the court specifically found that the claim did not require an interpretation of any tariffs or Ohio Admin.Code 4901:1-10-01 et seq ., *id.,* while State Farms' claim in this case does require such an interpretation. Moreover, in *Gayheart,* a power surge was the claimed act of negligence. "In fact, the crucial question presented * * * involved deciding which of two possible causes of the fire occurred-the power surge or faulty wiring-not deciding whether any '*service* ' rendered * * * was unreasonable." *Id.* (emphasis added). In this case, State Farms' claim alleges that the *service* rendered by CEI in inspecting the meter base was negligently performed, a claim that clearly primarily relates to service.

[2] {¶ 15} Although State Farm challenges the constitutionality of R.C. 4905 et seq., as applied to it, State Farm failed to raise this constitutional challenge in the court below. "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application * * * constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, syllabus. Thus, we will not consider State Farm's constitutional challenge to R.C. 4905 et seq.

{¶ 16} For the foregoing reasons, we find that this matter is within the exclusive jurisdiction of the PUCO. Thus, we hold that State Farm's sole assignment of error is without merit. The decision of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs.
WILLIAM M. O'NEILL, J., dissents with a

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Dissenting Opinion.
WILLIAM M. O'NEILL, J., dissenting.
{¶ 17} For the reasons that follow, I must respectfully dissent. It is clear the power of the Public Utilities Commission under the legislative scheme of R.C. Title 49 is comprehensive and plenary. However, this does not mean that exclusive original jurisdiction over all complaints of individuals against public utilities is lodged in the commission.

{¶ 18} In its simplest terms, this is a lawsuit concerning a fire at a residence that was caused by the failure of a "meter base," which had been inspected by employees of appellee, Cleveland Electric Illuminating Company. It is unnecessary to examine the relative merits of the claim, as the trial court dismissed the action on a jurisdictional basis, finding that "[p]laintiff has not alleged any cause of action cognizable to this forum and that this Court lacks subject matter jurisdiction over this claim." This is a simple negligence claim, and there is no question that courts of common pleas have jurisdiction over such matters. While the alleged tort feasor may be a large publicly regulated corporation, the simple act of negligence is neither unique nor complicated.

*4 {¶ 19} The Supreme Court of Ohio addressed this issue and found that "[c]ourts of this state ARE available to supplicants who have claims sounding in contract against a corporation coming under the authority of the Public Utilities Commission." [FN3] The Supreme Court expanded this holding to tort cases as well, holding that "claims sounding in contract or tort have been regarded as reviewable in the Court of Common Pleas, although brought against corporations subject to the authority of the commission." [FN4]

FN3. (Emphasis added.) *State ex rel. Dayton Power & Light Co. v. Riley* (1978), 53 Ohio St.2d 168, 169, 373 N.E.2d 385, citing *Southgate Dev. Corp. v. Columbia Gas. Transm. Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526; and *New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 132 N.E. 162.

FN4. (Citations omitted.) *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St.2d 191, 383 N.E.2d 575.

{¶ 20} It is important to distinguish between matters which are unique to utilities, such as rates and practices, and isolated acts of negligence when determining the jurisdiction of the courts of this state. Obviously, broad questions of policy and rate-making are within the exclusive purview of the PUCO. However, less lofty questions such as negligence leading to fires in a solitary residence are clearly within the competence and jurisdiction of the courts of common pleas. Appellee's argument, followed to its logical conclusion, would require the dismissal of all lawsuits which name a utility as a defendant ... without regard to the subject matter of the dispute. That is not the law of Ohio. As stated by the Supreme Court of Ohio, access to the courts is granted to "supplicants" even when they have the temerity to sue their utility provider.[FN5]

FN5. See *State ex rel. Dayton Power & Light Co. v. Riley*, supra.

{¶ 21} The reasoning of the Second District Court of Appeals, in *Gayheart v. Dayton Power & Light Co.* is appropriate in this matter. In that matter, the court reasoned:

{¶ 22} "We recently revisited the issue of jurisdiction in *Mid-American Fire & Cas. Co. v. Gray.*[FN6] In *Mid-American*, we held that the trial court had jurisdiction over a tort claim against a utility where a serviceman failed to respond timely to a service call. We found that this was an isolated act of negligence, not a 'practice' as in *Farra,*[FN7] and, therefore, the trial court had proper jurisdiction.

FN6. *Mid-American Fire & Cas. Co. v. Gray* (June 15, 1993), 2d Dist. No. 13763, 1993 WL 211651.

FN7. *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 576 N.E.2d 807.

{¶ 23} "In essence, every negligence claim brought against a public utility will be one involving some aspect of 'service.' However, we find the present case to be one not reasonably contemplated by the legislature in enacting R.C. 4905.26. In the present case, there is no evidence to suggest that DP & L authorized a power surge or that such a power surge was a 'practice' engaged in regularly by DP & L. Instead, the power surge alleged is an isolated act of negligence. In fact, the crucial question presented in this case involved deciding which of two possible causes of the fire occurred-the power surge or faulty wiring-not deciding whether any 'service' rendered

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by DP & L was unreasonable. The expertise of PUCO in interpreting regulations is not necessary to the resolution of this case. Rather, this is a case that is particularly appropriate for resolution by a jury. Thus, the trial court properly exercised jurisdiction over the claim." FN8

FN8. *Gayheart v. Dayton Power & Light Co.* (1994), 98 Ohio App.3d 220, 229, 648 N.E.2d 72.

***5** {¶ 24} The trial court was wrong when it decided that there was no jurisdiction over this negligence action. The matter should be reversed for trial so that a competent fact finder can resolve the respective negligence of the parties. This is NOT a matter which requires the expertise of the Public Utilities Commission of Ohio.

Ohio App. 11 Dist.,2004.
State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.
Not Reported in N.E.2d, 2004 WL 1486664 (Ohio App. 11 Dist.), 2004 -Ohio- 3506

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R.C. § 4905.22

C
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TITLE XLIX. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION--GENERAL POWERS
FACILITIES AND SERVICES

➡4905.22 Service and facilities required; unreasonable charge prohibited

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

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R.C. § 4905.26

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TITLE XLIX. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION--GENERAL POWERS
REGULATORY PROVISIONS

→4905.26 Complaints as to service; hearing

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, 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 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 not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange, whichever number be smaller, or by the legislative authority of any municipal corporation served by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by the telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory, or preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall fix a time for the hearing of such complaint.

The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the date, time of day, and location of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by the telephone company in the county or counties affected, and shall be published for not less than two consecutive weeks in a newspaper of general circulation in the county or counties affected.

Such hearing shall be held not less than fifteen nor more than thirty days after the second publication of such notice.

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R.C. § 4905.30

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TITLE XLIX. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION--GENERAL POWERS
REGULATORY PROVISIONS

→4905.30 Printed schedules of rates must be filed

Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. Such schedules shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such schedule, and may prescribe, by order, changes in the form of such schedules. The commission may establish and modify rules and regulations for keeping such schedules open to public inspection. A copy of such schedules, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

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TITLE XLIX. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE ELECTRIC RETAIL SERVICE
GENERAL PROVISIONS

→4928.01 Definitions

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code as amended by Sub. S.B. No. 3 of the 123rd general assembly.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent it consumes electricity it so produces or to the extent it sells for resale electricity it so produces.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that is engaged on a for-profit basis in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

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(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile commercial customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users. Such energy includes, but is not limited to, wind power; geothermal energy; solar thermal energy; and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric

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generation, landfill gas, or hydroelectric generation.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Small electric generation facility" means an electric generation plant and associated facilities designed for, or capable of, operation at a capacity of less than two megawatts.

(29) "Starting date of competitive retail electric service" means January 1, 2001, except as provided in division (C) of this section.

(30) "Customer-generator" means a user of a net metering system.

(31) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(32) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(33) "Self-generator" means an entity in this state that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

(C) Prior to January 1, 2001, and after application by an electric utility, notice, and an opportunity to be heard, the public utilities commission may issue an order delaying the January 1, 2001, starting date of competitive retail electric service for the electric utility for a specified number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2001.

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Baldwin's Ohio Revised Code Annotated Currentness
Title XLIX. Public Utilities
➡ Chapter 4933. Companies--Gas; Electric; Water; Others (Refs & Annos)
Preliminary Provisions
Disconnection of Services

4933.12 Company may shut off gas; limits; procedures; notice to county human services department

(A) Except as provided in division (C) of this section and division (E) of section 5117.11 of the Revised Code, if any person supplied with gas neglects or refuses to pay the amount due for the gas or for rent of articles hired by the person from a natural gas company or a gas company, the company may stop the gas from entering the premises of the person. In such cases, after twenty-four hours' notice, the officers, servants, or workers of the company may enter the premises of such persons, between eight a.m. and four p.m., take away such property of the company, and disconnect any meter from the mains or pipes of the company.

(B) The company shall not refuse to furnish gas on account of arrearages due it for gas furnished to persons formerly receiving services at the premises as customers of the company, provided the former customers are not continuing to reside at the premises.

(C) The company shall not, for any reason, unless required by the consumer for safety reasons, or unless tampering with utility company equipment or theft of gas or utility company equipment has occurred, stop gas from entering the premises of any residential consumer for the period beginning on the fifteenth day of November and ending on the fifteenth day of the following April, unless both of the following apply:

(1) The account of the consumer is in arrears thirty days or more .

(2) If the occupant of residential premises is a tenant whose landlord is responsible for payment for the service provided by the company, the company has, five days previously, notified the occupant of its intent to discontinue service to the occupant.

(D) No company shall stop the gas from entering any residential premises between the fifteenth day of November and the fifteenth day of April because of a failure to pay the amount due for the gas unless the company, at the time it sends or delivers to the premises notices of termination, informs the occupant of the premises where to obtain state and federal aid for payment of utility bills and for home weatherization and information on local government aid for payment of utility bills and for home weatherization.

(E) On or before the first day of November, a county human services department may request a company to give prior notification of any residential service terminations to occur during the period beginning on the fifteenth day of November immediately following the department's request and ending on the fifteenth day of the following April. If a department makes such a written request, at least twenty-four hours before the company terminates services to a residential customer in the county during that period for failure to pay the amount due for service, the company shall provide written notice to the department of the residential customer whose service the company so intends to terminate. No company that has received such a request shall terminate such service during that period unless it has provided the notice required under this division.

(F) No company shall stop gas from entering the residential premises of any residential consumer who is deployed on active duty for nonpayment for gas supplied to the residential premises.

Upon return of a residential consumer from active duty, the company shall offer the residential consumer a period equal to at least the period of deployment on active duty to pay any arrearages incurred during the period of deployment. The company shall inform the residential consumer that, if the period the company offers presents a hardship to the consumer, the consumer may request a longer period to pay the arrearages and, in the case of a

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company that is a public utility as defined in section 4905.02 of the Revised Code, may request the assistance of the public utilities commission to obtain a longer period. No late payment fees or interest shall be charged to the residential consumer during the period of deployment or the repayment period.

If a company that is a public utility determines that amounts owed by a residential consumer who is deployed on active duty are uncollectible, the company may file an application with the public utilities commission for approval of authority to recover the amounts. The recovery shall be through a rider on the base rates of customers of the company or through other means as may be approved by the commission, provided that any amount approved to be recovered through a rider or other means shall not be considered by the commission in any subsequent rate determination.

As used in this division, "active duty" means active duty pursuant to an executive order of the president of the United States, an act of the congress of the United States, or section 5919.29 or 5923.21 of the Revised Code.

4933.121 Company may shut off electricity; limits; procedures; notice to county human services department

(A) Except as provided in division (E) of section 5117.11 of the Revised Code, an electric light company shall not, for any reason, unless requested by the consumer for safety reasons, or unless tampering with utility company equipment or theft of electricity or utility company equipment has occurred, cease to provide electricity to any residential consumer for the period beginning on the fifteenth day of November and ending on the fifteenth day of the following April, unless both of the following apply:

(1) The account of the consumer is in arrears thirty days or more.

(2) If the occupant of residential premises is a tenant whose landlord is responsible for payment for the service provided by the company, the company has, five days previously, notified the occupant of its intent to discontinue service to the occupant.

(B) The company shall not refuse to furnish electricity on account of arrearages due it for electricity furnished to persons formerly receiving services at the premises as customers of the company, provided the former customers are not continuing to reside at the premises.

(C) No company shall cease to provide electricity to any residential premises between the fifteenth day of November and the fifteenth day of April because of a failure to pay the amount due for the electricity unless the company, at the time it sends or delivers to the premises notices of termination, informs the occupant of the premises where to obtain state and federal aid for payment of utility bills and for home weatherization and information on local government aid for payment of utility bills and for home weatherization.

(D) On or before the first day of November, a county human services department may request a company to give prior notification of any residential service terminations to occur during the period beginning on the fifteenth day of November immediately following the department's request and ending on the fifteenth day of the following April. If a department makes such a written request, at least twenty-four hours before the company terminates services to a residential customer in the county during that period for failure to pay the amount due for service, the company shall provide written notice to the department of the residential customer whose service the company so intends to terminate. No company that has received such a request shall terminate such service during that period unless it has provided the notice required under this division.

(E) No company shall cease to provide electricity to the residential premises of any residential consumer who is deployed on active duty for nonpayment for electricity provided to the residential premises.

Upon return of a residential consumer from active duty, the company shall offer the residential consumer a period equal to at least the period of deployment on active duty to pay any arrearages incurred during the period of deployment. The company shall inform the residential consumer that, if the period the company offers presents a hardship to the consumer, the consumer may request a longer period to pay the arrearages and, in the case of a company that is a public utility as defined in section 4905.02 of the Revised Code, may request the assistance of the

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public utilities commission to obtain a longer period. No late payment fees or interest shall be charged to the residential consumer during the period of deployment or the repayment period.

If a company that is a public utility determines that amounts owed by a residential consumer who is deployed on active duty are uncollectible, the company may file an application with the public utilities commission for approval of authority to recover the amounts. The recovery shall be through a rider on the base rates of customers of the company or through other means as may be approved by the commission, provided that any amount approved to be recovered through a rider or other means shall not be considered by the commission in any subsequent rate determination.

As used in this division, "active duty" means active duty pursuant to an executive order of the president of the United States, an act of the congress of the United States, or section 5919.29 or 5923.21 of the Revised Code.

4933.122 Procedures prior to termination of residential gas or electric service; limit on due dates

No natural gas, gas, or electric light company shall terminate service, except for safety reasons or upon the request of the customer, at any time to a residential consumer, except pursuant to procedures that provide for all of the following:

(A) Reasonable prior notice is given to such consumer, including notice of rights and remedies, and no due date shall be established, after which a customer's account is considered to be in arrears if unpaid, that is less than fourteen days after the mailing of the billing. This limitation does not apply to charges to customers that receive service pursuant to an arrangement authorized by section 4905.31 of the Revised Code, nor to electric light companies operated not for profit or public utilities that are owned or operated by a municipal corporation.

(B) A reasonable opportunity is given to dispute the reasons for such termination;

(C) In circumstances in which termination of service to a consumer would be especially dangerous to health, as determined by the public utilities commission, or make the operation of necessary medical or life-supporting equipment impossible or impractical, and such consumer establishes that the consumer is unable to pay for such service in accordance with the requirements of the utility's billing except under an extended payment plan.

Such procedures shall take into account the need to include reasonable provisions for elderly and handicapped consumers.

The commission shall hold hearings and adopt rules to carry out this section.

To the extent that any rules adopted for the purpose of division (C) of this section require a health care professional to validate the health of a consumer or the necessity of operation of a consumer's medical or life-supporting equipment, the rules shall include as a health care professional a physician assistant, a clinical nurse specialist, a certified nurse practitioner, or a certified nurse-midwife.

4933.123 Report by energy company of service disconnections for nonpayment

(A) For the purpose of this section:

(1) "Energy company" shall have the meaning assigned in division (A)(4) of section 5117.01 of the Revised Code.

(2) "Service disconnection for nonpayment" means the intentional discontinuation of gas or electric services to a residential customer by an energy company due to the failure of the customer to pay for such services.

(3) "Service reconnections" means the reconnection of gas or electric services by an energy company to a residential customer whose service was discontinued by such company for nonpayment.

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(B) Annually, on or before the thirtieth day of June, each energy company shall file a written report on service disconnections for nonpayment with the public utilities commission and the consumers' counsel. The report shall include the following information for the twelve-month period ending on the preceding thirty-first day of May, by month:

(1) Total number of service disconnections for nonpayment and the total dollar amount of unpaid bills represented by such disconnections;

(2) Total number of final notices of actual disconnection issued for service disconnections for nonpayment and the total dollar amount of unpaid bills represented by such notices;

(3) Total number of residential customer accounts in arrears by more than sixty days and the total dollar amount of such arrearages;

(4) Total number of security deposits received from residential customers and the total dollar amount of such deposits;

(5) Total number of service reconnections;

(6) Total number of residential customers.

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