

FILE

//

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Lexington)
Insurance Company, Frankenmuth Mutual)
Insurance Company, Charter Oak Fire)
Insurance Company, The Automobile)
Insurance Company of Hartford, The Standard)
Fire Insurance Company, Travelers Indemnity)
Company of America, Travelers Indemnity)
Company of Connecticut, Travelers Indemnity)
Company, Travelers Property Casualty)
Company of America, Phoenix Insurance)
Company, St. Paul Mercury Insurance Com-)
pany, St. Paul Surplus Lines Insurance Com-)
pany, United States Fidelity & Guaranty,)
Allied Mutual Insurance Company, and)
Nationwide Mutual Insurance, as Subrogees)
of Their Insureds,)

Complainants,)

v.)

FirstEnergy Corp., American Transmission)
Systems, Inc., The Cleveland Electric)
Illuminating Company, Jersey Central Power)
and Light Company, Metropolitan Edison)
Company, The Ohio Edison Company,)
Pennsylvania Electric Company, Toledo)
Edison Company, and The Illuminating)
Company,)

Respondents.)

RECEIVED-DOCKETING DIV
2006 JUL 10 PM 5:07
PUCO

Case No. 05-1012-EL-CSS
Consolidated With Case Nos.:
04-28-EL-CSS
05-803-EL-CSS
05-1011-EL-CSS
05-1014-EL-CSS
05-1020-EL-CSS

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
OR, ALTERNATIVELY, TO STRIKE CERTAIN PORTIONS
OF THE AMENDED COMPLAINT OF
LEXINGTON INSURANCE COMPANY, ET AL.

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business
Technician _____ Date Processed 7/10/06

I. INTRODUCTION

Complainants concede that the only proper respondents in these consolidated actions are American Transmission Systems, Inc., Ohio Edison Company, Toledo Edison Company and The Cleveland Electric Illuminating Company. But three fundamental problems with the Amended Complaint remain.

First and foremost, Complainants have failed to establish that certain insureds are customers as required by the Commission's Entries. Fundamentally, they argue that they only need to *allege*, based on "information and belief," that these insureds are customers to survive dismissal. This ignores the letter and the spirit of the Commission's March 7 and April 26, 2006 Entries, the purpose of which was to require Complainants to clearly establish the customer status of each insured so that these cases proceed only on behalf of claimants that would have standing to bring a complaint in their own right.

Secondarily, they argue that only after discovery the Commission may properly dismiss claims brought on behalf of insureds who are not customers. This argument doesn't begin to pass the threshold of sustainable logic. Complainants should not need discovery from Respondents to determine if their clients are customers of any FirstEnergy operating company. Rule 11 of the Ohio Rules of Civil Procedure mandate that in signing the complaint, counsel for Complainants certifies that to the best of their knowledge, information and belief there is good ground to support their claims. For Complainants to argue that they need discovery to determine if their own insureds are customers of a FirstEnergy company is a tacit admission that they did not even do a

rudimentary investigation of their claims by, for example, asking their insureds for a copy of their electric bill and whether or not they have changed service providers since August 14, 2003. These simple acts would have allowed Complainants to not only meet their pleading obligations under the Commission's prior orders, but their obligations under Rule 11 as well. The fact that they apparently have done neither, resulting in a continual snubbing of the Commission's orders, is why the Amended Complaint should be dismissed.

Next, the claims brought under R.C. 4905.26 and R.C. 4933.83 should be stricken or dismissed because, as a matter of law, neither claim states reasonable grounds for complaint. Complainants do not address the merits of Respondents' arguments but instead argue that Respondents' motion on these issues should be denied because the issues were addressed in the Commission's March 7 Entry. Although Respondents previously moved to dismiss Complainants' R.C. 4905.26 claim, the Commission did *not* address this claim. The Commission briefly discussed the R.C. 4933.83 claim, but because it also ordered Complainants to file an amended pleading, Respondents did not seek rehearing. The fact that Respondents did not seek rehearing of an issue raised by the original Complaint does not preclude Respondents from raising that issue again in response to the Amended Complaint.

Finally, and similarly, Complainants argue that their negligence and gross negligence claims should not be dismissed because the Commission previously declined to dismiss these claims "on jurisdictional grounds." Complainants ignore the clear implications of the Commission's prior entries. As explained in the March 7 Entry,

Complainants' claims are service-related. This brings them within the Commission's jurisdiction, regardless of what Complainants choose to call them. The Commission stated that it will consider these claims "from the standpoint of the respondents' compliance with various statutes found within Title 49 of the Revised Code," among other regulatory provisions. (March 7, 2006 Entry, ¶ 47.) This should have signaled to Complainants that it would be pointless to include tort claims in their amended pleading that merely restate their statutory claim. Complainants did so anyway. Striking these allegations simplifies the Complaint, consistent with this Commission's prior orders, and underscores to Complainants that tort claims cannot proceed as independent causes of action.

For these reasons, the Amended Complaint should be dismissed or the improper parts of it should stricken.

II. ARGUMENT

A. Complainants Have Not Established Standing Of Certain Insureds And Have Not Otherwise Complied With The Commission's Prior Entries.

In its March 7, 2006 Entry, the Commission explained that the only claims that may proceed in these consolidated cases are claims brought by or on behalf of customers of one of the Respondents. (March 7, 2006 Entry, ¶ 48-56.) Because an insured who is not a customer has no standing to maintain a complaint for inadequate service in its own right, the insurance companies, as subrogors, have no standing to maintain claims on behalf of non-customers. The Commission thus ordered that following the date for filing amended complaints provided for in that Entry, "the

complaint by any complainant that is not clearly identified as an Ohio customer or consumer will be dismissed. Similarly, the complainants must identify that Ohio electric light company that provides their service." (*Id.*, ¶ 52.) In its April 26 Entry on Rehearing, the Commission again stated "the necessity of naming the underlying insured entities and the utilities which provide their service." (April 26, 2006 Entry, ¶ 24.)

Based on the information provided by Complainants in Exhibits A through O of the Amended Complaint, it appears that many of the insureds listed in those exhibits are not customers or were not customers on August 14, 2003. (*See* Motion to Dismiss, pp. 6-7.) Complainants offer absolutely no evidence to the contrary. Indeed, rather than coming forward with any evidence to show that the insureds in question are or were customers, Complainants argue that "[t]hough it is ultimately Complainants' burden to prove these matters, it is not their duty to do so at the pleading stage of the proceedings." (Memorandum Contra, p. 6.) According to Complainants, all they are required to do at this point is disclose what they know "based on information and belief." Complainants then say that if discovery reveals that certain insureds are not customers, claims brought on behalf of such non-customers may be voluntarily dismissed.

Despite what any of the cases cited in page 5 of Complainants' brief have to say about the propriety of allegations based on "information and belief," the Commission's March 7 and April 26 Entries specifically require Complainants to demonstrate that the insureds are customers. Otherwise, Complainants cannot establish the requisite

standing to maintain claims on behalf of the insureds. (March 7, 2006 Entry, ¶¶ 51-53.)

That this case is in the “pleading stage” is irrelevant to the requirement that the Complainants establish standing. Complainants filed a pleading alleging that certain insureds are customers. Respondents have specifically identified the insureds for which they have no service record.¹ The burden now shifts to Complainants to show that the insureds are customers. If Complainants cannot meet this burden, they cannot establish standing, and if they cannot establish standing, they have no right to maintain their claims. The Commission made this abundantly clear in its prior Entries.

Complainants concede that if discovery reveals that certain insureds are not customers, those insureds should be dismissed. (Memorandum Contra, p. 6.) But determining whether any insured was a customer does not require discovery. Moreover, discovery is not a substitute for the good-faith investigation that should have been conducted before filing the Amended Complaint. Complainants’ counsel had an obligation under Rule 11 to make a good faith investigation into the facts alleged in the Amended Complaint. Properly alleging facts based on “information and belief” requires a party to do something more than just guesswork. Signing the Amended Complaint constituted a certification that to the best of Complainants’ knowledge, information and belief, there are good grounds for the allegations. Under the circumstances here, good grounds to support the allegations would require, at a

¹ Respondents are not “suggesting that ‘proof’ must be provided for every allegation of the Complaint at this time.” (Memorandum Contra, p.5.) The only “proof” required at this time is whether certain insureds are customers and if they are, who provides their service. Respondents have not argued that Complainants are required to produce proof of customer status for every individual and entity listed in Exhibits A through O of the Amended Complaint.

minimum, that some contact be made with the insureds to confirm their customer status. That obviously was not done here. There is no excuse why it shouldn't have been.

The insureds either were customers on August 14, 2003 or they were not. It is Complainants' obligation to demonstrate that their insureds were customers, not Respondents' obligation to try to figure out through discovery whether they were not. Indeed, the whole point of the Commission's prior Entries was to limit the claims and issues in this proceeding to customers. If those Entries are to mean anything, they should be enforced. And Complainants cannot circumvent those Orders by alleging customer status based on "information and belief," particularly where there is no showing that Complainants made any investigation into their insureds' status as customers, and Respondents have shown that some of the information submitted in the amended pleading is wrong.

Further evidence of a lack of any meaningful investigation into whether certain insureds were customers is revealed by the fact that Complainants list two service providers for some of their insureds. (See Motion to Dismiss, p. 7.) Complainants say that "without the opportunity to conduct discovery, it is impossible to conclusively determine which provider serviced that particular location." (Memorandum Contra, p. 6.) There is nothing "impossible" in calling the insureds in question and asking them who provided their service. This should have been done a long time ago. There is no excuse for Complainants not to have this information.

The Commission's prior orders are clear: the only claims that may proceed in these consolidated cases are claims brought by or on behalf of customers. Non-customers do not have standing. Complainants have failed to rebut evidence showing that certain insureds are not customers, and they have failed to clearly identify certain insureds and service providers. These claims should be stricken from the Amended Complaint and dismissed.

B. The Claims Brought Under R.C. 4933.83 and 4905.26 Should Be Dismissed Or Stricken.

Complainants argue that Respondents' motion to dismiss or strike claims brought under R.C. 4933.83 and 4905.26 should be overruled because the Commission has already considered and rejected Respondents' arguments, and Respondents did not seek rehearing of the March 7, 2006 Order on these issues. Whether or not the Commission previously considered Respondents' arguments or whether Respondents sought rehearing is irrelevant. Nothing prevents a party from rearguing issues prior to the time a final order is entered in a case.

The Commission's March 7, 2006 Order, in fact, did not address Respondents' arguments for dismissal of the R.C. 4905.26 claim. Complainants argue, "the express language of R.C. 4905.26 is in fact more broad than the duty set forth in 4905.22 and does, therefore, impose specific duties" (Memorandum Contra, p. 7.)

Complainants cite no authority for this claim, nor can they. As discussed in the March 7 Order, R.C. 4905.26 is a jurisdictional statute. (March 7, 2006 Entry, ¶ 49.) R.C. 4905.22 is the statute that imposes a duty to render to adequate service; the duty allegedly

violated here. (*Id.*) Because a public utility cannot “violate” a jurisdictional statute, the R.C. 4905.26 claim should be stricken or dismissed.

C. The Tort Claims Are Superfluous To The Statutory Claims And Should Be Stricken Or Dismissed.

Similar to their improper statutory claims, Complainants argue that because the Commission previously refused to dismiss the negligence and gross negligence claims on “jurisdictional” grounds, Respondents’ renewed motion to dismiss these claims is an inappropriate attempt to re-litigate these issues. Complainants, however, ignore the clear import of the Commission’s prior Order. The Commission correctly determined that labeling a claim “negligence” or “gross negligence” does not divest the Commission of jurisdiction where the claim is service-related. But this doesn’t mean that the Commission will adjudicate the claim under negligence or gross negligence standards. The Commission will decide such claims “from the standpoint of the respondents’ compliance with various statutes found within Title 49 of the Revised Code, as well as the administrative rules promulgated hereunder and the applicable tariffs.” (March 7, 2006 Entry, ¶ 47.)

Here, Complainants allege a single set of facts and contend that under those facts, they have three causes of action: violation of a statutory duty, negligence and gross negligence. But considering that the Commission will consider each of these three claims under the same standard, all that Complainants really have done is allege the same claim three different ways. Nowhere do Complainants explain how their

statutory claim is any different than the claims labeled as torts. The tort claims are merely superfluous and should be stricken or dismissed.

III. CONCLUSION

For the reasons discussed herein, the Amended Complaint should be dismissed or, in the alternative, certain claims and parties stricken.

Respectfully submitted,



David A. Kutik (Trial Counsel)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: 216-586-3939
Facsimile: 216-579-0212
E-mail: dakutik@jonesday.com

Mark A. Whitt
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Telephone: 614-469-3939
Facsimile: 614-461-4198
E-mail: mawhitt@jonesday.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Motion to Dismiss or, Alternatively, to Strike Portions of the Amended Complaint of Lexington Insurance Company, et al., was mailed by ordinary U.S. mail to the following persons this 10th day of July, 2006.

Edward F. Siegel, Esq.
5910 Landerbrook Drive, Suite 200
Cleveland, OH 44124

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
55 Public Square, Suite 1200
Cleveland, OH 44113

Francis E. Sweeney, Jr. Esq.
323 Lakeside Avenue, Suite 450
Cleveland, OH 44113

Joel Levin, Esq.
Aparesh Paul, Esq.
Levin & Associates Co., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, OH 44114

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
50 Public Square, Suite 3500
Cleveland, OH 44113

Leslie E. Wargo, Esq.
McCarthy, Lebit, Crystal & Liffman Co.,
L.P.A.
101 West Prospect Avenue
1800 Midland Building
Cleveland, OH 44115

Mark S. Grotefeld, Esq.
Daniel G. Galivan, Esq.
Grotefeld & Denenberg, LLC
105 West Adams Street, Suite 2300
Chicago, IL 60603

Christina L. Weeks, Esq.
Matthew L. Friedman, Esq.
Grotefeld & Denenberg, LLC
21 E. Long Lake Road, Suite 200
Bloomfield Hills, MI 48304

Patrick J. O'Malley, Esq.
Keis George LLP
55 Public Square, Suite 800
Cleveland, OH 44113



Mark A. Whitt
An Attorney for Respondents