

STATE OF MICHIGAN
COURT OF APPEALS

AMERITECH MICHIGAN,

Plaintiff-Appellant,

v

DETROIT EDISON COMPANY,

Defendant-Appellee.

UNPUBLISHED

January 27, 2004

No. 237856

Oakland Circuit Court

LC No. 01-030537-NZ

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court's order granting partial summary disposition to defendant. We affirm.

Plaintiff brought this action based on defendant's refusal to provide electric service to certain new sites and facilities. Plaintiff asserted that the failure to provide service violated defendant's tariffs filed with the Public Service Commission (PSC), was a breach of contract, and constituted a tortious interference with plaintiff's business relationships or expectancies. The circuit court partially granted defendant's motion for summary disposition, finding that the PSC had primary jurisdiction over the claims. Plaintiff's appeal concerns only the dismissal of its claim for tortious interference with a business expectancy.

The prudential doctrine of primary jurisdiction is designed to accord respect to the separation of powers in our constitutional system. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 211; 631 NW2d 733 (2001). Invocation of the doctrine is not the equivalent of summary disposition, as it merely defers a claim to an administrative agency. *Id.*, 205-206, n 18. This Court will review the circuit court's application of the doctrine de novo as a matter of law. *Id.*, 211.

Three reasons have been advanced for the invocation of the primary jurisdiction doctrine: (1) use of the agency's expertise in regulatory matters; (2) separation of powers and the principle that courts are not to make adverse decisions that threaten the authority of the agency, and (3) consistent application in resolving issues of administrative law. *Id.*, 198-199.

Causes of action in tort and violations of tariffs are generally not subject to the primary jurisdiction doctrine because they do not implicate the complexities of the regulatory scheme. *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 75; 559 NW2d 647

(1997). However, where tort claims arise out of the same facts and circumstances as contractual claims, and are governed by the tariff and contractual relationship of the parties, initial review by the PSC is appropriate. *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 563; 655 NW2d 304 (2002). To the extent that defendant's liability is specifically contemplated by the tariff, taking it outside the jurisdiction of the PSC would interfere with the agency's power and jurisdiction to regulate all public utilities. *Id.*

In *Michigan Basic Property Ins Assn v Detroit Edison Co*, 240 Mich App 524; 618 NW2d 32 (2000), the Court found a tort claim based on the defendant's failure to handle electric power transmission equipment in a safe and reasonable manner did not come within the primary jurisdiction of the PSC. The defendant's duties to maintain and operate equipment in a safe and reasonable manner did not arise solely from the contract. The plaintiffs' claims were not governed by the tariffs and did not implicate the PSC's regulatory responsibilities. *Durcon*, *supra*, is distinguishable from *Michigan Basic*, *supra*, because it was based on a contractual duty to provide service, rather than the protection of the general public from the dangers presented by electricity.

Plaintiff argues that its tortious interference claim is based on defendant's common law duty to provide power to customers, rather than a contractual obligation, and that an internal memorandum of defendant's shows that it denied hookups for an improper purpose not permitted by the tariff. In support of the former assertion, it relies on *Traverse City v Consumers Power Co*, 340 Mich 85, 97; 64 NW2d 894 (1954), which states that as a general rule, a utility is under a legal obligation to render service to all members of the public within its scope of operation who apply for such service and comply with reasonable rules and regulations. However, *Traverse City* does not identify the source of the obligation, and does not specifically state that the duty arises under the common law.

In *Rinaldo's Construction Corp*, *supra*, the Court held that a utility's duty to its customers is solely a matter of contract. The plaintiff alleged that the negligent tortious conduct of Michigan Bell interrupted plaintiff's business, and breached a duty to conduct its business in a reasonable manner. The Court agreed that the defendant owed duties, but concluded that they arose solely out of the contractual relationship between the parties and not from any independent legal obligations supporting a cause of action in tort. Thus, the matters were incident to the regulation of the telephone company within the primary jurisdiction of the PSC. 454 Mich 78-79.

The claim raised in this case is closely tied to defendant's contractual obligations. Further, the validity of defendant's defense that safety concerns dictated that the connections be refused is within the expertise of the PSC. We conclude that the circuit court did not err in deferring to the primary jurisdiction of the PSC.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Helene N. White