

**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.)	

**REPLY MEMORANDUM IN SUPPORT OF THE
MOTION TO DISMISS FIRST AMENDED COMPLAINT
OF COLUMBIA GAS OF OHIO, INC.**

1. Introduction

Respondent Columbia Gas of Ohio, Inc. (“Columbia”) has moved to dismiss Complainant United Services Automobile Association’s (“USAA”) First Amended Complaint against Columbia because the claims USAA has alleged are not properly before the Public Utilities Commission of Ohio (“Commission”), USAA has failed to state reasonable grounds for complaint and has not complied with the Commission’s pleading requirements, the Commission does not have authority to hear subrogation claims like USAA’s, and public policy disfavors USAA’s maintenance of substantively identical claims in both civil court and before the Commission.¹ In response, USAA mischaracterizes Columbia’s demonstration that USAA has failed to comply with the Commission’s pleading requirements, insists that controlling authority prohibiting the Commission from adjudicating USAA’s subrogation rights does no such thing, and misapplies the law controlling the Commission’s lack of jurisdiction over USAA’s manifestly tort-related claims. USAA’s arguments lack merit. The Commission should disregard them and dismiss USAA’s First Amended Complaint in its entirety.

¹ Mot. to Dismiss First Am. Compl. of Columbia Gas of Ohio, Inc. (Dec. 29, 2014).

2. Law and Argument

2.1 The Commission should dismiss USAA's First Amended Complaint because USAA has failed to comply with the Commission's pleading requirements.

In response to Columbia's demonstration that USAA has failed twice to comply with the Commission's requirements that a complaint include "a statement which clearly explains the facts which constitute the basis of the complaint,"² USAA argues only that "[a] claimant need not specify on which statutory subsection it rests its claims."³ USAA's response mischaracterizes Columbia's argument on this point.

Columbia has not asserted that USAA's First Amended Complaint is deficient for failing to identify the legal bases for its claims. Rather, USAA's First Amended Complaint, like its original complaint, fails to meet the Commission's basic pleading standard because it fails to identify the *factual* bases for its claims.⁴ USAA asserts that "Columbia *** commit[ted] multiple breaches of care culminating in [a] fire."⁵ But, rather than describing the specific actions it believes caused the fire at the Wood residence, USAA offers the Commission only a list of broadly described categories of legal duties⁶ and an assurance that discovery will reveal evidence to support its conclusory contentions.⁷

USAA's First Amended Complaint does not contain any facts that demonstrate that the Commission's administrative expertise is necessary to resolve its claims, or that Columbia's ambiguously alleged actions constitute a practice normally authorized by it. As Columbia previously explained, it is impossible to determine from USAA's First Amended Complaint that USAA's claims are properly before the Commission. Because USAA only describes Columbia's purported wrongdoing in generalities and legal conclusions, USAA has failed to show its claims are within the Commission's jurisdiction.

² Ohio Adm. Code 4901-9-01(B).

³ USAA Response Contra Respondent's Mot. to Dismiss First Am. Compl. at 2 (Jan. 13, 2015).

⁴ See Mot. to Dismiss of NiSource Inc. and Columbia Gas of Ohio, Inc. at 5-7 (July 23, 2014); Reply Mem. Supp. Mot. to Dismiss of NiSource Inc. and Columbia Gas of Ohio, Inc. at 2-5 (Aug. 21, 2014); Mot. to Dismiss First Am. Compl. of Columbia Gas of Ohio, Inc. at 2 (Dec. 29, 2014).

⁵ USAA Response Contra Respondent's Mot. to Dismiss First Am. Compl. at 4 (Jan. 13, 2015).

⁶ See First Am. Compl. ¶ 17.

⁷ USAA Response Contra Respondent's Mot. to Dismiss First Am. Compl. at 4 (Jan. 13, 2015).

2.2 The PUCO has no jurisdiction over subrogation claims because it lacks authority to determine insurers' subrogation rights.

USAA attempts to avoid controlling Ohio Supreme Court precedent regarding the Commission's lack of authority to determine subrogation rights by ignoring key language in that decision.⁸ The Court's decision in *Allstate Insurance v. Cleveland Electric Illuminating*, however, is dispositive of this case.⁹

In *Allstate*, an insurer brought a subrogation claim against an electric utility in common pleas court, alleging the utility was negligent¹⁰ in responding to customer calls regarding a tree limb that had fallen on a power line, causing a fire.¹¹ The utility moved to dismiss the complaint, arguing the Commission had exclusive jurisdiction over the case because it related to the utility's service.¹² The trial court denied the utility's motion, but the intermediate appellate court reversed, and the insurer appealed to the Supreme Court of Ohio.¹³ Adopting the two-part jurisdictional test for which *Allstate* is known – (1) would resolving the issues presented require the Commission's "administrative expertise," and (2) is the utility action at issue a normal practice of the utility?¹⁴ – the Court held that Allstate's "claim of negligence was properly before the court of common pleas," not the PUCO.¹⁵ In particular, the Court held that determining whether the utility's delay was reasonable did not require the PUCO's "expertise[.]"¹⁶

The Court then added that the Commission lacked jurisdiction to consider subrogation claims anyway. Earlier in its decision, the Court noted the "PUCO is not a court and has no power to judicially ascertain and determine legal rights and liabilities."¹⁷ At the opinion's conclusion, the Court reiterated that "even if Allstate had taken its complaint to PUCO, the commission lacks the authority to

⁸ USAA Response Contra Respondent's Mot. to Dismiss First Am. Compl. at 2-3 (Jan. 13, 2015).

⁹ See *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, 893 N.E.2d 824.

¹⁰ *Allstate* did not, as USAA contends (see USAA Mem. Contra at 3), concern a contract claim.

¹¹ *Id.* at ¶ 2-3.

¹² *Id.* at ¶ 4.

¹³ *Id.*

¹⁴ See *id.* at ¶ 11-15.

¹⁶ *Id.* at ¶ 14.

¹⁷ (Citations omitted.) *Id.* at ¶ 6.

‘determine legal rights and liabilities.’¹⁸ For this reason, the Court commented, “[i]t would have been wasteful and futile for Allstate to seek subrogation through PUCO.”¹⁹

For the same reason, it would be “wasteful and futile” for USAA to seek subrogation through the Commission. USAA brought its claims “as subrogee of Roger and Joy Ellen Wood,” Columbia’s customers.²⁰ USAA asserts that its subrogation rights are based on “the principles of legal and equitable subrogation, as well as the terms and conditions of the [Woods’] policy of insurance ***.”²¹ Legal subrogation (also known as equitable subrogation)²² “arises by operation of law and applies when one person is subrogated to certain rights of another so that the person is substituted in the place of the other and succeeds to the rights of the other person.”²³ “Conventional subrogation,” in contrast, “is premised on the contractual obligations of the parties, either express or implied.”²⁴ Accordingly, weighing USAA’s claims would require the Commission to determine USAA’s legal rights under either the principle of equitable subrogation or the Woods’ insurance policy. Yet, “[t]he PUCO is not a court and has no power to ascertain and determine legal rights ***.”²⁵

USAA would apparently have the Commission *assume* USAA has a right of subrogation. But proving that right is an important condition to each of USAA’s claims. Each count in USAA’s Amended Complaint depends on the assertion that USAA is “legally and equitably subrogated *** to the Wood’s rights to recovery ***.”²⁶ Because the Commission lacks the authority to determine USAA’s subrogation rights, the Commission must dismiss USAA’s Amended Complaint.

¹⁸ (Citations omitted.) *Id.* at ¶ 16.

¹⁹ *Id.* at ¶ 16.

²⁰ First Am. Compl. at 1 (Aug. 11, 2014).

²¹ *Id.* ¶ 13.

²² See *Johnson v. Progressive Ins. Co.*, 11th Dist. Lake No. 98-L-102, 1999 Ohio App. LEXIS 6258, *13 (Dec. 23, 1999).

²³ (Citation omitted.) *Blue Cross & Blue Shield Mut. v. Hrenko*, 1995-Ohio-306, 72 Ohio St. 3d 120, 121, 647 N.E.2d 1358.

²⁴ *Id.*

²⁵ (Citations omitted). *DiFranco v. FirstEnergy Corp.*, 2012-Ohio-5445, ¶ 20, 134 Ohio St. 3d 144, 148, 980 N.E.2d 996.

²⁶ First Am. Compl. ¶¶ 19, 24, 29 (Aug. 11, 2014).

2.3 USAA cannot bring substantively identical claims before both the Commission and the Delaware County Court of Common Pleas.

USAA has taken the position that it may file nearly duplicate claims both here and in the Delaware County Court of Common Pleas “[b]ecause the same fact pattern can be the basis for multiple claim types,” some of which “are exclusively within PUCO’s jurisdiction,” and others “that are for the courts.”²⁷ This position, too, is contrary to controlling Ohio Supreme Court precedent. The Court was clear that the two-part jurisdictional test it adopted in *Allstate* must be used to determine whether a trial court or the PUCO “has jurisdiction over a *case* involving a public utility ***.”²⁸ The *DiFranco* decision on which USAA attempts to rely²⁹ also made clear that “jurisdiction is not conferred in cases involving public utilities based solely on the form of action.”³⁰ “Instead,” the Court held, “courts must look to the *substance* of the allegations in the complaint to determine the proper jurisdiction.”³¹ USAA’s argument, that USAA may bring claims in both the Commission *and* civil court if it labels its claims as both service-related and tort-related, turns *DiFranco* on its head.

USAA misinterprets the Court’s *DiFranco* decision. There, the Court applied the *Allstate* test to only one of four claims that the plaintiffs originally brought in common pleas court not because the test is to be applied on a claim-by-claim basis, but because that claim was the only claim at issue on appeal.³² Indeed, the Court’s decision that the fourth claim was within the Commission’s exclusive jurisdiction (like the other three claims not before the Court on appeal) was in harmony with *Allstate*’s direction that *cases* that are substantively service-related are within the Commission’s exclusive jurisdiction.

²⁷ USAA Response Contra Respondent’s Mot. to Dismiss First Am. Compl. at 3 (Jan. 13, 2015).

²⁸ (Emphasis added.) *Allstate*, 2008-Ohio-3917, at ¶ 11.

²⁹ See USAA Response Contra Respondent’s Mot. to Dismiss First Am. Compl. at 3 (Jan. 13, 2015), citing *DiFranco*, 2012-Ohio-5445.

³⁰ (Citations omitted.) *DiFranco*, 2012-Ohio-5445, at ¶27.

³¹ (Citations omitted; emphases added.) *Id.*

³² *DiFranco*, 2012-Ohio-5445, at ¶ 3 (“The sole issue before this court is whether the customers properly filed their fraud claim in the common pleas court or whether that claim should have been filed with the Public Utilities Commission of Ohio ***.”).

USAA's claims are also distinguishable from the claims at issue in *DiFranco*. Unlike the plaintiffs in *DiFranco*, who asserted a variety of claims purportedly based in both contract and tort, USAA has brought essentially identical negligence claims in both the PUCO and the common pleas court, as Columbia detailed in its motion to dismiss USAA's First Amended Complaint.³³

USAA's essentially identical claims, which arise from the same set of facts, cannot be both service-related and service-unrelated. To allow both claims to go forward in two different forums would render meaningless the General Assembly's grant to the Commission "of exclusive jurisdiction over service-related matters ***."³⁴ It is also against public policy for several reasons, as Columbia previously explained.³⁵ Finally, USAA's claim that public policy supports its duplicative, opportunistic, and wasteful behavior because USAA is entitled to "access to a tribunal for disputes" rings hollow.³⁶ USAA already has access to a tribunal for this dispute – the Delaware County Court of Common Pleas. It is not entitled to – and should not be allowed to proceed before – two.

3. Conclusion

For the reasons set forth above, those set forth in Columbia's December 29, 2014 motion to dismiss USAA's First Amended Complaint, and the remaining reasons set forth in Columbia and NiSource Inc.'s July 23, 2014 motion to dismiss and August 21, 2014 reply in support thereof, the Commission should dismiss USAA's First Amended Complaint and let USAA proceed before the proper tribunal to hear its claims against Columbia (and other defendants), the Delaware County Court of Common Pleas.

³³ See Mot. to Dismiss First Am. Compl. of Columbia Gas of Ohio, Inc. at 4-5 (Dec. 29, 2014).

³⁴ *Allstate*, 2008-Ohio-3917, at ¶6.

³⁵ See Mot. to Dismiss First Am. Compl. of Columbia Gas of Ohio, Inc. at 6 (Dec. 29, 2014).

³⁶ See USAA Response Contra Respondent's Mot. to Dismiss First Am. Compl. at 4-5 (Jan. 13, 2015).

Respectfully submitted,

/s/ Christen M. Blend

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 Reply Memorandum in Support of Motion to Dismiss First Amended Complaint was served by regular mail this 20th day of January, 2015, 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/ Christen M. Blend
Christen M. Blend

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Summary: Reply Reply Memorandum in Support of the Motion to Dismiss First Amended Complaint of Columbia Gas of Ohio, Inc. electronically filed by Ms. Christen M. Blend on behalf of Columbia Gas of Ohio, Inc.