

IP 04-1761-C T/K Hoosier Energy v Exelon  
Judge John D. Tinder

Signed on 09/26/05

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

HOOSIER ENERGY RURAL ELECTRIC	)	
COOPERATIVE, INC.,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01761-JDT-TAB
	)	
EXELON GENERATION COMPANY, LLC,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
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HOOSIER ENERGY RURAL ELECTRIC )  
COOPERATIVE, INC., )  
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Plaintiff, )  
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vs. )  
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EXELON GENERATION COMPANY, LLC, )  
 )  
Defendant. )

1:04-cv-1761-JDT-TAB

**ENTRY ON DEFENDANT’S MOTION TO DISMISS OR STAY (Docket No. 31)<sup>1</sup>**

This matter is currently before the court on Defendant’s, Exelon Generation Company, LLC (“Exelon”), Motion to Dismiss or Stay (Docket No. 31). Plaintiff in this suit, Hoosier Energy Rural Electric Cooperative, Inc. (“Hoosier”), is a defendant in a parallel action brought by Exelon in the Eastern District of Pennsylvania (the “Pennsylvania Court”) that raises the same issues as does Hoosier’s complaint here. After carefully reviewing the parties’ briefs and supporting materials, the court finds as follows:

**I. BACKGROUND**

Hoosier is an Indiana incorporated rural electric cooperative with its principal

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<sup>1</sup> This Entry is a matter of public record and will be made available on the court’s web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

place of business in Bloomington, Indiana. Hoosier generates energy from millions of tons of coal mined each year in southern Indiana. The coal is sent to Hoosier's energy generating facilities, which are located in Indiana, where it is converted into electrical energy. Hoosier distributes the energy to its seventeen member systems of the cooperative in central and southern Indiana. In addition, Hoosier has entered into long-term contracts to sell electrical energy to Exelon. Exelon is a Pennsylvania limited liability company which generates and sells electric energy at wholesale and retail.

This case revolves around two contracts entered into in 1997 (the "Sales Agreements"). (Mem. Supp. Mot. Dismiss/Stay Exs. A1, A2.) Under the terms of the contracts, PECO Energy Company ("PECO") agreed to purchase certain amounts of energy from Hoosier's generating station located in Sullivan County, Indiana (the "Sullivan County Generating Station"). PECO subsequently assigned the Sales Agreements to Exelon.

Section 2.4 of the Sales Agreements allows for adjustments to the cost of energy due to certain statutory, regulatory, or tax changes. (*Id.* Ex. A1 § 2.4.) Specifically, section 2.4 provides that if Hoosier's cost at the Sullivan County Generating Station, relating to emission allowances, other environmental compliance, taxes, or the current requirements of the Federal Energy Regulatory Commission, is increased by any change in applicable law after January 1, 1997, then the prices charged to Exelon will also be increased according to the formula set forth in section 2.4. (*Id.*) In late 1998, the United States Environmental Protection Agency ("EPA") finalized a rule requiring significant reductions in nitrous oxide ("NOx") emissions. (Resp. 4-5.) Subsequently,

the State of Indiana promulgated an implementation plan, specifically mandating the reduction in NOx emissions by Indiana generators, including Hoosier's, by May 31, 2004. (*Id.*)

In response to the new federal and state environmental standards, Hoosier installed SCR technology on the two units at its Sullivan County Generating Station. According to Hoosier, the compliance project cost approximately \$73 million. (*Id.* at 5.) Hoosier argues that section 2.4 of the Sales Agreements requires Exelon to pay an additional amount of \$11,154,000 as its pro rata share of the cost increase due to the new environmental standards. (Compl. Ex. E.)

Exelon agrees that it is responsible for a share of the cost, and has made partial payments of the cost increase. (Mem. Supp. Mot. Dismiss/Stay Ex. 1B ¶ 4.) However, Exelon contends that Hoosier has overcharged Exelon, and Exelon has paid at least \$6.5 million more than the actual amount it contractually owes as its pro rata share of the compliance project at the Sullivan County Generating Station. (*Id.*) Primarily, Exelon claims that the compliance project was excessive and “over-controlling.” (*Id.*) In other words, Exelon believes that Hoosier's compliance project at the Sullivan County Generating Station reduced the NOx emissions beyond what was required by the new environmental standards. Exelon further asserts that by taking the “over-controlling” steps at the Sullivan County Generating Station, Hoosier was able to bring its entire electric generating system (including facilities other than the Sullivan County Generating Station) into compliance with the new environmental standards without installing any equipment to reduce NOx emissions at Hoosier's other facilities. (*Id.* Ex. 1B ¶¶ 17-18.)

Thus, argues Exelon, Hoosier is asking Exelon to subsidize compliance measures which brought all of Hoosier's generating operations, and not merely the Sullivan County Generating Station, into environmental compliance. According to Exelon, section 2.4's pro rata reimbursement scheme does not require Exelon to incur a cost increase for the compliance project, at least to the extent that the project brought those facilities other than the Sullivan County Generating Station into compliance with the new environmental standards.

Hoosier and Exelon attempted to informally resolve this dispute for four years. On July 27, 2004, the parties entered into a Waiver and Tolling Agreement (the "Tolling Agreement"), which tolled the statute of limitations up to and including October 1, 2004. (Resp. Ex. 3.) The parties agreed to toll the statute of limitations with the hope that they could negotiate an agreement to resolve the dispute without resorting to litigation. The parties failed to reach an agreement. On September 29, 2004, Exelon filed suit against Hoosier in the Eastern District of Pennsylvania. Two days later, without the knowledge of Exelon's suit, Hoosier filed suit against Exelon in Indiana state court. Subsequently, Exelon removed Hoosier's suit to this court.

Currently, two motions are pending in the Pennsylvania Court: 1) Exelon's Motion to Enjoin Defendant From Proceeding in the Indiana Action (Mem. Supp. Mot. Dismiss/Stay Ex. 1); and 2) Hoosier's Motion to Dismiss or, in the Alternative, Transfer to the Southern District of Indiana (*Id.* Ex. 2). While those motions are pending in Pennsylvania, this court must consider Exelon's Motion to Dismiss or Stay pending in this court.

## II. DISCUSSION

Based on the fact that a parallel suit involving the same parties was filed prior to this case and is pending in the Pennsylvania Court, Exelon asks the court to dismiss this case or, in the alternative, to stay this case pending resolution of the motions filed in the Pennsylvania Court. While the Seventh Circuit does not follow a rigid first-to-file rule, see *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 (7th Cir. 1987), it has recognized a rebuttable presumption that the first case should be allowed to proceed and the second should be abated. *Asset Allocation & Mgmt. Co. v. W. Employers Ins. Co.*, 892 F.2d 566, 573 (7th Cir. 1989). Further, a district court has broad discretion to stay or dismiss a suit “for reasons of wise judicial administration . . . whenever it is duplicative of a parallel action already pending in another federal court.” *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993). A suit is considered duplicative “if the claims, parties, and available relief do not significantly differ between the two actions.” *Id.* at 223. Hoosier acknowledges that the two suits here are duplicative. (Resp. 8.) Hoosier further concedes that this suit was the second-in-line, filed two days after Exelon’s suit in the Pennsylvania Court. (*Id.* at 7.) Nevertheless, Hoosier urges the court to deny Exelon’s Motion to Dismiss or Stay for two reasons: 1) Hoosier argues that because the facts of this case revolve around Indiana, this court is the “superior vehicle” to hear this case (*Id.* at 9-11); and 2) Hoosier claims Exelon’s suit was a preemptive strike made in anticipation of Hoosier’s Indiana suit (*Id.* at 12-15). However, neither argument is particularly persuasive here. Thus, for purposes of “wise

judicial administration,” this court will stay the proceedings here pending resolution of the motions filed in the Pennsylvania Court.

In determining whether to employ its discretion, the court recognizes that “Judges sometimes stay proceedings in the more recently filed case to allow the first to proceed; sometimes a stay permits the more comprehensive of the actions to go forward. But the judge hearing the second-filed case may conclude that it is a superior vehicle and may press forward.” *Cent. States, Se. & Sw. Areas Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442, 444-45 (7th Cir. 2000) (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 838-39 (7th Cir. 1999)). Hoosier essentially argues that this court is the “superior vehicle” to hear the suit and should “press forward” without a stay or dismissal. Hoosier correctly states that the relevant facts underlying this dispute center in Indiana. For example, Hoosier produces the energy and makes it available for “pick-up” in Indiana. The compliance measures taken by Hoosier were completed in Indiana according to the mandate given to it by the State of Indiana. Interpretation of the Sales Agreements, including section 2.4, is governed by Indiana Law.

But while the majority of facts appear to be based in Indiana, that alone does not necessarily qualify this court as the “superior vehicle” to hear the action. The factual orientation of the dispute is just one factor of many that the court should consider when determining whether the first-filed presumption should “yield[] to the interest of justice.” *Applexion S.A., v. Amalgamated Sugar Co.*, No. 95C858, 1995 WL 404843, at \*2 (N.D. Ill. July 7, 1995) (citing *Asset Allocation*, 892 F.2d at 572-73). Such additional factors include 1) whether the original suit is trivial in nature as compared to the second suit,

see *Asset Allocation*, 892 F.2d at 573; 2) whether the second-filed action has developed further than the first, see *Indianapolis Motor Speedway v. Polaris Ind., Inc.*, No. IP99-1190-C-B/S, 2000 WL 777895, at \*2 (S.D. Ind. Apr. 28, 2000); or 3) whether the plaintiff filed the first action in bad faith or in a race to the courthouse to avoid litigation in another forum. See *Tempco*, 819 F.2d at 750. Here, Hoosier does not argue that the Pennsylvania suit is trivial to the second-filed suit. Indeed, the suits involve the same parties, the same transactions, and the same breach of contract dispute; so, one suit could not be more trivial than the other. Likewise, Hoosier makes no showing that this suit has developed further than the Pennsylvania suit.<sup>2</sup> However, Hoosier contends that Exelon raced to the courthouse and filed the Pennsylvania suit in bad faith. If this allegation were true, then perhaps, in the interest of justice, this court would qualify as the “superior vehicle” to hear the case.

Hoosier asserts that Exelon’s filing in Pennsylvania was “the type of anticipatory filing that would be contrary to the application of the first-filed rule.” (Resp. 16.) The court disagrees. While courts in the Seventh Circuit are disinclined to apply the first-filed rule in cases of anticipatory lawsuits, those suits often involve the first-filed plaintiff

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<sup>2</sup> In fact, Exelon argues the opposite: that the Pennsylvania suit has developed further than the Hoosier suit. This court is not entirely convinced that the Pennsylvania suit has developed further than this suit. In the Pennsylvania suit, Exelon has filed a motion to enjoin Hoosier from proceeding with its suit in this court. Hoosier has filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the Pennsylvania suit to this court pursuant to 28 U.S.C. § 1404(a). According to the parties, these motions have been extensively briefed and are pending in the Pennsylvania Court. However, Exelon’s Motion to Dismiss or Stay has also been extensively briefed in this court. Thus, it is not clear to the court that the Pennsylvania suit has developed further than this suit. Nevertheless, it is clear that this suit has not developed further than the Pennsylvania suit.

seeking a declaratory judgment, see, e.g., *Tempco*, 819 F.2d 746; *Massey v. Conseco, Inc.*, No. 1:03-CV-1701-LJM-VSS, 2004 WL 828229 (S.D. Ind. Apr. 12, 2004); *Alpha Tau Omega Fraternity v. Pure Country, Inc.*, 185 F. Supp. 2d 951 (S.D. Ind. 2002); *Inst. for Studies Abroad, Inc. v. Int'l Studies Abroad, Inc.*, 263 F. Supp. 2d 1154 (S.D. Ind. 2001); *Patton Elec. Co. v. Rampart Air, Inc.*, 777 F. Supp. 704 (N.D. Ind. 1991), or the first-filed plaintiff acting in bad faith. See *Diversified Healthcare, Inc. v. N.J. Morgan & Assocs., Inc.*, No. EV-00-233-C-M/H, 2001 WL 405592 (S.D. Ind. Mar. 28, 2001) (The court dismissed the first-filed suit as anticipatory where the first-filed plaintiff waited twenty-eight days after filing the suit, and after the other party had filed a parallel suit in another district court, to serve process on the opposing party. Under these circumstances, the delay “evidence[d] bad faith” on the part of the first-filed plaintiff.).

Exelon has neither sought solely declaratory relief nor acted in bad faith. Hoosier fails to produce any authority supporting its position that a claim seeking declaratory relief, in addition to substantive monetary relief, is considered anticipatory merely due to the declaratory relief sought. In fact, the cases cited by Hoosier in support of its anticipatory suit argument merely contain first-filed claims based solely on declaratory relief without an additional substantive claim for monetary damages. See *Tempco*, 819 F.2d 746; *Massey*, 2004 WL 828229; *Alpha Tau Omega Fraternity*, 185 F. Supp. 2d 951; *Inst. for Studies Abroad*, 263 F. Supp. 2d 1154; *Kyle v. Consol. Roofing & Waterproofing, Inc.*, No. IP01-0676-C-H/G, 2001 WL 899639 (S.D. Ind. July 5, 2001); *Patton Elec.*, 777 F. Supp. 704 (While the amended complaint in *Patton* contained a substantive claim for monetary damages, the court declined to relate back the amended

pleadings. Thus, the court only considered the original complaint, which was based on declaratory relief, in deciding the first-filed issue.). Hoosier correctly asserts that Exelon seeks, in part, declaratory relief in the first-filed Pennsylvania suit. However, this case is easily distinguished from those declaratory relief cases cited by Hoosier because Exelon also brings a substantive breach of contract claim, alleging monetary damages up to \$8.6 million. Thus, Exelon's complaint amounts to more than merely a declaratory judgment suit. Such suits, even though declaratory relief is sought in part, are not necessarily anticipatory.

However, such suits may be considered anticipatory when the first-filed plaintiff has acted in bad faith. See *Diversified Healthcare*, 2001 WL 405592, at \*4-\*5 (dismissing the first-filed suit as anticipatory, not because the complaint sought, among other claims, declaratory relief, but because the first-filed plaintiff acted with bad faith in waiting twenty-eight days after filing the suit, and after the other party had filed a parallel suit in another district court, to serve process on the opposing party). Hoosier suggests that Exelon acted in bad faith by filing its complaint prior to the expiration of the Tolling Agreement and by making Hoosier wait three business days after the filing before receiving the summons and copy of the Pennsylvania complaint. However, Exelon's behavior by no means constitutes bad faith.

Hoosier and Exelon attempted to informally resolve this dispute for four years. On July 27, 2004, the parties entered into the Tolling Agreement, which tolled the statute of limitations up to and including October 1, 2004. Hoosier contends that Exelon misbehaved by filing suit on September 29, 2004, three days before the Tolling

Agreement would expire. The purpose of the Tolling Agreement was to toll the statute of limitations and similar affirmative defenses. The Tolling Agreement did not prevent either party from filing suit prior to its expiration. In fact, the Tolling Agreement contemplates the possibility of either party filing suit prior to its expiration: “Hoosier and Exelon agree that neither party will assert an affirmative defense . . . based on the failure to file such an action or proceeding between the date of this Waiver and Tolling Agreement and October 1, 2004, so long as such action or proceeding is filed on *or before* October 1, 2004.” (Resp. Ex. 3, ¶ 2 (emphasis added).) Indeed, by filing its suit on October 1, 2004, Hoosier also filed prior to the Tolling Agreement’s expiration. Thus, Exelon did not act in bad faith by filing suit prior to the Tolling Agreement’s expiration.

Hoosier further suggests that Exelon misbehaved by not sending Hoosier a courtesy copy of the Pennsylvania complaint on the same day that the suit was filed. The district court in *Diversified Healthcare* found that the first-filed plaintiff acted in bad faith by waiting twenty-eight days after filing suit to serve the summons and complaint on the opposing party. *Diversified Healthcare*, 2001 WL 405592, at \*5. In that case, the first-filed plaintiff filed suit, but delayed in serving the other party until after it had offered to negotiate a settlement, but never did, and after it learned that the opposing party had filed a parallel suit in another district court. The court found that waiting twenty-eight days to serve, under those circumstances, “evidence[d] bad faith” on the part of the first-filed plaintiff. Accordingly, the court refused to follow the first-to-file rule and dismissed the first-filed suit. However, the facts here fail to evidence similar bad faith on Exelon’s part. Exelon filed suit on Wednesday, September 29, 2004. Although Exelon choose

not to send Hoosier a courtesy copy of the complaint on that day,<sup>3</sup> Exelon did not delay in the formal service of the summons and complaint. Hoosier received the summons and complaint on Monday, October 4, 2004, just three business days after the complaint was filed. The minimal delay, if any, that existed here is insufficient to constitute bad faith on Exelon's part. In addition, even if Exelon had sent a courtesy copy of the complaint to Hoosier, this act would not have changed the fact that Exelon was the first to file and should therefore benefit from the presumption that follows the first-to-file rule.

Because Exelon did not engage in anticipatory filing and did not act in bad faith, the court finds that there are no sufficient justifications for allowing the first-filed presumption to "yield to the interest of justice." Accordingly, the appropriate step is to not allow this case to proceed further and to grant either Hoosier's motion to stay or motion to dismiss. "When comity among tribunals justifies giving priority to a particular suit, the other action (or actions) should be stayed, rather than dismissed, unless it is absolutely clear that dismissal cannot adversely affect any litigant's interests." *Cent. States*, 203 F.3d at 444 (citing *Deakins v. Monaghan*, 484 U.S. 193, 202-04 (1988)). If this suit were to be dismissed, and the Pennsylvania Court would later grant dismissal of its suit, then Hoosier would be barred by the statute of limitations from bringing an action to recover any possible damages it may be entitled to under the Sales Agreements. Thus, dismissal here would create an unwarranted risk of legal prejudice.

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<sup>3</sup> Likewise, Exelon alleges that Hoosier did not send a courtesy copy of its Indiana complaint to Exelon. (Reply 4.)

Granting the requested stay, as opposed to the dismissal, would be the appropriate alternative.

### III. CONCLUSION

For the foregoing reasons, Exelon's Motion (Docket No. 31), to the extent it seeks dismissal, is **DENIED WITHOUT PREJUDICE**. However, the alternative motion to stay is **GRANTED** pending resolution of the motions referred to above in the Pennsylvania Court. Hoosier must notify the court of a resolution of the pending motions in the Pennsylvania Court within 30 days after such resolution.

ALL OF WHICH IS ENTERED this 26th day of November 2005.

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John Daniel Tinder, Judge  
United States District Court

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