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. *et al*,	)	
Respondents.	)	

MOTION TO DISMISS FIRST AMENDED COMPLAINT OF COLUMBIA GAS OF OHIO, INC.

Pursuant to Rules 4901-9-01(C) and 4901-1-12, Ohio Administrative Code, Respondent Columbia Gas of Ohio, Inc. moves to dismiss the First Amended Complaint of United Services Automobile Association. A Memorandum in Support of this Motion is attached.

Respectfully submitted,

/s/ Eric B. Gallon
Eric B. Gallon (0071465) (Counsel of Record)
Christen M. Blend (0086881)
PORTER WRIGHT MORRIS & ARTHUR LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2190/2086
Fax: (614) 227-2100
Email: egallon@porterwright.com
cblend@porterwright.com

Stephen B. Seiple (0003809), Asst. General Counsel
Brooke E. Leslie (0081179), Senior Counsel
200 Civic Center Drive
Columbus, OH 43216-0117
Tel: (614) 460-5558
Fax: (614) 460-6986
Email:sseiple@nisource.com
bleslie@nisource.com

Attorneys for Respondent
COLUMBIA GAS OF OHIO, INC.

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. *et al*,	)	
Respondents.	)	

MEMORANDUM IN SUPPORT OF COLUMBIA GAS OF OHIO, INC.

1. Introduction

This complaint case against Respondent Columbia Gas of Ohio, Inc. ("Columbia") stems from a fire that occurred in 2012 at the Powell, Ohio home of Roger and Joy Ellen Wood. The Complainant, United Services Automobile Association ("USAA"), seeks a declaration that Columbia's breach of its statutory, regulatory, and/or tariff obligations to the Woods caused or allowed that fire to happen. USAA also requests authorization to seek treble damages in court.

USAA's original Complaint included Columbia's parent company, NiSource Inc., as a respondent; asserted strict liability and implied contract claims against both respondents; and requested attorney's fees and litigation expenses. USAA filed an amended complaint removing those claims and requested remedies after NiSource and Columbia filed a motion to dismiss. The Commission ordered that USAA's amended complaint be accepted, and held that "the portions of Respondents' July 23, 2014 motion to dismiss conceded by USAA" had become moot.[1] The Commission did not rule, however, on the remainder of Columbia's motion to dismiss, which asserted that USAA's remaining claims were not properly before the Commission and that USAA had failed to state reasonable grounds for complaint. Columbia now renews its motion to dismiss the remainder of USAA's claims.

[1] Entry ¶6 (Aug. 26, 2014).

2. Law and Argument

2.1. The grounds in Columbia's original motion to dismiss continue to require dismissal of USAA's PUCO complaint.

Columbia's original motion to dismiss[2] and reply memorandum,[3] both of which Columbia incorporates here by reference, presented three grounds for dismissal. First, the Commission lacks jurisdiction over tort claims such as USAA's negligence claim.[4] Second, USAA violated the Commission's requirement that each complaint include "a statement which clearly explains the facts which constitute the basis of the complaint."[5] USAA, instead, simply asserted that one or more of several broadly described, purported breaches of Ohio statute, Commission regulations, and/or Columbia's tariff had "caused and/or permitted the gas leak and ensuring Fire to occur."[6] Third, actions brought against Ohio natural gas companies for damage caused by fires or explosions are almost universally, and most appropriately, brought in civil court,[7] as such cases do not require the Commission's "administrative expertise."[8]

On reply, Columbia further explained that USAA's failure to comply with the Commission's pleading requirements also undermined its jurisdictional arguments. Demonstrating that a claim is within PUCO's exclusive jurisdiction requires a showing that the "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."[9] Because USAA's First Amended Complaint only described Columbia's purported wrongdoing with generalities and legal conclusions, USAA did not and could not make the necessary showing.

---

[2] *See* Mot. to Dismiss of NiSource Inc. and Columbia Gas of Ohio, Inc. (July 23, 2014).

[3] *See* Reply Memo. Supp. Mot. to Dismiss of NiSource Inc. and Columbia Gas of Ohio, Inc. (Aug. 21, 2014).

[4] *See*, *e.g.*, *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶6, *citing, inter alia, State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St.3d 209, 211, 625 N.E.2d 608 (1994).

[5] Ohio Adm. Code 4901-9-01(B). *See* Mot. to Dismiss at 5-7.

[6] First Amended Complaint ¶22; *see also generally id.* Counts I – III.

[7] *See* Mot. to Dismiss at 8-9, *citing, inter alia*, *Brown v. E. Ohio Gas Co.*, 8th Dist. Cuyahoga No. 79003, 2001 Ohio App. LEXIS 4475 (Oct. 4, 2001), *appeal denied*, 94 Ohio St.3d 1454 (2002), and *Vorhees v. Jovingo*, 4th Dist. Athens Nos. 04CA16, -17, and -18, 2005-Ohio-4948.

[8] *Allstate Ins.*, 119 Ohio St.3d 301, ¶12.

[9] *See* Reply Memo. Supp. Mot. to Dismiss at 2-3, *quoting Allstate Ins.* at ¶12.

2.2. Ohio law provides two additional grounds to dismiss USAA's PUCO complaint.

In response to USAA's First Amended Complaint, Columbia offers two additional reasons why USAA's claims may not be brought at the Commission. Both of those reasons, like the reasons described above and in Columbia's prior filings, require the Commission to dismiss USAA's PUCO complaint, leaving USAA's claims to proceed before the Delaware County Court of Common Pleas.

2.2.1. The PUCO has no jurisdiction over subrogation claims like USAA's claims, because it lacks authority to determine insurers' subrogation rights.

First, USAA's claims fail because they require the Commission to make an impermissible initial determination regarding USAA's right to subrogation. USAA did not bring its complaint as a Columbia customer. Instead, its complaint is premised on the assertion that USAA is "legally, equitably and contractually subrogated to any right of recovery possessed by [the Woods] to the extent of [the] payments *** USAA" made to the Woods for their property damage.[10]

The Supreme Court of Ohio has repeatedly recognized that the Commission "has no power to judicially ascertain and determine legal rights and liabilities."[11] In particular, the Court has recognized that assessing an insurer's right to subrogation requires a determination of legal rights that is outside the Commission's statutory jurisdiction.[12] In a 2008 opinion, the Court reversed an appellate decision that an insurance company should have brought its subrogation claim against a public utility at the PUCO, rather than in court. The Court held that bringing the claim at the PUCO "would have been wasteful and futile" because of the Commission's restricted authority.[13] For the same reason, the Commission should dismiss USAA's First Amended Complaint. Because the PUCO has no authority to hear subrogation claims, USAA's claims must be dismissed.

---

[10] First Amended Complaint ¶12.

[11] *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶6, citing *State ex rel. Dayton Power & Light Co. v. Riley*, 53 Ohio St.2d 168, 170, 373 N.E.2d 385 (1978) (holding that the courts, not the Commission, have jurisdiction over a breach of contract claim); *New Bremen v. Pub. Utils. Comm.*, 103 Ohio St. 23, 30-31, 132 N.E. 162 (1921) (holding that the Commission had a duty to dismiss an application to abandon natural gas facilities where a contract required the facilities' continued use and ultimate sale).

[12] *Allstate Ins. Co.*, 2008-Ohio-3917, ¶16.

[13] *Id.*

2.2.2. Because the PUCO's jurisdiction over service-related claims is exclusive, USAA's assertion of duplicate claims in the Delaware County Court of Common Pleas demonstrates that USAA's claims are not service-related.

Second, the proposition that a party can pursue simultaneous, nearly identical claims against the same public utility in both common pleas court and at the Commission is antithetical to the Commission's "exclusive jurisdiction over service-related matters ***."[14] USAA asserts that the fire at the Wood residence gave rise to several causes of action, some of which (USAA's service-related negligence, breach of tariff, and regulatory violation claims) are "for the Commission to decide" and others of which (its common-law negligence claim) are "for the Court to adjudicate."[15] Yet, the 29-year-old Commission opinion on which USAA relies for its contention that the same fact pattern can lead to both a civil complaint and a PUCO complaint – *In the Matter of the Application of The Ohio Bell Telephone Co. v. Telamarketing Investments, Ltd.*, Case No. 85-990-TP-CSS, 1985 Ohio PUC LEXIS 116, *5, Entry (Oct. 29, 1985) – is out-of-date. Much more recent holdings from the Supreme Court of Ohio confirm that whether a claim is framed as a tort or related to utility service is not important. What is important is "[t]he substance of the claim."[16] If a claim is substantively "service-related," then it is "within PUCO's *exclusive* jurisdiction."[17] If not, it is within "'the basic jurisdiction of the court of common pleas ***.'"[18]

USAA asserts that its negligence claim at the Commission "involves service-related negligence," while its common-law negligence claim in Delaware County "involve[s] the non-service-related aspects of negligence done by Columbia ***."[19] Yet, USAA's service-related negligence claim is a near duplicate of its common-law negligence claim. There are only three minor differences:

(1) the common pleas court complaint references NiSource and Columbia, rather than just Columbia;

---

[14] *Id.* ¶6.

[15] Response Contra Mot. to Dismiss at 4.

[16] *Allstate Ins. Co.*, 2008-Ohio-3917, ¶8, *citing State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 2004-Ohio-3208, 810 N.E.2d 953, ¶ 19..; *see also id.* at ¶14.

[17] (Emphasis added.) *Corrigan v. Illum. Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, ¶9.

[18] *Id.*, *quoting State ex rel. Ohio Edison Co. v. Shaker*, 68 Ohio St.3d 209, 211, 625 N.E.2d 608 (1994).

[19] Response Contra Mot. to Dismiss at 4.

(2) the common pleas court complaint uses the terms "Plaintiff" and "Defendants" instead of "Complainant" and "Respondent"; and

(3) the common pleas court complaint omits the PUCO complaint's assertion that Columbia violated the pipe-line safety code.[20]

USAA's civil complaint and PUCO complaint are so similar, in fact, that USAA accidentally filed its First Amended Complaint from this proceeding in the common pleas court, before realizing and correcting its mistake.[21] Moreover, USAA admits its breach of tariff and regulatory violation claims arise from the same set of facts as its service-related and common-law negligence claims.[22]

Hence, this is not a case in which different aspects of a public utility's relationship with its customer give rise to different causes of action, some tort- or contract-related and some service-related. It is, instead, a case in which the customer has brought substantively similar claims, arising from the same set of facts, in the PUCO and in court and sought to prosecute them simultaneously. Indeed, USAA opposed Columbia's motion to stay its civil suit pending the completion of this complaint case, and the court denied that motion.[23] Allowing both cases to proceed at this point would make a mockery of the Commission's "exclusive jurisdiction" over service-related claims and the courts' exclusive jurisdiction over non-service-related claims against a public utility.

If USAA's common-law negligence claim is properly before the Delaware County Court of Common Pleas – and, as shown in Columbia's initial motion to dismiss, almost all such claims are brought in common pleas court – then USAA's claims cannot be service-related. Because USAA has insisted on proceeding in the Delaware County Court of Common Pleas, USAA cannot proceed here. USAA's Commission complaint must be dismissed.

---

[20] *Compare United Service Automobile Association v. NiSource Ind.*, Case No. 14 CVC 07 0508, First Amended Complaint, Count I, ¶¶22-23 (Delaware C.P. Nov. 14, 2014) (attached at Ex. 1) and PUCO First Amended Complaint, Count I. ¶¶17 and 18.

[21] *See United Service Automobile Association v. NiSource Ind.*, Case No. 14 CVC 07 0508, United Services Automobile Association's Mot. for Judgment Entry *Non Pro Tunc* to Correct a Clerical Mistake, ¶¶1-4 (Delaware C.P. Nov. 14, 2014) (attached as Ex. 2).

[22] *See* Response Contra Mot. to Dismiss at 4-5.

[23] *United Service Automobile Association v. NiSource Ind.*, Case No. 14 CVC 07 0508, Judgment Entry Denying Defendant NiSource Ind. and Columbia Gas of Ohio, Inc's Mot. to Stay (Delaware C.P. Oct. 6, 2014) (attached as Ex. 3).

2.3. Public policy also disfavors the maintenance of parallel proceedings in both civil court and the PUCO.

As noted above, there are several legal reasons why a complainant may not pursue substantively identical claims in both a civil court and the PUCO. But there are several practical reasons, too, to prevent the kind of gamesmanship in which USAA is engaging here.

First, pursuing nearly identical claims in parallel proceedings would allow a complainant to increase the public utility's costs of litigation. While that might give the complainant an unfair advantage, it would also disadvantage ratepayers, who could ultimately end up paying those increased litigation costs.

Second, filing parallel actions allows a complainant to forum shop. A complainant that obtains an unfavorable ruling on a non-dispositive issue before one tribunal can simply dismiss that action and pursue the parallel claim. This, again, unfairly advantages the complainant, and it wastes the courts' and the Commission's resources.

Third, pursuing parallel proceedings could allow the complainant to recover more damages than Ohio's penalty statute, Ohio Rev. Code 4905.61, permits. If a complainant were to prevail in common pleas court and recover its damages, and then prevail at the Commission and recover treble damages under Ohio Rev. Code 4905.61, that complainant would effectively recover quadruple damages for a violation of public utility law.

And fourth, filing parallel complaints would create unintended, multiple avenues for appeal. If the complainant lost before the common pleas court, it could seek judicial review in the intermediate courts of appeal. And, if it lost before the courts of appeal, it could ask the Supreme Court of Ohio to accept jurisdiction for a further appeal, although the Court would be free to decline jurisdiction. But, if the complainant also lost before the Commission, it could obtain a mandatory review of the Commission's determination in the Supreme Court. Thus, filing parallel actions would increase the complainant's chances of convincing an appellate court to overturn a lower tribunal's decision, while also ensuring the complainant could have its claims reviewed by the Supreme Court.

In short, allowing a complainant to file parallel actions in both civil court and the Commission would enable the complainant to game the system, while clogging the Commission's and courts' dockets and unfairly driving up public utilities' costs. For these reasons as well, the Commission should dismiss USAA's First Amended Complaint and require USAA to proceed in civil court.

3. Conclusion

The Complainant's claims are not properly before the Commission, as the Commission lacks the jurisdiction to determine USAA's legal or equitable subrogation rights. Moreover, the Complainant's purportedly "service-related" claims are not properly before the Commission, as the Complainant has not demonstrated that those claims require the Commission's administrative expertise. To the contrary, claims like USAA's are typically brought in common pleas court – where USAA is, in fact, pursuing claims against Columbia (and several other companies) that arise from the same facts as, and are written nearly identically to, the claims USAA is pursuing here.

USAA's pursuit of such claims in common pleas court necessarily proves that those claims are not service-related; if they were, they would be within the Commission's exclusive jurisdiction. Moreover, allowing complainants like USAA to pursue parallel actions in both the common pleas court and the Commission would provide complainants unfair and unintended advantages in litigation, while driving up public utilities' rates and wasting judicial and Commission resources.

For all of these reasons, Columbia respectfully requests that the Commission dismiss USAA's First Amended Complaint and leave USAA to pursue its claims against Columbia (and the other defendants) in the Delaware County Court of Common Pleas.

Respectfully submitted,

/s/ Eric B. Gallon
Eric B. Gallon (0071465) (Counsel of Record)
Christen M. Blend (0086881)
PORTER WRIGHT MORRIS & ARTHUR LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2190/2086
Fax: (614) 227-2100
Email: egallon@porterwright.com
cblend@porterwright.com

Stephen B. Seiple (0003809), Asst. General Counsel
Brooke E. Leslie (0081179), Senior Counsel
200 Civic Center Drive
Columbus, OH 43216-0117
Tel: (614) 460-5558
Fax: (614) 460-6986
Email:sseiple@nisource.com
bleslie@nisource.com

Attorneys for Respondent
COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion to Dismiss First Amended Complaint was served by regular mail this 29th day of December, 2014, upon counsel for the Complainant at the following addresses:

Andrew P. Avellano
4181 East Main Street
Columbus, OH 43213

Erick J. Kirker
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

/s/ Eric B. Gallon
Eric B. Gallon

COLUMBUS/1749438v.3

Summary: Motion to Dismiss First Amended Complaint electronically filed by Mr. Eric B. Gallon on behalf of Columbia Gas of Ohio, Inc.