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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO 12:46

PAGE  
BENEDICT P. MIRALIA, TRUSTEE

Complainant,

v.

Docket No. 99-1587-GA-CSS

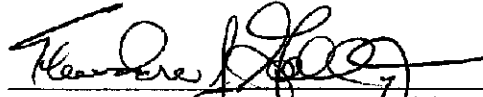
COLUMBIA GAS OF OHIO, INC.

Respondent.

**MOTION TO DISMISS COMPLAINT FOR FAILURE  
TO STATE REASONABLE GROUNDS FOR A COMPLAINT  
AND FOR LACK OF SUBJECT MATTER JURISDICTION**

Now comes Respondent, Columbia Gas of Ohio, Inc. (Columbia) and moves this Commission for an Order dismissing the Complaint of Benedict P. Miralia, Trustee (Complainant) in the above-captioned proceeding. Columbia's motion is supported by the attached Memorandum in Support.

Respectfully submitted,



James R. Berendsen (0007999)  
Theodore J. Gallagher (0055772)  
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Attorneys for Respondent,  
Columbia Gas of Ohio, Inc.

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Technician See Date Processed 12-30-99

## MEMORANDUM IN SUPPORT OF MOTION

### Overview

Upon a motion to dismiss, the Commission must assume that all material allegations of the Complaint are true. See, *Simmons v. Hertzman* (1991), 71 Ohio App. 3d 139, Motion for Leave to Certify overruled (1991), 61 Ohio St. 3d 1426. However, the Commission is not confined to the allegations of the Complaint when determining its subject matter jurisdiction. Rather, the Commission may consider any pertinent evidentiary materials, including the utility's publicly filed tariff. See, *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, (1976) 48 Ohio St. 2d 211, syllabus at ¶ 1.

By statute, the General Assembly has conferred exclusive subject matter jurisdiction in the Public Utilities Commission of Ohio (Commission) to regulate public utilities in Ohio, which statutory authority includes the regulation of rates and the power to determine complaints brought pursuant to the statutory procedures for service and rate complaints. See, *State, ex rel. Northern Ohio Telephone Company v. Winter* (1970), 23 Ohio St. 2d 6; *State, ex rel. Ohio Bell Telephone Company v. Court of Common Pleas of Cuyahoga County* (1934), 128 Ohio St. 553. The detailed

procedure for filing service complaints is contained in R.C. 4905.26, which states in relevant part:

Upon complaint in writing against any public utility by any person, firm, or corporation . . . that any rate, fare, charge, toll, rental, schedule, classification, or service or any joint rate, fare, charge, toll, rental, schedule, classification or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, . . . if it appears that reasonable grounds for complaint are stated, the Commission shall fix a time for hearing and shall notify complainants and the public utility thereof,... (Emphasis added.)

The Ohio Supreme Court has broadly interpreted R.C. 4905.26 regarding matters that may be raised by complaint before the Commission. See, *Allnet Communications Services, Inc. v. Pub. Utilities Comm.* (1987), 32 Ohio St. 3d 115. Notwithstanding the broad scope of the statute, the "reasonable grounds for complaint" requirement of R.C. 4905.26 must still be met before the Commission can order a hearing on the Complaint. *Id.* This pre-condition has been interpreted as a requirement that the allegations in the Complaint make some reasonable showing that a utility

violated some statute, rule or tariff, or that the utility is not providing proper service. See, *Allnet Communications Services, Inc v. Pub. Utilities Comm.* (1988), 38 Ohio St. 3d 195.

**Litigation Already Pending in a Court of Competent Jurisdiction**

As mentioned by Complainant, the controversy to which is the instant Complaint refers is already pending in the Parma Municipal Court. Columbia filed its Civil Complaint in the Parma Municipal Court on August 27, 1999, and was docketed at 99 CVF 2123. Discovery is underway in the pending civil action and the Complaint was recently amended to name the Complainant here as the Defendant and owner of the property where gas service was furnished but not paid for (See attached First Amended Complaint and Order approving First Amended Complaint for filing on December 16, 1999).

It would appear clear that the proceeding pending in the Parma Municipal Court, being filed before the instant Complaint, should and will continue until conclusion. It is a well-settled principle that the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction to the exclusion of all other

tribunals to adjudicate upon the whole issue and to settle the rights of the parties. *State ex rel Racing Guild of Ohio v Morgan* (1985) 17 Ohio St. 3d 54. Stated another way, "When a court of competent jurisdiction acquires jurisdiction of the subject matter of an action, its authority continues until the matter is completely and finally disposed of, and no court of co-ordinate jurisdiction is at liberty to interfere with its proceedings." *John Weenink & Sons Co. v Cuyahoga Cty. Court of Common Pleas* (1948) 150 Ohio St.349. One of the key considerations is whether the Parma Municipal Court is a court of competent jurisdiction to handle the dispute between the Complainant and Columbia. As will be more fully discussed, *infra*, Columbia contends that the dispute between Complainant and Columbia is not truly service or rate related, but rather is a basic dispute in contract or quasi contract concerning whether Complainant is responsible for paying for gas service furnished at property which it owns. Columbia urges this Commission to recognize the jurisdiction of the Parma Municipal Court to fully adjudicate the rights of the Complainant and Columbia.

**Commission does not have Jurisdiction**

There would be no need or purpose served for the Commission to attempt to exercise jurisdiction. Complainant appears to argue in its letter Complaint to the Commission that Columbia should not have filed suit in the Parma Municipal Court or that such a suit does not have merit. Complainant's arguments ring hollow for several reasons.

First and fundamentally, Complainant obviously has remedies through the civil justice system to defend itself in the action in the Parma Municipal Court and indeed is availing itself of those remedies.

Perhaps more importantly, it would appear that the specific dispute between Complainant and Columbia is, in this instance, best left to the Parma Municipal Court. The Commission's jurisdiction is limited to service and rate complaints. See, *Winter, supra*. The Commission does not have jurisdiction over a basic contract or quasi contract dispute, especially when one of the parties is seeking money damages. It has long been held that the Commission is in no sense a Court. It has no power to judicially ascertain and determine legal rights and liabilities, or adjudicate controversies between parties as to contract rights or property rights. *New Bremen v Pub. Utilities Comm.* (1921),

103 Ohio St. 23, 30-31. It has been consistently held that the Commission has no jurisdiction to consider breach of contract claims, even though a public utility may be involved. *Marketing Research Services, Inc. v Pub. Utilities Commission* (1987) 34 Ohio St. 3d 52; *State ex rel. Ohio Power Co. v. Harnishfeger* (1980) 64 Ohio St. 2d 9; *State ex rel. Dayton Power & Light Co. v Riley* (1978) 53 Ohio St. 2d. 168.

It is also important to recognize that Columbia is seeking monetary damages in the Parma Municipal Court. The Commission is without jurisdiction to award damages. See, *In the Matter of the Complaint of Landskroner & Phillips Company, L.P.A. v. The Cleveland Electric Illuminating Company* (March 30, 1995), unreported, PUCO Case No. 94-1993-EL-CSS, 1995 Ohio PUC LEXIS 274 (copy attached).

**Complainant has Failed to State Reasonable Grounds for Complaint**

As previously stated, Complainant must still meet the reasonable grounds for Complaint test as established by R.C. 4905.26 and the case law cited, *supra*. And, as argued above, the present matter lacks such reasonable ground in that the controversy is already before a Court of competent jurisdiction and that the Commission lacks jurisdiction to

adjudicate money damages issues and contractual disputes. The letter Complaint does not support any other basis for a Complaint.

Furthermore, the Complaint is devoid of allegations stated with any particularity as to matters involving the service provided or rates charged by Columbia, as required by R.C. 4905.26. O.A.C. 4901-9-01(A) requires that a complaint filed under R.C. 4905.26 state both the facts upon which the Complaint is based as well as the relief sought. The Complaint filed in this matter does neither. The Complaint states that "The basis of this complaint is that Columbia Gas of Ohio, Inc. . . . has filed a lawsuit against Musca Investments Co. for gas usage at the above referred to premises[.]" While the Complaint generally describes the contractual controversy between the parties, the only stated basis for the Complaint is that Columbia has filed a lawsuit, and it is lacking in any allegation regarding the service provided or rates charged by Columbia. The propriety of Columbia filing a civil lawsuit in an attempt to collect a debt is not an issue that involves the service provided or rates charged by Columbia. Consequently, reasonable grounds for a complaint have not been stated, and the Commission should decline to hear this matter.



Moreover, for the relief sought, the Complaint states "Your help in this matter is requested and would be sincerely appreciated." Columbia respectfully submits that the Commission is without jurisdiction to influence the proceeding before the Parma Municipal Court, as requested. If the Complainant in this matter believes that Columbia has improperly invoked the jurisdiction of the Parma Municipal Court, then Complainant should make that argument before the Parma Municipal Court.

#### Conclusion

Even if the Commission assumes that the Complainant's allegations are true for purposes of this motion, Complainant's Complaint must be dismissed for all of the foregoing reasons.

Respectfully submitted,



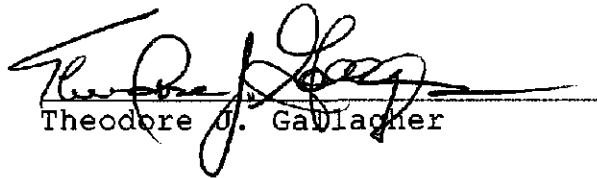
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Attorneys for Respondent  
Columbia Gas of Ohio, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Dismiss Complaint for Failure to State Reasonable Grounds for a Complaint and for Lack of Subject Matter Jurisdiction and Memorandum in Support by mailing same by regular U.S. mail this 22<sup>nd</sup> day of December 1999 on:

Anthony J. Musca  
Benedict P. Miralia, Trustee  
1202 Bond Court Building  
Cleveland, Ohio 44114

  
Theodore J. Gallagher

# The Parma Municipal Court

COLUMBIA GAS OF OHIO, INC.

Plaintiff

No. 99-CV-F-2123

vs.

MUSCA INVESTMENTS CO.

## JOURNAL ENTRY

Defendant

Plaintiff attorneys Motion to Amend Complaint is granted.

FILED  
PARMA MUNICIPAL COURT  
JUN 16 1999  
DEC 16 11:39

Order see Journal Vo.

97 page 549

*Mary L. Dunning*  
Judge Mary L. Dunning  
12-16-99

**IN THE PARMA MUNICIPAL COURT, PARMA, OHIO**

**COLUMBIA GAS OF OHIO, INC.**  
**200 Civic Center Drive**  
**Columbus, Ohio 43216-0117**

**Plaintiff**

**VS.**

**BENEDICT P.MIRALIA, TRUSTEE**  
**1202 Bond Court Building**  
**1300 East Ninth Street**  
**Cleveland, Ohio 44114**

**Defendant**

**Case No.**

**Judge Dunning**

**FIRST AMENDED  
COMPLAINT  
WITH JURY DEMAND  
ENDORSED HERBON**

**FIRST CAUSE OF ACTION**

1. Plaintiff, Columbia Gas of Ohio, Inc. is an Ohio corporation in the business of selling and providing gas service in Ohio including in Parma Heights, Ohio.

2. Defendant is a business or entity which did or does business in Parma Heights, Ohio.

3. Defendant owes or operates property at 6845 West 130 th Street, Parma Heights, Ohio that had been leased by Sun TV & Appliances.

4. Sun TV & Appliances filed a Bankruptcy petition in the U. S. Bankruptcy Court in Wilmington, Delaware in 1998.

5. On or about December 1, 1998 Sun TV & Appliances

rejected the lease to 6845 West 130 th Street, Parma Heights, Ohio pursuant to section 365 (a) of the Bankruptcy Code, which had the effect of returning the possession of the property to the Defendant.

6. Defendant made no effort to contact Plaintiff to advise Plaintiff that it had resumed control and possession of the property of 6845 West 130 th Street, Parma Heights, Ohio, such possession and control being assumed on or about December 8, 1998.

7. Defendant furnished gas service to 6845 West 130 th Street, Parma Heights, Ohio after December 8, 1998 with a total value of \$2,962.74.

8. Defendant has refused or failed to pay Plaintiff for the said gas service in the amount of \$2,962.74.

#### **SECOND CAUSE OF ACTION**

9. Plaintiff incorporates by reference the first 8 paragraphs of the Complaint as though fully rewritten again.

10. Plaintiff states that it furnished said gas service to 6845 West 130 th Street, Parma Heights, Ohio under an implied contract with the Defendant.

11. Defendant has refused or failed to pay for said gas service

12. As a result of Defendant's refusal or failure, Plaintiff has been damaged in the sum of \$2,962.74.

#### **THIRD CAUSE OF ACTION**

13. Plaintiff incorporates by reference the first 12 paragraphs of the Complaint as though fully rewritten again.


14. Plaintiff providing said gas service to 6845 West

130 th Street, Parma Heights, Ohio has conferred a benefit on the Defendant, particularly be preserving and protecting the said property during the winter season.

15. Plaintiff has not been paid for the said gas service provided to 6845 West 130 th Street, Parma heights, Ohio.

16. Defendant has been unjustly enriched to the detriment of Plaintiff in the sum of \$2,962.74.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of \$2,962.74, under its first cause of action, or alternatively, under either its second or third causes of action, plus interest at 10% from date of judgment and costs.

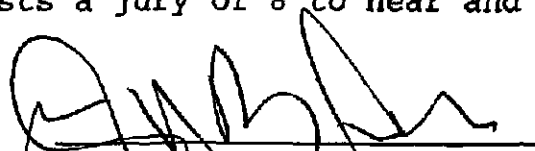


James R. Berendsen 0007999  
200 Civic Center Drive  
P. O. Box 117  
Columbus, Ohio 43216-0117  
614-460-4650

Attorney for Plaintiff

JURY DEMAND

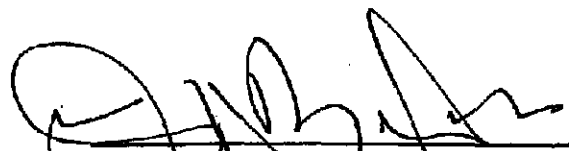
Plaintiff hereby requests a jury of 8 to hear and decide this matter.



James R. Berendsen

INSTRUCTIONS TO CLERK:

Please serve a copy of the Complaint on the Defendant, Benedict P. Miralia, Trustee 1202 Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114 by Certified Mail return receipt requested .



James R. Berendsen

1995 Ohio PUC LEXIS 274, \*

In the Matter of the Complaint of Landskroner & Phillips Co., L.P.A., Complainant, v. The  
Cleveland Electric Illuminating Company, Respondent

Case No. 94-1993-EL-CSS

PUBLIC UTILITIES COMMISSION OF OHIO

1995 Ohio PUC LEXIS 274

March 30, 1995

**CORE TERMS:** tariff, examiner, landlord, submeter, motion to dismiss, reasonable grounds, subject matter jurisdiction, customer, written permission, fails to state, timely filed, electricity, overcharged, submetering, submetered, prehearing

**PANEL:**

[\*1]

Gretchen L. Petrucci, Attorney Examiner

**OPINION:**

ENTRY

The attorney examiner finds:

1) On December 15, 1994, as amended on January 17, 1995, Landskroner & Phillips Co., L.P.A., (complainant) filed a complaint with the Public Utilities Commission of Ohio, alleging that The Cleveland Electric Illuminating Company (CEI) failed to enforce its tariffs when it knowingly permitted the complainant's landlord to submeter and overcharge the complainant for electricity from 1981 through 1993. Complainant alleges that it was overcharged in excess of \$ 75,000 and that CEI had a duty to prevent the unapproved submetering.

2) In accordance with the attorney examiner entry issued February 2, 1995, CEI timely filed its answer to the amended complaint. CEI acknowledged that the building has been submetered for over 20 years and that CEI approved the submeters prior to their installation. CEI denied the remaining material allegations of the amended complaint.

CEI also filed a motion to dismiss the amended complaint. CEI states that the amended complaint fails to state reasonable grounds for complaint and that the amended complaint should be dismissed for lack of subject matter jurisdiction. CEI [\*2] contends that its tariff permits buildings used primarily for office purposes to be submetered with its prior approval. CEI states that the amended complaint fails to state reasonable grounds because CEI authorized the submetering at the time that the meters were installed, which was prior to the June 17, 1976 effective date of the tariff language. Next, CEI states that the complaint is really an allegation that the landlord, not CEI, overcharged complainant. CEI argues that it charged its authorized rates to its customer, the building, and, therefore, it fulfilled its obligations under its tariff. CEI believes that the Commission is without jurisdiction to entertain this matter because the complainant demands monetary relief, because the Commission has no power to determine legal rights and liabilities regarding contract or property rights, and because the Commission does not have the power to regulate consumers. CEI further stated that it has no knowledge of the amounts billed by the landlord or paid by the complainant.

3) On March 13, 1995, the complainant timely filed a memo contra CEI's motion to dismiss. Complainant states that the crux of its complaint is that CEI violated [\*3] Rule 6 of its General Rules and Regulations, regarding the resale of service. Complainant states that, even if CEI granted the landlord the right to submeter, Rule 6 requires CEI to give written permission and, thus, only individuals who receive written permission from CEI after June 17, 1976 are permitted to submeter. Complainant alleges that CEI did not comply with its tariff. Next, complainant states that, although the Commission may not have authority to grant monetary damages, it has the equitable power to grant restitution to an aggrieved customer. Thus, complainant believes that the complaint meets the requirements of Rule 4901-9-01(A), Ohio Administrative Code.

4) In reviewing CEI's motion to dismiss for failure to state reasonable grounds for complaint, the Commission must assume that all material allegations of the complaint are admitted. See, *Simmons v. Hertzman* (1991), 71 Ohio App. 3d 139, motion for leave to certify overruled (1991), 61 Ohio St. 3d 1426. However, the Commission is not confined to the allegations of the complaint when determining its subject matter jurisdiction; rather, it may consider any pertinent evidentiary materials. See, *Southgate Development [\*4] Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St. 2d 211, paragraph one of the syllabus.

According to the amended complaint, complainant is a tenant of an office building, the landlord of which purchases electricity from CEI. The complainant alleges that the landlord submeters the electrical service and that CEI knowingly did not comply with its tariff in allowing the landlord to submeter. The attorney examiner finds that CEI's motion to dismiss the amended complaint should be denied. The attorney examiner finds that reasonable grounds for complaint have been stated as the amended complaint questions whether CEI has complied with its tariff. Additionally, the attorney examiner finds that the Commission does have subject matter jurisdiction over matters related to CEI's tariff and relationships with its customers. See, *Shopping Centers Assn. v. Pub. Util. Comm.* (1965), 3 Ohio St. 1; *Toledo Premium Yogurt, etc. v. Toledo Edison Company*, Case No. 91-1528-EL-CSS, Entry, September 17, 1992; and *Brooks, et al. v. Toledo Edison Company, et al.*, Case No. 94-1987-EL-CSS, Entry, March 16, 1995. Further, CEI is correct that the Commission is without jurisdiction [\*5] to award damages. Thus, any such claims that may be made by the complainant will not be considered.

5) Accordingly, the attorney examiner finds that this matter should proceed to a prehearing conference to be held at 1:30 p.m., on April 19, 1995, at the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215-3793. However, nothing prohibits any party from initiating settlement negotiations prior to the scheduled conference. An attorney examiner from the legal department will facilitate the settlement process. The complainant is directed to bring with it all written documentation that substantiates its claim.

It is, therefore,

ORDERED, That CEI's motion to dismiss the amended complaint is denied. It is, further,

ORDERED, That, a prehearing conference shall be held at 1:30 p.m., on April 19, 1995, at the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215-3793. It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO