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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Muncie D'Elia Development LLC,	)	
	)	
Complainant	)	
	)	
v.	)	Case No. 08-158-EL-CSS
	)	
American Electric Power,	)	
	)	
Respondent.	)	

COLUMBUS SOUTHERN POWER COMPANY'S
MOTION TO DISMISS AND ANSWER

Dated: March 12, 2008

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On February 20, 2008 counsel for the Complainant filed its complaint against American Electric Power. The events described in the complaint involve Columbus Southern Power Company (CSP), which conducts business as AEP Ohio. Therefore, CSP files this motion to dismiss and answer. It should be noted that since the complaint is in the form of a letter, as opposed to separately numbered allegations, the answer will be somewhat general in nature.

MOTION TO DISMISS

INTRODUCTION

This complaint presents to the Commission the same issues already being litigated in the Franklin County Court of Common Pleas,[1] the forum where it belongs.[2] That litigation commenced on November 21, 2006 and after CSP was joined as a defendant it filed a counterclaim against Muncie on June 14, 2007. CSP's counterclaim was for

[1] Case No. 06-CV-15302

[2] In its Answer to CSP's Amended Fourth Party Complaint Against Muncie, Muncie admits that jurisdiction is proper in that Court.

indemnification and for non-payment by Muncie of CSP's bill for time and labor related to the moving of a house.

There are no issues raised in the complaint which are within the Commission's jurisdiction. Instead, the complaint alleges that CSP acted in a grossly negligent manner in connection with a house being moved from its prior location on South High Street in Columbus, Ohio to a new location on Front Street in Columbus. It further alleges "significant damage to the moving equipment" and that "fire spread throughout the House." The Complainant did not own the moving equipment. Further, at the time of the incident complained of, the Complainant did not own the house. Therefore, Complainant has no standing to raise these issues. Complainant's reference to the National Electric Safety Code (NESC) also fails to state any legitimate controversy. There are no provisions of the NESC which are applicable to moving a house along city streets. Finally, Complainant requests that the Commission direct CSP to indemnify it for any judgment against it in the Common Pleas Court proceeding. At this time any such judgment is speculative and, in any event, the Court is the entity with jurisdiction to enforce its own judgments, not the Commission. Further, the Commission has no authority to order indemnification based on liability established in a civil proceeding. Consequently, this complaint should be dismissed.

BACKGROUND

This case involves a full cast of characters who already are involved in civil litigation with multiple cross-complaints. All of the characters were involved with moving an historic house owned by Grange Mutual Casualty Company (Grange) and

originally located on Grange's property on South High Street in Columbus, Ohio. The Complainant in this case (Muncie) arranged to purchase the house from Grange. However, as Julia D'Elia, one of the two partners in Muncie, testified in her deposition in the civil case, Muncie did not own the house "until it was actually sitting on a lot," on Front Street. (Tr. Deposition pp. 8, 9). The arrangements Muncie made with CSP and the various parties involved with the actual move of the house were made on behalf of Grange. (Id. at pp. 37-39).[3]

Muncie entered into a contract with Dingey Movers (Dingey). (Id. at pp. 19, 20).[4] In Muncie's Counterclaim against CSP in the civil litigation it stated its belief that Dingey hired various subcontractors to assist in moving the house, including Brownie Moving and Heavy Hauling, Inc. (Brownie) and Phil Jonassen Movers, Inc. (Jonassen). Jonassen rented power dollies to Dingey to assist in the move. (Id. at p.101). Muncie also arranged for tree trimming services from Tomblin Tree Service after Brownie advised Muncie that trees along the moving route needed to be trimmed. (Id. at pp. 42-44). During the move itself, Mr. Brownie stayed in front of the house and guided the people who had controls of the house and Mr. Jonassen was behind the house operating the power dollies. (Id. at pp. 66-67).

According to Muncie's admissions in its answer to CSP's Amended Fourth Party Complaint Against Muncie in the civil litigation:

1. Dingey, Brownie and Jonassen were responsible for steering the house along the route for moving the house.

[3] The complaint alleges that Muncie had entered into a contract with Grange "to purchase and move the House ...." This assertion might suggest, incorrectly, that Muncie owned the house at the time of the move.

[4] In its Counterclaim against CSP, Muncie stated that it hired Dingey "to facilitate the House moving."

2. The house was steered near or into overhead power lines that ran parallel to High Street. In this regard, Ms. D'Elia testified at her deposition that Brownie told her that the house was not close enough to hit those lines and he was not concerned. (Deposition Tr. pp. 73-75).

3. Brownie, Jonassen and Dingey performed the house move in a negligent manner by steering the house into a power line.

4. As a direct and proximate result of the negligence of Brownie, Jonassen and Dingey, CSP has been damaged.

5. Brownie, Jonassen and Dingey negligently planned and prepared the route for the house move and because of their poor planning and preparation there was an unanticipated outage necessary to move the house.

In Ms. D'Elia's deposition she testified that:

1. The only damage to the home (which at that time still belonged to Grange) from the fire was to electric outlets in the kitchen. (Deposition Tr. pp. 92, 93).

2. She is not aware of any additional damage to either the inside or outside of the house. (Id. p.at 93).

3. She had been in a bucket truck looking at the house several times since the move and never saw any evidence of damage to the house. This included looking at the roof and the downspout and gutter area on the side of the house where the arcing or contact allegedly happened. (Id. at pp.150, 151).

Muncies admissions and testimony make clear that:

1. To the extent the house was damaged during the move, Muncie did not own the house and has no standing to pursue any remedy for any such damage.

2. Despite Muncie's claim in its present complaint that fire "spread throughout the house," the only damage of which Muncie is aware is to electric outlets in the kitchen. There is no other damage to the interior or exterior of the house.

3. Other parties with whom Muncie contracted, either directly (Dingey) or indirectly through Dingey (Brownie and Jonassen), performed the house move in a negligent manner by steering the house into CSP's

power line. Those parties negligently planned and prepared the route for the house move.[5]

NATURE OF MUNCIE'S CLAIMS AND REQUESTED RELIEF

Muncie claims that CSP acted grossly negligent "and intentionally, materially and consistently falsified facts regarding the house move...." Further, Muncie claims that CSP violated minimum line clearance provisions under the National Electric Safety Code. It requests that the Commission:

1. Penalize CSP for its failure to de-energize or cover its electric line while allowing the house to be within 2 feet, 4 inches of the line;

2. Take any actions against CSP to insure this type of gross negligence does not occur again;

3. Order CSP to indemnify and hold Muncie harmless from any and all liability and damages it has or will suffer as a result of damage suffered to the equipment owned by the house movers (Muncie's contractor, Dingey and Dingey's subcontractors (Brownie and Jonassen)) and the costs and expenses associated with the civil litigation.

Muncie's complaint alleging gross negligence asserts a claim based in tort which is within the jurisdiction of the civil courts – precisely where this matter already is pending. Further, Muncie's request to be held harmless and to be indemnified for all liability in the civil action already is asserted by Muncie in the civil action.

In its counterclaim against CSP in the already pending civil action Muncie alleges:

[5] In Brownie's response to CSP's Request for Admissions in the civil case, Brownie has admitted that shortly before the house became electrified the house was steered to avoid hitting trees located on the other side of South High Street. He also admitted that even without the overhead electric lines running parallel to South High Street being moved, it was possible to steer the house on its planned route without coming into contact with such lines.

1. CSP's failure to de-energize the overhead power lines that ran parallel to South High Street "constitutes negligence" and violations of the National Electric Safety Code (¶ 20).

2. CSP's negligence proximately resulted in damages sustained by other parties to the civil action "which entitles Muncie to contribution for any amount Muncie is required to pay by way of settlement or judgment." (¶ 39).

3. CSP's actions constitute a breach of the National Electric Safety Code as incorporated in §4901:1-10-06, Ohio Admin. Code (¶ 42.).

These claims will proceed in the civil action. Moreover, not only is there no jurisdictional basis for these claims to proceed at the Commission, judicial economy supports dismissal of these claims by the Commission. As many as 15-20 witnesses could be called to testify in the multi-party civil litigation. Six or seven of those witnesses alone will address the alleged damages to the power dollies supplied by Jonassen to Dingey, the contractor retained by Muncie on behalf of Grange. Further, if this complaint were to proceed at the Commission, Brownie, Dingey and Jonassen would need to be joined to fully address Muncie's claims, resulting in virtually identical actions pending before the Court and this Commission. Muncie has been involved in the civil action since June 2007 and its attempt, more than eight months later, to have the Commission consider the same issues it has raised in the civil litigation should be rejected.

ARGUMENT

THE COMISSION LACKS JURISDICTION TO CONSIDER THE COMPLAINT

A. The Commission's Jurisdiction Under § 4905.26, Ohio Rev. Code, Is Limited To Complaints Concerning Rates Or Services, And The Commission Has No Jurisdiction Over Tort Claims.

While the complaint before the Commission does not mention §4905.26, Ohio Rev. Code, that is the statute that confers jurisdiction on the Commission to hear complaints.[6] Those complaints, however, must relate to service or rate related matters. The complaint in this instance has nothing to do with the justness or reasonableness of electric service provided to the Complainant or to the rates charged for such service. Consequently, there is no jurisdiction at the Commission to hear these tort claims. Exclusive jurisdiction lies to hear these claims in the Court of Common Pleas.

1. Because the Complaint Is Not Related To Service Or Rates, It Is Not Within The Commission's Jurisdiction Under § 4905.26, Ohio Rev. Code.

In considering a motion to dismiss a complaint for lack of subject matter jurisdiction under § 4905.26, Ohio Rev. Code, the Commission held that "**the task before this Commission is to determine whether this complaint is primarily a question concerning service and/or rates or if the complaint raises a tortious cause of action that is independent of service and/or rate-related questions.**" *Eishen v. Columbia Gas of Ohio, Inc.* (emphasis in original).[7] If a complaint at its core is not

[6] It is unclear whether Muncie's filing is intended to be a formal complaint presented for Commission adjudication. It is well established that in formal complaints the burden of proof is on the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 189. Muncie does not characterize its letter as a formal complaint and states that it looks forward "to assisting and cooperating with [the Commission's] investigation." Despite the ambiguity concerning Muncie's letter, CSP files this motion to dismiss and answer because the Commission might choose to treat the letter as a complaint.

[7] Case No. 01-885-GA-CSS, Entry, at 3 (Nov. 20, 2001).

service or rate oriented, the Commission has no choice but to dismiss the complaint for lack of subject matter jurisdiction.

Section 4905.26 states, in part, 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 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 bottom line is that § 4905.26, Ohio Rev. Code, provides the Commission jurisdiction only for complaints that assert one or more of four basic claims:

> (1) That "any *rate*, fare, [or] charge . . . charged, demanded, exacted, or proposed to be . . . charged, demanded, or exacted, is in any respect unjust [or] unreasonable . . .";
>
> (2) That "any . . . *service* rendered . . . or proposed to be rendered . . . is in any respect unjust [or] unreasonable . . .";
>
> (3) That "any regulation, measurement or practice affecting or relating to any *service* furnished by the public utility . . . is, or will be, in any respect" unreasonable [or] unjust . . ."; or
>
> (4) That "any *service* is, or will be, inadequate or cannot be obtained ...." (emphasis added).

The Commission's § 4905.26 jurisdiction, consequently, is limited to complaints concerning rates or service, *and nothing more.*[8] Complainant's allegations do not concern CSP's rates or electric services. Rather, Complainant alleges CSP was grossly negligent in connection with the movement of a house on a city street. Such alleged negligence is no more jurisdictional to the Commission than would be a complaint concerning an auto accident involving a CSP vehicle being driven to a job site. In short, there is absolutely no connection between CSP's rates or services and Complainant's claims. The absence of a nexus between the complaint and CSP's rates or services puts the complaint outside of the jurisdictional reach of § 4905.26, Ohio Rev. Code.

In *Eishen v. Columbia Gas*, the Commission dismissed a complaint regarding Columbia Gas' alleged negligent installation of a gas line in front of complainant's house.[9] The complainant alleged that a water line broken by Columbia Gas caused a surge in electrical power, which damaged appliances in the complainant's home. In considering Columbia Gas' motion to dismiss for lack of subject matter jurisdiction under § 4905.26, Ohio Rev. Code, the Commission stated, "the task before this Commission is to determine whether this complaint is primarily a question concerning service and/or rates or if the complaint raises a tortious cause of action that is independent of service and/or rate related questions." Entry at 3.

The Commission concluded that it lacked jurisdiction to hear the complaint. It reasoned that although the complainant stated that the cause for her complaint occurred when Columbia Gas, excavating on the street to install a gas line, hit a water line leading

[8] *See Kazmaier Supermarket, Inc. v. Toledo Edison Co. (1991),* 61 Ohio St. 3d 147, 151-152, 573 N.E.2d 655 (stating PUCO has jurisdiction to adjudicate utility customer complaints related to rates or services of the utility).

[9] *Eishen v. Columbia Gas of Ohio, Inc.*, Case No. 01-885-GA-CSS, Entry (Nov. 20, 2001).

to her house, "[t]here is no allegation, however, that Columbia Gas or its contractor *was engaged in providing utility service to complainant* at the time complainant's property damage took place, or even that the complainant was a customer of Columbia." Id. (emphasis added.) Consequently, lacking jurisdiction under § 4905.26, Ohio Rev. Code, the Commission properly dismissed the complaint.

Complainant here, similar to the *Eishen v. Columbia Gas* complaint, does not allege, and could not possibly allege, that its claims for relief are related to CSP's provision of electric service to Muncie, or anyone else for that matter. The house was not receiving electric service as it was moving along the street. Further, Muncie did not own the house and was an agent for Grange at the time of the incident. Consequently, the Commission should conclude, as it did in *Eishen v. Columbia Gas*, that Complainant's claims, "in essence, [are] seeking damages for tortious acts . . . not within our service and rate related jurisdiction." Entry at 3.

Ohio courts also have confirmed the rate and service oriented limitation to the complaint jurisdiction that § 4905.26, Ohio Rev. Code, grants the Commission. In *Dayton Communications v. Pub. Util. Comm.*[10] the Ohio Supreme Court upheld the Commission's rejection of an invitation by two motel owners and a private telephone company to assert its complaint jurisdiction over a dispute concerning the prices that Ohio Bell Telephone Company charged for the sale of in-place wiring. The Court focused on the important link to service on which §4905.26, Ohio Rev. Code, is based:

> R.C. 4905.26 authorizes any person to complain to the commission about any rate, fare, charge, toll, rental, schedule, classification or service; or about any practice affecting or relating to any service. We do not believe that these terms, which define the scope of the statute but are statutorily undefined, encompass prices demanded by a telephone company for

[10] *See Dayton Communications Corp. v. Pub. Util. Comm. (1980),* 64 Ohio St. 2d 302, 414 N.E.2d 1051.

> outright sale of equipment, including in-place cable and wires. *Were we to hold that these terms cover more than fees or amounts charged as the quid pro quo for the rendering of a telephone service, or policies relating thereto, we would be significantly expanding commission power under the statute.* We refuse to sanction such a step in the absence of General Assembly authorization.

Dayton Communications, 64 Ohio St. 2d at 307 (emphasis added).

Similar to the disconnect between the price Ohio Bell charged for inside wire and the regulated telephone service it provides, Complainant's claims have no connection to the electric service CSP provides to its customers. Complainant's claims, therefore, are outside the scope of the Commission's jurisdiction.

Gayheart v. Dayton Power & Light Co.[11] provides another example of how Ohio courts focus on whether the claim is service related when analyzing the jurisdictional reach of the complaint statute. In *Gayheart,* property owners brought a negligence action against The Dayton Power and Light Company ("DP&L"), arising from a fire that destroyed their barn, equipment, and livestock. Complainants maintained that a power surge on a neutral electric line caused the fire. DP&L filed a motion to dismiss, which asserted that the Commission had exclusive jurisdiction under § 4905.26, Ohio Rev. Code. The trial court rejected DP&L's motion and, after a trial, entered a final judgment in favor of plaintiff.

DP&L's first assignment of error on appeal was that the trial court lacked subject matter jurisdiction because § 4905.26, Ohio Rev. Code, provided the Commission exclusive jurisdiction over the case. The Court of Appeals rejected this argument. "To dispose of DP&L's first assignment of error, we must determine if the Gayhearts' claim

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

is related to service as contemplated by R.C. 4905.26 or is a pure common-law tort claim," the Court began. The Court concluded as follows:

> 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 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.

Gayheart, 98 Ohio App. 3d at 229 (emphasis added).

Similar to the property owners' claim in *Gayheart*, Complainant here alleges an isolated act of negligence. The question presented by the complaint is whether CSP was grossly negligent in not de-energizing a particular piece of equipment in the context of the extraordinary movement of a house along South High Street, not whether any electrical utility "service" rendered by CSP was unreasonable. As the *Gayheart* court held, this is not the substantial connection to service that § 4905.26, Ohio Rev. Code, requires to lodge jurisdiction with the Commission. Moreover, the expertise of the Commission is not necessary to resolve Complainant's claims. Accordingly, the Common Pleas Court is the proper forum to address Complainant's claims, and, as Complainant admits, that court already has correctly exercised jurisdiction over those claims.

Because the Complaint has no connection to the justness or reasonableness of CSP's provision of electric service to its customers or the rates that CSP charges for its

service, the Commission must conclude that there is no jurisdiction under the complaint statute to hear the Complaint. Consequently, the complaint must be dismissed.

2. Because The Allegations Of The Complaint Sound In Tort, Jurisdiction Lies With the Court Of Common Pleas, Not The Commission.

The Commission does *not* have jurisdiction to review tort claims. The Ohio Supreme Court explicitly held "that the commission has no power to judicially ascertain and determine legal rights and liabilities, since such power has been vested in the courts by the General Assembly pursuant to Article IV of the Ohio Constitution. Thus, 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."[12]

The mere fact that the Complaint before the Commission alleges National Electric Safety Code (NESC) and Title 49 violations does not magically turn these tort claims into rate and service complaints over which the Commission has jurisdiction under §4905.26, Ohio Rev. Code.[13] In fact, the Ohio Supreme Court has instructed that courts analyzing whether the claim before them should be before the Commission should look not to the form of the allegation as framed by the plaintiff, but to the substantive basis for the remedy being sought. *Milligan v. Ohio Bell Tel. Co.(1978), 56 Ohio St. 2d 191,* at 194-95, 383 N.E.2d 575.

Here, Complainant's claims before the Commission clearly "sound in tort." The same alleged NESC violations that Complainant relies upon in its complaint before the

[12] *Milligan v. Ohio Bell Tel. Co. (1978),* 56 Ohio St. 2d 191, 195, 383 N.E.2d 575 (summarizing Ohio Supreme Court's decision in *Village of New Bremen v. Pub. Util. Comm. (1921),* 103 Ohio St. 23, 30-31, 132 N.E. 162.

[13] In any event, the inapplicability of the NESC to the incident in question will be discussed below.

Commission is the basis of its tort claims in the Common Pleas Court. The Commission should reject Complainant's attempt to wedge these claims "sounding in tort" into the Commission's jurisdiction over rate and service related complaints.

The Ohio Supreme Court settled the question of whether the Commission can hear a tort or contract cause of action in 1921. The Court ruled that, even in instances where one of the litigants is a public utility regulated by the Commission, the Commission does not have the power to decide tort and contract claims.[14] In *Village of New Bremen*, a gas company, after exhausting its supply of natural gas, sought to withdraw gas service to the municipalities of New Bremen and Minster. The parties, however, had entered into a contract which set the rate for the price of gas in exchange for the gas company's commitment to supply gas for three years and to sell the village portions of its pipe lines if it was released from its duty to furnish gas by either acts of the parties or by judgment or decree of a court of competent jurisdiction.

Once the village learned of the gas company's desire to withdraw service, it brought suit in the Court of Common Pleas of Auglaize County to enjoin the gas company and its owner from discontinuing the gas service and dismantling its equipment. One month later, the gas company filed an application to withdraw service with the Commission, pursuant to the Miller Act.[15] The Commission ruled in favor of the gas company and authorized the permanent abandonment of the facilities in and about the village. The gas company contended that the Commission's order amounted to a judicial

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[14] *See Village of New Bremen, supra*; *see also Kohli v. Pub. Util. Comm. (1985)*, 18 Ohio St. 3d 12, 14; *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 304 (1980); *State ex rel. Ohio Power Co. v. Harnishfeger* (1980), 64 Ohio St. 2d 9, 10; *Milligan v. Ohio Bell Tel. Co.* (1978), 56 Ohio St. 2d 191, 195; *State ex rel. Dayton Power & Light Co. v. Riley (1978)*, 53 Ohio St. 2d 168, 169.

[15] Now codified at § 4905.21, Ohio Rev. Code.

decree releasing the gas company from furnishing gas to the village. The village appealed the Commission's order to the Ohio Supreme Court, which reversed the Commission.

The Ohio Supreme Court stated in no uncertain terms that "[t]he Public Utilities Commission is an administrative board, and only has such authority as the statute creating it has given it. This court has repeatedly declared that the powers of the commission are conferred by statute, and that it has no other authority than that thus vested in it." *Village of New Bremen, supra* at 30. The Court continued, "The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the Constitution (article 4). The Public Utilities [C]ommission is in no sense a court." Id. Further, the Court stated, "[The Commission] has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights. The Miller Act does not purport to confer such power upon the Public Utilities Commission, and if it did so in any of its terms it would be to that extent invalid." Id. at 30-31. Consequently, "[w]hen it is properly shown to the Public Utilities Commission that an order prayed for in an application filed with it will affect rights which are involved in an action pending in a court of general jurisdiction at the time of the filing of the application, it is the duty of the Commission to dismiss the application." Id. at 26 (Syllabus).

In the instant cases, similar to the facts in *Village of New Bremen*, Complainant filed its complaint at the Commission long after the tort actions, including its counterclaim, had commenced in the Franklin County Court of Common Pleas. Putting aside the point that the complaint should be dismissed because Complainant already has

filed a separate claim in Common Pleas Court, the Commission lacks the statutory and constitutional power to hear these tort claims. Consequently, the complaint must be dismissed.

B. The Commission Must Dismiss The Complaint Because A Parallel Case Already Is Pending In The Court of Common Pleas.

It is well-settled law that "[w]hen it is properly shown to the Public Utilities Commission that an order prayed for in an application filed with it will *affect rights* which are involved in an action pending in a court of general jurisdiction at the time of the filing of the application, *it is the duty of the Commission to dismiss the application.*"[16] (emphasis added). Here, Complainant pursued its tort actions at the Franklin County Court of Common Pleas before filing its complaint addressing the same subject matter with the Commission.

An order granting the relief sought from the Commission would affect the pending tort actions and, as a result, would "affect rights which are involved in an action pending in a court of general jurisdiction at the time of the filing" of the complaint. Consequently, the Commission should dismiss the complaint.

Complainant's duplicative litigation before the Commission also violates principles of judicial economy and comity. Like courts in all jurisdictions, Ohio courts disfavor duplicative judicial proceedings. In *John Weenink & Son Co. v. Court of Common Pleas*,[17] the Ohio Supreme Court stated as follows:

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[16] *Village of New Bremen v. Pub. Util. Comm. (1921)*, 103 Ohio St. 23, 132 N.E. 162, ¶ 2 syllabus. *See also Federal Gas & Fuel Co. v. Pub. Util. Comm. (1925)*, 112 Ohio St. 717, 720, 148 N.E. 685 (holding that the Commission has no jurisdiction to hear a complaint concerning abandonment of service where the order prayed for directly affects rights involved in a case pending in common pleas court).

[17] *See John Weenink & Son Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349.

> When a court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is finally disposed of and no court of coordinate jurisdiction is at liberty to interfere with its proceeding.[18]

Consequently, when actions involving the same issues and parties are filed in two different forums, courts routinely dismiss or stay one of those two proceedings.[19] While the decision regarding which of the two parallel actions should be dismissed is a matter of discretion (assuming for the moment that both forums had jurisdiction to entertain the actions),[20] the relevant considerations are such factors as orderly procedure, comity, judicial economy, the likelihood of conflicting opinions and the temporal sequence of the filings.[21] These principles of comity and judicial economy apply in situations like this where a court has acquired subject matter jurisdiction before the filing of a complaint with this Commission.

Here, both actions concern identical factual and legal issues. Accordingly, even assuming that the Commission had concurrent jurisdiction over Complainant's non-service/non-rate related tort claims under its complaint statute, principles of comity and judicial economy compel dismissal of the Complaint in deference to the Court of Common Pleas where the issues in these cases, including Muncie's counterclaim, first arose.

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[18] *Weenink, id.*, at syllabus ¶¶3-4. *See also State ex rel Phillips v. Polcar (1977),* 50 Ohio St. 2d 279.

[19] *See Commercial Union Ins. Co. v. Wheeling Pittsburgh Corp. (1985),* 106 Ohio App. 3d 477, 487; *Caspian Inv. Ltd. v. Viacom Holdings,* 770 F. Supp. 880 (S.D.N.Y. 1991).

[20] *State ex rel. Zellner v. Board of Educ.* (1973), 34 Ohio St. 2d 199, 200.

[21] *See Zellner*, 34 Ohio St. 2d at the Syllabus; *Caspian*, 770 F.Supp. at 884.

MUNCIE HAS NO STANDING TO BRING THIS COMPLAINT

Even if the complaint were to set out claims that were within the Commission's jurisdiction to consider, Muncie has no standing to bring this complaint to the Commission. Throughout the move, Grange owned the house. The arrangements Muncie made for the move were all made on behalf of Grange. To the extent the house was damaged (and the record in the civil action reveals that only a couple of electric outlets in the kitchen were damaged, despite the complaints's assertion that fire "spread throughout the house") it is Grange that suffered a loss, not Muncie.

Muncie's claim for indemnification is entirely speculative at this time since there has been no finding in the civil action imposing liability on Muncie. Therefore, since Muncie has incurred no liability it has no standing to pursue a claim of indemnification. Moreover, even if a party in the civil litigation in the future succeeds in obtaining a judgment against Muncie, Muncie's contract with its principle (Grange) controls Muncie's entitlement to indemnification from Grange.

THE CLEARANCE PROVISIONS OF THE NATIONAL ELECTRIC SAFETY CODE ARE NOT APPLICABLE TO A HOUSE BEING MOVED ON CITY STREETS

Muncie claims that CSP failed to comply with the National Electric Safety Code. However, even if CSP's compliance with the National Electric Safety Code were not part and parcel of the already filed civil tort claims, and even if Muncie had standing to pursue that compliance claim, the clearance provisions of the National Electric Safety Code simply do not apply to the distance between CSP's facilities and a house being moved along a street.

Crouch v. Mississippi Power & Light Company (1966), 193 So. 2d 144 involved a lawsuit brought by Mr. Crouch for injuries incurred when he came in contact with an energized line owned by Mississippi Power & Light Company (MP&L) during the course of moving a house on a road. Among the jury instructions given by the trial court was a statement that if the jury believed MP&L met the requirements of the National Electric Safety Code, then the defendants were not negligent regarding the erection and maintenance of the line.

On appeal, the Supreme Court of Mississippi held that this instruction was improper because the National Electric Safety Code applied to "the common use of roads and streets" (p. 146). The Court stated that "moving of the house beneath the lines, under the circumstances in evidence, was not a "common use of the highway." (Id.)

This Commission also has recognized that general safety rules, such as those contained in the National Electric Safety Code, are not necessarily applicable to house moving activities. The Commission granted a waiver of certain of the Federal Motor Carrier Safety Rules (which are incorporated in §4901:2-5-02, Ohio Admin. Code) as they pertain to house moving equipment, pending a final rule being issued by the Federal Motor Carrier Safety Administration. Exempting home movers from provisions of the Federal Motor Carrier Safety Rules is consistent with the Supreme Court of Mississippi's conclusion that while the National Electric Safety Code has applicability to the common use of roads and streets, moving homes is not a common use of the roads and streets, and therefore, the National Electric Safety Code is not applicable.

The purpose of the National Electric Safety Code is to address practices "in the exercise of [an electric utility's] function as a utility." (Sec1, 011 (A)). Since moving a

house down a street is not part of CSP's utility function, the Code provisions which address line clearance requirements relative to vehicles are not applicable. Moreover, a vehicle, as that term commonly is understood, was not employed in this move. Instead, a series of powered dollies were used to transport the house. The Code provisions on which Muncie relies simply do not apply to a large house on a set of dollies.

CONCLUSION

Based on the Commission's lack of jurisdiction to consider Muncie's tort claims, as well as on Muncie's lack of standing to pursue these claims and on the National Electric Safety Code being inapplicable to CSP's facilities' clearance in the context of moving a house on a city street, the Commission should dismiss the complaint.

ANSWER

Because of the narrative form of the complaint, a standard answer on an allegation-by-allegation basis is not feasible. Therefore, CSP sets forth certain basic denials.

1. CSP denies that it acted in a negligent manner in connection with moving the house owned by Grange and located at 1083 South High Street to a lot on Front Street.

2. CSP denies that Muncie owned the house at the time it was being moved.

3. CSP denies that the house moving companies have established that their equipment incurred significant damages.

4. CSP denies that but for its alleged "gross negligence" Muncie would not be forced to defend itself in the civil action.

5. CSP denies that it and its employees have intentionally, materially and consistently falsified facts regarding the house move.

6. CSP denies that it violated any requirements in connection with the house move.

7. CSP denies that it and its employees were not concerned with the width of the house.

8. CSP denies that the house never veered off the center line of South High Street.

9. CSP denies that a fire spread throughout the house.

10. CSP denies that it lacks respect for electrical safety and that the protection of property and life is not of high importance to CSP.

11. CSP denies that the National Electric Safety Code is applicable to this house being moved from South High Street to Front Street.

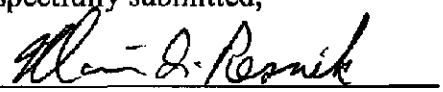
12. CSP denies that its actions in connection with this house move violated the National Electric Safety Code.

13. CSP denies that none of its employees were anywhere near the accident site.

14. CSP denies that a video has been attached to the complaint and therefore denies that any such video demonstrates the accuracy of Muncie's claims.

In addition, CSP incorporates into this answer the defenses set out in its Motion to Dismiss.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's Motion to Dismiss and Answer, was served by U.S. Mail upon counsel for the Complainant at the address shown below this 12th day of March 2008.

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