

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of The K&D)	
Group, Inc. and Reserve Apartments, LTD,)	
)	
Complainants,)	Case No. 11-898-HT-CSS
)	
v.)	
)	
Cleveland Thermal Steam Distribution, LLC,)	
)	
Respondent.)	

**MEMORANDUM CONTRA
APPLICATION FOR REHEARING**

Gretchen J. Hummel (Trial Attorney)
Scott E. Elisar
McNees Wallace & Nurick LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: 614-469-8000
Telecopier: 614-469-4653
ghummel@mwncmh.com
selisar@mwncmh.com

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**Attorneys for Cleveland Thermal Steam
Distribution, LLC**

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Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-15(D), Cleveland Thermal Steam Distribution, LLC ("Cleveland Thermal") hereby submits this Memorandum Contra the Application for Rehearing ("Rehearing Application") filed in this case by The K&D Group, Inc., and Reserve Apartments, LTD ("K&D" or "Complainants") on June 29, 2012, and requests that the Public Utilities Commission of Ohio ("Commission") deny K&D's Rehearing Application for the reasons discussed below.

I. INTRODUCTION

K&D filed its complaint ("Original Complaint") in this proceeding on February 18, 2011, and Cleveland Thermal filed its answer ("Answer") on March 1, 2011. On May 11, 2011, Cleveland Thermal filed a Motion to Dismiss ("Motion to Dismiss") the Original Complaint to which K&D filed a reply ("Memo Contra") on May 31, 2011, in which it also requested leave to file an amended complaint, an unsigned copy of which

was attached as an exhibit to its Memo Contra. Cleveland Thermal filed its reply and memorandum contra the request to amend the Original Complaint (“Reply”) on June 9, 2011. On June 16, 2011, the Attorney Examiner issued an Entry (“June 16 Entry”) granting K&D’s request to amend its complaint (“Amended Complaint”) and ordering Cleveland Thermal to file an answer within twenty days of the entry. Cleveland Thermal filed the required answer (“Answer to Amended Complaint”) on July 5, 2011.

On July 15, 2011, Cleveland Thermal filed a Supplemental Motion to Dismiss (“Supplemental Motion”) to address the amendments to K&D’s Original Complaint into which its Motion to Dismiss and Reply, filed by Cleveland Thermal on May 11, 2011 and June 9, 2011, respectively, were fully incorporated by reference. K&D filed a memo contra the Supplemental Motion to which Cleveland Thermal filed its Reply on August 11, 2011.

On May 30, 2012, the Commission issued an Entry in which it dismissed K&D’s complaint (“Dismissal Entry”). On June 29, 2012, K&D filed its Rehearing Application in which it raises no new issues not already considered and addressed by the Commission. Cleveland Thermal will provide a brief discussion of K&D’s claimed errors below.

II. DISCUSSION

A. The fuel charges billed to K&D by Cleveland Thermal were approved by the Commission.

K&D argues that the fuel charges billed to it by Cleveland Thermal were not approved by the Commission because the Commission did not conduct annual reviews¹

¹ The referenced reviews were recommended by Staff in a rate case long before Cleveland Thermal acquired the utility. The Commission has never ordered annual reviews of Cleveland Thermal’s fuel {C38102: }

of them and because Cleveland Thermal did not file fuel cost information with the Commission monthly as required by Tariff Sheet No. 16. Rehearing Application at 2-6. The Commission has already considered these claims in K&D's complaints and various responses to Cleveland Thermal's motions to dismiss and has rejected them.

In its Dismissal Entry, the Commission found, as a matter of fact, that K&D received steam service from Cleveland Thermal pursuant to its special arrangement, as amended in 2007 (together, the "Contract"), and the applicable portion of the Tariff, all of which were approved by the Commission. Dismissal Entry at 7. The Commission recognized that the fuel charges billed to K&D were governed by the terms of the 2007 amendment (the "2007 Amendment") to the special arrangement (Dismissal Entry at 7) which provides:

e. Fuel Adjustment Rider. Company shall ascertain the weighted average cost of fuels burned by Company for steam utility service for each month (including all direct costs incurred by Company to place fuel at the point of burning at boilers at plants in which steam is generated for sale under this Agreement) and **may** file that cost (expressed as cents per million BTU) with PUCO on a monthly basis. **The Customer's rates shall be increased each month by applying the fuel adjustment rider schedule ratio (contained in Sheet 16 of the PUCO approved tariffs of Company) for each full 0.1¢ of the monthly cost of fuel per million BTU. In the event Sheet 16 is cancelled by the PUCO, the fuel adjustment rider will still apply.**

(Emphasis added.)

K&D ignores the fact that the only part of the Tariff, Sheet No. 16, incorporated in K&D's Contract is the "fuel adjustment rider schedule ratio." Also, the 2007 Amendment

charges in any case in which Cleveland Thermal was a party. In fact, the Commission has never initiated annual reviews of the fuel charges of any predecessor owner of the utility, in spite of the fact that the tariffed fuel charge provision has been in effect for more than twenty years through several owners.

provides that Cleveland Thermal may file its weighted average fuel costs with the Commission on a monthly basis, but does not require it to do so.

K&D curiously attempts to invoke Section 4905.31(E), Revised Code, to support its position that Cleveland Thermal did not file its fuel costs with the Commission monthly. (Rehearing Application at 3-4). This provision says that: “[W]here variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs.” Section 4905.31(E), Revised Code. Yet, the 2007 Amendment approved by the Commission says that Cleveland Thermal **may** file fuel cost information with the Commission, but does not require it to do so. This contractual arrangement is a “...special contract,’ approved by the ... [Commission] pursuant to R.C. 4905.31, which permits ‘reasonable arrangement[s]’ between public utilities and their customers. Generally, such contracts include arrangements that differ from the standard rate schedules and are often tailored to a specific customer’s service.”²

In the *Sunoco Case*, the Ohio Supreme Court said that, “[w]hen the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.”³ Further, the Court said that, “...extrinsic evidence cannot be considered to give effect to the contracting parties’ intentions when the language of the contract is clear and unambiguous. [*Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635,](#)

² *Sunoco, Inc. (R&M) v. Toledo Edison Company et al.* 2011 WL 2276204, Ohio Supreme Court (June 9, 2011) at Paragraph 37 (“*Sunoco Case*”).

³ *Sunoco Case* at Paragraph 37.

[597 N.E.2d 499](#), syllabus.”⁴ The language of the 2007 Amendment is clear: (1) K&D agreed that monthly filings of Cleveland Thermal’s weighted average fuel costs were permitted, **but not required**, and, (2) K&D agreed to pay the fuel costs described in Paragraph e of the 2007 Amendment, calculated and charged pursuant to the Contract, without additional Commission review.

With respect to Cleveland Thermal’s compliance with the monthly fuel cost filing requirement of Tariff Sheet No. 16 (although not applicable to the fuel charges billed to K&D⁵), the Commission explicitly found, as a matter of fact, that Cleveland Thermal did provide this information to the Commission for review as required by Tariff Sheet No. 16 and that the scope of any Staff review conducted of that information was outside the control of Cleveland Thermal. Dismissal Entry at 7. It is in the discretion of the Commission to so find. As a practical matter, K&D’s argument that Cleveland Thermal’s monthly fuel cost filings with Commission Staff fail to satisfy the monthly requirement elevates form over substance since the fuel cost information was actually available to Staff monthly for its review.

Most convoluted is K&D’s argument that the Commission’s approval of Tariff Sheet No. 16 was conditioned on the monthly filing of fuel cost information, and that, having not met this requirement, the fuel charges billed by Cleveland Thermal were not “approved” by the Commission. Rehearing Application at 5-6. K&D cites no Tariff

⁴ *Id.* at Paragraph 66.

⁵ As indicated above, Paragraph e of the 2007 Amendment to K&D’s special arrangement provides that the filing of monthly fuel cost **information is not required**. The only part of Tariff Sheet No. 16 incorporated into Paragraph e of the 2007 Amendment is the application of the fuel adjustment rider schedule ratio. In fact, Paragraph e of the 2007 Amendment provides that the fuel charge provision contained therein remains applicable even if Tariff Sheet No. 16 is cancelled.

language or Commission order that supports the conclusion that the Commission's approval of Cleveland Thermal's fuel charge mechanism is conditional upon monthly fuel cost filings with the Commission. K&D also fails to explain why the fuel cost filing requirement of the Tariff, being different from that in its Contract, as contained in Paragraph e of the 2007 Amendment, is applicable to the fuel charges billed to it by Cleveland Thermal.

Lastly, K&D faults the Commission for ignoring its Opinion and Order in Case No. 97-522-HT-AIR ("1998 Rate Case Order"), claiming that Cleveland Thermal's failure to submit its fuel procurement processes⁶ or costs for annual review between 2007 and 2010 means that its fuel charges were passed on to customers in violation of the Commission's order adopting a Staff recommendation for annual reviews of Cleveland Thermal's fuel costs. Rehearing Application at 7-8. Yet, as indicated above (and even if it were relevant to the fuel costs billed to K&D pursuant to the 2007 Amendment), the Commission correctly found that K&D has submitted the fuel cost information to its Staff monthly as required by its Tariff, and that "the scope of Staff's review" of that information was outside the control of K&D. Dismissal Entry at 7. Accordingly, the Commission found that any claim regarding the sufficiency of said annual reviews cannot constitute reasonable grounds for a complaint against Cleveland Thermal. Dismissal Entry at 7.

⁶ Neither Cleveland Thermal nor any of its predecessors were ever ordered by the Commission to provide any monthly filings related to fuel procurement processes.

B. Cleveland Thermal's fuel charges are subject to ongoing Commission oversight pursuant to Sections 4905.05, 4905.06, and 4905.31, Revised Code.

K&D claims that, because the Commission did not exercise its discretion to conduct annual reviews of Cleveland Thermal's fuel costs recommended by Staff in Case No. 97-522-HT-AIR, "...the fuel charges and costs were left unchecked and Cleveland Thermal incurred fuel costs that were not subject to any prudence review." Rehearing Application at 10. Again, K&D reiterates (in boldface) this false claim: "It is undisputed that Cleveland Thermal did not submit its fuel procurement processes or costs for annual review between 2007 and 2010 -- and, in fact, it appears undisputed that Cleveland Thermal has not submitted its fuel procurement processes or costs for annual review since the 1998 Order." Rehearing Application at 8. First, Cleveland Thermal has disputed this misrepresentation in nearly every filing it has made in this case. Second, this statement is particularly offensive since Cleveland Thermal has provided K&D copies of the fuel cost filings it has made to Commission Staff each month for the time period during which K&D received steam service from Cleveland Thermal.⁷ Third, this statement flies in the face of the finding of fact made by the Commission cited above that Cleveland Thermal has made the monthly fuel cost filings as provided for in the Tariff. Dismissal Entry at 7. Finally, there is no Tariff language or

⁷ K&D continues to exaggerate the import of the fact that, instead of making monthly filings of its fuel costs with the Commission as required by the Tariff, Cleveland Thermal has made monthly submissions to Staff as had all of Cleveland Thermal's predecessors subject to this same requirement. This, of course was the only option available until 2011, when the Staff opened a docket for this purpose. In fact, this Tariff provision requiring monthly filing of the fuel cost data has been in effect for more than twenty years, applicable to the tariffs of three owners, and the Commission did not open a docket until last year for this purpose. K&D knows that Cleveland Thermal has submitted its "weighted average cost of fuel burned for central steam service for each month," as required by Tariff Sheet No. 16, to Staff every month by certified mail, since copies of these documents were provided to K&D in response to discovery it conducted in the civil case filed against it by Cleveland Thermal in Cuyahoga County Common Pleas Court.

Commission order that requires Cleveland Thermal to make monthly filings of its fuel procurement processes.

Sections 4905.06 and 4905.31(E), Revised Code, provide that the Commission has ongoing supervision over Cleveland Thermal generally and over special arrangements between Cleveland Thermal and its customers. Any suggestion that any aspect of Cleveland Thermal's regulatory services or charges is not subject to ongoing oversight demonstrates a lack of understanding of Ohio regulatory law. With respect to the exercise of that oversight, the Commission has already schooled K&D that the scope of its Staff's review of K&D's fuel charges is outside of the control of Cleveland Thermal and any claim of inadequacy or insufficiency of any such review does not constitute reasonable grounds for a complaint against Cleveland Thermal. Dismissal Entry at 7.

III. CONCLUSION

K&D has raised no new issues not already considered and addressed by the Commission in its Dismissal Entry. K&D merely reiterates its skewed representation of facts and law, even (1) in the face of the plain language of the 2007 Amendment, (2) in the face of significant documentation provided to it in discovery in the civil case pending in Cuyahoga County Common Pleas Court and the plain language of Ohio regulatory statutes, and (3) in spite of multiple contrary findings of fact and law in the Commission's Dismissal Entry. Yet, K&D has never claimed that Cleveland Thermal has violated the terms and conditions of its Contract, including the 2007 Amendment thereto. K&D has never claimed that Cleveland Thermal charged it the wrong rates; it simply continues to argue that it should not be charged the approved rates for which it

bargained. The Commission correctly found that "...K&D's sole basis for complaint in this proceeding is its claim that Cleveland Thermal's past rates, which were approved by the Commission..., were unreasonable and should not have been charged to K&D. Based on the well-established Commission precedents, as well as the undisputed facts of this case, the Commission finds that K&D has failed to set forth reasonable grounds for complaint as required by Section 4905.26, Revised Code."

Wherefore, Cleveland Thermal respectfully requests that the Commission deny K&D's Application for Rehearing.

Respectfully submitted,

/s/ Gretchen J. Hummel

Gretchen J. Hummel (Trial Attorney)

Scott E. Elisar

McNees Wallace & Nurick LLC

Fifth Third Center

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: 614-469-8000

Telecopier: 614-469-4653

ghummel@mwncmh.com

selisar@mwncmh.com

**Attorneys for Cleveland Thermal Steam
Distribution, LLC**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra Application for Rehearing* has been hand-delivered, sent electronically or served *via* ordinary U.S. Mail, postage prepaid, this 12th day of July, 2012 to the following parties of record.

/s/ /Gretchen J. Hummel

Gretchen J. Hummel

James F. Lang
Laura C. McBride
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Avenue
Cleveland, OH 44114

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Summary: Memorandum Cleveland Thermal Steam Distribution, LLC's Memorandum Contra Application for Rehearing electronically filed by Ms. Vicki L. Leach-Payne on behalf of Hummel, Gretchen J. Ms.