

FILE

9

BEFORE RECEIVED-DOCKETING DIV
THE PUBLIC UTILITIES COMMISSION OF OHIO 2007 APR -5 AM 11:22

Jack Vasi,

Complainant,

v.

Columbia Gas of Ohio, Inc.,

Respondent


PUCO

Case No. 06-575-GA-CSS

MOTION TO DISMISS
OF
COLUMBIA GAS OF OHIO, INC.

Now comes the Respondent, Columbia Gas of Ohio, Inc. (hereinafter "Columbia"), and files its Motion to Dismiss the Complaint filed herein on April 10, 2006. For the reasons more fully discussed in the attached Memorandum in Support, Columbia submits that the Complainant has failed to prosecute his claim in a timely manner. Therefore, Columbia respectfully requests that the Commission dismiss the Complaint herein.

Respectfully submitted by
COLUMBIA GAS OF OHIO, INC.


Rodney W. Anderson, Trial Attorney

Stephen B. Seiple, Lead Counsel
Rodney W. Anderson, Senior Attorney
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117
Telephone: (614) 460-4645
Fax: (614) 460-6986
Email: rwander@nisource.com
Attorney for Respondent

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician JB Date Processed 4-5-07

MEMORANDUM IN SUPPORT

1. Background

The Complaint in this case was originally filed on April 10, 2006 and the answer was filed on May 2, 2006. By entry dated October 11, 2006 the hearing in this case was originally scheduled for November 16, 2006, at 10:00 a.m. On October 17, 2006, Columbia filed and the Commission granted a motion for a continuance that requested only a "brief continuance" (from November 16 to November 21) due to counsel's unavailability because of previously scheduled medical procedures. As a result of this continuance, the hearing was rescheduled to November 29, 2006.

On November 28, 2006, one day prior to hearing, Complainant Vasi filed a motion for continuance (titled "motion for leave") to provide additional time to obtain counsel and to conduct discovery. Columbia did not oppose this motion and the Commission, by entry dated December 7, 2006, rescheduled the hearing for January 31, 2007. On January 31, 2007, the day of the hearing, Complainant Vasi made an oral request with the Commission for a continuance. Complainant Vasi's written motion for continuance was not filed until seven days after the scheduled hearing on February 7, 2007. Complainant yet again requested the continuance in order to obtain competent counsel and conduct discovery. Again Columbia did not oppose the continuance, and the hearing was rescheduled for April 3, 2007 at 10:00 a.m.

On March 16, 2007, only two and a half weeks before the scheduled hearing, Columbia received Complainant's first set of interrogatories. This was the first discovery request by the Complainant. Then, on April 3, 2007 at 4:47 p.m. Complainant Vasi filed a motion for

continuance with the Commission. Complainant Vasi's motion for a continuance was not filed with the Commission until nearly seven hours after the scheduled start of the hearing.

Complainant requested the continuance because he did not have counsel and he needed additional time to receive responses to interrogatories from Columbia, which, as stated above, were not received by Columbia until March 16, 2007, and thus not yet due under the Commission's discovery rules. *See* O.A.C. § 4901-1-17.

2. Argument and Analysis

As is apparent from the background described above, Complainant Vasi has failed to meaningfully prosecute his claim. Columbia, as well as the Commission, has afforded Complainant Vasi with ample time and understanding to prosecute his claim, which he has failed to do. Complainant Vasi has requested three continuances, all for the same or similar reasons, two of which were filed after the date of the scheduled hearing. As a result, Complainant Vasi's most recent request for a continuance has not shown good cause and his Complaint should be dismissed for failure to prosecute.

- a. Complainant has failed to prosecute his claim because of his failure to file a motion for continuance prior to the date of the hearing as required by the Commission in Ohio Administrative Code § 4901-1-12..***

The Complainant in this case has failed to prosecute his claim because his motion for a continuance was filed after the scheduled time for the start of the hearing. Pursuant to Ohio Administrative Code § 4901-1-12, "all motions unless made at a public hearing or transcribed

prehearing conference, or unless ordered for good cause shown, shall be in writing and shall be accompanied by a memorandum in support.” The Complainant has failed to comply with this rule on more than one occasion and his claim should therefore be dismissed for failure to prosecute. See *In the Matter of Kuzmission Trucking Co.*, 2005 WL 2661546 (Ohio PUC 2005). In *Kuzmission*, the Commission ruled that the Kuzmission was in default for his failure to be present at the hearing or to file a motion for a continuance, despite his assertion that he had called the Commission in advance to inform them of his unavailability. *Id.*

In applying the law from *Kuzmission*, it becomes clear that Complainant Vasi’s failure to file a written motion for continuance in advance of the hearing constitutes grounds for dismissal of the Complaint. In *Kuzmission*, the hearing had not previously been rescheduled, nor had Kuzmission previously requested any continuances. Despite this unfamiliarity, the Commission still found it appropriate to enter a default judgment against Kuzmission, despite his lack of knowledge of the procedures of the Commission. *Id.*

The default judgment for failure to appear by is akin to the motion to dismiss for failure to prosecute sought in this case. Complainant here filed his written motion for a continuance on April 3, at 4:47 p.m. while the hearing was scheduled for April 3, at 10:00 a.m.. Columbia did not find out about the oral request for a continuance by Complainant Vasi until the morning of the hearing. As a result of this 11th hour informal oral request, Columbia had already spent significant amounts of time and energy in preparation for the hearing including time preparing witnesses, gathering additional documents, and reviewing necessary material. One additional factor is that Complainant Vasi, unlike *Kuzmission*, should now have sufficient knowledge of the procedures involved in requesting a continuance from the Commission. Complainant Vasi’s two

prior requests should have sufficiently informed him that he is required to request a continuance before hearing. *See id.*

b. Complainant Vasi's claim should be dismissed for failure to prosecute because the requested continuances have resulted in "unreasonable delay" and have impaired the "rights and interests of all litigants before the tribunal"

In this case, Complainant Vasi's continued requests for continuances have led to an unreasonable delay in the prosecution of his claim and has thereby prejudiced Columbia. In the case of *State ex. Rel. Columbus Gas & Fuel Co. v. Pub. Util. Comm.*, the Supreme Court of Ohio held that "it is the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before the tribunal." *State ex. Rel. Columbus Gas & Fuel Co. v. Pub. Util. Comm.*, (1930), 122 Ohio St. 473, 172 N.E. 284.

Applying the precedent to the facts in this case, it becomes apparent that the Commission has not heard Complainant Vasi's case in approximately a year, which is an unreasonable delay considering the uncomplicated nature of the claims involved. *See id.* Complainant Vasi has now filed motions for three continuances, all of which are based on the same reasons: the opportunity to obtain counsel and the opportunity to conduct discovery. Complainant Vasi has had approximately one year to complete both of these tasks. Complainant Vasi is not entitled to an attorney nor is he required to have an attorney; the retaining of an attorney by a non-business complainant is not a necessity in Commission proceedings. *In the Matter of the Complaint of Tyrone Bonner v. The Dayton Power and Light Co.*, 2202 WL 32097082 (Ohio PUC 2002).

Also Complainant Vasi asked for his first continuance on November 28, 2006 to enable him to conduct discovery. Complainant Vasi has now had approximately four months since his first continuance to conduct discovery. Complainant Vasi has failed to complete discovery in a timely manner per the Commissions rules in Ohio Administrative Code § 4901-1-17, which requires discovery to be completed prior to the date of the hearing. There is no excuse for Complainant Vasi to have waited until two weeks before hearing to submit his first discovery requests. Columbia did not receive the interrogatories until March 16, which would make the time for response two days after the latest scheduled hearing. *See* Ohio Administrative Code § 4901-19.

Complainant Vasi's delay in conducting discovery as well as his proposed continuance until July would be an unreasonable delay and thereby further prejudice Columbia. Columbia has prepared to go to hearing on three separate occasions only to have an 11th hour motion for continuance filed by Complainant Vasi. On each of these occasions Columbia has had to prepare witnesses, review documents and facts, gather documents, and complete other hearing preparation logistics. The Commission should view this current situation from a totality of the circumstances, which would make it apparent that this claim should be dismissed for failure to prosecute due to unreasonable delay and prejudice.

c. Complainant Vasi's complaint should be dismissed for failure to prosecute because the motion for continuance does not show "good cause" as is required per Ohio Administrative Code § 4901-1-13 and it was filed after the time of the scheduled hearing.

Complainant Vasi has failed to comply with the Commissions rules as stated in Ohio Administrative Code § 4901-1-13, which states that "continuances...may be granted upon motion of any party for good cause shown." Ohio Administrative Code. § 4901-1-13.


Complainant has filed three motions for continuance with the Commission; all of which were for similar reasons: to obtain an attorney and to conduct discovery. As stated above, an individual is not required to have an attorney to participate in this type of hearing. *See In the Matter of the Complaint of Tyrone Bonner v. The Dayton Power and Light Co.*, 2002 WL 32097082 (Ohio PUC 2002). Also Mr. Vasi has had approximately one year to complete discovery and to obtain counsel. This is more than ample time to prepare discovery requests.

Also in the *Bonner* case, the Commission ruled that no more than two continuances should be granted to a Complainant who is seeking to complete discovery or "explore the possibility of retaining an attorney." *Id.* Mr. Vasi has not asserted any other grounds to satisfy the good cause requirement of Ohio Administrative Code § 4901-1-13. As a result Complainant Vasi's claim should be treated the same as if he had just failed to show up for the hearing; it should be dismissed for failure to prosecute.

WHEREFORE, Columbia respectfully requests the Commission to dismiss the Complaint for the reason that the Complainant has failed to prosecute his claim before the Commission.

Respectfully submitted by

COLUMBIA GAS OF OHIO, INC.

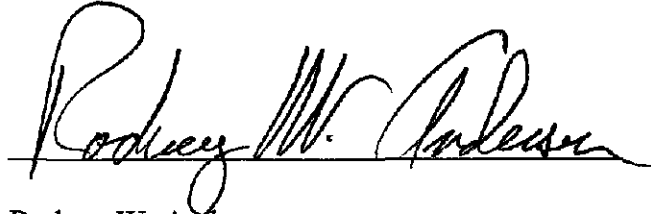


Rodney W. Anderson, Trial Attorney

Stephen B. Seiple, Lead Counsel
Rodney W. Anderson, Senior Attorney
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117
Telephone: (614) 460-4645
Fax: (614) 460-6986
Email: rwander@nisource.com
Attorney for Respondent
COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Dismiss and Memorandum of Support by mailing same by regular U.S. mail to Jack Vasi, 618 Oberlin Elyria Road, Elyria, Ohio 44035 this 5th day of April, 2006.

A handwritten signature in black ink, reading "Rodney W. Anderson", is written over a horizontal line.

Rodney W. Anderson
Attorney for
COLUMBIA GAS OF OHIO, INC.