

FILE

7

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Allianz US)
Global Risk Insurance Company, Lexington)
Insurance Company, and Royal Indemnity)
Company, as Subrogees of Republic)
Engineered Products Inc.,)

Complainants,)

v.)

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

Respondents.)

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

RECEIVED-DOCKETING DIV
2006 JUL 10 PM 5:08
PUCO

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
OR, ALTERNATIVELY, TO STRIKE CERTAIN PORTIONS
OF THE AMENDED COMPLAINT OF
ALLIANZ US GLOBAL RISK 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. and Ohio Edison Company. But two other fundamental problems with the Amended Complaint remain.

First, 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.

Second, 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. The Commission should strike these tort claims because they are merely restatements of the statutory claim; the 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 claims cannot proceed as independent causes of action.

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

II. ARGUMENT

A. 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 Entry, 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.

B. 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 Entry. 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

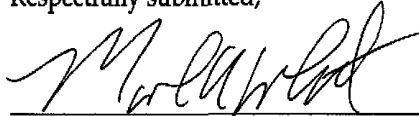
Code, as well as the administrative rules promulgated hereunder and the applicable tariffs." (March 7, 2006 Entry, ¶ 47.)

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 Allianz US Global Risk 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