

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of United)	
Services Automobile Association,)	
)	
Complainant,)	
)	
v.)	
)	Case No. 14-1176-GA-CSS
NiSource, Inc.,)	
)	
and)	
)	
Columbia Gas of Ohio, Inc.,)	
)	
Respondents.)	

ENTRY

The attorney examiner finds:

- (1) On July 3, 2014, United Services Automobile Association (USAA or Complainant), as subrogee of Roger and Joy Ellen Wood (insureds), filed a complaint against NiSource, Inc. (Nisource), and Columbia Gas of Ohio, Inc. (Columbia) (jointly, Respondents). In its original complaint, USAA alleged that Respondents failed to provide reasonable, necessary, and/or adequate natural gas service as required by the Revised Code and the Ohio Administrative Code. USAA contended that Respondents' failure resulted in a fire that caused \$386,140 in damage to USAA's insureds' property. USAA further asserted that it sought: a declaration from the Commission that Respondents breached their obligations under the Revised Code, Ohio Administrative Code, and applicable tariffs; compensation for the damage resulting from Respondents' breach of their obligations; authorization for an award of treble damages pursuant to R.C. 4905.61; compensation for the costs of litigation, including all expenses and attorneys' fees; and other relief as the Commission deems just and equitable.

- (2) On July 23, 2014, Respondents filed an answer to USAA's original complaint. In their answer, Respondents generally denied the allegations set forth in the complaint and set forth affirmative defenses. Additionally, Respondents filed a motion to dismiss the complaint.
- (3) On August 11, 2014, USAA filed a response to Respondents' motion to dismiss, as well as an amended complaint. In its amended complaint, USAA asserts that it seeks: a declaration from the Commission that Columbia breached its obligations under the Revised Code, Ohio Administrative Code, and applicable tariffs, and authorization for USAA to seek an award of treble damages pursuant to R.C. 4905.61, and other relief as the Commission deems just and equitable.

Additionally, USAA's amended complaint sets forth three counts. Count I alleges that Columbia breached duties of care owed to the insured which resulted in damages due to the negligent and careless acts and omissions including: (1) failing to monitor properly and safely the supply and distribution of natural gas; (2) failing to maintain properly and safely the supply and distribution of natural gas; (3) failing to inspect, control, maintain, and repair properly and safely the pipeline, meter, and applicable equipment used to supply, distribute, convey, transport, deliver, regulate, measure, and control the natural gas; (4) failing to train, instruct, and monitor its agents, workmen, and employees properly; (5) failing to train, instruct, and monitor its subcontractors properly; (6) continuing to provide gas to the premises when it knew or should have known of dangerous conditions in the supply and distribution system; (7) violating applicable codes, standards, practices, and regulations regarding the supply and distribution of natural gas and equipment; (8) supplying, conveying, selling, distributing, delivering, or transporting gas in an unsafe manner; (9) failing to abide by R.C. 4905.90 to 4905.96 and the pipeline safety code; and (10) otherwise failing to use due care under the circumstances.

Count II alleges that Columbia breached its tariff agreement with the insureds to provide sufficient, necessary, and reasonable gas service.

Count III alleges that Columbia committed regulatory violations when it failed to exercise due and reasonable care in providing sufficient, necessary, and reliable gas service to the insureds, as the insureds relied upon Columbia's expertise to ensure that gas service was supplied in accordance with applicable statutes and rules.

- (4) By Entry issued August 26, 2014, the attorney examiner permitted USAA's complaint to be amended pursuant to Ohio Adm.Code 4901-1-06. Further, the attorney examiner scheduled a settlement conference for October 6, 2014.
- (5) Thereafter, the settlement conference was rescheduled at the request of Complainant for December 2, 2014.
- (6) The settlement conference was held as rescheduled on December 2, 2014. However, the parties were unable to reach a settlement.
- (7) On December 29, 2014, Columbia filed a motion for leave to file an answer to USAA's amended complaint. In its motion for leave to file an answer, Columbia asserts that, although it timely answered and moved to dismiss USAA's original complaint, it inadvertently did not file an updated answer to the amended complaint. Columbia asserts that it should be permitted to answer in order to eliminate any ambiguity or confusion regarding its defenses to USAA's remaining claims in the amended complaint. Further, Columbia asserts that USAA does not oppose its motion for leave to file an answer.
- (8) The attorney examiner finds that Columbia's motion for leave to file an answer to USAA's first amended complaint is reasonable and should be granted.
- (9) As part of its December 29, 2014 motion, Columbia also filed a motion to dismiss the amended complaint. On January 13, 2015, USAA filed a memorandum contra Columbia's motion to dismiss. On January 20, 2015, Columbia filed a reply memorandum in support of its motion to dismiss the amended complaint.
- (10) In its December 29, 2014 motion to dismiss the amended complaint, Columbia first argues that the grounds in its original motion to dismiss continue to require dismissal of USAA's

amended complaint. Firstly, Columbia claims that the Commission continues to lack jurisdiction over USAA's negligence claim, because it involves a tort. Columbia asserts that the Supreme Court of Ohio has held that tort claims are outside of the Commission's jurisdiction, and that the Commission itself has held that actions of negligence are matters for the courts, citing *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 6, and *In re Complaint of Jean Hails*, Case No. 95-826-GA-CSS, Entry (Jan. 11, 1996) at ¶ 13.

Next, Columbia asserts that USAA failed to explain clearly the facts constituting the basis of its complaint according to Ohio Adm.Code 4901-9-01(B). Columbia asserts that USAA's complaint is not deficient for failure to identify the legal bases for its claims, but is deficient because it fails to identify the factual bases for its claims. Columbia argues that USAA has asserted broadly described categories of legal duties and assurance that discovery will reveal evidence to support its contentions rather than describing specific actions it believes caused the fire. Further, Columbia claims that USAA has failed to state any facts that demonstrate the Commission's administrative expertise is necessary to resolve its claims.

Columbia continues that, because the action for "regulatory violations" involves a fire or explosion, it is more appropriate for civil court because it does not require the Commission's administrative expertise, nor was the act complained of a practice normally authorized by the utility. In support, Columbia cites multiple cases brought in Ohio civil courts that involve actions against natural gas companies in Ohio for damage caused by gas fires or explosions.

Further, Columbia asserts that the Commission has no jurisdiction over USAA's claims, as it lacks authority to determine insurers' subrogation rights, citing *Allstate*, supra. Columbia submits that, consequently, USAA is barred from bringing its complaint before the Commission because it has not brought its complaint as a Columbia customer.

Next, Columbia argues that the Commission's jurisdiction over service-related claims is exclusive—demonstrating that USAA's assertion of duplicated claims in common pleas court means the

claims are not service-related. Columbia cites *Allstate* in support, and emphasizes that it does not matter whether a claim is framed as a tort, but rather the substance of the claim, in determining whether a claims falls within the jurisdiction of the Commission or the courts, citing *Corrigan v. Cleveland Elec. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, 910 N.E.2d 1009, ¶ 9.

Finally, Columbia asserts that public policy disfavors the maintenance of parallel proceedings in civil court and the Commission because it enables a complainant to “game the system” by clogging court and Commission dockets and driving up utilities’ costs. Columbia concludes that the Commission should dismiss USAA’s first amended complaint.

- (11) In its memorandum contra, USAA asserts that it has pleaded reasonable grounds to support its service-related negligence, breach of tariff, and regulatory violations claims.

USAA claims that the Commission has jurisdiction over subrogation claims because USAA is merely standing in the shoes of its insureds. Further, USAA argues that Columbia’s interpretation of *Allstate* is incorrect, as the Supreme Court in *Allstate* determined that certain types of contract claims are within the Court’s jurisdiction even though the Commission maintains exclusive jurisdiction over other types of claims. USAA asserts that the *Allstate* Court held not that subrogated claims could not be brought before the Commission, but that, if the underlying claim was not a Commission-exclusive claim, it could not be brought before the Commission as a subrogation claim. USAA emphasizes that there is no Ohio law that bars a subrogated insurer from bringing claims before the Commission, and notes that an Ohio appellate court has held that a subrogated claim, due to the underlying claim, should have been brought before the Commission. See *State Farm Fire & Cas. Co. v. Cleveland Elec. Illum. Co.*, 11th Dist. Lake No. 2003-L-032, 2004-Ohio-3506.

USAA asserts that the negligence claims contained in the amended complaint are service-related, and are exclusive to the Commission’s jurisdiction. USAA also contends that the breach of tariff and regulatory violations claims fall under the Commission’s jurisdiction. USAA asserts that Ohio law has explained that certain claims are exclusively within the

Commission's jurisdiction and other claims are exclusively for the courts; USAA claims that, because the same fact pattern can be a basis for multiple claim types, a complainant must be able to avail itself of its right to access a tribunal. Finally, USAA claims that, with respect to the public policy argument, judicial economy does not outweigh an injured party's right to have its disputes decided by a tribunal.

- (12) Upon review of the complaint, as amended, the attorney examiner finds that the complainant has stated reasonable grounds appear for the Commission to hear the complaint. Therefore, at this time, the attorney examiner finds that Columbia's motion to dismiss should be denied. However, although the motion to dismiss is denied at this time, nothing precludes Columbia from reasserting this motion at a later time, and the Commission is not precluded from ultimately dismissing this case on the grounds raised by Columbia, should the Commission deem it appropriate after considering the evidence of record. *See In re AT&T Communications v. Ameritech*, Case No. 97-1671-TP-CSS, Entry (Apr. 30, 1998) at 8-9.
- (13) Consequently, the attorney examiner finds that this case should be scheduled for a hearing on February 16, 2016, at 10:00 a.m. at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-C, Columbus, Ohio 43215-3793.
- (14) All discovery requests should be conducted in accordance with Ohio Adm.Code 4901-1-16 to 4901-1-24.
- (15) Any party intending to present direct, expert and/or factual testimony should comply with Ohio Adm.Code 4901-1-29(A)(1)(h), which requires that all such testimony to be offered in this type of proceeding be filed and served upon all parties no later than seven days prior to commencement of the hearing.
- (16) As is the case in all Commission complaint proceedings, the complainant has the burden of proving the allegations of the complaint. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

It is, therefore,

ORDERED, That Columbia's motion for leave to file an answer to the first amended complaint is granted. It is, further,

ORDERED, That, in accordance with Finding (12), Columbia's motion to dismiss is denied. It is, further,

ORDERED, That a hearing be scheduled as set forth in Finding (13). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy W. Chiles

By: Mandy Willey Chiles
Attorney Examiner

JRJ/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/13/2015 11:12:19 AM

in

Case No(s). 14-1176-GA-CSS

Summary: Attorney Examiner Entry granting Columbia's motion for leave to file an answer to the first amended complaint, denying Columbia's motion to dismiss in accordance with Finding (12), and scheduling a hearing as set forth in Finding (13). - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio