

**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., <i>et al</i> ,	)	
	)	
Respondents	)	

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**RESPONSE CONTRA TO  
RESPONDENTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT  
SUBMITTED ON BEHALF OF UNITED SERVICES AUTOMOBILE ASSOCIATION**

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The United Services Automobile Association (“USAA”) hereby submits the following response to the Motion to Dismiss First Amended Complaint of Columbia Gas of Ohio, Inc. (“Columbia”).

Prior to the present motion, Columbia filed a Motion to Dismiss USAA’s initial Complaint. USAA responded, and conceded certain arguments which concessions were adopted by PUCO and a corresponding First Amended Complaint was deemed filed. The concessions involved removing NiSource as a party and removing its strict liability and implied contract claims.

In its First Amended Complaint, USAA continued its service-related negligence claims, breach of tariff and regulatory violations claims. Because Columbia made arguments in its initial Motion to Dismiss that relate to claims presented in Plaintiff’s First Amended Complaint, Columbia has renewed those arguments with respect to the First Amended Complaint as well. To that extent, Plaintiff incorporates herein by reference its Response Contra and Memorandum Contra to Columbia’s initial Motion to Dismiss and continues to assert that Columbia’s Motion to Dismiss should be denied.

Further, by way of the present motion, Columbia has added additional arguments with respect to Plaintiff's First Amended Complaint. Columbia asserts in addition that PUCO has no jurisdiction over subrogation, and also adds additional arguments that PUCO has no jurisdiction over USAA's claims for service-related negligence, breach of tariff, and regulatory violations. However, Columbia's additional arguments fail as well, and Columbia's Motion to Dismiss the First Amended Complaint should be denied. PUCO has jurisdiction over the claims presented by USAA in the First Amended Complaint. Columbia has presented no law or other support that subrogation claims are outside of PUCO's jurisdiction. Further, PUCO has exclusive jurisdiction over service-related negligence claims, breach of tariff claims and regulator violation claims related to the gas industry. Columbia has made short-sighted arguments based on the premise that situation involved in this case could not give rise to claims that must be brought in PUCO and in the state Court. Because PUCO's exclusive jurisdiction is not all-encompassing, and because the state Court still maintains jurisdiction over certain claims, forcing a party with claims within each jurisdiction to only proceed in one venue would be limiting an injured party's access to a tribunal. There is no basis in law or public policy that has been presented by Columbia to support its continuing jurisdictional arguments.

For all of these reasons, as further explained in the attached Memorandum Contra, as well as the Response Contra and Memorandum Contra filed with respect to the Motion to Dismiss the Complaint, Complainant USAA respectfully requests that Columbia's Motions to Dismiss be denied.

Respectfully submitted,

BY: /s/ Erick J Kirker

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COUNSEL FOR COMPLAINANT

Dated: January 13, 2015

# **EXHIBIT A**

## MEMORANDUM CONTRA

### 1. Introduction

On July 17, 2012, a fire at the home of Roger and Joy Ellen Wood resulted in over \$368,000 worth of damage. The fire was caused by a leakage of gas supplied and distributed by Columbia Gas to the Wood residence, which was caused and allowed to happen by the improper actions and omissions of Columbia Gas<sup>1</sup> as presented in the First Amended Complaint. USAA brings this action as the Woods' subrogee.

### 2. Law and Argument

**2.1. USAA continues the arguments it presented in its Response Contra and its Memorandum Contra, and the additional arguments raised by Columbia in the present motion are without merit, therefore Columbia's Motions to Dismiss should be denied.**

As presented in USAA's Response Contra and Memorandum Contra, USAA has plead reasonable grounds to support its service-related negligence, breach of tariff, and regulatory violations claims. Moreover, USAA's service-related negligence claim is properly before the Commission because it represents a service-related complaint falling within the Commission's jurisdiction. Finally, USAA's breach of tariff claim and regulatory violations claim fall squarely within the Commission's jurisdiction. As such, Columbia's motion to dismiss should be denied, and USAA should be permitted to proceed with the instant action before the Commission. USAA's Response Contra and Memorandum Contra are incorporated herein by reference and arguments contained therein are continued with respect to the Motions to Dismiss presented by Columbia.

In addition to the previously briefed arguments, Columbia raised "two additional arguments" in the Motion to Dismiss the First Amended Complaint. Columbia also presented public policy arguments as well. But, each of Columbia's additional arguments is without merit. First, PUCO has jurisdiction over subrogation claims, because USAA is merely "standing in the shoes of its insured" and asserting a right of interest long-settled under Ohio law. For the negligence claims, Plaintiff's First Amended Complaint clearly identifies them as being the service-related negligence claims that Plaintiff has against Columbia that relate to claims exclusive to PUCO. The remainder of USAA's negligence claims are what has been brought in state Court. Further, USAA only brought the specific breach of tariff and regulatory violations claims in PUCO because they fall under PUCO's jurisdiction. With respect to public policy, the underlying principle that an injured party must have access to a tribunal is of far greater weight than any disfavor of multiple proceedings. Any argument that judicial economy outweighs an injured party's right to have its disputes decided by a tribunal is unsupportable.

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<sup>1</sup> And others, as noted in the state Court pleadings.

## **2.2. USAA's Complaint Should Not Be Dismissed Because USAA Has Pleaded Reasonable Grounds to Support its Service-Related Negligence, Breach of Tariff, and Regulatory Violations Claims.**

Dismissal is inappropriate because USAA has pleaded reasonable grounds to support its service-related negligence, breach of tariff, and regulatory violations claims. Pursuant to OHIO REV. CODE ANN. § 4905.26, "...if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for a hearing and shall notify complainants and the public utility thereof." A claimant need not specify on which statutory subsection it rests its claims.<sup>2</sup> USAA's claims cannot be dismissed merely because they are based on their rights as a subrogee, nor should they be dismissed because USAA filed a state Court action to make certain that all its claims against Columbia not exclusive to PUCO get heard as well as its claims against third parties not subject to PUCO's jurisdiction.

### **2.2.1 PUCO has jurisdiction over subrogation claims.**

Subrogation is defined as "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." Black's Law Dictionary (8 Ed.2004) 1467. Specific to insurance law, subrogation is also defined as "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." *Id.* In essence, subrogation allows one person to stand in the shoes of another and to exercise the rights or privileges of that person. *Indiana Ins. Co. v. Barnes*, 846 N.E.2d 73, 78 (Ohio App. 2005). Therefore, USAA is merely standing in the shoes of its insured and exercising all the rights and privileges of the insured, including the right to bring a claim in PUCO. Subrogation is a long-settled principle of Ohio law.

Columbia presented no law that provides that subrogation claims are outside of the scope of PUCO's jurisdiction. Instead, Columbia cited to Allstate Ins. Co. v. Cleveland Elec. Illum. Co., 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824 (2008) and New Brennan v. Pub. Utils. Comm., 103 Ohio St. 23, 132 N.E. 162 (1921). Neither the Allstate case or the New Brennan case held that PUCO had no jurisdiction over subrogation claims. Both cases involved decisions related to whether contract claims could be heard in PUCO, and both finding that certain contract claims are within the jurisdiction of courts and not the Commission. Allstate, supra at 304, New Brennan, supra at 32-33. There is no holding in either case that subrogation claims for matters within the jurisdiction of PUCO could not be heard by PUCO merely because

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<sup>2</sup> *In the Matter of the Complaint of Ronald Levi v. Columbia Gas of Ohio*, 2009 Ohio PUC LEXIS 304 (Pub. Util. Comm'n of Ohio May 4, 2009) (Columbia Gas moved to dismiss complaint, contending that complainant had failed to state reasonable grounds. Columbia Gas specifically argued that complainant had failed to specify which subsection of Rule 4901:1-6 he was referencing. The attorney examiner found that reasonable grounds existed for the purpose of going forward with the complaint and denied Columbia Gas's motion to dismiss.).

they were brought by a subrogee and not the subrogor. Columbia's reading of these cases, especially the Allstate, case are clear error. In Allstate, the subrogated insurer sued the utility in state court. Unlike the present case, the utility defendant in Allstate argued that the action was required to be brought in PUCO. The intermediate appellate court agreed. But, the Supreme Court overruled the finding of the intermediate appellate court to determine the certain types of contract claims are within the Court's jurisdiction even though PUCO maintains exclusive jurisdiction over other types of claims. The Allstate Court's statement that it would have been "wasteful and futile" for Allstate to bring the subrogation claims in PUCO was not because they were subrogation claims, but rather because the type of claims alleged were state Court claims not PUCO-exclusive claims<sup>3</sup>. Columbia has misread Allstate, and has overreached in its arguments because there is no Ohio law that would bar a subrogated insurer from bringing claims in PUCO.<sup>4</sup>

**2.2.2 PUCO has jurisdiction over the claims plead in the First Amended Complaint, i.e. Service-related negligence, breach of tariff and violations of regulatory provisions under the purview of PUCO.**

Columbia's proposition that "[b]ecause USAA has insisted on proceeding in the Delaware County Court of Common Pleas, USAA cannot proceed here" is flawed. USAA's decision to proceed in both venues to make certain all its available claim types are fully litigated to a tribunal of competent jurisdiction is not the test involved.<sup>5</sup> Ohio law has identified certain claims that are exclusively within PUCO's jurisdiction, and certain claims that are for the courts. Because the same fact pattern can be the basis for multiple claim types, USAA must be able to avail itself of its right to access to a tribunal.

Because *In the Matter of the Application of The Ohio Bell Telephone Co. v. Telemarketing Investments, Ltd.*, Case No. 85-990-TP-CSS, 1985 Ohio PUC Lexis 116 was decided in 1985 does not mean that it is invalid. Columbia Gas has not presented any finding of the PUC or Ohio Supreme Court altering or overruling the decision in *Ohio Bell*. However, recently, the Ohio Supreme Court was faced with a multi-claim litigation for a given set of facts, and did not reach its conclusion that a fraud claim was within the purview of PUCO simply because Plaintiff's other claims were before PUCO. See DiFranco, et al. v. FirstEnergy Corporation, et al. 134 Ohio St. 3d 144, 2012 – Ohio – 5445, 980 N.E. 2d 996 (2012). In DiFranco, the plaintiffs raised four causes of actions. The trial court found that all three were within the jurisdiction of PUCO. But, the appellate court in DiFranco reversed the trial court's

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<sup>3</sup> In Allstate, the matter involved a delay between the utility's receipt of the emergency calls and arrival at the scene.

<sup>4</sup> Further, there are cases in which Ohio Courts have ordered that certain claims, that were subrogation claims, must be brought in PUCO. State Farm Fire & Casualty Co. v. Cleveland Electric Illuminating Co., 2004 WL 1486664 at 2 (Ohio Ct. App. July 2, 2004).

<sup>5</sup> Allstate, supra.

decision on one of the claims, the fraud claim. The appellate court remanded the fraud count to the Court of Common Pleas. The Ohio Supreme Court overruled the appellate court and found the fraud claim was within PUCO's jurisdiction, but not because all claims stemming from one set of facts must be presented before the same tribunal. The Ohio Supreme Court in DiFranco had to analyze whether the fraud claim fell within the PUCO exclusive jurisdiction or not. So, clearly, the gist of the action concept being proposed by Columbia is not the correct one in a case involving various facts and various claims. To say that Columbia Gas did not commit multiple breaches of care culminating in this fire, some service-related (as defined by Sec. 4905.26) and some not service-related, would be failing to present the entire story.

Columbia Gas asserts that "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." This assertion is flawed, contrary to the pleadings and certainly made well before any significant discovery has been done in this matter. Any PUCO decision based on this assertion would be premature at this point.

### **2.2.3 Public policy favors USAA being allowed to avail itself of every claim it has available and to have full access to the tribunal with competent jurisdiction.**

Columbia Gas refers to the PUCO action and the state Court action filed by USAA as "parallel actions". This is a poor characterization used for advocacy purposes. PUCO has a certain exclusive, yet limited, area of jurisdiction. For example, this case involves multiple defendants, some of which cannot be brought before PUCO. USAA had no choice but to sue certain parties in state Court. With respect to Columbia Gas, multiple claims can be supported based on all the facts of this case. Hence, ensuring that all claims are presented in the tribunal with proper jurisdiction is crucial to USAA asserting its rights as an injured party.

Access to a tribunal for disputes is not only a constitutionally protected right<sup>6</sup>, but also a matter of general public policy as well. All of Columbia's public policy arguments are featherweight when compared to the heavy obligation to allow an injured party access to a tribunal. With respect to litigation costs, all the claims would be litigated, so where they are litigated is irrelevant to those costs. Columbia's decision to hire two different law firms, one for PUCO and one for the Delaware County matter, is what has increased their costs if anything, not where the claims are prosecuted. The forum shopping argument is flawed at its core. Because PUCO does not have the same powers as the state Court, it would not be a comparison shopping experience – it is a must go to situation due to the mutually exclusive nature of their subject matter jurisdiction.

Columbia is trying to use jurisdictional arguments as a sword, not a shield to protect against increased costs for the Commission and the Courts. Columbia is trying to limit USAA's access to a tribunal for its claims in attempt to cut-off USAA rights to assert those claims.

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<sup>6</sup> Ohio Constitution, Article I



### 3. Conclusion

The Commission may properly adjudicate USAA's service-related negligence claim because it represents a service-related complaint falling within the Commission's jurisdiction. The Commission may properly adjudicate USAA's breach of tariff claim and regulatory violations claim because these claims fall squarely within the Commission's jurisdiction. As such, the Commission should deny Columbia's motions to dismiss and permit USAA to proceed with the instant action as amended.

Respectfully submitted,

BY: /s/ Erick J Kirker

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COUNSEL FOR COMPLAINANT

Dated: January 13, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Motion to Dismiss was served by regular mail on this 13<sup>th</sup> day of January, 2015, upon counsel for the Respondents at the following addresses:

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Summary: Response Response Contra to Respondents' Motion to Dismiss First Amended Complaint

Submitted on Behalf of United Services Automobile Association electronically filed by Mr. Erick J. Kirker on behalf of United Services Automobile Association