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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Miles Management Corp., Alok Bhaiji, M.D., Inc., Union House Bar & Restaurant, and Regional Therapy, Inc.,	)	
Complainants,	)	Case No. 05-803-EL-CSS
v.	)	Consolidated With Case Nos.: 04-28-EL-CSS
American Transmission Systems, Inc., et al.	)	05-1011-EL-CSS 05-1012-EL-CSS 05-1014-EL-CSS
Respondents.	)	05-1020-EL-CSS

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE THE EXHIBIT TO THE SECOND AMENDED COMPLAINT OF MILES MANAGEMENT CORP., ET AL.

I. INTRODUCTION

Complainants' memorandum contra demonstrates only that Complainants have no intention to comply with the Commissions prior Entries, regardless of how many chances the Commission gives them to do so. The Commission's Entries of March 7 and April 26, 2006 directed Complainants to specifically identify each customer and each customer's service provider. Complainants claim that they complied with these Entries by alleging that each Complainant was served by "CEI and CPP." (Memorandum Contra, p. 2.) 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. Indeed, Complainants ignore the fact that FirstEnergy Corp. and its affiliates have nothing to do with CPP. CEI and CPP are different entities under different ownership and with different service territories. As a municipally-owned utility, CPP is not subject to the Commission's jurisdiction.

The whole point in requiring Complainants to identify their service providers is to ensure that the only claims that proceed are claims brought by customers of electric utilities that are subject to the Commission's jurisdiction. That determination cannot be made here because Complainants continue to refuse to do what the Commission has told them they must do: identify who provides service to whom. The Second Amended Complainant should be dismissed in its entirety for failure to follow Commission orders.

Complainants also continue to violate the Commission's prior entries by attaching and incorporating the Interim Report of the U.S.-Canada Power System Outage Task Force ("Interim Report") in their Second Amended Complaint. Complainants see nothing improper in attaching the Interim Report because the Commission previously determined that there may be "other circumstances under which the task force report might be admissible." (Memorandum Contra, p. 2.) The problem with this argument is two-fold. First, the report that the Commission discussed in its prior entries is not the same report attached to the Second Amended Complaint. The Commission previously determined the non-admissibility of the Final

Task Force Report, which supersedes the Interim Report that is at issue here. If the Final Report is not admissible, basic notions of relevance dictate that a preliminary version of that report is not admissible, either.

Second, the use of *any* version of the Task Force Report in pleadings cannot be one of the "other circumstances" where use of the report would be proper. The Commission determined that neither the report as a whole, nor any sections of it, are admissible. This means that the report cannot come into evidence. If the report is not in evidence, it cannot be argued in post-hearing briefs. But if the report is attached to a complaint, a complainant may argue that the report should be considered in post-hearing briefs because it is part of the pleadings and thus, part of the record. Allowing the final or interim Task Force Report to remain part of the pleadings therefore directly undermines the purpose of the Commission's prior rulings. In attaching the Interim Report to their pleadings, Complainants are simply attempting to do indirectly what the Commission has said cannot be done directly. The Commission should end this transparent ploy and strike the report from the pleadings.

Next, Complainants argue that the Commission should not dismiss the contract and tort claims because these claims are within the Commission's jurisdiction. Complainants again 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 contract or tort claims in their amended pleading that merely restate their statutory claims. Complainants did so anyway. The Commission should strike these contract and tort claims because the are merely restatements of the statutory claim; the contract and tort claims cannot proceed as independent causes of action. Striking these allegations simplifies the Complaint, consistent with this Commission's prior orders, and underscores to Complainants that tort and contract claims cannot proceed as independent causes of action.

Complainants do little to defend their claim that they may properly bring a claim based on the non-existent duty to provide "continuous" service, except to provide string cites of cases discussing the standard of review for a motion to dismiss. Complainants acknowledge that the Commission should "determine if the allegations provide for relief under any possible theory." (Memorandum Contra, p. 6, *quoting Illinois Control v. Langham* (1994), 70 Ohio St. 3d 512, syllabus.) All of Complainants' claims are predicated on the alleged breach of a duty to provide "continuous, uninterrupted service." (Second Amend. Compl., ¶¶ 5, 11, 21, 22, 23.) Complainants counter none of the authority cited by Respondents that demonstrates that Respondents have no duty to provide continuous, uninterrupted service. (*See* Motion to Dismiss, p. 12.) There can be no possibility of recovery, under any theory, for claims predicated on the breach of a duty that does not exist.

Complainants do not address the portion of the Respondents' motion seeking dismissal of the claims for relief for legal fees, prejudgment interest and punitive damages. Because the Commission clearly has no authority to award any of this relief, the Commission must strike these claims.

For each of these reasons, the Second Amended Complaint should dismissed in its entirety or, alternatively, the Interim Report and other impertinent matter stricken from the pleadings.

II. ARGUMENT

A. Complainants' Failure To Properly Identify Each Complainants' Service Provider Violates The Entries of March 7 and April 26.

The Commission's March 7 Entry ordered Complainants to identify whether they were electric customers and, if so, from whom they received service. Complainants ignored this directive in their First Amended Complaint; they ignored it again with their Second Amended Complaint; and they ignore it for a third time in their memorandum contra.

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 a respondents that is subject to Commission jurisdiction. (March 7, 2006 Entry, ¶ 48-57.) 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.)

Complainants argue that they have complied with the Commission's entries by "specifically alleg[ing] that the providers were CEI and CPP." (Memorandum Contra, p. 2.) As the Commission knows - and as Complainants also should know because they were informed of such by Respondents' dismissal motion - CEI and CPP are separate, unrelated entities. The Commission does not have jurisdiction over CPP. Consequently, any customer who received service from CPP must be dismissed. But the Second Amended Complaint doesn't say who allegedly received service from CPP and who received service from CEI. There is thus no way to tell whether any Complainant has alleged a cognizable claim. Complainants' refusal to clarify their pleading, along with ample warning of the consequences of not doing so, requires dismissal of the Second Amended Complaint in its entirety.

B. The Interim Report Should Be Stricken.

In the March 7 Entry, the Commission found that "the task force report is an 'evaluative and investigative' report and is therefore not admissible under subsection (b) of Rule 803(8), ORE, as an exception to the exclusion of hearsay." (March 7, 2006 Entry, ¶ 70.) The Commission specifically held, "[T]he Commission will not allow admission of the task force report as a hearsay exception." (*Id.*, ¶ 71.) The Commission further determined, in its Entry on Rehearing, that it would not make the "unprecedented

finding" that "isolated sections of the task force report might be admissible . . . ." (April 26, 2006 Entry on Reh'g, ¶ 27.)

Complainants apparently have abandoned their theory that the report, despite the Commission's prior rulings, is admissible as a "business record" and therefore should remain as part of the pleadings. (*See* Second Amend. Compl., ¶ 6.) They now argue that the report should remain in the pleadings because the Commission has left open the possibility that there are "other circumstances" under which the report could possibly be admitted. Even if this were true for the Final Task Force Report, the Interim Report, which Complainants seek to use here, is a different report. Basic notions of relevance demand that the Interim Report, which has been superseded by the Final Report, should be excluded and stricken from the pleadings.

More important, however, is that allowing *any* version of the report to remain as part of the pleadings potentially undermines the Commission's prior determination that the report is not admissible. Excluded evidence is not part of the record. Thus, in ruling that the Task Force Report is not admissible, the Commission has found that the report should not become part of the record. Pleadings, however, may be considered part of the record. Allowing the Task Force Report to remain part of the pleadings and become part of the record opens up the door for the use (and misuse) of the report in post-hearing briefs. This is not how the process is supposed to work. Parties should be (and are) limited to arguing evidence actually admitted at hearing, not evidence that becomes part of the record through the back door tactics that Complainants seek to use here.

In light of the Commission's prior determination that the report is not admissible, the Commission should ensure that the report does not become part of the record in any form or fashion unless a party makes a sufficient showing that any part of the report should be admitted for the "other circumstances" alluded to in the Commission's prior orders. The Commission cannot know what those "other circumstances" are until confronted with them. In the meantime, the report should remain excluded. It makes no sense to allow the report to become part of the record now, and determine later whether all of part of it should be excluded or sticken. The Commission has already made the determination that the report should be excluded in its entirety. If any Complainant thinks that the report should be admitted for some purpose that the Commission has not already addressed, they are perfectly capable of presenting their arguments at hearing.

C. The Contract And Tort Claims Are Superfluous And Should Be Stricken.

In addressing the part of the Commission's March 7 Entry concerning jurisdiction over contract and tort claims, Complainants ignore the clear import of that Entry. In its Entry, the Commission correctly determined that labeling a claim "negligence" or "breach of contract" 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 contract 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 four causes of action: violation of "regulatory duties," negligence, recklessness and breach of contract. But considering that the Commission will consider each of these claims under the same standard, all that Complainants really have done is allege the same claim four different ways. Nowhere do Complainants explain how their claim in Count IV for alleged violations of regulatory duties is any different than the claims labeled as breach of contract or torts under Counts I, II and III. The contract and tort claims are merely superfluous of the purported statutory claim and should therefore be stricken or dismissed.

D. Alleging A Violation Of A Duty To Provide Continuous Service Fails To State A Claim.

Each of the four counts of the Second Amended Complaint is expressly predicated on an alleged violation of a duty to provide "continuous" and "uninterrupted" service. (Second Amend. Compl., ¶¶ 5, 11, 21, 22, 23.) But as Respondents showed in their motion to dismiss, Respondents have no such duty. (Motion to Dismiss, p. 12.) The only thing Complainants have to say to that is that "all of the complainants' factual allegations must be taken as true," together with two pages of string cites to cases discussing the standard of review on a motion to dismiss. (Memorandum Contra, pp. 4-6.) Complainants' Second Amended Complaint doesn't

survive their own standard. Complainants have no possibility of recovery, under any theory, for the alleged breach of a duty that does not exist.

III. CONCLUSION

For the reasons stated above, the Second Amended Complaint should be dismissed entirely, or the Task Force Report and other impertinent, improper material stricken.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Reply Memorandum in Support of Motion to Dismiss Second Amended Complaint or, In the Alternative, to Strike the Exhibit to the Second Amended Complaint of Miles Management Corp., *et al.* was mailed by ordinary U.S. mail to the following this 10th day of July, 2006.

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