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BOEHM, KURTZ & LOWRY
ATTORNEYS AT LAW
2110 CBLD CENTER
36 EAST SEVENTH STREET
CINCINNATI, OHIO 45202
TELEPHONE (513) 421-2255
TELECOPIER (513) 421-2764

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PUCO

Via Overnight Mail

August 22, 2002

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43266-0573

Re: **Complaint of AK Steel Corporation v. Cincinnati Gas & Electric Company**
Case No. 02-989-EL-CSS

Dear Sir/Madam:

Please find enclosed an original and ten (10) copies of the AK Steel Corporation's Memorandum in Opposition to Cincinnati Gas & Electric Company's Motion for Summary Judgment and Motion to Dismiss AK Steel's Corporation's Amended Complaint filed in the above-referenced matter. Copies have been served to all parties on the attached Certificate of Service. Please place this document of file.

Respectfully yours,

David F. Boehm, Esq.
BOEHM, KURTZ & LOWRY

DFBkew
Encl.
cc: Dave Horn, Esq.

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served via ordinary mail (unless otherwise noted), this 22nd day of August, 2002.

James B. Gainer, Esq.
Associate General Counsel
Cinergy Corp. 139 East Fourth Street
Cincinnati, Ohio 45202
Counsel for CG&E

Steven Nourse, Esq.
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43266-0573

David F. Boehm, Esq.
Counsel for AK Steel Corporation

BEFORE THE
PUBLIC UTILITY COMMISSION OF OHIO

PUCO

AK STEEL CORPORATION	:	
Complainant	:	Case No. 02-989-EL-CSS
v.	:	
	:	
CINCINNATI GAS & ELECTRIC COMPANY	:	AK STEEL CORPORATION'S
	:	MEMORANDUM IN OPPOSITION TO
Respondent	:	CINCINNATI GAS & ELECTRIC CO'S
	:	MOTION FOR SUMMARY JUDGMENT
	:	AND MOTION TO DISMISS AK STEEL
	:	CORPORATION'S AMENDED COMPLAINT
	:	WITH ATTACHED AFFIDAVIT OF
	:	WILLIAM L. GREENE

The instant motions are CG&E's responses to AK Steel Corporation's ("AK Steel") Amended Complaint of June 19, 2002 in the within matter. The response consists of the following:

1) A Motion For Summary Judgment and accompanying Memorandum;
2) Affidavit of William L. Green; and
3) A renewal of and incorporation by reference of its previously filed Motion to Dismiss with no new arguments or assertions.

As to item 3 above, AK Steel's response is the same as contained in its original Memorandum in Opposition to the Motion to Dismiss and Motion to Assess Costs and its Motion to Amend Complaint both of which are incorporated herein by reference.

Proceeding therefore to CG&E's Summary Judgment, we note with some gratitude that CG&E's Memorandum of Law concedes failure at the very outset. CG&E maintains, and AK Steel agrees that the Public Utility Commission of Ohio ("PUCO" or "Commission") has never granted a Motion for Summary Judgment. (Motion for Summary Judgment at 5). CG&E further accurately quotes the Commission's October 17, 1997 Entry in Starlink v.Alltel, Case No. 96-1405-TP-CSS at page 3 (but erroneously cites it as page 4 of the Opinion) wherein the Commission states:

"The Attorney Examiner notes that the Commission's Rules Of Practice do not include a provision that would allow a party to seek summary judgment. While many aspects of the Rules Of Civil Procedure are similar to the Commission's Rules Of Procedure, there is no equivalent in the Commission's rules for summary judgment. On this point, Alltel and Western Reserve are correct."

Having quoted the Commission's very clear statement that there never has been a summary judgment granted by the Commission and that there is no provision therefor, CG&E nonetheless proceeds with its argument for a summary judgment citing Dresher v. Burt, 750 Ohio St. 3d 280 (1996) as authority. Dresher obviously did not involve a PUCO proceeding. More about Dresher later on.

CG&E also claims to find authority for a grant of summary judgment in a very curious place. §4905.26, entitled "*Complaints as to service*" is the statutory provision for receiving complaints against the utility. Tucked in a long run-on sentence is the phrase relied upon by CG&E to overturn the uninterrupted stance of the PUCO that summary judgments have no place in PUCO procedure. A review of that sentence in its entirety provides a context for the significance of the quoted price:

"§4905.26 Complaints as to service. 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." (Emphasis added).

It is significant that the language CG&E cites is found not as a stand alone provision particularly setting forth the reasons and procedure for a dismissal or judgment in favor of the movant like Rule 56 or Rule 12(B) of the Civil Rules, but rather as an incidental condition to a hearing. It is significant that there is no motion challenging the allowance of a hearing provided for as with Rule 56 and 12 and this,

no doubt, explains in part why the CG&E Motion is not styled under §4905.26. It is significant that there is no provision in §4905.26 for the filing of affidavits such as the one attached to CG&E's Motion.

On page 5 of its Motion, CG&E claims that the phrase excised from §4905.26 is "*precisely*" the requirement of review for a determination of summary judgment and that Rule 56, like §4905.26, clearly contemplated an end to the complaint "*based only on the pleadings before the Commission.*" We are astounded by these claims.

First, as to CG&E's assertion that only the pleadings are considered in a motion for summary judgment, Rule 56 states that in addition to pleadings, the following are to be considered on a motion for summary judgment: *"depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact."* Indeed, CG&E apparently has forgotten that it attached an affidavit to its Motion for Summary Judgment.

As to the equally astonishing assertion that the phrase *"reasonable ground for complaint are stated*" is "*precisely*" the same as the summary judgment rule, let us, unlike CG&E, look at Rule 56. Rule 56 says that a summary judgment shall be rendered forthwith if, the pleadings and all other documents referred to above, *"show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."*

A comparison of this standard to the "*reasonable grounds for complaint are stated*" standard surgically removed from context in §4905.26 leaves the reader with the troubling question of whether CG&E has filed a summary judgment motion without reading the summary judgment rule. In addition

to the other glaring differences and distinctions between this phrase and Rule 56 is the notable fact that §4905.06 makes no provision for affidavits.

While it is clear that no mechanism for a summary judgment exists and for that reason alone the Motion of CG&E must be rejected, AK Steel will address the remainder of this meritless motion herein.

CG&E claims that Dresher v. Burt, 75 Ohio St. 3d 280, 662 N.E.2d 264 (1996) would allow a Motion for Summary Judgment (if summary judgments were allowed by the Commission) in this case. CG&E has once again displayed a curious tendency not only to cite the wrong case, but to cite it wrongly. Dresher v. Burt involved a motion for summary judgment by the appellant/defendant St. Elizabeth Medical Center ("SEMC") against the plaintiff/appellee Judy Dresher, the patient and unknowing victim of a Dr. James Burt, who performed unnecessary and experimental vaginal surgery on her and many patients without their knowledge or permission in an unsolicited attempt to enhance their sexual enjoyment ("Love Surgery"). The now infamous Dr. Burt had surgical privileges at SEMC which was sued by several patients including plaintiff/appellee for, *inter alia*, negligently credentialing the so-called "Love Doctor." From the outset, you can clearly see the chances that this case will lend itself to comparisons with a PUCO proceeding challenging the end of the Market Development Period seem long indeed.

On page 7 of its Motion, CG&E writes: *"The Dresher court held that:"* and proceeds with the lengthy quote for which it cited the case. However, even a cursory reading of Dresher reveals that the quoted language is not the holding of Dresher, but a quotation from the U.S. Supreme Court's decision in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), a decision respecting Rule 56 of the Federal Rules of Procedure. It is clear that the Ohio Supreme Court is not quoting Celotex *"with approval"*. Since the Ohio Supreme Court in Dresher was considering Rule 56 of the Ohio Rules of Civil Procedure, it was not obligated to follow the Celotex case and in fact, did not follow it in several

particulars. It is also instructive to note that in Dresher, the Ohio Supreme Court affirmed the denial of the motion for summary judgment; exactly the opposite result for which it is cited here. The discussion of the evidentiary burden of the moving and non-moving parties to a summary judgment motion in this very complicated and dissimilar factual situation provides much more smoke than light to the case at bar. It is rendered even murkier since the Justices concurred and dissented in varying pluralities to various parts of the "*holding*". It is difficult to discern whether a particular voting bloc represented a majority opinion to a particular issue. Be that as it may, we will address Dresher briefly.

The Dresher court held that the evidence cited by appellant's failed to show that appellee did not possess any evidence necessary to support its claim. The Dresher court concluded the appellees responses to appellant/movant's request for admissions and for production of documents indicated that appellees were in possession of evidence necessary to prove their negligence claim, but they were unwilling to divulge the evidence unless presented with a proper discovery request. *"Therefore, the* [appellant's] *motion for summary judgment on the grounds that appellees lacked evidence to prove the essential elements of a negligent credentialing cause was supported by nothing more than* [appellant's] *own conclusory assertions in its memorandum in support of the motion."* Dresher v. Burt, 75 Ohio St. 3d 280 at 296, 662 N.E. 2d 264 at 276.

More instructive and more to the point of the Dresher holding (as opposed to Celotex holding) is the following: *"Rather, the moving party must be able to specifically point to some evidence of the type listed in Civil Rule 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied".* (Emphasis theirs). Dresher v. Burt, 75 Ohio St. 3d at 293, 662 N.E. 2d at 274.

Getting down to particulars, let us examine the allegations of the amended complaint and CG&E's motion and supporting affidavit for issues. In its Amended Complaint, AK Steel alleges in paragraph 13 thereof "*AK Steel states that CG&E's switching claims are false and inflated and do not amount to the claimed 20% plus*". CG&E has said, through the affiant, that it has calculated the switching correctly and describes briefly how it has calculated them. It would appear that there is an issue of material fact. If contrary to fact and law, there was provision for a summary judgment in Commission proceedings or regulations, and if contrary to fact and law, affidavits in support of the extralegal summary judgment were provided for, AK Steel's counsel would submit an affidavit with this memorandum that would say:

> AK Steel has barely begun the discovery process and has to date, received a response to its first data request with vital information redacted by CG&E for alleged confidentiality reasons and it will, if informal means fail to gain compliance, file to compel discovery. It would further aver that it is confident that given sufficient discovery, the evidence will show that CG&E's switching numbers are incorrect, citing Rule 56(F).

But counsel will not burden the record with such an affidavit in this case unless ordered or invited by the Commission because, for all the reasons stated before, there is no provision for a summary judgment before the Commission. Starlink v. Alltell, Case No. 96-1405-TP-CSS (Opinion at 3) (October 17, 1997).

One further matter in this regard. CG&E claims in its Motion at page 4, that the switching statistic that AK Steel states became available from the PUCO are not material to CG&E or to this case as they are supplied to the Commission by the certified retail electric service (CRES) providers themselves and not by CG&E. These, it claims, are unreliable. However, *"CG&E reports switching statistics to the Commission and the Ohio Consumers Counsel (OCC) on a weekly basis, in a manner consistent with its Commission approved Transition Plan Stipulation, and OAC 4901:1-25-01(N) ... AK knows, or should know, all of these facts".*

Very interesting. After reading CG&E's brief and several phone calls to the PUCO, AK Steel was indeed informed that CG&E, on a voluntary basis, provides its own data to the PUCO and the OCC. Apart from reading this new information in CG&E's brief, we cannot imagine how AK Steel or anyone other than the OCC or the Commission would come to discover this. Moreover, when AK Steel's counsel asked the PUCO Staff for a copy of such a report, he was informed that CG&E would have to consent to its dissemination! So, this confidential report of which AK Steel *"knows or should have known"* is not to be given to it without CG&E's permission and still has not been given to it at the date of this writing. Neither AK Steel, nor to our knowledge, any other ratepayer knows what it says. And curiously, the only other party to the Stipulation to receive it, is the one who will be completely unaffected by its contents. The OCC's constituency, the residential customers, cannot have their MDP ended by switching, as the Stipulation guarantees this customer class the safe haven of a frozen tariff rate until 2006.

Finally, the allegations of AK Steel raise very substantial issues about how the shopping percentages are calculated. They have caused the Commission to ask the very same questions of CG&E that AK Steel asks. The interrogatories sent to CG&E by the PUCO that are attached as Exhibit 1 to CG&E's reply to AK Steel's Memorandum in Opposition are just some of the factual issues raised by the almost total absence of data supplied to the Commission and CG&E's ratepayers. CG&E's lame, but adamant, insistence that it is "*doing it the right way*" and consistent with the Stipulation in pleadings and in the affidavit are not evidence, but pleas that it be taken entirely at its word and without any demonstration or detail. The Stipulation itself provides almost no particulars as to the underlying details of the calculations. In the end, CG&E is squirming to avoid putting on proof and standing cross-examination. It must not be allowed to succeed.

CONCLUSION

WHEREFORE, for the reasons set forth above, AK Steel prays that the PUCO deny CG&E's Motion to Dismiss and Motion for Summary Judgment

Respectfully submitted,

David F. Boehm, Esq.
BOEHM, KURTZ & LOWRY
2110 CBLD Center, 36 East Seventh Street
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: dboehmlaw@aol.com

COUNSEL FOR AK STEEL CORPORATION

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