

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)
CHURCH MUTUAL INSURANCE COMPANY,)
subrogee of **JAMESTOWN REFORMED CHURCH,**)
against **CONSUMERS ENERGY COMPANY.**)
_____)

Case No. U-14331

At the October 12, 2006 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On January 2, 1999, during a west-Michigan blizzard, a wooden pin that secured a 7200-volt primary power line owned by Consumers Energy Company (Consumers), detached from a wooden cross-arm on a utility pole adjacent to Jamestown Reformed Church (Jamestown). The power line subsequently blew against the side of Jamestown and apparently started a fire that consumed the building. The power line that fell did not directly supply power to Jamestown, although the church was a customer of the utility.

Church Mutual Insurance Company (Church), Jamestown's insurer, paid \$2,416,817.77 for fire damages, and, subsequently, in a December 27, 1999 subrogation action in Ottawa County Circuit Court, filed a lawsuit against Consumers alleging claims of negligence, trespass, and

nuisance with respect to the Jamestown fire. Church alleged that Consumers was negligent in its maintenance, design, repair, or inspection of its primary distribution facilities adjacent to Jamestown. Consumers responded by raising its B10.1 tariff as a defense to the negligence claim.

Church requested partial summary disposition on the trespass claim, and Consumers sought summary disposition on all claims. The trial court denied Church's motion and granted Consumers' motion. The trial court dismissed the trespass and nuisance claims on grounds that the real cause of action was negligence, and dismissed the negligence claim on grounds that it properly belonged before the Commission.

In an unpublished opinion *per curiam*, decided October 30, 2003 (Docket No. 240571) (the Opinion), the Michigan Court of Appeals affirmed the trial court, holding "Given the fact that the primary issues plaintiff raises are specifically governed and anticipated under the tariff, we find that the trial court's reliance on the primary jurisdiction doctrine was appropriate in this case." Opinion, p. 1. The Court further states that "Whether defendant is exempt from liability under rule B10.1 is a question properly reserved for the MPSC." Opinion, p. 7.

On May 28, 2004, the Michigan Supreme Court denied Church's application for leave to appeal the Court of Appeals decision. *Church Mutual Ins Co v Consumers Energy Co*, 470 Mich 865; 680 NW2d 894 (2004). On September 28, 2004, the Michigan Supreme Court denied Church's motion for reconsideration of its May 28 order. *Church*, 471 Mich 887; 688 NW2d 501 (2004).

On December 7, 2004 (December filing), Church filed a request with the Commission for a declaratory ruling regarding the applicability of Consumers' B10.1 tariff to the negligence claim. Specifically, Church asked the Commission to declare that the limitation on liability contained in B10.1 did not exempt the utility from liability in this case. On January 5, 2005, the Commission

issued a notice of hearing, so that evidence could be taken on the issue. *See*, 1999 AC, R 460.17701(2) (Rule 701).

On January 28, 2005, Consumers filed a response to Church's petition for a declaratory ruling and its own request for a declaratory ruling. In that response, Consumers asserts that B10.1 prescribes its liability, and further requests the Commission for a declaratory ruling that the design, operation, maintenance, and repair of the distribution system providing service to Jamestown was in accordance with all applicable National Electrical Safety Code (NESC) provisions, all administrative rules, all tariffs, and all accepted standards of good utility practice. Consumers argues that Church's petition is too narrow, and that these additional issues have been specifically deferred to the Commission by the Court of Appeals.

On February 18, 2005, Church filed a reply to Consumers' response, asserting that the additional issues brought up by Consumers need not be decided, because Church's proffered interpretation of B10.1 will result in the case moving back to the Circuit Court.

At a prehearing conference held on February 25, 2005, Administrative Law Judge Sharon L. Feldman (ALJ) limited the scope of the planned evidentiary hearing to what was requested in the December filing (the applicability of Consumers' B10.1 tariff to Church's negligence claim). Finding that the Commission's jurisdiction was invoked by Church's filing and not by the judicial rulings on primary jurisdiction, the ALJ held that the scope of the proceeding was governed by Church's petition. On March 11, 2005, Consumers filed a request for immediate consideration of, and application for, leave to appeal the ALJ's limitation of the scope of the proceedings. *See*, 1999 AC, R 460.17337 (Rule 337). On March 25, 2005, the Commission Staff (Staff) filed a brief in support of Consumers' request for immediate consideration, and Church filed a reply brief urging the Commission not to consider Consumers' March 11 application.

Following the February prehearing conference, the parties agreed to resolve this matter on a motion for summary judgment to be filed by Church. No evidentiary hearing was held. Church filed a motion for summary judgment on April 8, 2005. On April 20, 2005, Consumers and the Staff filed responses to the motion. The ALJ heard oral argument on April 26, 2005. On July 15, 2005, the ALJ issued a Proposal for Decision (PFD). On August 5, 2005, Consumers filed exceptions to the PFD, and on August 19, 2005, Church filed replies to exceptions.

II.

PROPOSAL FOR DECISION

Noting the discretionary nature of a declaratory ruling, the ALJ found that Church's petition for an interpretation of Consumers' B10.1 tariff under a specific set of facts was an appropriate one for a declaratory ruling, because it could provide guidance for the parties' future conduct. PFD, pp. 8-9; *see, also*, MCL 24.263, Rule 701(1). The ALJ found that the Commission's jurisdiction is invoked by Church's petition, and not by the Court of Appeals' dismissal of the case. The ALJ found that "in ruling on the request for declaratory ruling, the Commission is merely interpreting a tariff provision clearly within its jurisdiction to interpret, at the request of a customer to whom the tariff provisions clearly applies." PFD, p. 9. The ALJ also noted the lack of any factual dispute, and the fact that the Court found that interpretation of the tariff provision should precede any further examination of Church's negligence claim. On these grounds, the ALJ recommended that a declaratory ruling be issued.

The ALJ found that the plain language of B10.1 indicates that it was meant to address only those situations where damage has been incurred as a result of interruptions in service, phase failure or reversal, or variations in the service characteristics. The ALJ examined and rejected Consumers' arguments that the history of the provision requires a broader interpretation, or that a

possible drafting error resulted in the language currently in the provision. The ALJ noted the Commission's focus on narrowly defining the circumstances in which utility tariffs address liability, and consistent rejection of judicial attempts to require the Commission to establish negligence standards. *See, e.g.*, August 20, 1998 order in Case No. U-11639, p. 11; May 17, 2005 order in Case No. U-14059, p. 20. The ALJ recommended that the Commission interpret the tariff language at issue to limit Consumers' liability only for direct and consequential damages caused by "interruptions in the service, phase failure or reversal, or variations in the service characteristics," as outlined in B10.1. PFD, p. 19.

The ALJ then addressed Church's request for a determination that its claims against Consumers do not arise out of the contractual customer-utility relationship between Church and Consumers. The ALJ found that, due to its broad scope, this question is not appropriate for resolution as a declaratory ruling under the terms of Rule 701, and recommended that the Commission decline to address it.

III.

EXCEPTIONS AND REPLIES TO EXCEPTIONS

Consumers contends that the tariff language of B10.1 should be read broadly to relieve the company of liability for all losses "due to causes or conditions beyond the company's reasonable control."¹ Consumers argues that the provision applies even outside the customer-utility relationship, to limit the company's liability to third persons where the damage is caused by circumstances beyond the utility's reasonable control. In its exceptions, Consumers disagrees with the ALJ's findings on the tariff language. Consumers argues that the 1963 change in tariff

¹Though the Staff takes the position that the Commission has jurisdiction over, and should hear, Church's entire negligence claim as stated in its trial court complaint, the Staff takes no position on the merits of the negligence claim, nor offers any interpretation of this tariff provision.

language was only meant to better define the phrase “causes and conditions beyond the Company’s control,” and was not meant to impose additional liability upon the utility in situations in which the utility formerly was not liable, such as this one. Consumers argues that the blizzard was the type of condition that is beyond the company’s reasonable control, and the fact that it did not cause an interruption in service is irrelevant because the tariff provision is intended to limit Consumers’ liability in all such situations. Consumers argues that any other interpretation means that damages claimed for losses resulting from conditions beyond the company’s control will impact rates.

In its replies to exceptions, Church argues that the ALJ properly limited the scope of these proceedings to that which Church requested in its December filing. Church contends that, in its trial court complaint, it alleged that a 7200-volt primary electrical line, not a single phase service drop supplying retail electrical service to Jamestown, arced and electrified the building, and caused ignition of combustible material located in an attic at Jamestown. Therefore, Church concludes, Consumers’ alleged violation of duties arises from independent legal obligations supporting a cause of action in tort and not arising out of the provision of retail service to Jamestown. Church argues that the only issue that the Court of Appeals deferred to the Commission was whether Consumers is exempt from liability under its B10.1 tariff. Church further argues that Michigan law is clear that the Commission has no common law powers and possesses only that authority granted by the Legislature, which is strictly construed, and does not include the power to determine tort claims. Church points out that its claims as originally filed all sound in negligence, and no breach of contract claim has ever been alleged. Church points out that it is undisputed that the loss or damage was not caused by a power surge or any similar variation in service characteristics.

IV.

DISCUSSION

The Commission has discretion to issue a declaratory ruling on the applicability of a statute or rule administered by the Commission to an actual state of facts. MCL 24.263; Rule 701. The Commission agrees with the ALJ that its jurisdiction is not invoked by the decision of a Circuit Court to dismiss a case, and concludes that the ALJ properly limited the scope of this proceeding to the issues addressed in Church's petition. The Commission further agrees with the ALJ's finding regarding Church's request for a determination that its claims against Consumers do not arise out of the contractual customer-utility relationship between Church and Consumers, and declines to issue any declaratory ruling on that issue.

Church petitions the Commission for a decision that tariff B10.1 is properly interpreted only to limit the utility's liability for damages that are caused by interruptions in service, phase failure or reversal, or variations in the service characteristics. "Tariffs are ordinarily to be applied according to their plain meaning." *CenturyTel of Michigan v Public Service Comm*, 245 Mich App 351, 365 (2001). Tariff Rule B10.1 provides, in pertinent part (emphasis added):

B.10.1 Character of Service

Subject to the provisions of the third paragraph of this Rule B10.1, the Company shall endeavor, but does not guarantee to furnish a continuous supply of electric energy and to maintain voltage and frequency within reasonable limits. [¶] The Company shall not be liable for *interruptions in the service, phase failure or reversal, or variations in the service characteristics, or for any loss or damage of any kind or character occasioned thereby*, due to causes or conditions beyond the Company's reasonable control, and such causes or conditions shall be deemed to specifically include . . . failure, malfunction, breakage, necessary repairs or inspections of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry; act of God; war; action of the elements; storm or flood . . .

The Court of Appeals, when asked to interpret this provision, found that the Commission “was better equipped to understand industry standards,” and held that, under the primary jurisdiction doctrine, “Whether defendant is exempt from liability under rule B10.1 is a question properly reserved for the MPSC. Maintenance and design problems resulting in damages are clearly anticipated under rule B10.1.” Opinion, p. 8. However, the Commission finds that it need not reach the issue of maintenance and repair, because this tariff language is not applicable to the factual scenario presented to the Commission.

Church, in its petition and its motion for summary disposition, presents a situation in which there was no interruption in service to Jamestown, no phase failure or reversal, and no variation in the characteristics of service to Jamestown. Church does not complain about the service it received from Consumers; Church complains that Consumers was responsible for starting the fire by failing to properly maintain the distribution line that fell on the church. As this is a stipulated motion for summary disposition, there is no factual dispute. Church did not file a complaint with the Commission alleging negligence on the part of Consumers. Church filed a petition and motion requesting the Commission to decide the single issue of whether, under the facts of the fire as described, B10.1 applies to limit Consumers’ alleged liability.

The Commission finds that B10.1 is not applicable to the factual scenario as presented, and, for that sole reason, does not limit Consumers’ alleged liability in this matter. By its terms, B10.1 does not anticipate Church’s claims unless the loss or damage to Jamestown was caused by “interruptions in the service, phase failure or reversal, or variations in the service characteristics . . .,” and the parties are in agreement that none of these contingencies occurred in this case. The plain meaning of B10.1 is that the limitation of liability contained therein is not triggered unless one of these contingencies causes a loss. B10.1 is a tariff provision that anticipates a particular set

of problems, more commonly referred to as power surges or interruptions, and the direct and consequential losses that occur thereby. The set of facts presented involve a fire allegedly caused by a distribution line brought down in a blizzard. Tariff B10.1 does not apply to this set of facts.

The Commission FINDs that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. Tariff Rule B10.1 does not apply to the factual scenario presented in Church's motion for summary judgment.

THEREFORE, IT IS ORDERED that Tariff Rule B10.1 does not apply to the factual scenario presented in Church Mutual Insurance Company's motion for summary disposition.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of October 12, 2006.

/s/ Mary Jo Kunkle
Its Executive Secretary

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MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of October 12, 2006.

Its Executive Secretary