

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Muncie/D'Elia Development, LLC,)

Complainant,)

v.)

Case No. 08-158-EL-CSS

American Electric Power,)

Respondent.)

COLUMBUS SOUTHERN POWER COMPANY'S
REPLY MEMORANDUM TO
COMPLAINANT'S MEMORANDUM CONTRA
MOTION TO DISMISS

When Columbus Southern Power Company (CSP) filed its answer to the complaint in this proceeding it also filed a motion to dismiss the complaint. That motion was based on three arguments: 1) Lack of Commission Jurisdiction to Consider the Complaint; 2) The Complainant's Lack of Standing to Bring the Complaint; and 3) The Clearance Provisions of the National Electric Safety Code Are Not Applicable To a House Being Moved on City Streets.

Muncie/D'Elia Development, LLC (Muncie or Complainant) filed its memorandum contra the motion to dismiss on April 11, 2008. Muncie argues that it must be able to pursue its complaint at the Commission in order to seek treble damages in the civil courts pursuant to §4905.61, Ohio Rev. Code. This argument fails to present a valid basis for proceeding with the complaint at the Commission. Complaints that are outside the Commission's jurisdiction do not become jurisdictional just so the complainant can pursue treble damages.

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Further, Muncie argues that the National Electric Safety Code (NESC) is applicable to the circumstances involved in this case – moving a house on a street with parallel and overhead wires. The only basis asserted by Muncie for its position is that otherwise, “no safety standards apply to a house move” and “there has to be some sort of safety standard addressing minimum distance which applies to an event that takes place approximately once a year.” (Memorandum Contra, p.10)

Muncie’s argument misses the point. Because house moves are unique in the circumstances surrounding each move, standards set out in a code such as the NESC are not meaningful. Absent some reference in the NESC, or in an applicable interpretation of the NESC, there is no basis for concluding that the NESC applies to the issues Muncie has brought before the Commission.¹

This does not mean, however, that there are no safety standards applicable to CSP’s activities as part of moving the house in question or that Muncie is without a proper forum in which to pursue its claims. In fact, Muncie is pursuing its claims in Franklin County Court of Common Pleas. Its complaint at the Commission alleging gross negligence by CSP is premised on tort law standards, standards which are outside the Commission’s jurisdiction. Its request in this complaint for indemnification for potential liability in the civil action already is being asserted in that civil action.

Muncie improperly argues that resolution of its “tort (negligence) and contract” claims in its civil action require resolution of the alleged violation of the NESC. (*Id.* at 5). If this argument were upheld it would render meaningless the many court cases cited by

¹ In preparing this reply memorandum CSP realized that it failed to provide the citation for its statement at page 19 of its motion to dismiss concerning the waiver of §4901:2-5-02, Ohio Admin. Code. The citation is: *In the Matter of the Waiver of the Provisions of Rule §4901:2-5-02, Ohio Admin. Code*, Case No. 00-1588-TR-UNC Finding and Order, September 7, 2000. CSP apologizes for any inconvenience this omission might have caused.

CSP, and Muncie, which clarify the distinction between a civil court's jurisdiction over tort and contract claims and the Commission's jurisdiction over claims concerning rates and service. Tort and contract claims are within the sole jurisdiction of civil courts and those courts do not need an assist from the Commission, even if "technical questions" (Id.) are involved.

To support its argument Muncie relies on the decision in State Farm Fire and Casualty Company v. Cleveland Electric Illuminating Company 2004-Ohio-3506; 2004 Ohio App. Lexis 3159. That case stands for nothing more than the proposition that a court, when determining its jurisdiction over a complaint against a regulated utility, must determine whether the claim "is a pure common-law tort or whether it primarily relates to service In doing so, we must review the substance of the claim rather than mere allegations that the claims sound in tort." (§ 10). The claim in the State Farm case involved the utility's inspection of its meter serving its customer. The Court held that even though the complaint alleged negligent inspection of the meter, and therefore was "sounding in tort" the claim "primarily relates to service." (§ 11). The Court also ruled in favor of Commission jurisdiction because resolving the claim "clearly would necessitate an extensive interpretation of CEI's service tariff" (§ 12, 13).

Contrary to the State Farm case, the complaint brought before the Commission does not involve any service regulated by the Commission. Rather, this case involves an accommodation made by CSP to enable a company to move a house on a city street. Further, unlike inspections of meters, CSP's actions relevant to this complaint do not involve the interpretation of any CSP tariff.

Muncie also asserts that it properly has invoked the Commission's jurisdiction because §4901:1-10-01, Ohio Admin. Code, applies to this case. As previously noted, there is no merit to Muncie's argument that this section is applicable to house moving. Muncie's need for a standard against which to measure CSP's action is met by the very standard it asserts in its complaint – negligence. In fact, even in its memorandum contra Muncie concedes that its "legal claims are sound in tort and contract, i.e. whether Respondent failed to act with reasonable care and whether Respondent breached the contract it entered into with Muncie "and will be determined in its civil court proceeding." The assertion in the complaint before the Commission that CSP acted with "gross negligence" is the same assertion presented in the civil court case. Muncie's protest notwithstanding, its complaint at the Commission is a duplication of its court case.

In this regard, Muncie's reliance on *Marsh v. Howard Trucking, Inc.*, 1980 Ohio App. Lexis 12871 is instructive. Muncie quoted from that case as follows: a court "may not be deprived of jurisdiction where the rights and duties in issue have as their source legal relations that are conceptually distinct from the responsibilities that arise under the public utilities regulatory framework. (Memorandum Contra, p.8). That is precisely why this case belongs in court, where it is, and not in the Commission. The basis for the complaint is conceptually distinct from the regulatory framework administered by the Commission.

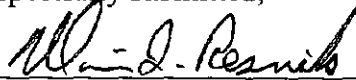
Finally, even if the facts alleged in the complaint were properly before the Commission, Muncie lacks the standing to pursue those facts. Regardless of how Muncie characterizes its role in the house move, Muncie gave sworn deposition testimony that it

did not own the house during the move. Therefore, it has no standing to pursue a claim for the alleged damages to the house which Muncie conceded were minor. Muncie also has testified that the arrangements it made with CSP were made on behalf of Grange, the owner of the house. Muncie's memorandum contra did not dispute these facts.

Muncie claims it is in the "zone of interest" intended to be protected. Whatever zone of interest might have been agreed to between Muncie and Grange, such an agreement does not generate the standing necessary for Muncie to proceed with this complaint. Muncie did not own the house, it was acting as an agent for Grange, the owner.

For the reasons stated in its motion to dismiss and this reply memorandum, the Commission should dismiss this complaint.

Respectfully submitted,

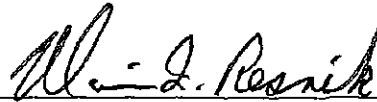


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Columbus Southern Power Company's Reply Memorandum To Complainant's Memorandum Contra Motion To Dismiss was served by first class United States Mail, postage prepaid, to the persons listed below, on this 28th day of April, 2008.



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