BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Katherine M. Lycourt-Donovan Complainant,	)	
v.	)	**Case No. 12-2877-GA-CSS**
Columbia Gas of Ohio, Inc. Respondent.	)	
In the Matter of the Complaint of Seneca Builders LLC, Complainant,	)	
v.	)	**Case No. 13-124-GA-CSS**
Columbia Gas of Ohio, Inc., Respondent.	)	
In the Matter of the Complaint of Ryan Roth et al., Complainants,	)	
v.	)	**Case No. 13-667-GA-CSS**
Columbia Gas of Ohio, Inc., Respondent.	)	

APPLICATION FOR REHEARING
By
SENECA BUILDERS, LLC, RYAN ROTH AND R&P INVESTMENTS, INC.

February 13, 2015

The Public Utilities Commission of Ohio ("PUCO" or "Commission"), issued an Opinion and Order in these proceedings regarding several claims made by multiple individual complainants against Columbia Gas of Ohio ("Columbia" or the "Company"). The Commission ruled in favor of Columbia on all issues, stating that Columbia's actions -while appearing to be abandonment under the statute - did not constitute abandonment. The Commission also stated that Columbia's actions were unreasonable but did not constitute inadequate service. For the reasons listed below, complainants Seneca Builders, LLC ("Seneca"), and Ryan Roth and R & P Investments, Inc., ("Roth") seek rehearing of the Opinion and Order issued by the Commission in the above captioned proceedings.

Seneca and Roth are authorized to file this Application for Rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35. Rehearing is sought of the January 14, 2015, Opinion and Order, for the following Assignments of Error:

A. The PUCO erred when it ruled that there was insufficient evidence to support a finding that Columbia improperly and illegally abandoned service in violation of R.C. 4905.21.

B. The PUCO erred when it ruled that there was insufficient evidence to support a finding that Columbia improperly and illegally abandoned service in violation of R.C. 4905.20.

C. The PUCO erred when it ruled that there was insufficient evidence to support a finding that Columbia provided inadequate service pursuant to R.C. 4905.22.

D. The PUCO erred when it ruled that the Complainants failed to satisfy the burden of proof in support of their claims.

The basis of this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and Seneca and Roth's claims of error, the PUCO should modify or abrogate its Opinion and Order and rule for the Complainants.

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MEMORANDUM IN SUPPORT
Of the
APPLICATION FOR REHEARING

I. INTRODUCTION

Columbia is the natural gas distribution company in the Toledo, Ohio area. Columbia's service territory in Toledo includes the Graystone Woods subdivision, located on Oakside Road

in the Northwestern part of the city. Columbia's statutory violations include the unilateral decision by Columbia to interrupt and then abandon natural gas service to the Complainants and to the rest of the Oakside Road neighborhood at the end of May, 2012. Natural gas service has not been re-established since then. As of February 13, 2015, Columbia Gas of Ohio has denied service to the residents on Oakside Road for more than 31 months. The Commission issued an Opinion an Order in this case on January 14, 2015.

The Commission ruled in its Opinion and Order that Columbia's actions "indicated abandonment of service under the statute."[1] However, then the Commission stated that the "record in these clearly cases clearly reflects the Company's intent to continue serving Complainants once the remediation of the situation was complete."[2] Additionally, the Commission stated that, "we find Columbia's unwillingness to articulate a standard that must be met before reconnection of service to be unreasonable, we do not find that such unwillingness, in conjunction with the other factors for consideration of an inadequate service claim, is tantamount to the provision of inadequate service pursuant to R.C. 4905.22."[3]

The Commission's ruling on the abandonment issue is contrary to the plain language of the statute and therefore in violation of the law. Also, because the Commission incorrectly decided the abandonment issue the additional finding that there was no inadequate service to these customers is also flawed. The Order ignores statutory law and case precedent. Therefore, Complainants now respectfully request the Commission grant rehearing on these issues.

[1] Opinion and Order at 31.

[2] Id.

[3] Id. (Emphasis added).

II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10. This statute provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered and appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."[4] Additionally, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considered the order to unreasonable or unlawful."[5]

In considering an Application for Rehearing, Ohio law provides that PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear."[6] If the PUCO grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * * ."[7]

Seneca and Roth meet both the statutory conditions as applicants for rehearing under R.C. 4903.10 and the requirements of the PUCO's rule on applications for rehearing. Both Seneca and Roth are parties to this case and actively participated in the case. Both parties are submitting this joint Application for Rehearing in writing and thus satisfy the requirements of R.C. 4903.10. Therefore, Seneca and Roth respectfully request that the PUCO grant rehearing on the matters specified below.

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[4] R.C. 4903.10.

[5] R.C. 4903.10 (B).

[6] Id.

[7] Id.

III. LAW AND ARGUMENT

ASSIGNMENTS OF ERROR

A. The PUCO Erred When It Ruled That There Was Insufficient Evidence To Support A Finding That Columbia Improperly And Illegally Abandoned Service In Violation of R.C. 4905.21.

a) R.C. 4905.21 requires an application for abandonment be filed before a line or any portion of a line is closed for service.

The Commission is a creature of statute and has only those powers conferred upon it by the General Assembly.[8] The Commission cannot act outside the bounds of its statutory parameters. Abandonment is a statutorily defined process and a statutorily defined event. R.C. 4905.21 states,

> [A]ny public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn closed for traffic or service all or any part of any line, * * * referred to in section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing.

R.C. 4905.20 states,

> [N]o public utility as defined in section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, * * * or the service rendered thereby, that has once been laid constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover, except as provided in section 4905.21 of the revised Code.

The Revised Code clearly indicates the types of actions that can be considered abandonment and the method by which a utility can take those actions. R.C. 4905.21 explicitly

[8] Tongren v. Pub. Util. Comm., 85 Ohio St. 3d 87, 88, 1999-Ohio-206, 706 N.E.2d 1255 (1999).

states closing a line for service requires an abandonment application, without any reservations or exceptions.

At the hearing multiple pieces of evidence came forward which proved that the line has been abandoned. Witness Anstead was questioned about an email (Seneca Exhibit 5), which was addressed to him, dated August 9, 2012, from Steve Sylvester, who the witness identified as being the General Manager / Vice President of Columbia Gas for Ohio and Kentucky at the time of the email.[9] In the email Mr. Sylvester told Witness Anstead that "We are going to cut the main test it leave it temporarily disconnected with air in the dead side cap our side that is live. If they don't remediate we never go back."[10] The Vice President of Columbia for Ohio and Kentucky sent an email stating they were **cutting the line**, **filling the dead side** with air, – which was the side serving the residents of Oakside Road - **and capping the live side**. Then he stated if they don't remediate **we never go back**. This is clearly abandonment. They have separated the line leading to the area at issue from the main thereby closing it for service and have stated they will never go back unless the situation is remediated. This isn't a safety precaution. It is, to use Columbia's own words, a "retirement" of the line.[11]

Yet, Columbia never filed anything with the Commission stating they were planning to do that or even stating that they had completing this service line closure. Columbia closed a line for service without filing an application, as required by R.C. 4905.21. Therefore, they have violated the statute and have illegally abandoned both the line and service to those customers receiving service from that line. It does not matter that Mr. Sylvester characterized the separation

[9] Transcript Volume II at 320-321.

[10] Seneca Exhibit 5.

[11] Seneca Exhibit 7.

as "temporary." The evidence shows that the Company closed a line for service without filing an application as required by R.C. 4905.21. Therefore Columbia violated the law, and the Commission is responsible for correcting this violation.

Chris Kozak, a Columbia employee, affirmed that Columbia closed the line for service, corroborating Witness Anstead's earlier statement that the Company cut the line and closed it for service.[12] When asked if the customers who were no longer receiving service had their service effectively terminated Witness Kozak replied, "I believe that could be an interpretation."[13] Additionally, Witness Kozak testified that Columbia removed the impacted customers from their billing systems and when asked if that meant these people were no longer customers of Columbia Gas Witness Kozak answered, "Correct."[14]

The record is clear that Columbia abandoned service to the customers on Oakside Road. As demonstrated above, witnesses for the Company have stated several times that service to these customers was terminated and the line was severed and reburied. But, contrary to the law, Columbia filed no application. Columbia unilaterally terminated customers' service and cut the line serving them and filled it with air all without informing the Commission. R.C. 4905.21 is very clear "any public utility * * * desiring to **abandon or close**, * * * **closed for traffic or service all or any part of any line** * * * shall make an application to the public utilities commission in writing." The weight of the evidence demonstrates Columbia failed to do this. Columbia illegally closed a line and abandoned service in direct violation of R.C. 4905.21.

[12] Transcript Volume III at 528-529 & Transcript Volume II at 335.

[13] Id. at 530.

[14] Id. at 533 lines 2-6.

b) R.C. 4905.21 requires an application be filed anytime a public utility plans on closing or abandoning a line, regardless of whether the closure or abandonment will be permanent.

The Commission erred when it stated "the evidence of record does not support a finding that the August 23, 2012 separation of the four-inch intermediate main serving Graystone Woods equated to a **permanent abandonment of service** for which Columbia needed to file an application under R.C. 4905.20 and R.C. 4905.21."[15] R.C. 4905.21 does make a distinction between abandonment and permanent abandonment but that distinction does not alter the filing requirement. R.C. 4905.21 begins by stating,

> [A]ny public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn closed for traffic or service all or any part of any line, * * * referred to in section 4905.20 of the Revised Code, **shall make application** to the public utilities commission in writing. (Emphasis added).

R.C. 4905.21 also states,

> **If** the application asks for the abandonment or withdraw of any main track, main pipe line, gas line, * * * or the service rendered thereby, **in such a manner as can result in the permanent abandonment of service** between any two points on such railroad, or of service and facilities of any such public utility, no application shall be granted unless the railroad or public utility has operated the track, pipe line, gas line, * * * for at least five years. (Emphasis added).

The statute's use of the language "If the application asks for the abandonment * * * in such a manner as can result in the permanent abandonment of service" makes it clear that the statute is not solely contemplating permanent abandonment but also recognizes that temporary abandonment also occurs. Regardless of the type of abandonment at issue, the statute requires an

[15] Opinion and Order at 29-30. (Emphasis added)

application be filed. Because abandonment is governed by statute this is a legal issue as opposed to a factual determination.

The Commission incorrectly inferred that only permanent abandonment requires a filing when in fact as has been shown any abandonment or closure for service requires a written application to the Commission. R.C. 4905.21 even delineates between an abandonment or closure for an undefined term and a permanent abandonment by adding the additional requirement of at least five years of service for the granting of a permanent abandonment.[16] The fact that the legislature included the language "permanent abandonment" in addition to merely "abandonment" or "closure for service" indicates the General Assembly contemplated varying types of abandonment or closures within the statute.

R.C. 1.47 states the presumptions to be held in all statutes enacted in Ohio. It states,

> In enacting a statute, it is presumed that:
> (A) Compliance with the constitutions of the state and of the United States is intended;
> (B) The entire statute is intended to be effective;
> (C) A just and reasonable result is intended;
> (D) A result feasible of execution is intended.[17]

Applying this statute to R.C. 4905.21 demonstrates the flawed logic applied by the Commission in these cases. By distinguishing between an undefined abandonment or closure for service and permanent abandonment the Commission ignored R.C. 1.47(B). The Commission held that only permanent abandonments require applications under R.C. 4905.21. That conclusion is a mistaken interpretation of the statute. The Commission's interpretation only gives credence to a single sentence within the latter portion of the statute, rendering the preceding sentences ineffective. Additionally, it ignores the first word of the very sentence on

[16] R.C. 4905.21.

[17] R.C. 1.47

which the Commission is relying. The portion of the statute which mentions "permanent abandonment" states, "**If** the application asks for the abandonment * * * in such manner as can result in the permanent abandonment of service * * * ".[18] The sentence begins with "if" which is a clear indicator that the General Assembly contemplated applications that did not request permanent abandonment. Yet, the General Assembly still required an application be filed as demonstrated by the phrase "If the application seeks". The Commission's holding stating that only permanent abandonment requires application under R.C. 4905.21 is contrary to the plain language of the statute, renders portions of the statute ineffective, and is an attempt to insert discretion where none is authorized. The Commission is incorrectly and selectively applying only portions of the statute. The Commission turned a legal determination, whether abandonment occurred according to the statute, into a factual determination by also considering future actions that may or may not have an impact on the abandonment.

The record is clear that Columbia abandoned and closed a line for service without first filing an application with the Commission as required by the statute. The Commission needs to reverse its finding that Columbia was not required to file an application under R.C. 4905.21. The Commission must not surrender its oversight to the companies it is supposed to be regulating. Furthermore, allowing companies to abandon service without Commission approval sets a dangerous precedent and leaves unprotected the basis of customer service, the service itself.

[18] R.C. 4905.21 (Emphasis added).

c) R.C. 4905.21 requires an application be filed with the Commission when a Company "desires" to abandon or close a line for service.

The Commission erred when it ruled that Columbia was not required to file an application to abandon when it abandoned and closed for service the line serving the Graystone Woods subdivision.[19] R.C. 4905.21 begins by stating,

> [A]ny public utility or political subdivision **desiring to abandon** or close, or have abandoned, withdrawn **closed for traffic or service** all or any part of any line, * * * referred to in section 4905.20 of the Revised Code, **shall make application** to the public utilities commission in writing. (Emphasis added).

In this case, Witness Kozak was asked to read an email he authored and sent to a variety of recipients on September 24, 2012, including legal counsel for the Company.[20] In the email he wrote "There are no suggestions for remediation. As such, **we are strongly considering a complete abandonment** of these homes and development."[21] The email continued, "Internally, work has started on the process and some outreach to the PUCO has been initiated."[22] Witness Kozak confirmed that in the email he was referring to the legal process of abandonment which takes place before the PUCO.[23] Yet, this email was sent a month after Columbia had already dug up the line serving the development and cutting it off the main line and capping it.[24] Columbia was required under R.C. 4905.21 to file an application before taking that action, which it failed

[19] Opinion and Order at 31.

[20] Id. at 544-546.

[21] Seneca Exhibit 19. (Emphasis added).

[22] Id.

[23] Transcript Volume III at 547.

[24] Opinion and Order at 5.

to do. Then, Columbia begins internal discussions about abandoning the line (which it had already done by separating it from the main) and still refused to file an application as required by the statute.

The record reflects that Columbia failed to follow the statutory process laid out for the abandonment or closure for service of a line before they took the action to close the line. The record also reflects that even as Columbia discussed "complete abandonment" internally they still failed to file an application as required by the statute. The Commission should recognize these statutory violations and hold Columbia accountable for failing to follow the statutory procedure before unilaterally cutting the line and ceasing service to the customers in the Graystone Woods Subdivision. Seneca and Roth respectfully request that the Commission modify, abrogate, and reverse its original Order in order to ensure Columbia's compliance with Ohio laws, to protect Commission authority, and protect Ohio's residential utility customers from such blatant disregard of Ohio's laws.

B. The PUCO Erred When It Ruled That There Was Insufficient Evidence To Support A Finding That Columbia Improperly And Illegally Abandoned Service In Violation of R.C. 4905.20.

The Commission erred when it held that the actions of Columbia did not equate to abandonment of service which would require the filing of an application under R.C. 4905.20. R.C. 4905.20 states,

> [N]o public utility as defined in furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, * * * or the service rendered thereby, that has once been laid constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover, except as provided in section 4905.21 of the revised Code. Any railroad or public utility violating this section shall forfeit and pay into the state treasury not less than one hundred dollars, nor more than one thousand dollars, and shall be subject

> to all other legal and equitable remedies for the enforcement of this section and section 4905.21 of the Revised Code.

As has been extensively discussed and conclusively shown above Columbia abandoned and closed for service a line without first filing an application as required by R.C. 4905.21. This failure to file was not only a violation of R.C. 4905.21 but also R.C. 4905.20.

Columbia's refusal to follow the statutory procedure deprived the Commission of its statutory authority and left the impacted customers without the protection of Commission oversight and regulation. These blatant actions are an affront to the regulatory scheme in Ohio and must not be allowed to go unanswered. Columbia's unilateral severing of the line and cessation of service has left the customers in the Graystone Woods subdivision without gas service to their homes since 2012. In that time Ohio has experienced some of its coldest winter weather on record and a polar vortex, all while these customers lacked the ability to heat their homes in the manner they expected. Columbia's unauthorized actions necessitated that these customers were required to turn to alternative to measures to heat their homes in order to make it through the dangerous conditions of the polar vortex.

The Commission should reverse its original Order and find Columbia in violation of R.C. 4905.20. A reversal will avoid setting the dangerous precedent that utilities can take whatever actions they please regardless of the statutory procedures governing those actions and without Commission oversight. The Commission should not surrender its authority over the utilities and should hold utilities accountable for their actions. Seneca and Roth respectfully request that the Commission reverse its order and find Columbia in violation of R.C. 4905.20 and to subject Columbia to the forfeitures and any and all other legal and equitable remedies authorized by R.C. 4905.20. This will serve to protect the customers impacted and serve as a deterrent for future unauthorized actions by the Company.

C. The PUCO Erred When It Ruled That There Was Insufficient Evidence To Support A Finding That Columbia Provided Inadequate Service Pursuant To R.C. 4905.22.

The Commission held that Columbia's refusal to articulate a standard for reconnection was unreasonable but given other factors did not arise to level of an inadequate service claim.[25] R.C. 4905.22 states,

> [E]very public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable.

The law requires that all utility service be provide in a reasonable manner. But the Commission held that Columbia's refusal to articulate a standard was unreasonable.[26] The Commission used the very word the statute requires the Company to avoid. However, the statute does not allow for varying degrees of unreasonableness. Therefore, because the Commission found Columbia's refusal to articulate a standard for reconnection as unreasonable the Commission should hold Columbia in violation of R.C. 4905.22 for providing inadequate service.

Furthermore, because the Commission failed to adhere to the statutory requirements regarding abandonment it also failed to find that Columbia provided inadequate service in violation of R.C. 4905.22. However, the Commission should have found illegal abandonment in violation of the R.C. 4905.21 and R.C. 4905.20. According to Commission precedent, illegal

[25] Opinion and Order at 31.

[26] Id.

abandonment constitutes inadequate service and a violation of R.C. 4905.22.[27] In *Buzz*, the Commission held that when a utility ceases service without filing an application and without Commission approval that utility has provided inadequate service.[28] The same outcome should be found in this case. Because the Commission erred in failing to find illegal abandonment it also erred by failing to find Columbia provided inadequate service in violation of R.C. 4905.22. Seneca and Roth respectfully request that the Commission modify, abrogate, and reverse its original Order and find the Company in violation of R.C. 4905.22 as the law and case precedent require.

D. The PUCO Erred When It Ruled That The Complainants Failed To Satisfy The Burden Of Proof In Support Of Their Claims.

The Commission began its discussion by noting that the Complainants bear the burden of proof in a complaint case.[29] The Commission was correct in its articulation of the standard but incorrect when it held that the Complainants failed in this case. The burden in this case was to prove the claims by a "preponderance of the evidence" which the Commission correctly noted means "the greater weight of the evidence". A "preponderance of the evidence" is also often explained as proving a proposition as being more likely than not; or in a quantitative sense, more than 50% of the evidence supports the proposition. The record in this case is filled with testimony and evidence that Columbia has abandoned service (under the statutory meaning) yet the Commission anchored its ruling in the testimony of the Company that it will begin service again once the stray gas issue is remediated. However, this testimony is about future, alleged, intended actions and is therefore unsupported.

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[27] In re Investigation of Buzz Telecom, Case No. 06-1443-TP-UNC, Opinion and Order (Oct. 3, 2007).

[28] Id.

[29] Opinion and Order at 4.

Ohio Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Assuming, *arguendo*, that the testimony regarding the Company's intentions toward future actions should hold any weight whatsoever it still fails to have any impact on the evidence of past conduct. Whether the Company intends to provide service in the future has no tendency to make the fact that they have already terminated service more or less likely. Furthermore, an intention to act in a certain manner in the future should not be considered evidence that those actions will actually occur. Intention, by virtue of its intangible nature, cannot be given the same evidentiary weight as the evidence providing factual accounts of actions that have actually occurred. Intentions have no bearing on the fact that the Company is currently not serving the area and has closed the line for service thereby abandoning it under the statute but without following any of the abandonment procedures.

Especially when those intentions are conditioned on the occurrence of an event for which the Company is not claiming responsibility. As previously shown, the then Vice President and General Manager of Columbia for Ohio and Kentucky wrote, "If <u>they</u> don't remediate <u>we never go back</u>."[30] The Company only intends on resuming service on the condition that an event occurs, remediation, for which the Company has claimed no responsibility. Therefore, any intentions to return are merely that, intangible ideas that cannot be considered credible evidence. In law and evidence <u>it is not the thought that counts</u> but what can be proven through actual events, actions, words, and tangible proof.

[30] Seneca Exhibit 5.

The Commission erred when it stated that the "evidence" of the Company's intentions towards its future actions outweighed the evidence demonstrating the Company had already closed the line for service and terminated service to its customers in violation of R.C. 4905.21. The Company by its own admittance closed a line for service and terminated service to customers without first filing an application as required by R.C. 4905.21. The Commission recognized this indicated a violation of the plain language of the statute. The Commission erred when it took ancillary evidence into account and ignored the statutory violation and held the Company did not need to file an application. The weight of the evidence supports the fact that Columbia abandoned and closed for service a line without first filing a statutorily required application. The testimony of Company employees about what the Company **intends** to do in the **future** has no bearing on what has already taken place and cannot diminish the fact that the actions that have occurred have occurred in violation of Ohio law. Seneca and Roth respectfully request that the Commission modify, abrogate, and reverse its original Order as needed to reach the result which the laws of Ohio demand.

IV. CONCLUSION

Seneca and Roth respectfully request that the Commission grant rehearing on all the above stated issues and modify, abrogate, or reverse the original Order as requested. This Application for Rehearing and its specific requests will not only protect and vindicate the rights of the impacted customers of Graystone Woods but will also serve to protect residential utility customers across Ohio by avoiding the dangerous precedent of surrendering Commission authority and oversight to the utilities. Finally, it will in part rectify the damage done by Columbia's blatant disregard for Ohio's laws and serve as a deterrent for other utilities that may attempt to act contrary to the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Application for Rehearing* has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on February 13, 2015.

/s/Christopher J. Allwein
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Summary: Application for Rehearing electronically filed by Mr. Christopher J. Allwein on behalf of Ryan Roth and R&P Investments, Inc. and Seneca Builders, LLC