

In the Matter of the Application of )  
Columbia MHC East LLC d/b/a Columbia )  
Park Water and Sewer System, for an )  
Increase in Rates and Charges )

Case No. 18-1294-WS-AEM  
Case No. 18-1528-WS-AIR

---

**Application-Motion for Rehearing of Journal Entry made by the  
Public Utilities Commission of Ohio January 23, 2019**

---

Columbia Park Water and Sewer System ("CPWSS") is in receipt of the Journal Entry of January 23, 2019 ("Journal Entry") issued by the Public Utilities Commission of Ohio with respect to the above rate cases. Pursuant to O.R.C. 4903.10 the interests of the Applicant were not adequately addressed during the hearing or deliberation which resulted in the Journal Entry, and Applicant is entitled to a rehearing;

**Applicants application for a waiver discussed in Paragraph #6-#8 of the Journal Entry.**

In the review of similar Rate Case applications for small utilities made by other applicants in Ohio to the Public Utilities Commission, it is apparent that these waivers are routinely given. It is also noted that a formal granting of the waived has not been routinely NOTICED OR DOCKETED in each similar case. CPWSS in fact, mirrored one of these applications, Carroll Township Treatment Services, filed on May 17, 2018 ("Carroll"), wherein a waiver request was granted with respect to

13221578\_1

the requirements in Section 4909.18 (A) through (E).

No notice was given by the PUCO that the instant application would be treated differently than that of Carroll, and no Data Request was received from the PUCO staff asking for the schedules required under Section 4909.18 (A) through (E). No waiver was granted/docketed to Carroll for their Rate Case, yet the PUCO is considering this application under the waiver.

It should be noted that Applicant received four different Data requests from the PUCO staff, all of such requests were complied with on a timely basis. No mention was made in these Data Requests of the need for the schedules which are excluded under the waiver. No mention was made of the contention that the waiver was denied because no formal notice was given of its granting.

It is grossly unfair, discriminatory and inequitable that the application of CPWSS is being treated differently than similar applications made to the PUCO. It is inequitable that the lack of a formal notice by PUCO within 30 days of the granting of the waiver is being used by PUCO as an excuse to deny or dismiss the application.

**CPWSS disagrees with assertions made in paragraph #12 of the Journal Entry.**

Applicant CPWSS referenced and incorporated into its Rate Case No. 18-1528-WS-AIR ALL of the filings Case No. 18-1294-WS-AEM. This included

---

its opposition to the intervention of US Bank and the Receiver.

**CPWSS Never Received Notice of any Motion to Dismiss, the Motions were filed prematurely and in violation of the rights of Due Process of CPWSS and its principals:**

One of the criteria for the granting of a rehearing is that Applicants interests were not represented in the initial hearing. According to the Journal Entry Motions to Dismiss were made by "Movants" on **December 21, 2018** on 18-1294-WS-AEM and **January 4, 2019** on Case No. 18-1528-WS-AIR.

As these Motions were filed **BEFORE** Movants were granted status as intervenors in the Cases, they should have been rejected by PUCO out of hand. The Public Utilities Commission ("PUCO") was in error when on the SAME DATE IT GRANTED INTERVENOR STATUS, **January 23, 2019** it decided the untimely filed Motions to Dismiss. The obvious effect of these actions was not to allow CPWSS time to respond and oppose.

Movants never provided any Notice to CPWSS of these Motions. The attorneys for the Movants had always provided e-mail copies of any filings on the various cases to the principal of CPWSS, Kenneth C. Burnham, but in this instance chose not to.

Additionally, Mr. Burnham had a number of contacts with Dorothy Bremer of the PUCO during this time period; and although Ms. Bremer had provided Mr. Burnham with copies of prior filings, she never copied

---

Mr. Burnham on the Motions to Dismiss, or mentioned them.

We view Movants actions to make these Motions prematurely and also to conceal these Motions from CPWSS as unethical and intentional. CPWSS would have responded if it knew of these Motions to Dismiss and that they were being considered even though these motions were made prior to being granted intervenor status.

A rehearing is necessary so that CPWSS can present its contentions, allegations and defenses and debunk the factual inaccuracies in the allegations of the Movants.

**Nothing in the Receivership Order gives the Receiver any right to own, control or operate CPWSS.**

The Receiver has the right to act for those parties who are and were subject to the Loan Agreement. In its decision on the Appeal of CV-17-887110 the 8<sup>th</sup> Circuit Court of Appeals found that US Bank admitted that the assets of CPWSS were not encumbered by the mortgage. Further CPWSS was not a party to the Loan Agreement. CPWSS, the owner of the Waste Water Treatment Plant ("WWTP"), received no monies from the loan, and signed none of the Loan Documents.

Despite the tortured arguments of the Movants, just because CPWSS had improvements on the land of Columbia Park which the Court considered fixtures, does not pledge these fixtures under any fixture filing, loan or lien of the Movants. CPWSS was not signatory to

---

any fixture filing, lien or loan, nor received monies from the loan.

**The effects of this Journal Entry are far reaching and affect every utility in the State of Ohio.**

Every public utility in Ohio has "fixtures" located on property it does not own. These could be transformers, pump stations, transmission lines, poles and the wiring, piping and the like. This Journal Entry effectively declares that these fixtures are subject to lien as a function of being located on those properties and subject to the various loan agreements encumbering those properties.

As stated prior, Eight Circuit Court of Appeals **found** that CPWSS **was not** a party to the loan agreement encumbering Columbia Park, and that US Bank admitted that the assets of CPWSS were not encumbered by the mortgage.

The Court of Appeals erred in finding that the WWTP and water system served Columbia Park only, which is factually inaccurate. The service area of CPWSS serves other unrelated properties and customers.

The Journal Entry was based on the tortured and factually inaccurate arguments of the Movants, and thus led to a flawed Decision. A rehearing is required as CPWSS did not have the opportunity to present these and other arguments.

**The Journal Entry purports to turn over operational control of CPWSS to the Movants, who lack the lawful Certificates to operate.**

---

## **“ 4933.25 Issuing certificate of public convenience and necessity.**

No sewage disposal system company established after September 19, 1961, or expanding after October 2, 1969, or water-works company established or expanding after October 2, 1969, shall construct, install, or operate sewage disposal system facilities or water distribution facilities until it has been issued a certificate of public convenience and necessity by the public utilities commission. The commission shall adopt rules prescribing requirements and the manner and form in which sewage disposal system companies and water-works companies shall apply for such a certificate. Before the commission issues a certificate of public convenience and necessity, it may hold a public hearing concerning the issuance of the certificate. Notice of the hearing shall be given to the board of county commissioners of any county and the chief executive authority of any municipal corporation to be served by a sewage disposal system company or water-works company. As used in this section, "sewage disposal system company" and "water-works company" have the same meanings as in section 4905.03 of the Revised Code and include only "public utilities" as defined in section 4905.02 of the Revised Code.

Effective Date: 05-06-1998"

The Journal Entry is invalid as a matter of law.

### **APPEAL to the Supreme Court of the State of Ohio:**

Notice is given hereby that, absent the granting of a rehearing, the

Journal Entry and the underlying cases cited by the Journal

Entry:

CV-17-887110

Appeal to the 8<sup>th</sup> Circuit of CV-17-887110

have been, or will be appealed to the Supreme Court of the State of Ohio. Pending the outcome of that appeal the Journal Entry should be stayed. It should be noted that the Journal entry was untimely and premature in that it considered the Receivership Order in CV-887110 and the Appellate Court decision prior to the time frame for filing the aforementioned Supreme Court Appeal.

\*\*\* CPWSS moves that the PUCO withdraw or re-consider the Journal Entry.

---

**The Journal Entry is factually inaccurate:**

The Eight Circuit Court of Appeals found that CPWSS was not a party to the Loan Agreement because the Lender – US Bank admitted that the assets were unencumbered by such Agreement. This is in direct conflict with the findings recited in the Journal Entry.

\*\*\* CPWSS moves that the PUCO withdraw or re-hear the Journal Entry

**JURISDICTION:**

The law is well settled in the State of Ohio. PUCO has been granted the sole authority by the State of Ohio Legislature to establish and set rates for Public Utilities in the State and use its expertise to decide any issues associated therewith. The decisions and rate making process of the PUCO are reviewable solely by the Supreme Court of the State of Ohio.

**4903.12 Jurisdiction.**

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Precedent cases are conclusive in that the Court of Common Pleas may decide public utility cases only involving pure contract matters, such as a utility owing an invoice under a contract to a laundry supply company; but such Court cannot consider matters involving the rate making process, or needing the expertise of the PUCO. There is no contract of any kind or

---

**nature between the Movants and CPWSS as admitted by US Bank.**

This was by the affirmed Eight Circuit Court of Appeals. They found that the assets of CPWSS were not encumbered by the Loan Agreement, thus no contract existed.

“ Subject-matter jurisdiction connotes the power to hear and decide a matter upon its merits. Cheap Escape Co., Inc. v. Haddox, LLC, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶ 6. The Public Utilities Commission ("commission") has exclusive jurisdiction over matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except the Supreme Court) any jurisdiction over such matters. State ex rel. Cleveland Elec. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas, 88 Ohio St.3d 447, 450 (2000); see also Kazmaier Supermarket, Inc. v. Toledo Edison Co., 61 Ohio St.3d 147, 150-51 (1991) ("The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission.")." ”

DiFranco v First Energy, 969 N.E. 2d 1241, 2011 “ Further, according to the standard announced in Hull, 110 Ohio St.3d 96, 2006-Ohio-3666, 850 N.E.2d 1190, a pure contract claim is one *having nothing to do with the utility's service or rates*—such as a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier. By noting these examples, the Supreme Court obviously meant to convey that for a claim to be properly considered as a pure contract claim, the contract at issue must be completely unrelated to the utility's service or rates.”

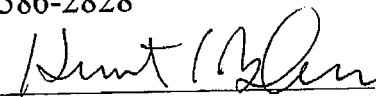
In Hull v. Columbia Gas of Ohio, 110 Ohio St.3d 96, 2006-Ohio-3666, 850 N.E.2d 1190, the Supreme Court “[C]asting the allegations in the complaint to sound in tort or contract is not sufficient to confer jurisdiction upon a trial court” when the basic claim is one that the commission has exclusive jurisdiction to resolve.’ \* \* \* [T]he dispute in this case is the antithesis of the pure contract case envisioned by the exception to the PUCO's jurisdiction. A pure contract case is one *having nothing to do with the utility's service or rates*—such as perhaps a dispute between a public utility and one of its employees or a dispute between a public utility and its uniform supplier.”

The PUCO should not base its Journal Entry on an Order wherein the jurisdiction of the issuing Court has reasonably been called into question.

\*\*\*\* For the reasons stated above the Journal Entry should be re-heard, withdrawn, modified or stayed.

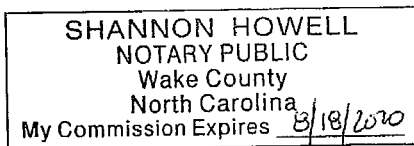


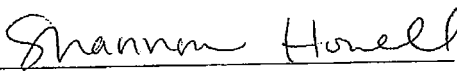
Columbia Park Water and Sewer System  
1080 Pittsford-Victor Road #202  
Pittsford, New York 14534  
585-586-2828

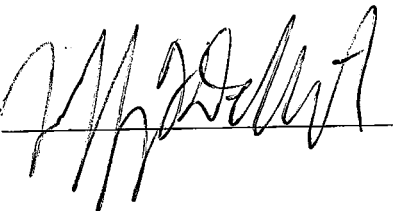
BY:  Kenneth C, Burnham

STATE OF NORTH CAROLINA    )  
COUNTY OF WAKE                )ss.:

On January \_\_, 2019, before me, the undersigned, a Notary Public in and for said State, personally appeared Kenneth Burnham, personally known to me, subscribed to the within instrument under oath and acknowledged to me that the allegations contained herein are truthful, and that he executed the same.



  
Notary Public

BY: , Jeff DeVoesick ; attorney representing CPWSS

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**1/30/2019 4:04:08 PM**

**in**

**Case No(s). 18-1294-WS-AEM, 18-1528-WS-AIR**

Summary: App for Rehearing Application for Rehearing by Columbia MHC East LLC electronically filed by Mr. Jeffrey F DeVoesick on behalf of Columbia MHC East LLC