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**

JOINT RESPONSE OF RECEIVER M. SHAPIRO REAL ESTATE GROUP OHIO, LLC AND U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF MERRILL LYNCH MORTGAGE TRUST 2007-C1, COMMERCIAL PASS-THROUGH CERTIFICATES, SERIES 2007-C1 TO APPLICATION – MOTION FOR REHEARING

M. Shapiro Real Estate Group Ohio, LLC, through Kimberly Scott, the court-appointed receiver in Cuyahoga County Court of Common Pleas Court Case No. CV-17-887110 with respect to the regulated assets at issue herein and U.S. Bank National Association, as Trustee for the Registered Holders of Merrill Lynch Mortgage Trust 2007-C1, Commercial Pass-Through Certificates, Series 2007-C1 (collectively, "Respondents") hereby respond to the Application – Motion for Rehearing of Journal Entry Made By the Public Utilities Commission of Ohio on January 23, 2019 (the "Application") filed by CPWSS on January 30, 2019.[1]

On January 23, 2019, the Commission filed its Entry dismissing and closing the two actions at issue herein (the "Entry"). The Commission correctly found, among other things, that only the Receiver has standing to purse the emergency and permanent rate increase applications pursuant to the Eighth District Court of Appeals' December 20, 2018 decision affirming the Receivership Order in all respects. The Commission also found that CPWSS did not contest Respondents' Joint Motions to Dismiss the rate increase applications. For the reasons stated

[1] For the sake of brevity and consistency, all defined terms contained with the Joint Motions to Dismiss are incorporated herein by reference.

herein, Respondents respectfully assert that none of the grounds cited in the Application merit a rehearing of these matters and that the Commission should deny the Application.

1. The Commission Did Not Err In Denying CPWSS' Waiver Requests

Paragraph 6 of the Commission Order of December 8, 2018 clearly explains that CPWSS failed to properly and timely file the waiver request thirty (30) days or more prior to the docketing of an application to increase rates and therefore said application was denied by operation of law. *Id*.; O.A.C. 4901-7-01, Appendix A, Chapter III (A)(4).

Paragraph 7 of the Commission's December 5, 2018 order, also clearly states that, on November 20, 2018, the Staff sent a letter to CPWSS stating that the application filed on October 9, 2018 did not comply with the standard filing requirements of O.A.C. 4901-7-0, Appendix A, Chapter III and Staff did not have enough information to begin its review of the application. There were additional critical errors and omissions in CPWSS' filing. The Commission's November 20, 2018 letter identified such things as the failure to include plant in service depreciation accrual rate, jurisdictional reserve balance schedules, costs of service study, the direct testimony of utility personnel or expert witness testimony to support the underlying application.

As indicated in the December 5, 2018 order , the O.A.C 4901-7-01 Appendix A, Chapter III(A)(4)(c) states that within sixty (60) days of an application for increase in rates being filed, the Commission will issue an entry indicating whether the application complies with the Commission standard filing requirements. The Commission appropriately ruled that the application did not overcome said deficiencies.

2. The Assertions Contained in Paragraph 12 of the Entry Are Correct

Paragraph 12 of the Entry recites the facts concerning the filing of Respondents' Joint Motions to Intervene in both cases and the opposition that CPWSS' filed, through its counsel, in only the emergency rate increase proceeding. *Id*. CPWSS disagrees with the Commission's statement that CPWSS did not oppose the Joint Motion to Intervene in the permanent rate increase case on that basis that CPWSS did not have to file an opposition in that action because "CPWSS referenced and incorporated into" the permanent rate increase proceeding all of its filings in the emergency rate increase action, including the opposition. Application at 2 – 3. CPWSS neither specifies how, when, or where any such incorporation was made nor provides any support for its position that any such reference and incorporation is binding on the Commission when dealing with separately docketed proceedings.

CPWSS' disagreement is of no consequence, however, as the Commission did not rely upon any failure to oppose the Joint Motions to Intervene when granting same. Rather, the Commission wrote, "[h]aving fully reviewed the arguments of the parties concerning the issue of intervention, the Commission finds that Movants have satisfied the requirements for intervention in these matters" as required. *Id*. at ¶13 (emphasis added). The Commission clearly considered CPWSS' filed opposition and ruled in Respondents' favor on the merits. CPWSS' argument is without merit.

3. CPWSS Received Notice of the Joint Motions to Dismiss and Has Been Afforded Every Opportunity to Represent Its Interests

CPWSS next argues that it was deprived of an opportunity to respond to the Joint Motions to Dismiss because Respondents allegedly failed to give notice to CPWSS of same and because a Commission staff member did not provide Burnham with copies of the motions or

mention them to him. Application at 3 – 4. CPWSS believes that it therefore did not have an opportunity to represent its interests at the initial hearing. *Id*. at 3. It cannot be disputed that CPWSS did, in fact, receive immediate notice of the filings and that it had every opportunity to represent its interests before the Commission.

As noted in the Entry, CPWSS has been represented by counsel in both proceedings. Jeffrey L. DeVoesick, Esq. ("DeVoesick") filed the emergency rate increase application on August 15, 2018, the amendment thereto, and the opposition to the Joint Motion to Intervene. DeVoesick also filed all of CPWSS' filings in the permanent rate increase application dating back to October 9, 2018. The "Parties of Record" tabs on the Commission's dockets for these proceedings identify DeVoesick as CPWSS' attorney of record and verify that he agreed to be automatically served via electronic mail. [2]

Pursuant to O.A.C. 4901-1-05(B), and upon the docketing division's acceptance of Respondents' filings in these actions, "an e-mail notice of the filing will be sent by the commission's e-filing system to all persons who have electronically subscribed to the case. The e-mail notice will constitute service of the document upon the recipient." *Id*. CPWSS did receive notice of Joint Motions to Dismiss via the Commission's docketing system and had ample opportunity to respond to those motions.

CPWSS also claims that the Commission erred in granting the Joint Motions to Intervene and the Joint Motions to Dismiss together through the Entry. CPWSS is wrong. O.A.C. 4901-1-12(E), which is labeled "Motions," states, "the term 'party' includes all persons who have filed motions to intervene which are pending at the time a motion or memorandum is to be filed or

[2] CPWSS' assertion that Respondents' have acted unethically by not e-mailing copies of the Joint Motions to Dismiss to Burnham is absurd. Application at 3 – 4. While CPWSS correctly states that Burnham has been served with court filings via e-mail in "the various cases," it of course fails to acknowledge that (i) service was so provided to Burnham in cases where Burnham is a *pro se* party and (ii) that Burnham is not a *pro se* party in these matters before the Commission.

served." Having previously filed Joint Motions to Intervene, Respondents were parties to these proceedings and were permitted to file their Joint Motions to Dismiss while the prior motions were pending. As described in the section, CPWSS was duly notified of the filing of the Joint Motions to Dismiss and failed to oppose those motions, which were granted upon the merits. There is no basis upon which to order a rehearing.

4. The Receivership Order Authorizes the Receiver to Operate and Control the WWTP

As fully detailed in the Joint Motions to Dismiss, there can be no dispute that the WWTP is, as a matter of law, subject to the Receivership Order by virtue of the Judgment entered in the Appeal. The court of appeals expressly held that the WWTP constitutes a fixture upon the Columbia Park real estate, that it is therefore subject to the Mortgage, is part of the Mortgaged Property as defined in the Receivership Order, and is thus subject to the Receivership Order.[3] CPWSS' characterization of the Entry as potentially affecting "every utility in the State of Ohio" is pure hyperbole. It is the appellate court, not this Commission, that declared the WWTP to be subject to the Mortgage, and it is the appellate court, not this Commission, that holds that the WWTP is subject to the receivership. The Commission has not determined those legal issues, rather it properly accepted those court rulings when concluding that the Receiver is the only party with standing in these matters.

The Receiver plainly has authority to operate the WWTP under the supervision of the trial court. Section 4905.02(A) of the Ohio Revised Code expressly contemplates that a receiver may operate a public utility. CPWSS' effort to now argue what it failed to raise in opposition to the Joint Motions to Dismiss must be disregarded.

[3] *See*, Jt. Motion to Dismiss at 8 – 9 (Case No. 18-1294-WS-AEM) and Jt. Motion to Dismiss at 4 and Exhibit A thereto (Case No. 18-1528-WS-AIR).

5. PUCO Does Have Exclusive Jurisdiction To Decide The Issues Presented In These Proceedings.

The emergency and permanent rate increase applications are subject to this Commission's jurisdiction, and there is no reason for this Commission to withdraw or rehear the matters decided in the Entry. *See*, Application at 7. As it has done throughout the parties' state court litigation, CPWSS goes to great lengths to confuse the jurisdiction that a state court possesses to determine contract matters involving regulated public utilities (which two state courts have now done with respect to the Mortgage and enforcement of the Receivership Order) with the exclusive jurisdiction that this Commission enjoys with respect to matters concerning a public utility's rates and charges, and classifications and services. *Id*. at 7 – 8. It scarcely requires pointing out, but the proceedings before this Commission consist solely of matters relating to a utility's rates and charges. Accordingly, this Commission possesses the necessary jurisdiction to determine whether a particular party has standing to file, maintain, and pursue applications for the emergency and permanent increases in the rates charged by a regulated utility.

Based upon the forgoing reasons, Respondents respectfully request that the Commission deny the Application for Rehearing in its entirety.

Respectfully submitted,

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Summary: Response Joint Response of Receiver M. Shapiro Real Estate Group Ohio, LLC and U.S. Bank National Association, As Trustee for the Registered of Holders of Merrill Lynch Mortgage Trust 2007-CI, Commercial Pass-Through Certificates, Series 2007-CI to Application - Motion for Rehearing electronically filed by Mr. Donald L Mason on behalf of M. Shapiro Real Estate Group Ohio, LLC, Through Kimberly Scott, Court Appointed Receiver and US Bank NA National Associatoin, As Trustee