

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint)	
of United Services Automobile Association,)	
)	
Complainant,)	Case No. 14-1176-GA-CSS
v.)	
)	
NiSource Inc. <i>et al</i> ,)	
)	
Respondents.)	

**REPLY MEMORANDUM IN SUPPORT OF THE
MOTION TO DISMISS
OF NISOURCE INC. AND COLUMBIA GAS OF OHIO, INC.**

United Services Automobile Association (“USAA”) has submitted a First Amended Complaint that withdraws its claims against the parent company of Respondent Columbia Gas of Ohio, Inc. (“Columbia”), NiSource Inc. USAA has also withdrawn its strict liability and implied contract claims and its requests for monetary damages, litigation expenses, and attorney’s fees. Although USAA did not move for leave to amend its complaint, as required by Rule 4901-1-06, Ohio Administrative Code, Respondents encourage the Commission to treat USAA’s submission as a motion for leave to amend and grant that motion.

USAA’s remaining claims are “service-related negligence” (Amended Count I), “breach of tariff” (Amended Count II), and “regulatory violations” (Amended Count III). Whether these claims are properly before the Commission depends on the answers to two related questions: First, does USAA’s First Amended Complaint state “reasonable grounds for complaint,” as required by Section 4905.26, Revised Code?¹ And second, are USAA’s claims really service-related claims within the Commission’s jurisdiction?² As Respondents explained in their Motion to Dismiss, and for the reasons set forth below, the answer to both questions is no.

¹ Section 4905.26, Revised Code.

² See, e.g., *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶7.

The Commission's rules require complaints to include "a statement which clearly explains the facts which constitute the basis of the complaint."³ In order to proceed to hearing, a complaint must set forth "**specific facts**"⁴ that provide "fair notice of the allegations being made against [the respondent], and *** fair notice of the factual basis for such allegations ***."⁵ Ohio statute, in addition, gives the Commission jurisdiction to consider complaints against public utilities only if those complaints are service-related.⁶ A claim that sounds in tort form should be heard by the Commission if "PUCO's administrative expertise [is] required to resolve the issue in dispute" and "**the act complained of** constitute[s] a practice normally authorized by the utility[.]"⁷ Thus, determining whether USAA's claims are properly before the Commission requires a consideration of the acts that are the subject of USAA's complaint.

That determination is impossible here, because USAA's First Amended Complaint only describes Columbia's purported wrongdoing in generalities. USAA asserts that "[a fire] was caused by a leakage of gas *** distributed by Columbia."⁸ From where did the gas allegedly leak, exactly? "[F]rom its *** pipeline, meter, and applicable equipment."⁹ Why did the gas allegedly leak? Because the "pipeline, meter, and applicable equipment" were "defective,"¹⁰ and because of "the improper actions and omissions that caused and allowed the leak to exist."¹¹ And, what were those allegedly "improper actions and omissions"? USAA's "service-related negligence" claim simply lists a grab-bag of vague legal conclusions masquerading as factual allegations, including:

- g. violating applicable codes, standards, practices and regulations regarding the supply and distribution of natural gas and applicable equipment; and

³ Ohio Adm. Code 4901-9-01(B).

⁴ (Emphasis added.) *In the Matter of the Complaint of James M. Carpenter v. Acme Telephone Answering Service*, Case No. 89-326-RC-CSS, 1989 Ohio PUC LEXIS 606, Entry, ¶9 (June 28, 1989).

⁵ *Id.* ¶11.

⁶ See Section 4905.26, Revised Code.

⁷ (Emphasis added.) *Allstate Ins. Co.*, 2008-Ohio-3917, ¶¶12-13.

⁸ (Emphasis added.) First Amended Complaint ¶9.

⁹ *Id.*

¹⁰ *Id.*

¹¹ USAA Memorandum Contra at 2.

- h. supplying, conveying, selling, distributing, and/or delivering and/or transporting gas in an unsafe manner that presented an unreasonable risk of harm;
- i. failing to meet the requirements set forth in OHIO REV. CODE ANN. Sec. 4905.90 - .96 (Regarding gas pipe-lines) and the pipe-line safety code; and
- j. otherwise failing to use due care under the circumstances.¹²

USAA's "regulatory violations" claim similarly describes Columbia's purported wrongdoing as "fail[ing] to comply with [Columbia's] regulatory and statutory obligations ***."¹³

USAA argues that its "negligence claim represents a service-related negligence claim falling within the Commission's jurisdiction," like the one at issue in *State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.*¹⁴ Yet, the complaint in *State Farm* specifically "allege[d] that CEI negligently inspected the meter base affixed to [the insured's] residence,"¹⁵ "resulting in the fire."¹⁶ Here, it is unclear what Columbia allegedly did to cause the Woods' fire. *State Farm*, moreover, is in the distinct minority of Ohio opinions regarding jurisdiction over public utility fires. As noted in Columbia's Motion to Dismiss, actions against natural gas companies in Ohio for damage caused by gas fires or explosions are almost universally brought in court.¹⁷ And, *State Farm* contains a strong dissent from then-Judge William O'Neill, now a Justice on the Supreme Court of Ohio, who wrote that the trial court should have asserted jurisdiction over the insurance company's claims. "Obviously, broad questions of policy and rate-making are within the exclusive purview of the PUCO," Judge O'Neill wrote. "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."¹⁸ Columbia, and several Ohio courts, agree with Judge O'Neill.

¹² First Amended Complaint ¶17.

¹³ *Id.* ¶¶22, 28.

¹⁴ *State Farm Fire & Cas. Co. v. Cleveland Elec. Illuminating Co.*, 11th Dist. Lake No. 2003-L-032, 2004-Ohio-3506.

¹⁵ *Id.* at ¶11.

¹⁶ *Id.* at ¶3.

¹⁷ See Columbia Motion to Dismiss at 8-9.

¹⁸ *State Farm Fire & Cas. Co.*, 2004-Ohio-3506, ¶20.

Indeed, it is not clear that USAA has even pled a negligence claim that would pass muster in a court of common pleas. Although USAA cloaks its claims in the guise of “service-related negligence,” “breach of tariff,” and “regulatory violations,” USAA’s Memorandum Contra suggests that USAA is actually asserting a strict liability claim, like the one in its Delaware County Common Pleas Court complaint.¹⁹ In defending the specificity with which USAA pled its complaint, USAA effectively asserts that Columbia is liable because there was a gas leak and a fire, regardless of its cause:

Columbia was responsible for safely supplying gas to the interior of the Wood home. The defective pipeline, meter, and equipment that Columbia installed, repaired, serviced, and regulated failed to supply gas to the interior of the Wood home. Rather, gas supplied by Columbia leaked out of the Columbia equipment, causing a fire and resulting damage to the Wood home and personal property that initiated outside of the Wood home. As such, in providing natural gas service to the Wood home, Columbia was negligent, breached its tariff, and violated its statutory and regulatory [duties].²⁰

Or, per USAA’s “breach of tariff” claim, Columbia is purportedly liable because Columbia “caused **and/or permitted** the gas leak and ensuing Fire to occur.”²¹ Yet, in Ohio, “strict liability *** is not available *** as a cause of action against a highly regulated public utility ***.”²² The Supreme Court has affirmed that “[g]as companies are not liable for the escape of gas in strict liability ***. *** ‘The bare fact of explosion and resulting fire would not suffice to establish a dereliction of duty on the part of the gas company.’”²³ Thus, Columbia cannot be strictly liable to USAA for the fire at the Woods’ residence. “Facts and circumstances must be shown which indicate a want of ordinary care on the part of the gas company, proximately causing the injury, or evidence of facts from which such want of due care might be inferred.”²⁴

¹⁹ See Columbia Motion to Dismiss, Exhibit A, Count II.

²⁰ USAA Memorandum Contra at 3.

²¹ (Emphasis added.) First Amended Complaint ¶22.

²² *Otte v. Dayton Power & Light Co.*, 37 Ohio St.3d 33, 36 (1988).

²³ *Weiss v. Thomas & Thomas Dev. Co.*, 79 Ohio St. 3d 274, 277 (1997), quoting *Northwestern Ohio Natural Gas Co. v. First Congregational Church of Toledo*, 126 Ohio St. 140, 153 (1933).

²⁴ *Id.*

Here, USAA has failed even to plead facts and circumstances indicating a want of ordinary care on the part of Columbia. Like USAA's original Complaint, USAA's First Amended Complaint fails to give Columbia fair notice of the factual basis for USAA's allegations. And, like USAA's original Complaint, USAA's First Amended Complaint fails to give the Commission enough information to determine whether "the act complained of constitute[s] a practice normally authorized by the utility"²⁵ and is, therefore, properly before the Commission. Because USAA has not pled sufficient factual allegations to go forward to hearing before the Commission, NiSource Inc. and Columbia Gas of Ohio, Inc. respectfully request that the Commission dismiss USAA's Complaint with prejudice.

Respectfully submitted,

/s/ Christen M. Blend

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²⁵ *Allstate Ins. Co.*, 2008-Ohio-3917, ¶¶12-13.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Dismiss was served by regular and electronic mail on this 21st day of August, 2014, upon counsel for the Complainant at the following addresses:

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Summary: Reply Memorandum in Support of the Motion to Dismiss of NiSource Inc. and Columbia Gas of Ohio, Inc. electronically filed by Ms. Christen M. Blend on behalf of NiSource Inc. and Columbia Gas of Ohio, Inc.