

BRIEF IN SUPPORT

I. STATEMENT OF FACTS

These are the undisputed facts relevant to this PUCO, proceeding, and they are as follows:

On May 7, 2018, complainant filed correspondence addressed to Columbia's legal counsel and argued for the first time, that Columbia wrongly disconnected his natural gas service on May 3, 2018, despite arrangements that were made on April 19, 2018, between Columbia and Complainant. On May 10, 2018, Columbia's legal counsel filed a correspondence addressed to the Commission, responding to complainant's correspondence dated May 7, 2018. On May 16, 2018, the Commission issued an Entry granting Columbia's motion to dismiss and finding that *res judicata* barred complainant from re-litigating previously argued claims. On May 17, 2018, Complainant filed correspondence addressed to the Commission alleging that Columbia was still not in compliance with the PUCO's rulings concerning termination of his natural gas service on May 3, 2018, regarding leaving notice in a conspicuous location on May 3, 2018.

On May 17, 2018, complainant filed an application for rehearing of the Commission's May 16, 2018, Entry. Columbia did not file a memorandum contra to complainant's application for rehearing. On May 21, 2018, complainant filed a correspondence addressed to the Commission and to the attorney examiner on the docket, again alleging that Columbia wrongly disconnected natural gas service on May 3, 2018, despite arrangements that were made on April 19, 2018, between Columbia and Complainant.

On June 13, 2018, the Commission issued an Entry on Rehearing granting rehearing for the limited purpose of further consideration of the matter raised in complainant's application for rehearing, stating that the Commission had reviewed all arguments raised in Complainant's May

17, 2018 application for rehearing, any argument raised on rehearing that is not specifically discussed had been considered and should be denied.

On August 8, 2018, the Commission issued a Second Entry on Rehearing denying Complainant's application for rehearing of the May 16, 2018 Entry. On August 13, 2018, the Complainant now files this application for rehearing of the Commission's August 8, 2018, Second Entry on Rehearing.

II. LAW AND ARGUMENT

A. **ASSIGNMENT OF ERROR NO. 1: Complainant asserts that the Commission did not adequately consider additional documents he previously filed in this matter, including correspondence dated May 21, 2018 in its August 8, 2018 Entry.**

Pursuant to R.C. 4903.10, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding by filing an application within 30 days after the Commission's order is journalized. Specifically, said section provides, "such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful...no party shall in any court urge or rely on any ground for reversal, vacation, or modification not set forth in the application..."

Complainant's case clearly falls within this guideline. Complainant's instant application for rehearing pertains entirely to Commission's abrogating its statutory duties under R.C. 4903.10. This duty, established under R.C. 4903.10, is not discretionary in nature; rather, it is mandatory. Nowhere within the enabling legislation is there a provision allowing the Commission to pick and choose which duties the commission will perform, or when commission will begin to perform it. Under the statute creating the duty which the complainant seeks to

compel commission to perform, there can be no valid excuse given for commission refusing to perform said duties, as none are statutorily provided.

In ruling on a motion to reconsider, a Court follows *Matthews v. Matthews*, 5 Ohio App. 3d 140, 450 N.E. 2d 278 (10 Dist. 1981), where paragraph two of the syllabus states:

The test generally applied upon the filing of a motion for Reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App. R. 26, construed.)

The complainant's application for rehearing should be granted with regard to the above assignment of error because he had raised a new argument for the Commission's consideration. This fact is unrelated to the facts of Case No. 15-873-GA-CSS, which complainant had filed with the Commission on May 4, 2015. This additional claim occurred after the complainant filed his initial case which occurred subsequent to his May 2015 filing in the First Complaint case. The Commission was clear in its Second Entry on Rehearing in the First Complaint Case: Mr. Howard would have to pursue any additional claim that occurred after he filed his initial case in the context of a new complaint case. First Complaint Case, Second Entry on Rehearing (Dec. 20, 2017, at ¶33. Consequently, because the current Complaint Case presents a viable claim that Columbia wrongly disconnected natural gas service on May 3, 2018, regarding leaving notice in a conspicuous location on May 3, 2018, despite arrangements that were made on April 19, 2018, between Columbia and Complainant, that occurred after he had filed his initial case the complainant was entitled to pursue this additional claim in the in the current Complaint Case. Id. at ¶33.

Moreover, because complainant current case with regards to additional claim is not a restatement of his prior case before this Commission, which occurred after the complainant filed

his initial case which occurred subsequent to his May 2015 filing in the First Complaint case, the doctrine of *res judicata* is inapplicable to the additional claim which occurred after the complainant filed his initial case which occurred subsequent to his May 2015 filing in the First Complaint case. Therefore, Columbia's motion to dismiss complainant's complaint with prejudice should be denied.

As noted above, on May 7, 2018, complainant filed correspondence addressed to Columbia's legal counsel and argued for the first time, that Columbia wrongly disconnected his natural gas service on May 3, 2018, despite arrangements that were made on April 19, 2018, between Columbia and Complainant. Columbia breached the April 19, 2018 agreement made between the parties to keep the gas service on until end of business on May 3, 2018, and wrongly disconnected complainant's natural gas service on May 3, 2018, before the end of business on that date. See, Columbia's May 10, 2018, response at Attachment A which shows that the gas was disconnected on May 3, 2018, at 8:30 am. Complainant asserts that he sustained his burden of proof with respect to his additional claim that Columbia breached the April 19, 2018 agreement made between the parties to keep the gas service on until end of business on May 3, 2018, and that Columbia wrongly disconnected complainant's natural gas service on May 3, 2018 at 8:30 am, before the end of business on that date. Therefore, complainant believes that the Commission should grant his application for rehearing filed May 17, 2018.

Columbia did not file a memorandum contra to complainant's application for rehearing. Second Entry on Rehearing (Aug. 8, 2018), ¶9. Therefore, Columbia cannot raise this matter on appeal because it has neglected to address this matter before the Commission in this case or cannot now complain of its failure to do so. Thus, the complainant states that he had raised an issue for the first time for the Commission's consideration that was not either considered at all or

was not fully considered by the Commission when it should have been pursuant to *Matthews v. Matthews*, 5 Ohio App. 3d 140, 450 N.E. 2d 278 (10 Dist. 1981) at paragraph #2 of the syllabus. Therefore, complainant believes that the Commission should grant his application for rehearing filed May 17, 2018.

Furthermore, the commission specifically noted that it had considered supplemental filing in this case, including the correspondence dated May 7, and May 10, 2018 but specifically declined to discuss them because it found that those documents reiterated claims and arguments originally made by the parties in the pleadings before the Commission. Second Entry on Rehearing (Aug. 8, 2018), ¶16. Nothing can be further from the truth. At the risk of repeating myself, on May 7, 2018, complainant filed correspondence addressed to Columbia's legal counsel and argued for the first time, that Columbia wrongly disconnected his natural gas service on May 3, 2018 at 8:30 am, despite arrangements that were made on April 19, 2018, between Columbia and Complainant. Therefore, the Commission erred in its Second Entry on Rehearing by finding that the documents dated May 7 and May 10, 2018, reiterated claims and arguments originally made by the parties in the pleadings filed on December 21, 2017, January 10, 2018, and January 11, 2018, pursuant to *Matthews v. Matthews*, 5 Ohio App. 3d 140, 450 N.E. 2d 278 (10 Dist. 1981) at paragraph #2 of the syllabus. Therefore, complainant believes that the Commission should grant his application for rehearing filed May 17, 2018.

As a result, the complainant states that the Commission's unreasonable and unlawful conclusion in regards to the argument raised for the first in the May 7, 2018, document was arbitrarily and capricious and should be tested by the Supreme Court of Ohio pursuant to R.C. 4903.13.

Lastly, on May 21, 2018, complainant filed a correspondence addressed to the Commission and to the attorney examiner on the docket, again asserting the argument that he had raised for the first time on May 7, 2018, that Columbia wrongly disconnected natural gas service on May 3, 2018 at 8:30 am, despite arrangements that were made on April 19, 2018, between Columbia and Complainant. As noted above, the commission specifically noted that it had considered supplemental filing in this case, including the correspondence dated May 7, and May 10, 2018 but specifically declined to discuss them because it found that those documents reiterated claims and arguments originally made by the parties in the pleadings before the Commission. Second Entry on Rehearing (Aug. 8, 2018), ¶16. The commission cannot pick and choose what supplemental filings in a case that it will consider or when commission will begin to perform it. Under the statute creating the duty which the complainant seeks to compel commission to perform, there can be no valid excuse given for commission refusing to perform said duties, as none are statutorily provided.

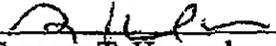
As noted above, on May 21, 2018, complainant filed a correspondence addressed to the Commission and to the attorney examiner on the docket, again alleging that Columbia wrongly disconnected natural gas service on May 3, 2018 at 8:30 am, regarding leaving notice in a conspicuous location on May 3, 2018, despite arrangements that were made on April 19, 2018, between Columbia and Complainant. Complainant submits that although Columbia wrongly disconnected his gas service on May 3, 2018 at 8:30 am. Complainant asserts that Bermex did not physically leave a disconnection notice at the service address in compliance with Columbia's policies and procedures and the commission's rules and states further that such a notice was not posted at the premises when Columbia wrongly disconnected gas service on May 3, 2018 at 8:30 am., as required by Ohio law.

This document raised for the first time that Columbia wrongly disconnected natural gas service on May 3, 2018 at 8:30 am, regarding leaving notice in a conspicuous location on May 3, 2018, despite arrangements that were made on April 19, 2018, between Columbia and Complainant and the commission failed to note that it had considered this supplemental filing in this case, that was unrelated to the claims made by the parties in the December 21, 2017 complaint, the January 10, 2018 answer and motion to dismiss, and January 11, 2018 memorandum contra, that the Commission declined to specifically discuss in the Second Entry on Rehearing. Thus, the complainant states that he had raised an issue for the first time for the Commission's consideration that was not either considered at all or was not fully considered by the Commission when it should have been pursuant to *Matthews v. Matthews*, 5 Ohio App. 3d 140, 450 N.E. 2d 278 (10 Dist. 1981) at paragraph #2 of the syllabus.

To the extent, the complainant states that the Commission's unreasonable and unlawful conclusion in regards to the argument raised for the first in the May 7, 2018, document was arbitrarily and capricious and should be tested by the Supreme Court of Ohio pursuant to R.C. 4903.13. Additionally, Columbia did not offer sufficient evidence to refute the argument raised for the first in the May 7, 2018.

WHEREFORE, this instant application for rehearing of the Commission's August 8, 2018, Second Entry on Rehearing should be granted pursuant to *Matthews v. Matthews*, 5 Ohio App. 3d 140, 450 N.E. 2d 278 (10 Dist. 1981) at paragraph #2 of the syllabus because the complainant instant filing calls to the attention of the commission an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.

Respectfully submitted,



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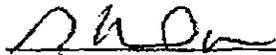
PROOF OF SERVICE

This is to certify that a regular copy of the foregoing of Gregory T. Howard was sent via ordinary U.S. Mail or via email, or facsimile this 15th day of August, 2018 to:

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Fax Log for
Gregory Howard
(419) 754-0153
Aug 13 2018 2:12PM

Last Transaction

<u>Date</u>	<u>Time</u>	<u>Type</u>	<u>Station ID</u>	<u>Duration</u>	<u>Pages</u>	<u>Result</u>
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