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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

TRIPLE A SPORT WEARS, INC.,	)	
Complainant,	)	Case No. 05-1020-EL-CSS
v.	)	
FIRSTENERGY CORP. and AMERICAN TRANSMISSION SYSTEM, INC.,	)	
Respondents.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Complainant's memorandum in opposition misses the point in a number of ways. Foremost, this is not a tort case, Complainant's attempt to plead it as one notwithstanding. Complainant has invoked the Commission's jurisdiction to hear a service-related claim while admitting the two most salient facts that render it legally insufficient as a service-related claim – Complainant is not a customer of any Respondent and its damage was caused, in any event, not by a lack of service but because unknown thugs committed a robbery.

In order for this case to proceed to hearing, the Commission must determine whether reasonable grounds for complaint are stated. The Complaint here does not state reasonable grounds because Respondents owed no duty to Complainant. Complainant admittedly is not a customer, is not even located anywhere near the service territory of Respondents and otherwise has no relationship with Respondents whatsoever. Moreover, irrespective of this complete lack

of nexus between Complainant and Respondents, Complainant admits that its losses were due not to the existence of an outage but the fact that during that period of time it did not adequately secure its store and was robbed.

In the initial brief, Respondents cited in support of dismissal of this matter numerous cases where courts have discussed a utility's duties in the context of large-scale outages. Complainant urges the Commission to disregard these authorities because most were decided in New York. But the reasoning behind these cases is more important than where they were decided. And the reasoning is unimpeachable. If a public utility were liable to everyone conceivably affected by a large-scale outage in any way, the utility would be subject to ruinous liability, and ratepayers to confiscatory rates. Limiting the duty to serve to customers is a rational, acceptable way of apportioning liability to a controllable degree. Complainant offers no argument to the contrary. Nor does Complainant cite any cases that have dealt with the same public policy issue and decided it a different way. The attempt to distinguish some of Respondents' cases on the basis that they did not include claims of "gross negligence" or "wanton" conduct is as irrelevant as it is unpersuasive.

Complainant also argues that FirstEnergy Corp. is subject to Commission regulation as a "public utility" because Commission news releases regarding the FirstEnergy operating companies' rate stabilization and competitive bidding cases refer to "FirstEnergy." The press and general public frequently refer to "FirstEnergy" as a tradename – short-hand for any of the FirstEnergy family of companies. How the company's name is used in common, everyday parlance is utterly irrelevant to whether the legal entity incorporated as "FirstEnergy Corp." meets the statutory definition of a "public utility." FirstEnergy Corp. simply does not meet the statutory definition.

Having failed to offer any countervailing authority as to the existence of a legal duty owed by Respondents, the Complaint must be dismissed.

II. ARGUMENT

A. The Facts As Plead Do Not Establish A Cognizable Claim.

Complainant argues that to survive a motion to dismiss, it "need not provide evidence or prove the sufficiency of its claims in its statement of claims." (Compl. Br. at 4.)[1] Rather, according to Complainant, all it needs to do is include "a statement which clearly explains the facts which constitute the basis of the complaint, and a statement of the relief sought." (*Id.*, *quoting* O.A.C. 4901-9-01(A).) Because the Complaint alleges the factual basis for the claim and includes a prayer for relief, Complainant argues that it must survive a dispositive motion.

The issue isn't whether Complainant has *alleged* a claim or properly commenced a complaint proceeding. The issue is whether the claim alleged states reasonable grounds for complaint. If Complainant's standard were the correct one, no complaint could ever be dismissed. Any complaint that included a fact statement and prayer for relief would automatically proceed to hearing. This obviously is not the correct standard.

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[1]Ironically, much of the remainder of Complainant's brief attempts to do just that. Complainant recites three pages of "facts" and includes an affidavit filed in a different case to attempt to show that its claims have merit. None of this information goes to the issue of whether Respondents owed Complainant any legal duty. The affiant, Mr. Forte, does not say anything to establish a relationship between Complainant and any FirstEnergy company. Nor does he purport to have personal knowledge of anything having to do with Respondent's electrical system. Rather, he submitted the affidavit based on matters observed on Con Ed's system. (Affidavit ¶ 6.) The sum and substance of the affidavit is that Con Ed did not do anything to cause the August 14, 2003 outage. The affidavit does not affirmatively state that Respondents caused the outage. The statements about Respondents that Complainant seeks to attribute to Mr. Forte are not even Mr. Forte's own words; they are quotes from the Task Force Report. And the Task Force Report, contrary to Complainant's gross misrepresentation, doesn't say that FirstEnergy was "grossly negligent" or "reckless." Those are Complainant's conclusions, and Complainant's alone. Respondents suspect that it would come as a great surprise to Mr. Forte to learn that an affidavit he prepared in defense of a lawsuit against his company is now being used by an unrelated party in an unrelated case. The affidavit is completely irrelevant to any issue of whether Respondents owed Complainant a legal duty. It should be stricken from the record.

Filing a complaint does not automatically trigger a hearing under R.C. 4905.26. "'Reasonable grounds for complaint' must exist before the Public Utilities Commission, either upon its own initiative or upon the complaint of another party, can order a hearing, pursuant to R.C. 4905.26 . . . ." *Ohio Utilities Co. v. Public Util. Comm'n* (1979), 58 Ohio St.2d 153, syllabus ¶ 2. To state reasonable grounds, the complaint must allege facts that, if true, raise a cognizable claim of inadequate service. If the facts alleged, even assuming they are true, do not set forth a cognizable claim, the complaint must be dismissed. *E.g., Lucas Cty. Comm'nrs v. Public Util. Comm'n* (1997), 80 Ohio St. 3d 344, 347 (affirming Commission's dismissal of complaint for failure to state reasonable grounds).

The Complaint alleges that Complainant is a customer of Con Edison. (Complaint ¶ 3.) Complainant alleges that its store was looted during the August 14, 2003 outage. (*Id.* ¶ 33.) No direct relationship between Complainant and Respondents is alleged, none can be inferred, and Complainant admits in its brief that none exists. These facts preclude any finding that the Complaint states reasonable grounds to proceed to hearing. As discussed below, Respondents owed no duty Complainant. Where there is no duty, there can be no claim to present at hearing.

B. Any Common Law Duties That Respondents Allegedly Owe Are Irrelevant To A Determination Of Adequacy Of Service And, In Any Event, Do Not Establish A Duty Here.

Complainant devotes a substantial portion of its brief to a discussion of common law tort duties that Respondents allegedly owe to Complainant and others. This, of course, is not a tort case. The Complaint arises from an alleged failure to render service. An electric utility does not have a common law duty to render service. The duty is purely statutory. *McGee v. East Ohio Gas Co.* (S.D. Ohio 2002), 2002 WL 484480, at *8 (attached as Exhibit A)("While it may be true that, at some point in history, the duty to serve was a common law duty, Title 49 appears to have superseded the common law.") Thus, any claim predicated on a failure to render service

necessarily arises from R.C. 4905.22, not common law. This is true regardless of whether the claim is pled as a tort, breach of contract, or something else. *E.g., Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St. 3d 147, 153 (allegations of tort and breach of contract insufficient to circumvent Commission's exclusive jurisdiction). Filing a claim at the Commission and calling it "negligence" does not alleviate the need for a complainant to show that Title 49, Commission rules and orders or a tariff provision imposed a duty on the utility to do or not do something in relation to the complainant. Notably, the statutes and administrative code provisions that give rise to a duty to render adequate service to "customer/consumer" are not mentioned anywhere in Complainant's brief. The reason, of course, is because Complainant isn't one.

Complainant is obligated to plead its claim in the context of a duty owed under Title 49, Commission regulations or a tariff. Complainant ignores this obligation as if it doesn't exist, arguing instead that its complaint is legally sufficient in the context of principles of common law. But for this complaint to survive a motion to dismiss, Complainant must do more than simply allege that Respondents "have a duty to refrain from committing reckless and wanton acts," (Compl. Br. at 5) "a duty to maintain the safety of their lines" (*id.* at 6) and "a duty to exercise the highest degree of care consistent with the practical operation of its business." (*Id.* at 8.) Complainant must tie such allegations to those *to whom* such duties are owed and under what circumstances, something it admittedly cannot do.

Importantly, the outage cases cited in Respondents' motion were common law negligence cases in which plaintiffs there attempted similar tactics to save legally improper claims. *E.g., Milliken & Co. v. Consolidated Edison Co.* (1994), 84 N.Y.2d 469, 644 N.E.2d 268, 619 N.Y.S.2d 686; *Strauss v. Belle Realty Co.* (1985), 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d

555; *Goldstein v. Consolidated Edison Co.* (App. Div. 1st Dept. 1986), 115 A.D.2d 34, 499 N.Y.S.2d 47; *Longo v. New York City Educ. Constr. Fund* (App. Div. 1st Dept. 1985), 114 A.D.2d 304, 493 N.Y.S.2d 561. These courts concluded that a utility's liability for a large-scale power outage is limited to the utility's customers. The rationale for limiting liability has as much to do with public policy as it does logic. *Straus*, 65 N.Y.2d at 402, 482 N.E.2d at 36, 492 N.Y.S.2d at 557 ("In fixing the bounds of that duty, not only logic and science, but policy play an important role."). From a purely logical perspective, an outage can have an infinite number of both foreseeable and unforeseen consequences. It is precisely *because* of the logical consequences of a large scale outage that courts invoke public policy to limit liability to a controllable degree. "[I]n the case of a blackout of a metropolis of several million residents and visitors, each in some manner necessarily affected by a 25-hour power failure, liability for injuries in a building's common areas should, as a matter of public policy, be limited by the contractual relationship." *Id.* at 401, 482 N.E.2d at 35, 492 N.Y.S.2d at 556. Courts have wisely concluded that the degree of liability (where there are grounds for liability) should extend to customers but no farther. "To conclude otherwise would expand the field of obligation of a public utility beyond reasonable limits and impose a crushing burden." *White v. Southern California Edison Co.* (2d Dist. 1994), 25 Cal. App. 4th 442, 448, 30 Cal. Rptr. 2d 431, 435-36, *citing Lowenschuss v. Southern Cal. Gas Co.* (1992), 11 Cal. App. 4th 496, 499-50, 14 Cal. Rptr. 2d 59. To allow claims by non-customers would require utilities to increase rates for customers, who would receive no corresponding benefit. Utilities would essentially become insurers for non-customers, with customers picking up the tab.

Complainant makes no effort at all to dispute or distinguish the rationale or public policy considerations underlying *Strauss* and its progeny. Instead, Complainant cites a number of cases

that discuss tort duties that can arise from various relationships and circumstances that have nothing to do with the duties of utilities to non-customers. *Hawkins v. Ivy* (1977), 50 Ohio St. 2d 114, involved the duties of motorists to take precautions to prevent harm to other motorists. The case had nothing to do with duties owed by public utilities. The case of *Berjian v. Ohio Bell Tel. Co.* (1978), 54 Ohio St. 2d 147, nominally involved a public utility, but not with respect to utility service. The issue in that case was whether the telephone company could enforce a liability limitation in an advertising agreement for a Yellow Pages ad. The court held that it could and, coincidentally, found that the phone company did *not* act willfully or wantonly by bungling a customer's ad. And the parties in that case, unlike here, had privity of contract. *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347, and *Brauning v. Cincinnati Gas & Elec. Co.* (Hamilton Cty. 1989), 54 Ohio App. 3d 38, both involved the duty of utilities to prevent physical harm to persons and not, as alleged in this case, purely economic harm caused by looting that occurred during a service outage. *Mitchell Motor Parts, Inc. v. Erie Ins. Group* (Franklin Cty. 1999), 1999 WL 1267352, involved property damage caused by allegedly faulty wiring by a municipal electric company, but the plaintiff in that case – unlike the case here – was a customer. The *Mitchell* court affirmed a directed verdict for the city utility.

Thus, although Complainant calls attention to certain duties that Respondents may have in certain contexts, it has failed to identify any duty owed in the context that is relevant to this case. Where a utility is alleged to have caused a large-scale power outage, the utility's liability for property damage or personal injury, to the extent there are grounds for such liability, is limited to customers and, by necessity, to its service territory. Non-customers cannot bring a claim. The law in this regard should be considered settled.

C. Complainant's Allegations Of Gross Negligence And Wantonness Do Not Distinguish Its Claims From The Authorities Cited In Respondents' Motion.

In attempting to distinguish the authorities cited in Respondents' motion, Complainant makes the only argument that it can: that most of the cases were decided by New York courts. Complainant makes no attempt to dispute the reasoning underlying the majority of these cases or to explain why Ohio courts should or would reach different results under similar facts. Ohio courts, in fact, have looked to the same rationale that underpins the New York outage cases to conclude that the duty to serve extends only to customers. *Gin v. Yachanin* (Cuyahoga Cty. 1991), 75 Ohio App. 3d; *Galloway v. Ohio Power Co.* (Licking Cty. 1985), 1985 WL 4181.

Rather than distinguish Respondents' authorities, Complainant uses terms like "gross negligence" and "wanton" as if they were talismanic phrases that preclude a court or the Commission from dismissing a complaint. While these terms may add extra drama to Complainant's allegations, substantively they mean nothing. Unless a utility owes a duty to a person affected by an outage, it makes no difference whether the cause of the outage was "careless," "negligent," "wanton," "malicious," or anything else that Complainant wants to call it. The cases that Complainant cites do not hold otherwise.

Indeed, Complainant's attempts to show that allegations of "gross negligence" or "wantonness" actually mean something are totally misleading. Complainant attempts to distinguish *Armstrong v. City of New York* (N.Y. Sup. 2005), 2005 WL 742432, by saying that the reason the court dismissed the plaintiffs' claims was because they failed to allege that Con Edison was grossly negligent. (Compl. Br. at 9.) That is not true. The court specifically *declined* to rule on the issue of whether Con Edison's tariff, which provided for liability only in the event of gross negligence, was valid. (*Id.* at *3.) Not only did the court decline to rule on that issue, it never even discussed it. The reason it didn't discuss it is because it didn't have to.

The plaintiffs failed to meet the threshold burden of establishing that Con Edison owed a duty to them because the plaintiff's were not customers. *Id.* at *2.

Respondents would point out that yet another New York court has recently dismissed claims arising from the August 14, 2003 outage that were brought by non-customers. In *Ruth v. FirstEnergy* (Sup. Ct., N.Y. Cty., Sept. 23, 2005) (attached as Exhibit B), a group of restaurant owners in the New York metropolitan area sued FirstEnergy and various subsidiaries for damages allegedly sustained during the outage. There, as here, the plaintiffs alleged "gross negligence," among other claims. *Id.* at 3. None of the plaintiffs were customers of any FirstEnergy company. Citing *Strauss* and subsequent cases, the court held that the FirstEnergy companies owed no duty to plaintiffs, and dismissed the complaint. The court found the public policy rationale stated in *Strauss* "even more compelling in this attenuated situation. To extend a duty to non-customers in these circumstances would result in exposing the utility to liability 'to every tenant in every one of the countless skyscrapers comprising the urban skyline . . .'." *Id.* at 7, *quoting Milliken & Co. v. Consolidated Edison Co.*[2]

Finally, Complainant argues that *Gin* and *Galloway* cases are distinguishable because neither alleged that the utility acted grossly negligent or wantonly, and "in both cases, plaintiffs alleged that the power companies breached their contractual duties." (Compl. Br. at 9.)[3] Neither case was decided on the basis of whether the plaintiff alleged gross negligence. Nor was either plaintiff's case based on breach of contract. Instead, consistent with the authorities from New

[2] Notably, the *Ruth* court also rejected the argument that the court should defer ruling on the dismissal motion until the plaintiffs had the opportunity to conduct discovery. *Id.* at 4. Complainant appears to make the same argument here, stating that it has "stated a valid claim which will be proven through discovery . . . ." (Compl. Br. at 3, 4.) No amount of discovery will change the fact that Complainant is not now, and has never been, Respondents' customer.

[3] The Complaint here essentially claims the same thing. Paragraph 56 alleges that "ATSI failed to transmit power through lines to Consolidated Edison who in turn failed to transmit power to Complainant thereby damaging Complainant." In other words, Complainant appears to allege that ATSI had a contractual duty to serve Con Edison (which it did not), and that the breach of that duty damaged Complainant.

York and elsewhere, the Ohio courts held that an electric utility's contractual duty to furnish service to customers is insufficient to establish a duty to non-customers where the utility fails to render service. *Gin*, 75 Ohio App. 3d at 805; *Galloway*, 1985 WL 4181 at *2. When a utility fails to deliver adequate service, customers may have a cause of action, but non-customers do not. This proposition is directly controlling here and requires dismissal of the Complaint.

D. FirstEnergy Corp. Is Not A "Public Utility."

Complainant argues that FirstEnergy Corp. is a "public utility" because it meets the definition of "electric light company" under R.C. 4905.03. But FirstEnergy doesn't do any of the things that make an entity an "electric light company" under the statute. FirstEnergy does not "supply electricity for light, heat or power purposes to consumers within this state," and it does not "supply electric transmission service for electricity delivered to consumers in this state . . . ." These functions are performed by FirstEnergy's operating companies and by ATSI, respectively. FirstEnergy itself is a holding company, not a "public utility."

Arguing otherwise, Complainant says that because certain Commission news releases refer to "FirstEnergy" in describing the operating companies' rate stabilization plans and competitive bidding plans, FirstEnergy cannot claim that it is exempt from the Commission's jurisdiction. The dockets in the rate stabilization case and competitive bid case reflect that the operating companies are the parties to those proceedings, not FirstEnergy Corp. As a holding company, FirstEnergy Corp. is the parent of FirstEnergy Service Company, which provides shared services to the operating companies owned by FirstEnergy Corp. and thus frequently files papers at the Commission *on behalf of* the operating companies. The Commission's reference to "FirstEnergy" is simply a short-hand way of referring collectively to the entire FirstEnergy organization through a tradename.

Regardless, any jurisdiction the Commission has over FirstEnergy Corp. is limited to the company's status as a "holding company." *See* R.C. 4905.05. The fact that the Commission has supervisory jurisdiction over holding companies does not render a holding company a "public utility," or otherwise subject the holding company to statutes and regulations applicable to public utilities.

III. CONCLUSION

Complainant has not established that Respondents owed it any legal duty that could have been breached as a result of the August 14, 2003 outage. For the reasons set forth in Respondents' motion and reiterated here, there is no reasonable grounds for complaint. Accordingly, the Complaint should be dismissed.

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 was sent by ordinary U.S. mail Edward F. Siegel, 5910 Landerbrook Drive, #200, Cleveland, Ohio 44124 this 5th day of October, 2005.

An Attorney for Respondents

Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Eastern Division.

Linda MCGEE, Plaintiff,

v.

EAST OHIO GAS COMPANY, Defendant.

No. 99-CV-813.

March 26, 2002.

OPINION AND ORDER

MARBLEY, District J.

I. INTRODUCTION

***1** This matter is before the Court on the Defendant's Motion for Summary Judgment. On May 31, 2001, the Defendant, East Ohio Gas Company, filed a motion for summary judgment on the Plaintiff's claims brought under the Equal Credit Opportunity Act, 15 U.S.C. § 1691, and Ohio Revised Code § 4112.021. East Ohio also moves for dismissal of the Plaintiff's claim of breach of a public utility's duty to serve for lack of subject matter jurisdiction.

For the following reasons, the Court DENIES the Defendant's Motion in part and GRANTS the Defendant's Motion in part.

II. FACTS [FN1]

FN1. The following facts are taken primarily from this Court's September 6, 2000 Opinion and Order, granting in part and denying in part the Defendant's motion for partial summary judgment, and granting in part and denying in part the Defendant's motion for partial dismissal.

Joseph McGee, the Plaintiff's husband, requested and received gas service at 355 Guilford Avenue in Wooster, Ohio for a period ending in March 1993. Mr. McGee owed the Defendant, East Ohio Gas Company ("East Ohio"), $314.98 when he discontinued his service.

The Plaintiff, Linda McGee, requested and received service at 447 1/2 Spink Road in Wooster, Ohio between May and December of 1997. When she discontinued her gas service, Ms. McGee owed East Ohio $206.18, which remains unpaid. From June 30, 1998, to July 1, 1999, Joseph and Linda McGee received gas service at 283 East Wood in Shreve, Ohio. When service was discontinued, Joseph McGee owed $108.99 to East Ohio on this account. [FN2]

FN2. It is not clear whose name was on the account at this address. East Ohio implies that it was a joint account, while the Ms. McGee states it was in her husband's name. As this matter is before the Court on the Defendant's Motion for Summary Judgment, the facts will be viewed a light most favorable to Ms. McGee, the nonmovant.

In July 1999, Linda and Joseph McGee moved into a home at 114 1/2 Maple Avenue. Linda McGee requested gas service for the new residence. An East Ohio representative, Clarence "Rich" Kuhn, came to the home to install a meter, and Mr. McGee opened the door and let him into the house. While he was at the residence, Mr. Kuhn informed Mr. McGee that both the furnace and the water heater should be taken apart and cleaned. Mr. McGee then signed a combined application for service and work order as the "customer." Recognizing Mr. McGee as someone who owed a past due bill to East Ohio, Mr. Kuhn contacted East Ohio's credit department in Marietta, Ohio, under the belief that Joseph McGee was living at 114 1/2 Maple Avenue. Mr. Kuhn discovered that Mr. McGee had an arrearage of $314.98 from the Guilford Avenue account. Mr. McGee's account balance from Guilford Avenue was transferred to the Maple Avenue account.

Payment of $314.98, the past due amount for the Guilford Avenue account, was received on February 7, 2000 by a collection agency for East Ohio. East Ohio received the payment on March 10, 2000 and immediately credited the Maple Avenue account.

On March 14, 2000, Ms. McGee filed an Amended Complaint with this Court, on behalf of herself and others similarly situated, as a "credit-worthy married woman," alleging the following: (1) that the Defendant violated her rights under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 ("ECOA"), through conduct that has the purpose or effect of discrimination on the basis of sex and/or marital status; (2) that the Defendant violated her rights under Ohio Revised Code § 4112.021, through conduct that has the purpose or effect of discrimination on the basis of her sex and/or marital status; and (3) that the Defendant breached its duty as a public utility to serve. [FN3] The Plaintiff seeks equitable and legal relief. Pursuant to this Court's May 23, 2001 Opinion and Order granting in part and denying in part the Plaintiff's Motion for Class Certification, the Plaintiff's claims seeking equitable

relief are being pursued as a class action.

> FN3. The Plaintiff also alleged a violation of the Ohio Corrupt Practices Act, but that claim was dismissed pursuant to this Court's September 6, 2000 Opinion and Order.

***2** On September 6, 2000, this Court issued an Opinion and Order, granting in part and denying in part the Defendant's motion for summary judgment. This matter is now before the Court on the Defendant's second Motion for Summary Judgment on the Plaintiff's state and federal claims of discrimination, and the Defendant's Motion to Dismiss the Plaintiff's claim for breach of a public utility's duty to serve. Through the pending motion, the Defendant requests that this Court revisit the issues that were addressed by its September 6, 2000 Order, based on an expanded record, including the deposition of Linda McGee, the deposition of Mr. Kuhn, and affidavits from East Ohio employees Juanita Watkins and Gary Pitt.

III. STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the non-moving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.,* 12 F.3d 1382, 1388-89 (6th Cir.1993). The non-moving party must then present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.,* 8 F.3d 335, 340 (6th Cir.1993) (citation omitted). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (finding summary judgment appropriate when the evidence could not lead a trier of fact to find for the non-moving party).

In evaluating a motion for summary judgment the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970). In responding to a motion for summary judgment, however, the non-moving party "may not rest upon its mere allegations ... but ... must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *see Celotex,* 477 U.S. at 324; *Searcy v. City of Dayton,* 38 F.3d 282, 286 (6th Cir.1994). Furthermore, the existence of a mere scintilla of evidence in support of the non-moving party's position will not be sufficient; there must be evidence on which the jury could reasonably find for the non-moving party. *Anderson,* 477 U.S. at 251; *see Copeland v. Machulis,* 57 F.3d 476, 479 (6th Cir.1995).

B. Rule 12(b)(1)

***3** In addition to seeking summary judgment on the Plaintiff's claims of discrimination, East Ohio seeks dismissal of the Plaintiff's claim for breach of duty to serve for lack of subject matter jurisdiction.

"[W]here subject matter jurisdiction is challenged under Rule 12(b)(1), ... the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Rogers v. Stratton Indus.,* 798 F.2d 913, 915 (6th Cir.1986). In the context of a Rule 12(b)(1) motion, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding,* 467 U.S. 69, 73 (1984). A Rule 12(b)(1) motion to dismiss will be granted only if, taking as true all facts alleged by the plaintiff, the court is without subject matter jurisdiction to hear the claim.

C. Motion for Reconsideration

The Defendant's Motion for Summary Judgment essentially amounts to a motion for reconsideration of this Court's September 6, 2000 Opinion and Order. That is, the Defendant again seeks summary judgment and dismissal on the same claims on which he previously sought and was denied summary judgment and dismissal.

Generally, a motion for reconsideration should be granted if the moving party demonstrates: (1) an intervening change in the law; (2) newly discovered evidence that was not previously available to the parties; or (3) a need to correct a clear error or prevent manifest injustice. *Gencorp, Inc. v. Am. Int'l Underwriters,* 178 F.3d 804, 834 (6th Cir.1999). As to the claims of discrimination, the Defendant bases its motion on the second of these three grounds. Specifically, East Ohio asserts that its motion for summary judgment should now be granted based on an

expanded record developed during the course of discovery in this case. Thus, summary judgment will be proper if, in light of the new facts that are now known to the Defendant, the Court would have issued a contrary ruling in its September 6, 2000 Opinion and Order. As to the claim for breach of a public utility's duty to serve, East Ohio bases its motion on the need to correct a clear error or to prevent manifest injustice resulting from this Court's prior ruling.

IV. ANALYSIS

A. ECOA and Ohio Rev.Code § 4112.021

The Defendant asserts that, based on newly discovered facts, it is entitled to summary judgment on both the federal and state claims of discrimination based on marital status.

As the Court stated in its September 6, 2000 Order, the legal analysis of an ECOA claim tracks the *McDonnell Douglas* legal burden-shifting analysis applicable to a Title VII claim. *Lewis v. ABC Bus. Serv.*, 135 F.3d 389, 406 (6th Cir.1998); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). [FN4] Accordingly, the plaintiff has the initial burden to establish a *prima facie* case of discrimination based on marital status. The burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action that is the subject of the complaint. Finally, the burden shifts back to the plaintiff to offer evidence that the defendant's articulated reason was in reality a pretext for discrimination. *See Johnson v. United States Dep't of Health and Human Servs.*, 30 F.3d 45, 47 (6th Cir.1994) (setting forth the burden-shifting framework for a Title VII case). Therefore, summary judgment for the Defendant is appropriate either if the Plaintiff has failed to demonstrate a *prima facie* case of discrimination or if there is no genuine issue of material fact as to the Defendant's legitimate, non-discriminatory reason for taking the disputed action. *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir.1992). East Ohio asserts that summary judgment is appropriate both because the Plaintiff cannot prove that East Ohio had a pattern, policy, or practice of discrimination as part of her *prima facie* case, and because there is no genuine issue of material fact as to its legitimate, non-discriminatory reason for transferring Mr. McGee's $314.98 arrearage from his Guilford Avenue account to the account at 114 1/2 Maple Avenue.

FN4. The *McDonnell Douglas* burden shifting analysis also applies to claims brought pursuant to Ohio Rev.Code § 4112. *Mitchell v. Toledo Hospital*, 964 F.2d 577, 582 (6th Cir.1992) (citation omitted).

1. Ms. McGee's Prima Facie Case

***4** To establish a *prima facie* case of disparate impact, the plaintiff must: (1) identify a specific policy used by the defendant; and (2) show through statistical evidence that the policy caused an adverse effect on a protected group. *Kovacevich v. Kent State University*, 224 F.3d 806, 830 (6th Cir.2000) (citing *Scales v. J.C. Bradford and Co.*, 925 F.2d 901, 908 (6th Cir.1991)). The Plaintiff also must demonstrate a systemwide practice of intentional discrimination to prove a class claim of disparate treatment. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (stating that class plaintiffs in a disparate treatment case must demonstrate that discrimination is the employer's "standard operating procedure"). Therefore, to set forth a *prima facie* case, Ms. McGee must demonstrate that East Ohio maintains a pattern, practice, or policy that has either the purpose or effect of discrimination based on sex and/or marital status.

East Ohio asserts that Ms. McGee cannot establish a *prima facie* of discrimination because the undisputed record establishes that East Ohio has no pattern, practice, or policy of transferring account balances between account applicants and former account holders. East Ohio bases this claim on the affidavit of Juanita Watkins, an East Ohio employee, which states: "East Ohio does not have a 'policy' of transferring debts previously owed by non-applicants to the accounts of applicants. East Ohio does not have a policy, in writing or in practice, of routinely transferring a past due balance of one spouse to the individual account of the other spouse." East Ohio contends that the only policy it has in place regarding the transfer of past due account balances is its policy, consistent with Ohio law, to transfer account balances of former customers to current account holders if the former customer continues to reside at the address that has the past due account. *See* OHIO REV. CODE § 4933.12(B) ("The company shall not refuse to furnish gas on account of arrearages due it for gas furnished to persons formerly receiving services at the premises as customers of the company, provided the former customers are not continuing to reside at such premises.").

The Court finds, first, that Ms. Watkins' affidavit is insufficient to support a motion for summary judgment on the theory that the Plaintiff cannot prove a *prima facie* case of discrimination. The affidavit is insufficient particularly in light of the fact that East

Ohio may have a practice or "standard operating procedure" of transferring the debts of former customers to the current, individual accounts of their spouses, even if it has no "policy" as such. In addition, while Ms. Watkins has given a sworn statement that East Ohio has no policy of transferring the debts of former customers to the current accounts of their spouses, Ms. McGee has sworn that she and others like her were subject to those very practices. Thus, this issue--an issue of credibility--must be resolved by a trier of fact, who can evaluate each witness' credibility.

*5 Second, the Plaintiff has presented additional evidence that East Ohio, in fact, engaged in a practice of transferring the debts of non-applicants to the individual accounts of their spouses. Indeed, Mr. Kuhn testified as much in his deposition. [FN5] He also testified that, when an individual applied for an account, it was customary to ask the name and social security number of the applicant's spouse, and then to pass along that information for a determination of whether the spouse owed a debt to East Ohio. While the Court recognizes that, under certain circumstances, East Ohio is permitted to ask its customers questions about their marital status, that fact does not destroy the Plaintiff's claim of discrimination. To the contrary, the key issue here is not whether it was illegal to ask the questions about the applicant's spouse, but whether the actions that followed as a result of those questions (i.e. the consolidation of a non-applicant's debt with his spouse's individual account), constituted discrimination in violation state and federal statutes. The fact that East Ohio may have asked applicants questions about their marital status, which may or may not have been legal, merely demonstrates how East Ohio obtained the information to accomplish the arguably illegal transfer.

> FN5. Specifically, pages 54-55 of Mr. Kuhn's deposition read, in relevant part:
> Q: To your knowledge, were you ... doing anything contrary to company policy in putting Mr. McGee's bill on to Miss McGee's bill at that time when the connection was made? A: No.
> Q: As a collector, in fact, was it your job to identify people like that and to make those transfers so those bills could be collected?
> A: Yes.

Despite the evidence set forth by East Ohio, including the new information contained in Ms. Watkins' affidavit, there remains a genuine issue of material fact as to whether East Ohio had a policy or practice of discrimination in violation of ECOA, 15 U.S.C. § 1691 , and Ohio Rev.Code § 4112. Therefore, the Court DENIES the Defendant's Motion for Summary Judgment on the theory that the Plaintiff cannot prove a *prima facie* case of discrimination.

2. East Ohio's Legitimate, Non-Discriminatory Reason
East Ohio asserts that, even if the Plaintiff can present a *prima facie* case, the undisputed evidence demonstrates that the company had a legitimate, non-discriminatory reason for transferring Mr. McGee's $314.98 arrearage from his Guilford Avenue account to the account at 114 1/2 Maple Avenue. East Ohio relies on the depositions of Mr. Kuhn and Ms. McGee, both taken after this Court's September 6, 2000 Opinion and Order was issued, to support its claim of a legitimate, non-discriminatory reason for its action. Specifically, in Mr. Kuhn's deposition, he stated that Ms. McGee's marriage to Mr. McGee had no influence on his decision to contact East Ohio's credit department regarding Mr. McGee's past due balance. Rather, he contacted the credit department and had the arrearage transferred to the Maple Avenue account based on his mistaken belief that East Ohio permitted transfers of a past due bill incurred when a former customer was living at another address, to the account of the address where that former customer is currently living. East Ohio contends that the explanation set forth by Mr. Kuhn is supported by the fact that, during Ms. McGee's deposition, she testified that when Mr. Kuhn took her application for an account, he did not ask her for her husband's social security number, did not perform a credit check on her husband, and did not mention her husband in any way. Thus, East Ohio asserts that Mr. McGee's arrearage was transferred only because Mr. Kuhn misunderstood East Ohio's actual transfer policy.

*6 In further support of its motion, East Ohio relies on cases from other jurisdictions in which courts granted summary judgment to a creditor in an ECOA action where the creditor provided a non-discriminatory reason for its action. *See Riggs Nat'l Bank v. Linch,* 36 F.3d 370, 374 (4th Cir.1994) (upholding the district court's grant of summary judgment in favor of the lender where the lender required a spouse to co-sign because many of the assets upon which the applicant relied to prove creditworthiness were jointly held with the spouse); *Harbaugh v. Continental Ill. Nat'l Bank and Trust Co.,* 615 F.2d 1169, 1170 (7th Cir.1980) (affirming summary judgment for the creditor bank when the applicant's credit card was issued in her husband's name only because the applicant had completed her application as "Mrs. John Harbaugh," and the bank had a policy of removing the courtesy title upon processing, thus issuing the credit card to "John Harbaugh").

The Court finds that there remains a genuine issue of material fact regarding East Ohio's legitimate, non-discriminatory reason for its transfer of Mr. McGee's debt to Ms. McGee's account. First, the fact that Mr. Kuhn testified in his deposition that the debt was transferred only because of his mistaken understanding of East Ohio's transfer policy is insufficient to defeat the Plaintiff's dispute of this fact. This is a credibility issue. The trier of fact could simply disbelieve Mr. Kuhn's explanation, and find instead that he was acting pursuant to East Ohio's policy. Second, even if Mr. Kuhn was honestly mistaken in his understanding East Ohio's transfer policy, that mistake may nonetheless be considered to be probative evidence of East Ohio's actual practices of transferring debts of former customers in a way that has an adverse impact on married people. Both the issues of whether Mr. Kuhn made an actual, honest mistake regarding East Ohio's policy, and whether, if such a mistake was made, his mistaken belief was premised on East Ohio's actual transfer practices, are tied to the credibility of numerous East Ohio employees. Such issues are best resolved by a jury at trial, rather than by this Court upon a motion for summary judgment.

Third, the cases relied on by the Defendant in support of its motion are distinguishable from this case. In those cases, the account-holder's marital status came into play because of some legitimate, non-discriminatory policy. Here, however, the alleged legitimate, non-discriminatory basis for the action was a mistake. Both in *Linch* and in *Harbough*, it was logical for the courts to grant summary judgment to the defendants, as the plaintiffs had no way of disproving the existence of the policies that came into play. Here, however, the Plaintiff may disprove Mr. Kuhn's alleged legitimate, non-discriminatory reason for making the transfer either by challenging his credibility, or by presenting direct evidence of East Ohio's actual transfer policies or practices.

*7 The Court cannot conclude, as a matter of law, that Mr. McGee's arrearage was transferred to Mrs. McGee's account based on a legitimate, non-discriminatory reason. Therefore, the Court DENIES the Defendant's Motion for Summary Judgment on the Plaintiff's claims of discrimination on the basis of marital status, brought under the ECOA, 15 U.S.C. § 1691, and Ohio Rev.Code § 4112.021.

B. "Breach of Duty to Serve" Claim--Subject Matter Jurisdiction

Pursuant to Ohio Rev.Code § 4905.26, Ohio's Public Utility Commission ("PUCO") has jurisdiction to hear certain claims brought against public utilities. Specifically, the statute provides that PUCO has jurisdiction over claims that:

> any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, ... is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential ....

OHIO REV. CODE § 4905.26. "Where PUCO does have jurisdiction as provided by the statute, that jurisdiction is exclusive and reviewable only by the Supreme Court [of Ohio]." *Gayheart v. Dayton Power & Light Co.*, 648 N.E.2d 72, 76 (Ohio Ct.App.1994) (citing *State ex rel. N. Ohio Tel. Co. v. Winter*, 260 N.E.2d 827 (1970)). PUCO's jurisdiction, however, does not extend to every claim brought against a public utility. Specifically, PUCO does not have exclusive jurisdiction over contract and pure common law tort claims brought against public utilities. *Id.* (citations omitted).

In its September 6, 2000 Opinion and Order, this Court found that, because the Plaintiff brought her claims under Ohio Rev.Code § 4112, rather than Ohio Rev.Code § 4905, the Court had jurisdiction over the Plaintiff's breach of duty to serve claim. *McGee v. East Ohio Gas Co.*, 111 F.Supp.2d 979, 985 (S.D.Ohio 2000). East Ohio now argues that this Court's prior finding constitutes a clear error of law because the duty of a public utility to serve, and a breach thereof, arises directly from Ohio Rev.Code § 4905, and PUCO has exclusive jurisdiction over the claim pursuant to the above statutory provision. *See* OHIO REV. CODE § 4905.22 (requiring public utilities to provide "adequate" and "reasonable" services, on "reasonable" terms); OHIO REV. CODE §§ 4905.33 and 4905.35 (prohibiting public utilities from treating similarly-situated customers differently and unduly discriminating among customers); *Westside Cellular v. Northern Ohio Cellular Tel. Co., Inc.*, 654 N.E.2d 1298, 1299-1300 (Ohio Ct.App.1995) ("By enacting statutory provisions ... forbidding discrimination among its customers ... the General Assembly has lodged exclusive jurisdiction in such matters with the commission, subject to review by the Supreme Court.") (citations omitted).

*8 Ms. McGee argues that her claim for breach of a duty to serve arises under the common law. She contends that under the common law, public utilities accept a duty to serve the public fairly, reasonably, and without discrimination, in exchange for the right to provide service. *Ohio Power Co. v. Village of Attica,* 261 N.E.2d 123, 126 (Ohio 1970); *see also Munn v. Illinois,* 94 U.S. 113, 125-27 (1876) (discussing the common law rule that when one devotes one's property to a use that is within the public interest, one "in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created"). Therefore, Ms. McGee argues that her claim neither arises under Ohio Rev.Code § 4905, nor is restricted to the jurisdiction or remedies of the PUCO as set forth therein.

Upon additional briefing, argument, and review of supplemental authorities on this issue, the Court finds that PUCO has exclusive jurisdiction over the Plaintiff's claim for breach of a duty to serve because that claim arises from Ohio Rev.Code § 4905, not from common law. While it may be true that, at some point in history, the duty to serve was a common law duty, Title 49 appears to have superseded the common law. The Court notes that, while Ms. McGee relies on *Village of Attica* in support of her claim, that reliance is misplaced. *Village of Attica* relies on *Industrial Gas v. Pub. Util. Comm'n,* 21 N.E.2d 166, 168 (Ohio 1939), for the proposition that public utilities have a duty to serve without discrimination. *Village of Attica,* 261 N.E.2d at 126. *Industrial Gas,* however, relies on Ohio Rev.Code § 614.12, the statutory predecessor to Ohio Rev.Code § 4905, as the source of the duty to serve, not the common law. *Indus. Gas,* 21 N.E.2d at 168. And with the enactment of §§ 4905.33 and 4905.35, it is clear that the legislature contemplated that PUCO would adjudicate discrimination claims with respect to public utilities.

Thus, despite the Plaintiff's assertion that the claim arises from common law, she has failed to cite any Ohio case, nor is the Court aware of any Ohio case, since Ohio's adoption of a statutory duty to serve, that has relied on the common law as the source of that duty. The Court recognizes that the fact that the Plaintiff did not explicitly rely on Title 49 does not alter its conclusion that this claim arises under that statute. *See State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas,* 727 N.E.2d 900, 905 (Ohio 2000) (enjoining a common pleas court from hearing a claim brought under Ohio Rev.Code § 1331.01 when the substance of the complaint raised issues within PUCO's exclusive jurisdiction, even though the complaint did not plead claims under Title 49); *Kazmaier Supermarket, Inc. v. Toledo Edison Co.,* 573 N.E.2d 655, 660 (Ohio 1991) (finding that the substance or "root" of the complaint, not the specific statutes cited therein, controls the determination of whether PUCO has jurisdiction).

*9 Therefore, the Court GRANTS the Defendant's Motion to Dismiss the Plaintiff's breach of a public utility's duty to serve for lack of jurisdiction.

V. CONCLUSION

Based on the foregoing analysis, the Court DENIES the Defendant's Motion for Summary Judgment as to the Plaintiff's claims under the Equal Credit Opportunity Act, 15 U.S.C. § 1691, and Ohio Rev.Code § 4112.021, and GRANTS the Defendant's Motion to Dismiss the Plaintiff's breach of public utility's duty to serve claim.

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2002 WL 484480 (S.D.Ohio)

END OF DOCUMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

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AMY RUTH INC., REMI RESTAURANT INC., LEZOCCOLE LTD., MESTRE INC., 109 EAST 56th STREET, LLC., CONSUMER FOOD SERVICES LLC D/B/A BURGER KING, FRANCHISE FOOD SERVICES INC. D/B/A BURGER KING, COASTAL GROUP MANAGEMENT D/B/A BURGER KING, PK RESTAURANT LLC, BROOKLYN FAMOUS PIZZA CORP., STARJEM RESTAURANT L.C., NO-GAR ENTERPRISES D/B/A BURGER KING, GEM FOODS OF BROOKLYN D/B/A BURGER KING, 65TH STREET FOODS D/B/A BURGER KING, FIFTH AVENUE FOODS D/B/A BURGER KING, TOP CATCH, METROSTAR CAFÉ, THE ATRIUM RESTAURANT CORP. D/B/A GIOVANNI'S ATRIUM, YOOJIN ENTERPRISES CORP. D/B/A JUJIN RESTAURANT, CARACELLO'S RESTAURANT, CHEONG & SENG CO., ACQUAPAZZA, INC., BARBETTA RESTAURANT INC., BELLINI RESTAURANT CORP., BIENVENUE RESTAURANT INC., CAFÉ DE PARIS INC., D&A RESTAURANT LIMITED D/B/A LA MIRABELLE, ELYMAR RESTAURANT CORP., D/BA CHEZ NAPOLEON, LFN RESTAURANT INC. D/B/A NANNIS, ROS RESTAURANT CORP. D/B/A CELLINI, SBM GROUP INC. D/B/A CHELSEA BISTRO AND BAR, POMPEI RISTORANTE OF WEST HEMPSTEAD INC., RALDO RESTAURANT ASSOC. D/B/A STEINWAY PASTA AND GELATI INC., AND ADF COMPANIES,

Plaintiffs,

-against-

FIRSTENERGY CORP. I/S/A FIRST ENERGY CORP.

Defendant.

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Index No. 111713/04

Part Calendar 18923

IRA GAMMERMAN, J.H.O.:

Defendant FirstEnergy Corp. (FE) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action, on the grounds that defendant is not itself an energy producing company, and that even if it were an energy provider, it would not be responsible for a break in service to non-customers, such as plaintiffs..

Plaintiffs are 34 restaurant owners, located in the metropolitan New York area, who allegedly suffered damages as a consequence of the interruption in electric service that has become known as the Blackout of August 14 and 15, 2003. The Blackout affected electric service in an area ranging from Ohio north to Ontario, Canada, east to New York, New Jersey and Massachusetts, and west to Michigan.

The North America Electric Reliability Council (NAERC) is a non-governmental entity, comprised of ten regional reliability councils, whose purpose is to insure that the bulk electric system in North America is reliable, adequate and secure. NAERC and its ten regional councils have developed systems, and operating and planning standards, for insuring the reliability of the electricity transmission grid.

According to the United States-Canada Power System Outage Task Force Interim Report: Causes of the August 14th Blackout in the United States and Canada, issued November 2003[1], the initiating events of the blackout involved FE's control area, and the failures of FE to respond to the escalating power crisis caused cascading power failures resulting in the massive Blackout. FE operates a control area in Northern Ohio, consisting of 7 electric utility operation companies.

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[1]Hereinafter this document will be referred to as the Task Force Report.

(Task Force Report p.10).[3] On August 14, 2003, FE did not respond to a series of emergencies resulting from damage to electrical lines due to trees' contact with the lines, because of a failure of its internal systems to alert FE to the problem, and service outages began to occur. Then once the outages were observed, FE failed to interact with other service providers, causing the outages to cascade and the area of disrupted service to expand to include the New York metropolitan area. The Blackout affected businesses here, crippling the plaintiffs' restaurants.

The plaintiffs brought this action to recover lost business revenue, lost inventory and punitive damages. The complaint alleges four causes of action on behalf of each plaintiff. The causes of action are: 1) breach of contract, 2) gross negligence, 3) breach of implied warranty, and 4) punitive damages.

Defendant argues that regardless of the theory of the cause of action, whether it is breach of contract, gross negligence or breach of implied warranty, the claims must be dismissed, because a utility's duty to maintain an uninterrupted supply of electricity runs only to its customers, and that the plaintiffs are not its customers, since Citing Strauss v Belle Realty Co., 65 NY2d 399 (1985) and its progeny, FE asserts that the complaint fails to allege a contractual relationship between FE, as service provider, and the plaintiffs, who have not attached any agreement to the pleading, so that there can be no basis for a duty under New York law.

Plaintiffs argue that they may be third-party beneficiaries of some contracts of defendant, as yet unknown, that will give rise to liability, under the rationale of Koch v Consolidated Edison

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[3]Plaintiff argues that defendant has not established this fact by proper proof. However, plaintiff has submitted the Task Force Report that confirms defendant's allegations.

Co. of New York, 62 NY2d 548 (1984).[3] Plaintiffs maintain that discovery is necessary to determine the existence of such contracts, and that dismissal, at this juncture, prior to discovery, would be premature.

FE counters that to come within the doctrine set forth in Koch, plaintiffs must be able to demonstrate that they were expressly designated in the contract as third-party beneficiaries. Defendant alleges that the complaint contains no allegations regarding a claim of third-party beneficiary status, nor does it allege that an express designation of third-party beneficiary status as required by Milliken & Co. v Con Ed, 84 NY2d 469 (1994). Defendant asserts that plaintiffs' opposition papers on the motion do not supply the deficiency, so that a Koch-type claim is not presented. FE contends that if plaintiffs were designated as third-party beneficiaries under an FE contract, they should know about it, and be able to cite the precise agreement that creates the duty. Defendant argues that plaintiffs inability to name the agreement would tend to negate the existence of such agreement. Further, defendant claims that discovery is no more than a fishing expedition, and that since plaintiffs have not provided sufficient facts, or even identified an agreement to support their speculative and last-minute third-party beneficiary claim, discovery is not warranted.

A review of the issue of utility liability for disruption in service yields a series of cases limiting the scope of the duty almost exclusively to contractual customers. Starting with Strauss v Belle Realty Co., 65 NY2d 399, supra, the Court of Appeals delineated the scope of the duty as to extend to only those parties who had a contractual relationship with the utility for the electrical

[3]Hereinafter all references to Consolidated Edison Company of New York will appear as Con Ed.

service. The Court, in explaining its holding limiting liability, stated that "while the absence of privity does not foreclose recognition of a duty, it is still the responsibility of courts, in fixing the orbit of duty, 'to limit the legal consequences of wrongs to a controllable degree,' and to protect against crushing exposure to liability. 'In fixing the bounds of that duty, not only logic and science, but policy plays an important role.'" Id. at 402 (citations omitted)..

Thereafter, in Longo v New York City Educ. Constr. Fund, 114 AD2d 304 (1st Dept 1985) and Goldstein v Con Ed, 115 AD2d 34 (1st Dept 1986), tenants, non-customers of the utility for the service provided who were injured on landlord's property during the 1977 blackout, were denied relief against the utility. Based upon the holding in Strauss, the Appellate Division, First Department, concluded that the utility, in those cases, Con Ed, had breached no legal duty to plaintiffs, because they had no contractual relationship with the utility to provide the disrupted service.

In Milliken & Co. v Con Ed, 84 NY2d 469 (1994), the Court of Appeals weighed in again and applied the same logic to lost profits damages suffered by garment manufacturer tenants, as the result of disruption in electric service in Manhattan's garment district four days prior to "buyers' week." The limitation was upheld even though some of the manufacturers were obligated under their respective leases to pay for electric service. The Court of Appeals has "as a general policy and approach declined to leapfrog duties, over directly juridically related parties, to noncontractually related consumers of a utility's service or product." Id. at 477.

The principles set forth in these cases apply to the instant case to fix the orbit of liability for the Blackout to only contractually-related customers of the entity responsible. While the Task Force Report indicates that FE and its operating entities may bear the burden of responsibility for

initiating the cascading outages that affected the New York area, FE has no contractual relationship with plaintiffs, who are tenants in buildings that derive their power from local providers like Con Ed, not FE. Moreover, the complaint does not allege a contractual customer relationship between FE and the plaintiffs. Indeed, the instant claim is even more attenuated than those in the cases enumerated above, because the contractual relationship is even further removed.

Plaintiffs' theory that they may be third-party beneficiaries, under some unknown contract, is speculative at best. The Court of Appeals in Koch v Con Ed, 62 NY2d 548, supra permitted the customers of the Power Authority of the State of New York (PASNY), the City of New York and certain public benefit corporations to sue Con Ed as third-party beneficiaries of the contract between Con Ed and PASNY. The Court found that special legislation required Con Ed to provide PASNY's power to the City of New York and the public benefit corporations; that the PASNY/Con Ed agreement provided "an express obligation" to operate and maintain all facilities necessary to deliver power to the particular customers at issue in that case, id. at 559; and that the plaintiffs in Koch "were precisely the consumers for whose benefit the legislation was enacted and the agreements made between PASNY and Con Ed," id.

In Milliken, the Court of Appeals made clear that for the third-party beneficiary theory to apply, there must be an express undertaking of a duty to supply electricity to the claimant on the part of the utility. Absent such express undertaking in the subject contract between the utility and another party, no third-party beneficiary rights are created. Tri-Tone Litho, Inc. v Con Ed, 230 AD2d 625 (1st Dept 1996). Here, plaintiffs have not pleaded such claim in their complaint, nor can they point to any contract under which they claim to be third-party beneficiaries, much

less point to an express designation of any particular plaintiffs, alone or as a group, in any contract by FE for the provision of power in this area. They have not set forth sufficient facts to make out a claim of third-party beneficiary status, so as to create a duty upon the part of defendant. Milliken & Co. v Con Ed, supra. If plaintiffs were third-party beneficiaries, one would expect them to know of the particular contract and to attach it to their pleading, or at the very least to provide it in their opposition papers; they have not done so.

The total failure to provide any factual support for their third-party beneficiary theory also militates against permitting discovery. James v State of New York, 90 AD2d 342 (4th Dept 1982), affd 60 NY2d 737 (1983). Plaintiffs must first show some basis for their claim before seeking discovery, not just mere speculation. Mindel v Gross, 132 AD2d 535 (2d Dept 1987).

What remains critical is that the public policy behind the rule in Strauss is even more compelling in this attenuated situation. To extend a duty to non-customers in these circumstances would result in exposing the utility to liability "to every tenant in every one of the countless skyscrapers comprising the urban skyline [and] would unwisely subject utilities to loss potentials of uncontrollable and unworkable dimensions." Milliken & Co. v Con Ed, 84 NY2d at 478. Public policy dictates against such result.

Since a duty is key to all the theories propounded in the complaint, and that duty is lacking in the first through third causes of action, those claims must be dismissed. As for the fourth cause of action, it is a claim for punitive damages, that cannot stand on its own, Harris v Camilleri, 77 AD2d 861 (2d Dept 1980). This claim, too, is subject to dismissal.

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the complaint is dismissed

in its entirety with costs to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/23/05

ENTER:

J.H.C. IRA GAMMERMAN