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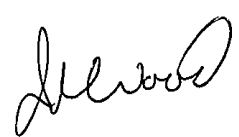
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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO  
**FILE**

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TOBI PLEDGER, et al	)	
	)	
Complainants	)	CASE NO. 04-1059-WW-CSS
	)	
	)	
vs.	)	COMPLAINANTS'
	)	MOTION FOR REHEARING
	)	
CAPITAL PROPERTIES MANAGEMENT LTD.	)	
Respondent	)	

Complainants move for a rehearing of this matter. A memorandum of objections is attached.



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## MEMORANDUM

The Complaint raised the issue whether a landlord may intercept the water and sewer services provided by regional utilities and available to the general public and resell those services to its tenants at any price above the tariff rate of the supplier without Commission oversight. The Commission has answered this in the affirmative. The decision as presently written excludes the water and sewer utilities of the thirty percent of Ohioans who rent their residences and the majority of businesses, who lease their business places, from the protection of regulated utility pricing. For the first time, the Commission has held that a landlord's charges, whatever the amount and however great the profit, are immune from regulatory oversight because the charges need no longer conform to the tariff of the supplying utility. In doing so this Commission has improperly redefined "in the business of" and "consumers" as set forth in the jurisdictional statutes, and has ignored its own authoritative Conclusions of Law that a reseller of water and sewer services must conform to the tariff of the supplier and may not avail itself of a benefit exclusive to a public utility and escape oversight. Finally, Complainants object to the outrageous manner in which Respondent through its agent has interfered with the client-attorney relationship in this case, the Commission acceptance of a supposed "request" of a party represented by an attorney of record, and its action on that "request."

1. The jurisdictional statute invests the Commission with jurisdiction over every corporation "in the business of" supplying water through pipes or tubing to consumers in Ohio. R.C. 4905.04, 4905.02 and 4905.03(A)(8). In **Inscho**, as presently interpreted by the Commission, the Commission altered "in the business of supplying" to "primarily in the business of supplying." Such alteration limits the Commission's jurisdiction over landlords facially profiting from the interception and resale of water and sewer services to their tenants. Complainants object to this as an impermissible amendment of the legislative jurisdiction.

a tariff rate, was not subject to regulatory oversight, while a landlord profiting from the resale of the necessary utilities of water and sewer, as evidenced by charging a rate higher than the tariff rate of the supplying utility, was subject to regulation. As a profiting landlord was not going to apply for, much less succeed in obtaining, a certificate of necessity, this jurisdictional test would always end the substantive matter one way or another without burdening the Commission's resources. Legitimate interests of the landlords and the tenants were automatically protected by this tariff test. With the present case, the Commission abandons this simple construct for one as simple, but wholly unfair and begging litigation. By granting all landlords a pass (except for the arbitrary regulation of a landlord who sells to one other person not a tenant), tenants are left unprotected and landlords are encouraged to see how far they can go before common sense forces the Commission to return to its first elegant, efficient solution, the tariff test of jurisdiction.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

A copy of the foregoing brief was served upon attorney for Respondent Orla E. Collier III at Benesch, Friedlander Coplan & Aronoff LLP, 88 East Broad Street, Suite 900, Columbus, Ohio 43215-3506 by first class mail this 1st day of November, 2004.

John Wood  
Trial Attorney to Complainants

2. The jurisdictional statute invests the Commission with jurisdiction over every corporation in the business of supplying water through pipes or tubing to “consumers” in Ohio. R.C. 4905.04, 4905.02 and 4905.03(A)(8).

A. In **Inscho**, as presently interpreted by the Commission, the Commission’s statutory jurisdiction where a corporation sells to “consumers” was altered to sells to “the general public.” While the statute requires only that Complainants be consumers, **Inscho** requires that when the consumers are tenants, they are not protected unless they can also plead that there is at least one non-tenant consumer, whether a Complainant or not. This labyrinthine requirement is wholly absent from the statute and is an impermissible limitation on the Commission’s jurisdiction.

B. This **Inscho** test is satisfied where the landlord offers its services to any or all who will rent its premises, and offers to rent to the general public.

C. This alteration from sale to consumers to sale to offers to sell to the general public is without meaning as no Ohio water or sewer utility offers its services to the general public, that is, throughout the state. The **Inscho** test of only a single other non-tenant person certainly contradicts “general public,” and as noted in the **Inscho** dissent, a landlord selling to 220 units may not be selling to the general public while an artesian supplier selling to twenty-five would be selling to the general public, although certainly offering service to a less “general” public.

3. **Inscho** held that jurisdiction does not lie where the landlord’s charges are consistent with the tariff of the utility from which the service is obtained. Conclusion of Law, Paragraph 14. In the present case it is uncontested Respondent is charging rates above the tariffs of the suppliers. Complainants argue this test discovers whether a landlord is “in the business of” selling water and sewer, and so is subject to regulation, rather than only passing through the costs, and so not subject to regulation. The Commission now impermissibly excuses all landlords from this test it had made a binding Conclusion of Law. Complainants object to this.

4. **Inscho** stated jurisdiction existed where a Respondent availed itself of special benefits available to public utilities. Conclusion of Law. Paragraph 11. Complainants pled a special benefit statutorily exclusive to public utilities. In **Inscho** dicta, the Commission Staff provided “such as” examples of exclusive benefits, an *ejus generis* listing. The Commission has now altered its “e.g.” examples to “i.e.” exclusive requirements, although the language in the dicta did not survive into the Conclusion of Law. Complainants object to this. The examples are meaningless as tests because they all require or imply that the Respondent has already sought Commission approval and thus acknowledged the jurisdiction of the Commission prior to a Complaint.

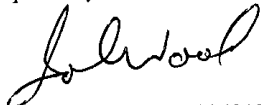
5. The Commission granted a “request” by one of the Complainants to be removed from the case. This Complainant was then represented by an attorney of record and so was not appearing *in propria persona* (see, 4901-1-08(A)). The “request” was not presented by her attorney of record, and was without notice to the attorney of record (see, 4901-1-05). The “request” was dictated by Mr. David Goodman, an agent of Respondent, after making repeated, persistent and protested contacts with Complainant after filing and while she was represented by an attorney and while the corporate Respondent was represented in the matter by an attorney. Corporations must act through an attorney-at-law (see, 4901-1-08(A)). It was signed following perceived threats. Complainant filed the document with the Commission at the insistence of David Goodman.. In thirty some years of appearing before courts and agencies, I have never seen this kind of impropriety in a regulatory case. The Commission was incorrect to receive or act upon a filing purporting to be from a party already represented by an attorney of record.

#### CONCLUSION

The **Inscho** case, for all its clumsiness in the dicta, was redeemed by the simple Conclusion of Law that a landlord merely passing through the costs of water and sewer, evidenced by charging

a tariff rate, was not subject to regulatory oversight, while a landlord profiting from the resale of the necessary utilities of water and sewer, as evidenced by charging a rate higher than the tariff rate of the supplying utility, was subject to regulation. As a profiting landlord was not going to apply for, much less succeed in obtaining, a certificate of necessity, this jurisdictional test would always end the substantive matter one way or another without burdening the Commission's resources. Legitimate interests of the landlords and the tenants were automatically protected by this tariff test. With the present case, the Commission abandons this simple construct for one as simple, but wholly unfair and begging litigation. By granting all landlords a pass (except for the arbitrary regulation of a landlord who sells to one other person not a tenant), tenants are left unprotected and landlords are encouraged to see how far they can go before common sense forces the Commission to return to its first elegant, efficient solution, the tariff test of jurisdiction.

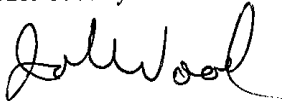
Respectfully submitted,



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