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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.	)	

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Respondents FirstEnergy Corp. ("FirstEnergy") and American Transmission Systems, Inc. ("ATSI"), pursuant to Rule 4901-1-12 of the Ohio Administrative Code ("O.A.C."), respectfully move to dismiss the Complaint. For the reasons that follow, this motion should be granted.

I. INTRODUCTION

Complainant is a New York corporation and a "customer of Consolidated Edison." (Complaint, ¶ 3.) Complainant alleges that as a result of a power outage at his place of business on August 14, 2003, it suffered damages because of the criminal acts of unknown third parties, who broke into and robbed Complainants' place of business during the outage. (*Id.*, ¶ 33.) The reason this matter is in front of this Commission appears to stem from the last paragraph of the Complaint, in which Complainant alleges, "Respondent ATSI failed to transmit

power through its lines to Consolidated Edison who in turn failed to transmit power to Complainant thereby damaging Complainant." (*Id.*, ¶ 56.)[1]

The Complaint is deficient in at least two fundamental respects. First, contrary to what the Complaint says, ATSI has no contractual relationship with Consolidated Edison ("Con Ed") and does not otherwise have any obligation to render transmission service to Con Ed or Con Ed's customers. Under its Commission-filed tariff, ATSI only provides transmission service in Ohio and Pennsylvania. (ATSI PUCO Tariff, attached as Exhibit A.) ATSI cannot be liable for not providing service to an entity that it did not serve and was not required to serve.

Second, even if ATSI had a duty to serve Con Ed, the alleged failure to perform that duty does not give Complainant a cause of action against ATSI. A public utility owes a duty to serve its customers. Complainant is not a customer or consumer of any service from ATSI, nor does Complainant claim to be. A non-customer, like Complainant, cannot bring a claim predicated on a public utility's alleged failure to serve its customers. *Gin v. Yachanin* (Cuyahoga Cty. 1991), 75 Ohio App.3d 802, 805 ("Courts have repeatedly held that a power and light company owes no duty to noncustomers which would be breached by its failure to provide electricity to a customer."); *see also Strauss v. Belle Realty Co.* (1985), 65 N.Y.2d 399, 401, 482 N.E.2d 34, 35, 492 N.Y.S.2d 555, 556 ("[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."); *White v. Southern California Edison Co.* (2d Dist. 1994), 25 Cal. App. 4th 442, 448, 30 Cal. Rptr. 2d 431, 435-36 ("In the absence of a contract between the utility and the consumer expressly providing for the furnishing of service for a

[1] Complainant also alleges that it "receives power through lines owned and/or operated by ATSI" (*id*) -- thus suggesting a direct relationship between Complainant and ATSI, though, as noted above, the Complaint later

specific purpose, a public utility owes no duty to a person injured as a result of an interruption of service or a failure to provide service.").

As a matter of law, ATSI owed no duty to Complainant that was breached as a result of the August 14, 2003 outage. The Complaint in this action should be dismissed.

II. ARGUMENT

A. FirstEnergy Corp. Should Be Dismissed As A Respondent.

As an initial matter, the Commission may take administrative notice that FirstEnergy is a public utility holding company. Accordingly, FirstEnergy is not a "public utility" as defined in Ohio Revised Code Section 4905.02, is not subject to Commission regulation under Section 4905.05, and does not operate "service and facilities" for the provision of electric service under Section 4905.22. FirstEnergy should therefore be dismissed.

B. ATSI Owes No Duty To Complainant Pursuant To Any Statute, Regulation Order Or Tariff.

In bringing this action, Complainant "seeks . . . a declaration that one or more of the Respondents breached its statutory obligation to furnish necessary and adequate service and facilities to Complainant . . . ." (Complaint, ¶ 2.) Ohio Revised Code Section 4905.22 requires public utilities to "furnish necessary and adequate service and facilities." The determination of what constitutes "adequate service" is made on a case-by-case basis. *Ohio Bell Tel. Co. v. Public Util. Comm'n* (1984), 14 Ohio St. 3d 49. The duty to provide adequate service under Section 4905.22 does not extend to entities that a utility never agreed to serve and has no duty to serve under its tariffs.[2]

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admits and avers otherwise.

[2] Respondents recognize, of course, the body of Commission precedent holding that Ohio Revised Code Section 4905.26 allows complaints by "any person" and is not necessarily limited to "customers." The statutory language authorizing complaints by "any person" does not dispense with the need for such "persons" to establish

As a consequence of a large-scale electrical outage that occurred in 1977 in Consolidated Edison Company's service territory in New York, a considerable body of case law has evolved in that state concerning the scope of duties owed by public utilities. These authorities establish that a public utility's duty to render adequate service extends only to customers of the utility.[3] The rationale underlying these decisions has also been adopted in Ohio.

1. Liability for damages allegedly caused by a widespread outage extends only to customers.

In *Strauss v. Belle Realty Co.* (1985), 65 N.Y.2d 399, 482 N.E.2d 34, 492 N.Y.S.2d 555, an elderly tenant fell in a darkened stairwell of an apartment building during the 1977 blackout in New York City. The tenant's landlord was the utility's customer; the tenant was not. The Court of Appeals held: "[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. Recognizing that the plaintiff may have adequately pled a claim under traditional tort principles, the Court stated that "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

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that a duty was owed to them by the responding party. In certain circumstances, a public utility may owe a duty to someone who is not a customer, provided that there is a close "nexus" between the public utility and the complaining party. *E.g., Long v. Cincinnati Bell Tel. Co.*, Case No. 02-755-TP-CSS (Entry on Rehearing of March 25, 2003), at 2-3 (reasonable grounds for complaint stated where respondent, who was responsible for assigning telephone numbers but did not have direct relationship with subscribers, changed subscribers telephone number without authorization). There is no nexus at all between Respondents and entities located entirely outside the State of Ohio that do not take any service from Respondents.

[3] These well-established authorities may explain why Complainant, a New York corporation, sued Respondents in Ohio and not its home state. Had Complainant filed suit in New York, its case would be subject to immediate dismissal. *See Armstrong v. City of New York*, 2005 WL 742432 (N.Y. Sup. 2005) (attached as Exhibit B) (dismissing claims of non-customers who sued Consolidated Edison for damages allegedly sustained as a consequence of the August 14, 2003 outage).

to liability. In fixing the bounds of that duty, not only logic and science, but policy play an important role." *Id.* at 402, 482 N.E.2d at 36, 492 N.Y.S.2d at 557 (internal quotations omitted).

Subsequent New York decisions, applying *Strauss*, have refused to recognize a duty on the part of a public utility to non-customers. In *Longo v. New York City Educ. Constr. Fund* (App. Div. 1st Dept. 1985), 114 A.D.2d 304, 493 N.Y.S.2d 561, plaintiff filed an action for personal injuries allegedly sustained when the plaintiff fell down a flight of stairs during the 1977 blackout. Judgment was entered for the plaintiff following a jury trial. The appellate court reversed, finding that Con Edison owed no duty to the plaintiff because the plaintiff was not a customer. "The decision of the court in the *Strauss* case mandates reversal of the judgment entered against Con Edison in this case and the dismissal of the complaint." *Id.* at 304, 493 N.Y.S.2d at 562.

In *Goldstein v. Consolidated Edison Co.* (App. Div. 1st Dept. 1986), 115 A.D.2d 34, 499 N.Y.S.2d 47, the plaintiffs sought damages under facts similar to *Strauss* and *Longo*. Electricity to an apartment building was supplied at a wholesale rate to a cooperative housing corporation. The corporation billed individual tenants each month for their proportionate share of electricity. *Id.* at 36, 499 N.Y.S.2d at 48. Following the 1977 blackout, one of the plaintiffs fell in a darkened stairway and was injured. *Id.* The trial court entered judgment for the plaintiff. On appeal, plaintiffs argued that their case was distinguishable from *Strauss* because, although not direct customers of Con Edison, plaintiffs were contractually obligated to pay their proportionate share of expenses, including electricity, in connection with the ownership and maintenance of the building. The appellate court disagreed. "[S]aid contract is the Goldstein's occupancy agreement with Lind-Ric [the cooperative corporation] and not an agreement with Con Ed to supply electrical service." *Id.* at 39, 499 N.Y.S.2d at 50. In reversing the judgment

against Con Edison, the court held: "[W]here, as here, the cooperative corporation and not the tenant/shareholder is the customer of Con Ed, such tenant/shareholder is not entitled to recover for the breach of Con Ed's service agreement with the cooperative corporation. As Con Ed has thus breached no legal duty to the Goldstein's, it cannot be held liable for the injury." *Id.* at 40, 499 N.Y.S.2d at 50.

More recent New York cases have continued to follow *Strauss*. In *Milliken & Co. v. Consolidated Edison Co.* (1994), 84 N.Y.2d 469, 644 N.E.2d 268, 619 N.Y.S.2d 686, commercial tenants brought suit against Con Edison and others for lost profits allegedly caused by a power outage. A water main broke and flooded the basement of a building where Con Ed maintained an electrical substation, causing a fire that disrupted electric service to Manhattan's Garment District for four days during "buyer's week." *Id.* at 475, 644 N.E.2d at 269, 619 N.Y.S.2d at 687. Over 200 business owners brought over 50 lawsuits against Con Ed, the City of New York, and other defendants. *Id.* The trial court dismissed the claims of business owners who did not have an electric service contract with Con Edison. The appellate court reinstated the plaintiffs' claims and granted leave to appeal, certifying to the New York Court of Appeals the question of "whether a regulated utility owes a duty of care, answerable in negligence, to commercial tenants who do not have service contracts with the utility, but who are obligated under their leases to reimburse their landlords for apportioned electricity costs." *Id.* at 475-76, 644 N.E.2d at 269-70, 619 N.Y.S.2d at 787-88. The Court of Appeals answered the question in the negative. "[W]e have as a general policy and approach declined to leapfrog duties, over directly juridicially related parties, to noncontractually related consumers of a utility's service or product." *Id.* at 777, 644 N.E.2d at 271, 619 N.Y.S.2d at 689 (*citing Strauss v. Belle Realty Co.*). The Court declined to extend a duty to non-customers "because it would hold regulated utilities

liable to every tenant in every one of the countless skyscrapers comprising the urban skyline. This would unwisely subject utilities to loss potentials of uncontrollable and unworkable dimensions." *Id.* at 478, 644 N.E.2d at 271, 619 N.Y.S.2d at 689 (*citing Strauss*).

Strauss and *Milliken*, in fact, have been applied to dismiss non-customer claims arising from the August 14, 2003 outage. Earlier this year, a court dismissed Consolidated Edison from a lawsuit brought by a group of clammers, who alleged that Consolidated Edison breached a duty to supply service to a water treatment plant during the outage. *Armstrong v. City of New York, Inc.*, 2005 WL 742432 (N.Y. Sup. 2005). With the water treatment plant shut down, plaintiffs alleged that the local waters became polluted and killed clams that the plaintiffs would have harvested. Because the plaintiffs "have no contractual or other direct relationship with Con Edison," the court dismissed the electric company from the lawsuit. *Id.* at *3.

2. The principles underlying the New York cases are equally applicable in Ohio.

Ohio courts, like New York, have also recognized that liability for service outages extends only to customers, not to the general public. In Ohio, this issue has arisen in the context of inoperable traffic signals. In *Gin v. Yachanin* (Cuyahoga Cty. 1991), 75 Ohio App. 3d 802, the plaintiff, a car accident victim, alleged that The Cleveland Electric Illuminating Company ("CEI") was partially at fault for the accident because a CEI crew disconnected service to a traffic signal. The plaintiff alleged that CEI had a duty to provide service to the City of Cleveland. Plaintiff claimed she was injured by CEI's alleged failure to provide that service. The court affirmed summary judgment in favor of CEI, stating that "when an electric company contracts with a city to provide the electricity for street lights and traffic signals, the electric company assumes no duty to the general public to provide such service." *Id.* at 805. This holding stems from the broader proposition that "a power and light company owes no duty to

noncustomers which would be breached by its failure to provide electricity to a customer." *Id.*[4] Under similar facts, the court in *Galloway v. Ohio Power Co.*, 1985 WL 4181 (Licking Cty. 1985) (attached as Exhibit C) also affirmed summary judgment for the electric company.

In *Gin* and in the New York cases, the utility undertook a duty to provide service to a specific, identifiable customer. As a result of the utility's failure to provide service to that customer, a third party alleged that it suffered personal injuries or economic losses. The claims seeking recovery of these damages were dismissed because a utility's duty to provide service flows only to its customers, not to third parties or the public at large. In this case, the parties stand in a similar relation as in the cases cited above. Complainant alleges that ATSI breached a duty to render service to Consolidated Edison and that Complainant suffered damages as a result. (Complaint, ¶ 56.) In other words, Complainant alleges damages not because of the breach of a duty to Complainant, but because of an alleged breach of duties purportedly owed to Consolidated Edison. The authorities are clear: ATSI's alleged breach of a duty to provide electrical service to customers does not create a cause of action for non-customers.

Indeed, the reasons for not recognizing a duty owed by ATSI to Complainant is even more compelling in this case than in any of the above-cited cases. First, ATSI, unlike Consolidated Edison, does not provide service in New York and has no relationship with end users of service in New York. Second, even though most of the cited cases involved claims for personal injury, the courts still refused to impose a duty. If a utility does not have a duty to protect non-customers against personal injuries, there is no reason why it should have a duty to

[4]The *Gin* court cited *Arenado v. Florida Power & Light Co.* (Fla. App. 1988), 523 So. 2d 628; *Shafouk Nor El Din Hamza v. Bourgeois* (La. App. 1986), 493 So. 2d 112; *East Coast Freight Lines v. Consolidated Gas, Elec. & Power Co.* (1946), 187 Md. 385, 50 A.2d 246; and *Cochran v. Public Service Elec. Co.*, 97 N.J.L. 480 (1922), 117 A. 620. Other authorities that are consistent with *Gin* and the cases it cited include *Levy v. Florida Power & Light Co.* (Fla. App. 2001), 798 So. 2d 778; *Vaughan v. Eastern Edison Co.* (1999), 48 Mass. App. Ct. 225, 227, 719 N.E.2d 520, 522; and *White v. Southern Cal. Edison Co.* (1994), 25 Cal. App. 4th 442, 450, 30 Cal. Rptr. 2d 431,

protect non-customers against purely economic damages, such as those alleged here. Third, in most of the cited cases, the courts acknowledged that the utility could be deemed the direct, proximate cause of the plaintiff's damages under ordinary negligence principles. Here, Complainant concedes that the damages he sustained are directly attributable to robbers. (Complaint, ¶ 33.) Courts have recognized that utilities should not be considered the proximate cause of looting and vandalism occurring as the result of a city-wide blackout. *See, e.g., Liplan Food Corp. v. Consolidated Edison Co.* (N.Y. Sup. 1985), 129 Misc. 2d 629, 631, 493 N.Y.S. 2d 740, 742 ("[T]he looting and vandalism that took place in plaintiff's market was not caused by the failure to supply electricity to the market premises. Rather, as indicated, it was due to the general 'blackout' condition of the streets and the City in general.").

The alternative to limiting a utility's duties to its customers would be to deem public utilities as unconditional insurers of service potentially to anyone who might ever be affected by the loss of electric service. Given that the "grid" described in the Complaint is a complex, interconnected system, this liability would be virtually limitless. The potential liability of a utility to non-customers would be reflected in rates paid by a utility's customers, and non-customers would receive the benefit without having to pay such rates. Here, for example, if found liable for a service interruption to a New York customer who pays Consolidated Edison rates, ATSI could potentially be forced to raise rates that would eventually be passed on to Ohio customers, who derive no benefit from the expansion of liability to non-customers in New York and elsewhere.

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436-37. For additional authority, *see* Annotation, *Liability of Electric Utility to Nonpatron For Interruption or Failure of Power*, 54 A.L.R.4th 667 (1987 & Supp. 2005) (collecting and discussing cases).

A public utility cannot be held accountable as an insurer to anyone and everyone remotely affected by a service outage. "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. The duty to render adequate service extends only to those whom a public utility has agreed and undertaken a duty to serve -- to customers. If the Commission were to expand this duty to non-customers, it would harm Ohio utility ratepayers, who ultimately would suffer higher rates because of the expansion of liability to entities that do not have to pay those rates. Such an expansion of liability would be particularly untenable in this case, where the immediate cause of Complainant's damages was inflicted by vandals, not the Respondents.

3. The Commission's rules support limiting a Ohio utility's duties to Ohio customers, or those receiving service in Ohio.

Specific rules and regulations of the Commission confirm that a utility's duty in this context extends only to customers or direct consumers and set forth procedures for resolving complaints by a "customer/consumer." *See e.g.*, Chapter 4901:1-10, O.A.C.

ATSI is a "transmission owner" and an "electric utility" subject to these rules. 4901:1-10-01(A)(1), 4901:1-10-02(L). ATSI's Commission-filed tariff indicates that it owns and operates facilities that provide transmission service on behalf of FirstEnergy's Ohio EDUs and Pennsylvania Power Company. Complainant is located in New York. Complainant cannot be a "customer" or "consumer" of service that ATSI doesn't provide in the state where Complainant is located.

Because Complainant is neither a customer nor consumer, Complainant cannot establish that ATSI owed any legal duty to Complainant that arises by operation of the

Commission's service rules. Any alleged "link" that ATSI had in the chain of transmission providers that wheeled power ultimately consumed by Consolidated Edison's retail customers, such as Complainant, is not sufficient to show that ATSI violated any statute, rule or Commission order enacted for Complainant's benefit. Simply put, there is no statutory, regulatory or common law requirement that establishes any duty to serve between ATSI and an out-of-state customer of another electric utility.

The Commission cannot allow a Complaint to proceed where there has been no showing that the responding party owed any duty to the Complainant pursuant to any statute, regulation, order or tariff. That being the case here, the Complaint should be dismissed.

III. CONCLUSION

Complainant admits that it is not FirstEnergy's or ATSI's customer. Therefore, neither ATSI nor FirstEnergy owed any duty to Complainant that was breached as a consequence of the August 14, 2003 outage. Recognizing a duty to non-customers "would unwisely subject utilities to loss potentials of uncontrollable and unworkable dimensions." *Milliken & Co.*, 84 N.Y.2d at 478, 644 N.E.2d at 271, 619 N.Y.S.2d at 689. The Commission should dismiss the Complaint with prejudice.

Respectfully submitted,

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
E-mail: dakutik@jonesday.com

Mark A. Whitt
JONES DAY
Street Address:
325 John H. McConnell Boulevard, Suite 600
Columbus, OH 43215-2673
Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 281-3944
Facsimile: (614) 461-4198
E-mail: mawhitt@jonesday.com

COUNSEL FOR RESPONDENTS
FIRSTENERGY CORP. AND AMERICAN
TRANSMISSION SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss and Memorandum in Support was sent by ordinary U.S. mail Edward F. Siegel, 5910 Landerbrook Drive, #200, Cleveland, Ohio 44124 this 6th day of September, 2005.

Mark A. White /pao
An Attorney for Respondents

Exhibit A

American Transmission Systems, Inc. Sheet No. 1

P.U.C.O. No. 1
ELECTRIC SERVICE

Transfer of Transmission Facilities to American Transmission Systems, Inc.

Effective September 1, 2000, American Transmission Systems, Inc. ("ATSI") shall assume full responsibility for the transmission facilities of The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company (hereinafter "the ATSI transmission system"). ATSI shall become the owner and operator of said facilities and will assume all responsibilities as transmission provider for the ATSI transmission system.

ATSI shall plan, operate, and maintain the ATSI transmission system in accordance with regional reliability council guidelines, industry standards, and applicable regulatory requirements to ensure that reliability of transmission service is maintained.

ATSI will provide transmission service under the rates, terms, and conditions of its Open Access Tariff (FERC Electric Tariff, Second Revised Volume No.1), and any service agreements executed thereunder. For purposes of its Open Access Tariff, all retail customers of The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company will be considered native load customers of ATSI.

ATSI fully succeeds to the native load obligations of The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company. Retail customers of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company whose rates are unbundled under the Ohio Customer Choice Program, shall receive the same type, firmness, and service priority of transmission service as they received as bundled retail customers.

*Filed under authority of Order No. 98-1633-EL-UNC
The Public Utilities Commission of Ohio, dated February 17, 2000

Effective for service rendered on or after September 1, 2000

Exhibit B

Slip Copy, 7 Misc.3d 1003(A), 2005 WL 742432 (N.Y.Sup.), 2005 N.Y. Slip Op. 50426(U)
Unpublished Disposition
(Cite as: 7 Misc.3d 1003(A), 2005 WL 742432 (N.Y.Sup.))

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.
Robert ARMSTRONG, Carl Basic, Patrick Basilicato, Robert Bennet, Albert Bigelow, Eugene Carragher, David, d/b/a Certified Clam Corporation, Donald Cirillo, Keith Craffey, William Dean, Bernard Deaver, John Deckert, Michael Deckert, Carlos A. Doo, Louis Egnatovich, Robert Egnatovich, Daniel Franklin, Lloyd Franson, Richard Gardner, Dennis Herbert, Billy B. Horton, James Jenks, Andrew Lubaczewski, Eric Lubaczewski, Gary Lubaczewski, Theodore Lubaczewski, Craig Mainstream, William Mount, Joseph E. Mulvaney, Gerald J. Nielsen, John O'Brien, Frank E. Pearce, Sr., James Pearce, Wayne Richmond, Paul Ritter, William Rossetti, Robert Ruddy, Joao Santos, Thomas Schnoor, Jr., David S. Sharky, Ronald Sickler, Martin Slaybaugh, Harry Stevens, Jr., David Suk, David Thompson, Michael Topal, Jude Welsh, William Willem and John Zemalkowski a/k/a Zemalowski, Plaintiffs,
v.
CITY OF NEW YORK, INC., Department of Environmental Protection, Bureau of Wastewater Treatment, Consolidated Edison, Inc., Consolidated Edison Company of New York, Inc., and ABC fictitious power companies and distributors, Defendants.
No. 111725/04.

Feb. 22, 2005.

FAVIOLA A. SOTO, J.

**1 The plaintiffs in this action, clammers who rake clams from the Sandy Hook and Raritan Bays of New Jersey (the Bays), and a clam wholesaler, seek to recover from defendant Consolidated Edison Company of New York, Inc. (Con Edison) for economic losses allegedly incurred during and after the massive blackout of August 14, 2003 (2003 Blackout). Defendant Con Edison moves for an order dismissing the complaint as against it, pursuant to CPLR 3211(a)(7). For the reasons stated herein, the motion to dismiss is granted.

Plaintiffs' Allegations

Plaintiffs allege that certain New York City wastewater treatment facilities spilled untreated sewage and other contaminants into waters surrounding New York City, which migrated to and settled in the Bays and contaminated the water. They allege that the New Jersey Department of Environmental Protection (NJDEP) and other governmental agencies detected unacceptably elevated levels of fecal coliform and other contaminants in the water, and that NJDEP closed the shellfish beds located in the Bays. They allege that from August 18, 2003 until September 5, 2003, the plaintiffs could not harvest or wholesale clams, thereby sustaining damages.

In their sixth cause of action, asserted against Con Edison, plaintiffs claim that: they are direct and/or third-party beneficiaries of Con Edison's continuation of services to defendants the City of New York (the City) and the Bureau of Wastewater Treatment (BWT); these entities were entitled to receive electricity from Con Edison to operate its facilities; and Con Edison breached its duty of care because it negligently or wrongfully discontinued, disconnected, and interrupted, for an unreasonable length of time, the electricity supply to the City of New York and BTW, causing the City to spill or discharge effluents, and for them to therefore sustain damages.

Specifically, plaintiffs allege in their complaint that Con Edison:

A. failed to provide to the City "electrical instrumentalities and facilities that were safe and adequate and in all respects just and reasonable, in violation of [its] charter and authority as a public utility";

B. "failed to maintain adequate and reasonable equipment, including equipment to produce and "furnish to the City of New York emergency supplies of electricity for reasonably foreseeable situations" and "failed to furnish sufficient electricity to meet the needs and demands of the City ...";

C. "arbitrarily and unreasonably discontinued, disconnected, and interrupted its electrical service" to the City "without first taking other action that might have prevented such interruption" or giving notice or warning to the City of such intended action; and,

D. allowed its "interruption of its electrical service to the City of New York to continue for an unreasonable length of time without due cause or justification".

The Dismissal Motion

Con Edison moves for dismissal arguing that in the event of a service interruption, it is only liable for gross negligence, and that the plaintiffs have not alleged gross negligence on its part. Con Edison also contends that in the event of a widespread blackout, it is only liable to its direct customers if gross negligence is established, and is not liable to third parties who suffer injury due to service interruptions to customers. Con Edison further argues that the plaintiffs do not allege that they are customers or suffered injuries as customers, but merely that the electrical service interruption to the City of New York caused the shut down of waste and sewage facilities which, eventually, caused their injuries.

**2 Con Edison also argues that plaintiffs' demand for losses of profits, market share, marketing advantage and good will are speculative, ill-defined and not recoverable and, based on the facts of the complaint, plaintiffs' demand for punitive damages is unfounded.

Pursuant to CPLR 3211(c), Con Edison further asks the court to consider the affidavit of Michael Forte, its Chief Engineer for Transmission Planning. The affidavit explains the events that caused the 2003 Blackout and the process for restoration of electrical service, and concludes that there was no negligence on the part of Con Edison. In his affidavit, Forte references the Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations, which was commissioned by the United States and Canadian governments and submitted by Con Edison in support of its motion. [FN1] Con Edison argues that this case is distinguishable from other cases because the 2003 Blackout, the largest such occurrence in the nation's history, has been extensively investigated and no negligence on Con Edison's part has been found.

FN1. In addition to the aforementioned Canadian/U.S. Report, Con Edison has also submitted the Initial Report by the New York State Department of Public Service on the August 14, 2003 Blackout.

Discussion

Con Edison argues that the complaint should be dismissed because New York law provides that it owes no duty to the plaintiffs.

In opposition, plaintiffs argue that it is not New York Law that governs, but New Jersey law, and that New Jersey does impose a duty. They assert that New York lacks interest, New Jersey has a paramount interest in protecting its waters from pollution, and the injuries to their businesses occurred in New Jersey.

New York law governs here, and plaintiffs' arguments to the contrary are not persuasive. The significant contacts and the jurisdiction in which they are located are based in New York, New York has the greatest concern with the specific issue raised in this litigation, the defendants include the City of New York and are based in New York, plaintiffs are private parties including those located in New York, and the purpose of the law is to regulate conduct, by determining duty and the standard of care, and not to allocate loss. See *Padula v. Lilarn Props. Corp,* 84 N.Y.2d 519; *Schultz v. Boy Scouts of America, Inc.* 65 N.Y.2d 189. *New York Law*

The Court of Appeals has restricted the orbit of duty owed by utilities for service interruptions that allegedly cause injuries to those with whom or which the utility does not have a contractual relationship. *Strauss v. Belle Realty Co.,* 65 N.Y.2d 399 [1985]; *Milliken & Co. v. Consolidated Edison Co.,* 84 N.Y.2d 469, 477 [1994]). [FN2]

FN2. Plaintiffs' reference to *Koch v. Consolidated Edison Co.,* 62 N.Y.2d 548 [1984], to support their argument, that they are the members of the public for whose benefit Con Edison was contracted to perform services, is misguided. There, and unlike in this action, the Court found that Con Edison had expressly undertaken a *contractual* duty to supply energy to the plaintiffs (*id.* at 558-559; *see also Milliken & Co.,* 84 N.Y.2d at 479.

In *Strauss,* the Court of Appeals considered whether Con Edison owed a duty to a 77-year old man injured in a fall on a darkened staircase in his apartment building during a citywide blackout. Although the Court found that the injuries "may have been conceivably foreseeable," it nonetheless determined that there was no contractual relationship between the plaintiff and the utility for the lighting in the building's common areas and, as a matter of public policy, that the utility owed no duty to the plaintiff. *Strauss,* at 402.

The court noted that while it need not be blind to the obvious impact of a city-wide deprivation of electric power, it is court's responsibility to limit the legal consequences of wrongs to a controllable degree. *Strauss, supra,* 65 N.Y.2d at 402.

**3 Similarly, in *532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc.,* 96 N.Y.2d 280, 289 *rearg. denied sub nom. 5th Ave. Chocolatiere, Ltd. v. 540 Acquisition Co., LLC.,* 96 N.Y.2d 938 [2001], the court stated: "[a]s a matter of policy, we restricted liability for damages in negligence to direct customers of the utility in order to avoid crushing exposure to the suits of millions of electricity consumers in New York City and Westchester".

So too in *Milliken & Co., supra,* the court determined that the utility owed no duty to the plaintiffs, commercial tenants of Garment Center properties, who claimed to have suffered injuries due to a disruption of electrical services during "Buyers Week" as the plaintiffs lacked a direct contractual relationship with the utility. The court further noted that plaintiffs could not recover under a theory of third-party beneficiaries. *Id.,* at 478.

Here, the plaintiffs have no contractual or other direct relationship with Con Edison, the complaint does not state a cause of action against this defendant in tort, the complaint does not set forth a cause of action for plaintiffs' recovery against Con Edison as third-party beneficiaries, and plaintiffs' claimed damages are economic in nature. Nor, in light of settled law, have plaintiffs otherwise stated in their complaint a cause of action that would distinguish their claims so as to survive this motion to dismiss.

In light of this conclusion, the court does not rule on the parties' arguments regarding the applicability of a provision found in the Tariff that "in case the supply of service shall be interrupted or irregular or defective or fail from causes beyond its control or through ordinary negligence of employees, servants or agents ... [Con Edison] will not be liable therefor".

As plaintiffs failed to cross-move for leave to amend their complaint and failed to submit a proposed amended complaint or to make the requisite showing, their request set forth in their opposing papers is not considered.

Accordingly, it is

ORDERED that the motion of defendant Consolidated Edison Company of New York, Inc. to dismiss the complaint as against it is granted, and the complaint is severed and dismissed as against said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remaining parties are reminded that they are to appear for a compliance conference on June 22, 2005, at 2:00 p.m., at 80 Centre Street, Room 103; and it is further

ORDERED that movant shall serve notice of entry with a copy of this decision and order upon the County Clerk and the Trial Support Office within thirty days of entry.

Slip Copy, 7 Misc.3d 1003(A), 2005 WL 742432 (N.Y.Sup.), 2005 N.Y. Slip Op. 50426(U) Unpublished Disposition

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Exhibit C

Court of Appeals of Ohio, Fifth District, Licking County.

Elizabeth GALLOWAY, et al., Plaintiffs-Appellants,

v

OHIO POWER COMPANY, et al., Defendants-Appellees.

No. CA-3142.

Dec. 4, 1985.

Civil Appeal from the Court of Common Pleas

Case No. 83S-77257

Gerald S. Leeseberg, Wolske & Blue, Columbus, Ohio, for plaintiffs-appellants.

James R. Blake, Day, Ketterer, Raley, Wright & Rybolt, Canton, Ohio, for defendants-appellees.

OPINION

MILLIGAN, Judge.

Public Utilities--Power Outage--Duty to Highway User--Summary Judgment

*1 The Licking County Common Pleas Court granted partial summary judgment in favor of defendant--Ohio Power Company upon the complaint of plaintiffs, reciting no just reason for delay, Civ.R. 54(B). Plaintiffs appeal, assigning three errors:

ASSIGNMENT OF ERROR NO. I

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS THAT DEFENDANT DID NOT OWE A DUTY TO THE PLAINTIFF TO NOTIFY THE APPROPRIATE AUTHORITIES OF THE EXISTENCE OF A POWER OUTAGE IN ORDER THAT APPROPRIATE ACTION COULD BE TAKEN TO PREVENT INJURY TO THE PUBLIC.

ASSIGNMENT OF ERROR NO. II

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS THAT DEFENDANT DID NOT OWE A DUTY TO THE PLAINTIFF TO RESTORE ELECTRICAL POWER IN A PROMPT, REASONABLE MANNER.

ASSIGNMENT OF ERROR NO. III

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF PROXIMATE CAUSE.

On August 21, 1983, at approximately 10:50 p.m., plaintiff, a passenger in a motor vehicle, was injured when the vehicle was involved in an intersection collision at U.S. Route 40 and State Route 30.

At the time, the traffic light signal control at the intersection was not functioning.

The summary judgment is limited to the claim of plaintiff against Ohio Power Company, the supplier of electric energy for operation of the traffic control device at the intersection owned and operated by the State of Ohio.

Plaintiff claims that the summary judgment is inappropriate as a matter of law upon the undisputed facts.

Notwithstanding the fact that the trial court gave no rationale for its decision, plaintiff claims that summary judgment was granted for one or more of the following reasons:

1) Defendant had no duty to notify the appropriate authorities of the existence of a power outage so that appropriate action can be taken;

2) Defendant met its duty of restoring electrical power in a reasonable manner; and

3) Plaintiff's injuries and damages were not proximately caused by defendant.

Appellant's Brief, page 1, L.R. 4(D) compliance

Plaintiff seeks to establish and place two duties upon the Power Company, articulated as follows:

1) Ohio Power Company was negligent in failing to notify the appropriate authorities of the existence of a power outage in order that prompt action could be taken to minimize risks to the public engendered by the disruption of traffic control;

and
2) Defendant Ohio Power Company negligently failed to restore electrical power in a prompt, reasonable fashion.

The initial question is whether the Power Company owes a duty to this plaintiff. *Keister v. Parke Centre Lanes* (1981), 3 Ohio App.3d 19, 443 N.E.2d 532.

We examine the testimonial assertions in the light most favorable to the plaintiff in an effort to determine whether there was a relationship between the parties upon which the law imposes a definable duty.

On the evening of August 21, 1983, lightning damaged electrical facilities of Ohio Power, interrupting service to some 1500 customers over a substantial area. One of these interruptions caused the traffic light in question not to function.

***2** Ohio Power was notified at 10:05 p.m. by a customer on Palmer Road that there was an outage in the general area, which included the area where the traffic light in question is located. Within seven minutes, an employee was dispatched in an effort to learn the cause of the failure. A wire-supporting insulator, damaged by lightning, was found to be the cause of the power interruption; the fallen wire was restrung and service was restored by 1:25 a.m., August 22. At approximately 10:50 p.m., the collision took place at the intersection. At that time, the traffic control device was not functioning and there was no other warning device posted.

None of the testimony presented demonstrates that the Power Company was advised that the traffic control device was not functioning. However, it was clearly within the area where service had been interrupted.

The Power Company has no agreement with the State of Ohio to maintain or repair the traffic light at the intersection in question. (Deposition of Crabb).

Upon that basis, issues have been joined in the assignments of error and rejoinder of the appellee.

I--Duty to Notify

The appellant cites no authority for the existence of a duty to warn upon the admitted facts in the case *sub judice.*

His reliance upon *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347, is misplaced.

To support a judgment in favor of the plaintiff in an action based upon negligence, the record must disclose substantial evidence which tends to prove negligence, or facts from which an inference of negligence may reasonably be drawn.
Hetrick, supra, at syllabus 1

Such company is not liable to one injured as the result of some unusual occurrence that cannot fairly be anticipated or foreseen and is not within the range of reasonable probability. *Hetrick, supra,* at syllabi 1 and 3.

Finally, *Hetrick* imposes a standard of "highest degree of care consistent with the practical operation of such business in the construction, maintenance and inspection of such equipment." *Hetrick, supra,* at syllabus 2.

We conclude that the plaintiff-appellant has failed to establish facts giving rise to a justiciably recognized duty which the Power Company owed to the plaintiff.

This conclusion is consistent with *Greenhoe v. City of Akron* (Oct. 25, 1982), Summit Co.Com.Pl. No. 81-1-0017, slip op., unpublished, and *Greenhoe v. City of Akron* (May 18, 1983), Summit App. No. 10978, unreported. See also *Terrill v. ICT Insurance Co.* (La.App.1957), 90 So.2d 292; *Creveling v. Dayton Power & Light* (Jan. 14, 1985), Logan App. No. 8-83-27, unreported (plaintiff, the decedent, was killed when a ladder came in contact with electrical equipment operated and maintained by Dayton Power & Light); and *Jones v. Columbus & Southern Ohio Electric* (July 10, 1985), 10th App. No. 84AP-1151, unreported (the court held that "failure to predict that a worker will come in contact with the power line is not actionable negligence").

The first assignment of error is overruled.

II--Duty to Restore Power Promptly

***3** We overrule this assignment of error for the reasons stated above. Furthermore, we overrule the assignment of error for the additional reason that there is no fact issue upon which reasonable minds could differ upon the question of whether reasonable restoration could have taken place within the period between interruption of power, notice to the appellee of the light failure, and the accident in question.

III--Proximate Cause

Finding as we do, no duty existed upon the facts in the case *sub judice,* we do not reach the question of proximate cause; therefore, we overrule the third

assignment of error. See *Keister v. Parke Centre Lanes, supra.*

We overrule the three assignments of error and affirm the summary judgment of the Court of Common Pleas of Licking County.

PUTMAN, P.J., and TURPIN, J., concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

NORMAN J. PUTMAN, P.J.
JOHN R. MILLIGAN, J.
IRA G. TURPIN, J.

Not Reported in N.E.2d, 1985 WL 4181 (Ohio App. 5 Dist.)

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