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I. INTRODUCTION

Contrary to Appellants' assertions, this case is not about "interpret[ing] and enforc[ing] the NESC [i.e., the National Electrical Safety Code]." (Merit Brief of Appellants ("Appls. Br.") at 5.) In fact, Appellants concede that, under the NESC, Appellants' structures (an above-ground swimming pool and shed) were located too close to Ohio Edison's 69 kilovolt ("kV") line. The only question this case has *ever* presented is whether that violation should be cured by moving Appellants' structures, or rather the 69 kV line owned and operated by Ohio Edison Company ("Ohio Edison" or the "Company"). On *that* question, Appellants themselves admit that the NESC is silent. (*See* Appls. Br. at 5 (conceding that the Public Utilities Commission of Ohio (the "Commission") "correctly determined" that the NESC "does not provide guidance on whether the structures or facility should be moved," citing 2/23/2011 Commission Entry ("Order"), ¶ 15 (App. at 12)).)

The question as to which of the structures must move is instead governed by an easement that was granted to Ohio Edison in 1949. Under that easement, the utility retains the "right to clear and keep clear [its] right of way of trees, bushes *and other obstructions* within distance of fifty feet of said right of way." The question of which structures must move, then, involves straightforward interpretation of the plain language of this private easement. As the Commission correctly observed: "the Commission has no special expertise with respect to interpreting easements. Courts of common pleas are better suited to apply equitable and legal principles to resolve competing property rights." (Order at ¶ 19 (App. at 14).)

Recognizing that very fact, the Company filed an action in the Mahoning County Court of Common Pleas to enforce the terms of its easement, and it did so months *before* Appellants filed their complaint at the Commission. The common pleas court, as Appellants admit (*see*

Appls. Br. at 2), entered an injunction requiring them to move their pool and shed. The Appellants have appealed that decision, meaning that they will continue to receive their day(s) in court – the proper court – to argue about the easement’s terms (though, in light of the easement’s language, it is difficult to see how they could succeed). Given the nature of Appellants’ claims, however, the Commission simply is not an appropriate forum. That is what the Commission found. This Court should uphold that ruling.

II. STATEMENT OF FACTS

A. **Ohio Edison’s Power Line Is Located In A Valid Easement Over Appellants’ Property, And Has Been In Place For Decades.**

In 1949, Ohio Edison purchased an easement over the property that Appellants now own. (See 8/29/2005 Mot. to Dismiss, Ex. 1, Ex. C (Supplement to Appellee’s Br. (“Supp.”) at 21).) In addition to providing Ohio Edison a right-of-way to construct and maintain a power line along the path specified in the easement, the easement also grants Ohio Edison the right to clear any “trees, bushes and other obstructions within a distance of fifty feet from the center of said right-of-way.” (Id.) Ohio Edison constructed a line through that right-of-way some 40 plus years ago, and has maintained that line ever since. (Id. at Ex. 1, ¶ 7 (Supp. at 9).) The line is currently rated to operate at 69 kV. (Id. at Ex. 1, ¶ 4 (Supp. at 9).)

B. **Appellants Concede That Their Later-Constructed Structures – An Above Ground Pool And Shed – Are Located Closer To Ohio Edison’s 69 kV Line Than The National Electric Safety Code Allows.**

Appellants do not dispute that they erected the above-ground pool and shed at issue here decades after the line was in place. They further concede that they located the structures closer to the 69 kV line than the NESC allows. (Appls. Br. at 3.) In particular, the shed was erected at a distance of 10 feet from the line (the NESC requires that it be a minimum of 13.2 feet) and the

pool was placed 20.7 feet from the line (while the NESC requires it be a minimum of 25.7 feet away). (Id.)

Because the structures violated the NESC minimum safe distance rules, the presence of the pool and shed created a safety hazard both for Appellants (or anyone else who used the pool or shed) and Ohio Edison employees, and a reliability issue for the Ohio Edison customers served by the line. Accordingly, invoking its right under the easement, Ohio Edison asked Appellants to move the structures. Appellants refused.¹

C. Ohio Edison Brought An Action In Mahoning County Court Of Common Pleas To Enforce Its Right Under The Easement To Keep A Right Of Way Around The Line Clear Of Obstructions.

On April 9, 2009, Ohio Edison brought suit in the Mahoning County Court of Common Pleas seeking declaratory and injunctive relief under the easement. (8/25/09 Mot. to Dismiss at Ex. 1 (Supp. at 8) (attaching Mahoning County Complaint).) More specifically, the Company sought a preliminary and permanent injunction requiring Appellants to move their structures. (Id. at Ex. 1, Prayer for Relief (Supp. at 9).) On June 19, 2009, the court entered a preliminary injunction, enjoining Appellants from using the swimming pool or shed, or allowing anyone else to use it. (Id. at Ex. 3 (Supp. at 36).) Three days later, on June 22, 2009, Ohio Edison filed a motion for summary judgment, which was fully briefed by the end of July. (Id. at Ex. 4 (docket sheet) (Supp. at 37).)

¹ Appellants now contend that “[b]efore Appellants built the structures, they contacted Ohio Edison and received approval.” (Appls. Br. at 1.) Appellants made no such allegation, however, at any point in the Commission proceedings below. In fact, Ohio Edison gave no such approval.

D. Appellants, Without Informing The Commission Of The Pending State Court Action, Filed A Complaint In The Commission Seeking To Require Ohio Edison To Move Its 69 kV Line.

On August 5, 2009, Appellants filed a complaint in the Commission seeking an order requiring the Company to move its 69 kV line. In doing so, they did not bother to mention (1) the existence of the Mahoning County Court of Common Pleas case; (2) the fact that injunctive relief had already been granted against them; or (3) that a fully-briefed motion for summary judgment was pending.

On August 25, 2009, Ohio Edison filed a motion to dismiss the Commission complaint raising two grounds. First, Ohio Edison argued that the case did not fall within the Commission's subject matter jurisdiction. (Supp. at 1.) Ohio Edison noted that, while the Commission has broad jurisdiction over *service-related matters*, it lacks jurisdiction to adjudicate rights, such as those at issue here, that arise solely out of property rights granted pursuant to an easement. Ohio Edison based its argument on this Court's test from *Corrigan v. Illuminating Co.*, (2009), 122 Ohio St. 3d 265. (Supp. at 4-5.) Noting that there was no dispute as to any aspect of the NESC, and that all parties agreed that the structures were in violation, Ohio Edison argued that the Commission lacked jurisdiction to resolve the dispute, and that the earlier-filed Mahoning County case thus controlled. (Supp. at 5.)

On August 30, 2010, following an eight-month stay of discovery in the Commission proceeding, Appellants sought to revive their case by filing a "Request for Ruling" on Ohio Edison's previous Motion to Dismiss. (Order at ¶ 7 (App. at 9).) In that motion, they again requested an order that Ohio Edison move its 69 kV line. In their filing, Appellants failed to mention that only two weeks earlier, the Mahoning County magistrate had granted Ohio Edison's motion for summary judgment in the state court case: (1) finding that the easement's plain language was dispositive; (2) noting that Appellants had built their facilities under Ohio Edison's

lines well after the easement was established and the lines were built; and (3) ordering Appellants to relocate their pool and shed to a safe distance from Ohio Edison's 69 kV line. (*See* 2/16/11 Mem. Contra Mot. to Order Ohio Edison to Move 69 kV Lines at Ex. B (Supp. at 66-68) (finding Wilkes' pool and shed to be a "continuing nuisance that wrongfully interferes with Ohio Edison's right to operate the Boardman-Pidgeon South 69 kV transmission line in a safe and reliable manner, in violation of Ohio Edison's rights under the easement").)

While awaiting the Commission decision on their "Request for Ruling," Appellants also filed in state court various objections to the magistrate's decision. (*See id.* at Ex. C (Supp. at 70).) On October 21, 2010, the Court overruled Appellants' objections and ordered them to move the pool and shed by February 17, 2011. (*Id.*) On December 1, 2010, the trial court judge denied Appellants' motion to stay that Order. (*Id.* at Ex. A (Supp. at 57-58) (noting that court denied defendants' motion to stay execution).)

The Wilkes appealed the Order to the Seventh District Court of Appeals, and also sought a stay of the Order pending the outcome of that appeal. On February 4, 2011, the Seventh District denied the request for a stay. (*Id.* at Ex. D (Supp. at 73).)

On February 7, 2011, three days after the stay was denied, Appellants filed in the Commission a "Motion to Order Ohio Edison to Move 69 kV Lines to Comport With The National Electric Safety Code." (Order at ¶ 14 (App. at 10).) As with other Commission filings, Appellants failed to note the status of the state court action, or that the appeals court had denied their request for a stay.²

² Appellants have moved the structures to new locations beyond the minimum required distance under the NESC. They nevertheless continue to pursue this action.

E. The Commission Dismissed Appellants' Complaint, Finding That It Lacked Jurisdiction Over The Matter, And That The Complaint Failed To State Reasonable Grounds.

On February 23, 2011, the Commission entered an Order dismissing the case. (App. at 1-21.) In particular, the Commission found that both (1) it lacked jurisdiction, and (2) the complaint failed to state reasonable grounds.

On the jurisdictional issue, the Commission cited this Court's two-prong test under *Allstate* and *Corrigan*. Turning to the first prong, the Commission found that its administrative expertise was not needed to resolve Appellants' claim:

To secure the Commission's jurisdiction, the complainants argue that the Commission's administrative expertise is needed to resolve issues relating to the NESC. We disagree. ... Neither party disputes ... that the proximity of the swimming pool and storage shed to the 69 kV line violate the NESC. The parties merely dispute the remedy that should be applied to bring about compliance with the NESC.

(Order at ¶ 19 (App. at 13-14).)

The Commission stated that the remedy was, at least in the first instance, controlled by the easement. The Commission observed that it "has no special expertise with respect to interpreting easements," and that "[c]ourts of common pleas are better suited to apply equitable and legal principles to resolve competing property rights." (Id. (App. at 14).) It went on: "Consequently, we must answer in the negative the question of whether the Commission's expertise is needed to resolve issues relating [to] easements." (Id.)

The Commission also concluded that Appellants' complaint failed to meet the second prong of the *Allstate* test. According to the Commission, "the removal of structures from the property of a private landowner is not a practice authorized by a utility." (Id. at ¶ 20 (App. at 14).) The Commission therefore determined that "the most prudent first course of action is for a utility to seek authority from a court of common pleas to remove the encroachments." (Id.)

Appellants filed an application for rehearing. The Commission denied it, again finding that it lacked jurisdiction under *Allstate* and *Corrigan*. According to the Commission, “[t]he parties agree that there is a violation of the NESC. It is, therefore, not necessary for the Commission to decide whether there is a NESC violation.” (4/5/11 Entry on Rehearing, at ¶ 5 (App. at 20).) Thus, “[w]e cannot ignore that there is a dispute concerning an easement over which we do not have jurisdiction.” (Id.) This appeal followed.

III. ARGUMENT

Proposition of Law Number 1: A complaint against an electric utility that does not involve the interpretation of any federal or state statute or administrative provision designed to regulate electric utilities, but rather involves only the interpretation of a private easement, does not fall within the exclusive jurisdiction of the Commission, and jurisdiction to hear such a complaint properly lies in a court of common pleas.

This Court has adopted a two-part test to define the contours of the Commission’s jurisdiction:

First, is [the Commission’s] administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by a utility?

Allstate Insurance Co. v. Cleveland Electric Illuminating Co (2008), 119 Ohio St. 3d 301, 304 (internal quotation marks omitted); *Corrigan v. Illuminating Co.* (2009), 122 Ohio St. 3d 265, 267 (same). “If the answer to either question is in the negative, the claim is not within PUCO’s exclusive jurisdiction.” *Allstate*, 119 Ohio St. 3d at 304. Moreover, in announcing the test, this Court also cautioned that the fact “[t]hat PUCO has exclusive jurisdiction over service-related matters does not diminish the basic jurisdiction of the court of common pleas in other areas of possible claims against utilities, including pure tort and contract claims.” *Id.* at 302 (internal quotation marks omitted). Indeed, this Court has long held that “[t]he public utilities commission is in no sense a court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property

rights.” *Village of New Bremen v. Pub. Util. Comm.* (1921), 103 Ohio St. 23, 30-31. Here, the answer to both prongs of the *Allstate* test is “no,” and as a result, this claim falls within the “basic jurisdiction” of the court of common pleas.

As to the first prong, despite Appellants’ best efforts to obscure the fact, *there simply is no dispute in this case regarding the NESC*. Both parties have accepted and relied on an affidavit by professional engineer David R. Kozy that describes the NESC violation. The parties do not dispute that the NESC prescribes minimum clearances between 69 kV lines and structures like Appellants’ pool and shed. They do not disagree about the proper way to calculate those clearances, or that such calculation must be based on the position of the line as if it were operating at the maximum allowable operating temperature of 212°F. They do not dispute that in this case, the NESC requires minimum clearances of 25.7 feet from Appellants’ pool and 13.2 feet from the roof of their shed. And they do not disagree that under the NESC, their structures are too close to the line. In short, in the proceeding before the Commission, the parties agreed on every relevant aspect of interpretation and application of the NESC. Thus, contrary to Appellants’ assertion that “the PUCO is shirk[ing] its obligation to interpret and enforce the NESC” (Appls. Br. at 5), there simply was no NESC interpretation, analysis or calculation left for the Commission to perform.

The only issue that this case has ever presented is the appropriate remedy for the undisputed NESC violation — i.e., whether to require Ohio Edison to move the 69 kV line, or to require Appellants to move their pool and shed. As to that question, Appellants admit that “[t]he PUCO correctly determined that ... ‘the NESC does not provide guidance on whether the structures or facility should be moved.’” (Appls. Br. at 5.) Rather, the answer to that question, as the Mahoning County Court of Common Pleas found, turns solely on the meaning of the terms

of Ohio Edison's easement. The Commission properly recognized that it does not have any special expertise in adjudicating property rights. (Order at ¶ 19 (App. at 14).) In fact, this Court itself has made that same observation. *See New Bremen*, 103 Ohio St. at 30-31.

Because the sole disputed issue involves only the interpretation of an easement – an issue on which the Commission does not have any particular expertise – the answer to the first of the *Allstate* questions is no. That, in and of itself, is sufficient to preclude jurisdiction. *See Allstate*, 119 Ohio St. 3d at 304 (“The test we adopt today is not conjunctive; we need not address the second question because the answer to the first question ... is that the PUCO does not have exclusive jurisdiction.”).

The complaint here also fails the second prong of the *Allstate* test. The act complained of – removal of structures that violate the NESC from a private landowner's property – is not a “practice normally authorized by a utility.” In contrast to the “vegetation management” practices at issue in *Corrigan*, for example, for which utilities are required by rule to adopt and file with the Commission “written programs” for the Commission's review, *see* Ohio Adm. Code 4901:1-10-27(E), utilities are not required to adopt written programs to address the handling of structures in the easement, such as Appellants' pool and shed. As this case does not involve a practice normally authorized by a utility, “the most prudent first course of action is for a utility to seek authority from a court of common pleas to remove the encroachments.” (Order at ¶ 20 (App. at 14).)

In their brief, Appellants appear to concede that *Corrigan* is controlling authority (*see* Applts. Br. at 5-7), but they fail to appreciate how the case applies on the facts here. In *Corrigan*, the Court found that the Commission had jurisdiction, but only because that case was not controlled by the interpretation of an easement:

[T]his case is not about an easement. There is no question that the company has a valid easement and that the tree is within the easement. . . . It is clear from the record that ***the Corrigan's are not contesting the meaning of the language of the easement*** but rather the company's decision to remove the tree instead of pruning it. . . . Therefore, the Corrigan's complaint with the decision to remove the tree is really an attack on the company's vegetation-management plan.

Corrigan, 122 Ohio St. 3d at 269 (emphasis added).

In stark contrast, this case has ***everything*** to do with an easement. The sole dispute between the parties is whether, under the terms of the easement, Ohio Edison must relocate the 69 kV line or whether instead Appellants' must relocate their pool and shed. The Mahoning County court resolved that question by reference to the easement's language, finding that Ohio Edison has a right to insist on the relocation of "obstructions" in its right-of-way, a term that the Mahoning County court correctly determined includes the pool and shed.

Likewise, Appellants' citation to *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas* (2002), 97 Ohio St. 3d 69, (Applts. Br. at 7), offers them no support. There, a utility had sued a commercial customer in state court to collect on unpaid electric bills. *Id.* at 69-70. The customer counter-claimed for violations of Commission rules regarding establishment of electric service, procedures for obtaining an account guaranty, and billing requirements. *Id.* In granting the utility a writ of prohibition, this Court upheld the Commission's exclusive jurisdiction ***over counter-claims that are based on those rules.*** *Id.* at 73 (but holding that other counter-claims regarding indefiniteness and lack of consideration relating to a guaranty were contractual issues within state court's jurisdiction). Once again, though, here there is no dispute regarding the Commission's rules or the proper interpretation of the NESC. Rather, the only issue is whether the transmission line or Appellants' structures should be moved, and that issue

turns squarely on the easement. Accordingly, the Commission properly determined that it lacked jurisdiction.

Proposition of Law Number 2: Where a court of common pleas properly has jurisdiction over a dispute involving a utility, the court's judgment is not subject to collateral attack in the Public Utilities Commission, but rather must be challenged, if at all, through appeal.

The Commission was also correct to deny Appellants' attempt to use the Commission as a forum to mount a collateral attack on the state court judgment. Where a court properly exercises jurisdiction over a dispute, it has the authority to "adjudicate upon the whole issue and to settle the rights of the parties ... *to the exclusion of all other tribunals.*" *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St. 2d 279, syllabus. ¶ 1 (emphasis added). As this Court has observed, "In our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that – final. Therefore, subject to only rare exceptions, direct attacks, i.e., appeals, by parties to the litigation, are the primary way that a civil judgment is challenged." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Division of State Fire Marshal* (2007), 115 Ohio St. 3d 375, 380. "[I]t necessarily follows that collateral or indirect attacks are disfavored and that they will succeed only in certain very limited situations." *Id.* (dismissing case as improper collateral attack on previous decision); *see also B-Dry Sys., Inc. v. Kronenthal* (June 30, 1999) Montgomery App. Nos. 17130, 17619, 1999 Ohio App. LEXIS 3080, *18 (holding that where tribunal properly asserts jurisdiction over a dispute in the first instance, other tribunals have no jurisdiction over subsequently-filed suits involving same dispute).

Here, the Mahoning County Court of Common Pleas decided the very issue that Appellants sought to put before the Commission: the appropriate remedy under the easement for the undisputed NESC violations created by the proximity between Appellants' structures and the Company's 69 kV line. Thus, the court's order, by requiring Appellants to move their pool and

shed, fully resolved the NESC violation, and thus also resolved the only disputed issue in the Commission proceeding.

Given the “firm and longstanding principle” disfavoring collateral attacks, the Commission properly declined to hear a collateral attack on that valid state court judgment. While Appellants claim that “collateral attacks are permissible in the PUCO” (Appls. Br. at 8), the only case they cite for that proposition is *Western Reserve Transit Authority v. Public Util. Comm.* (1974), 39 Ohio St. 2d 16. But that case is irrelevant. There, a party complained when its Commission case was dismissed without hearing because of a decision in *another Commission case*. See *id.* at 18 (noting sua sponte Commission dismissal based on prior Commission proceeding). In that specific context, this Court noted that R.C. 4905.26 contemplates collateral attacks on prior *Commission* orders in subsequent Commission cases. *Id.* This Court did not, however, hold that a party may collaterally attack a valid prior *court* order in a later Commission case (especially where the Commission lacks jurisdiction, as it does here). Thus, *Western Reserve* does not support Appellants’ attempt to use a Commission proceeding as an end-run around the Mahoning County court’s final judgment.

Proposition of Law Number 3: The Commission properly dismisses a complaint alleging discriminatory treatment when the facts that allegedly constitute discrimination are not stated with particularity.

The Commission was also correct to deny Appellants’ “discriminatory treatment” claim. This is true for two reasons. First, Appellants did not raise the “discriminatory treatment” issue in their application for rehearing, and thus cannot raise it now. Second, pursuant to the Commission’s broad statutory authority to adopt procedural rules for the conduct of hearings, the Commission requires that complaints alleging discrimination must state the facts constituting the alleged discrimination “with particularity.” Ohio Administrative Code 4901-9-01(B). As

Appellants admit, their complaint did not merely failed to plead discrimination with “particularity,” the complaint failed to plead such allegations *at all*. (See Applts. Br. at 9-10.)

Revised Code Section 4903.10 specifically prevents parties from challenging a Commission determination on any grounds that the party has not first set forth in an application for rehearing:

[An] application [for rehearing] shall be in writing and shall set for the specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. *No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.*

R.C. 4903.10. As this statutory language commands, this Court has held that “setting forth specific grounds for rehearing is a jurisdictional prerequisite for review. *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 340, 349. Accordingly, failure to include an issue in such an application “precludes [this Court] considering the issue.” *Id.* (finding that OCC had waived an issue by “not setting it forth in its application for rehearing”). *See also, e.g., In re Application of Columbus S. Power Co.*, ___ Ohio St.3d. ___, 2011-Ohio-2638 ¶ 19 (stating that R.C. 4903.10 “jurisdictionally bars [this Court] from considering arguments not raised before the commission on rehearing”); *Consumers’ Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, 247 (“We have held that setting forth specific grounds for rehearing is a jurisdictional prerequisite for our review.”) (citing cases).

Here, while Appellants filed an application for rehearing, that application did not raise the discriminatory treatment issue. Their six-page application for rehearing, filed March 8, 2011, is directed *exclusively* at the issue of whether the Commission has jurisdiction based on its power to “enforce the NESC.” (3/8/2011 Appl. for Reh’g at 2.) Nowhere do they argue that the Commission erred in refusing to consider their discriminatory treatment claim because of their failure to plead it with specificity. Accordingly, they have waived that issue.

Even if Appellants had presented the “discriminatory treatment” issue in their application for rehearing, the issue still would not warrant review in this Court. The General Assembly has expressly granted to the Commission the authority to “adopt and publish rules to govern its proceedings and to regulate the mode and manner of ... hearings relating to parties before it.” R.C. 4901.13. As this Court has noted, this statutory provision grants the Commission “broad authority in the conduct of its hearings.” *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.* (2007), 113 Ohio St. 3d 180, 191. *See also, Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379 (“Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings.”). Indeed, “[i]t is well-settled that pursuant to R.C. 4901.13, the commission has discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.” *Weiss v. Pub. Util. Comm.* (2001), 90 Ohio St. 3d 15, 19 (internal quotation marks omitted); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560 (same). So, for example, in *Weiss*, this Court unanimously upheld the Commission’s determination that it would not hear a complaint as a class action.

Exercising its authority under R.C. 4901.13, the Commission adopted Ohio Adm. Code 4901-9-01, which sets forth the rules governing “Complaint proceedings.” Of particular relevance here, that rule requires that complaints pressing a claim of discriminatory treatment “must” state the facts that constitute the alleged discrimination “with particularity”:

All complaints filed under section 4905.26 of the Revised Code ... shall contain ... a statement which clearly explains the facts which constitute the basis of the complaint *If discrimination is alleged, the facts that allegedly constitute discrimination must be stated with particularity.*

OAC 4901-9-01(B) (emphasis added). Moreover, not only has the Commission adopted this rule, but the Commission was right to do so. Claims of discrimination are easy to make and can be difficult – and costly – to defend. A utility has the right to know the basis for such a complaint.

Here, Appellants admit that they failed to plead in their Complaint *any* facts constituting alleged discrimination. As Appellants acknowledge, they “did not specifically allege in their Complaint that they were receiving unjust and discriminatory treatment from Ohio Edison regarding the enforcement of the NESC.” (Appls. Br. at 9-10.) Thus, not surprisingly, the Commission found that Appellants “fail[ed] to state reasonable grounds for Complaint.” The Appellants’ admission, in and of itself, provides a sufficient basis to uphold the Commission’s decision.

Nor can Appellants excuse their failure through their assertion that they “issued discovery related to this issue.” (Appls. Br. at 10.) The Commission rule articulates a *pleading* standard – parties must meet those standards *before* they are granted access to discovery. That is a particularly commonsensical approach where, as here, the facts supporting Appellants’ allegations of discrimination would presumably be well within their knowledge. After all, they are claiming that their neighbors received different treatment. If that is, in fact, the case, surely Appellants should be able to plead which neighbors and what structures. Their unsupported allegations in their opposition to the motion to dismiss that Ohio Edison treated unidentified “neighbors’ structures” differently should not give Appellants license to conduct a fishing expedition in Ohio Edison’s files, complete with the attendant cost and disruption that such an expedition would entail.

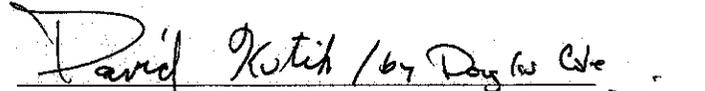
The Commission properly dismissed Appellants’ untimely and unsupported allegation of discrimination, and this Court should uphold that determination.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the Commission dismissing Appellants' complaint in this matter for lack of jurisdiction and for failure to state reasonable grounds for complaint.

July 26, 2011

Respectfully submitted,


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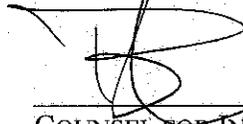
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Intervenor-Appellee Ohio

Edison Company was delivered to the following via regular U.S. mail this 26th day of July, 2011:

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