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SERVICE NOTICE

PAGE 1

CASE NUMBER 85-1891-WS-CSS
CASE DESCRIPTION KEN MEEK V GEM BOAT SERV/P. GRUMMEL
DOCUMENT SIGNAL ON August 6, 1990
DATE OF SERVICE AUG 7 19:30

PERSONS SERVED

PARTIES OF RECORD	ATTORNEYS
COMPLAINANT	
KEN MEEK	DAVID R. PHEILS, JR. ESQ. ATTORNEY AT LAW 110 LOUISIANA AVENUE PERRYSBURG, OH 43551
RESPONDENT	
GEM BOAT SERV INC	NONE
RESPONDENT	
GRUMMEL, PAUL	JOYCE D EDELMAN PORTER, WRIGHT, MORRIS & ARTHUR 250 EAST BROAD STREET COLUMBUS, OH 43215

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Speed-Memo

Date

8/7/90

Subject:

In the matter of Ken Meek vs. Gem Beach Marina
Case No. 85-1891-WW-CSS

Dear Sirs:

Enclosed find an original plus 14 copies of Respondent Gem Beach Marina's Memorandum Contra to Complainant Ken Meek's Application for Rehearing. Please file stamp these copies and return a copy to me in the self-address postage paid envelope.

Very truly yours,

[Signature]
MEYER AND VOLKER
D. Bowen Lovvick
Attorneys at Law

TO Public Utilities Commission
180 East Broad Street
12th Floor (Docketing)
Columbus, OH 43266-0573

101 1/2 MADISON - P. O. BOX 77
FORT CLINTON, OHIO 43452
TELEPHONE (419) 732-3135

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BEFORE THE PUBLIC UTILITIES
COMMISSION OF OHIO

RECEIVED
AUG 8 1960
DOCKETING DIVISION
PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT
OF KEN MEEK,

Case No. 85-1891-WW-CSS

Complainant,

RESPONDENT GEM BEACH
MARINA'S MEMORANDUM CONTRA
TO COMPLAINANT KEN MEEK'S
APPLICATION FOR REHEARING

vs.

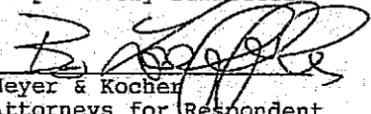
GEM BEACH MARINA, INC.

Respondent.

Now comes Respondent, Gem Beach Marina, Inc. by and through counsel Meyer and Kocher and hereby submits its Memorandum Contra to Complainant Ken Meek's Application for Rehearing.

For the reasons contained in the Memorandum Contra below, the Respondent hereby submits that the Complainant's application for rehearing is not well-taken and should be denied.

Respectively submitted,


Meyer & Kocher
Attorneys for Respondent
Gem Beach Marina, Inc.
by one of its attorneys
D. Bowen Loeffler
Ohio S.C. No. 0030562
101 1/2 Madison Street
P.O. Box 37
Port Clinton, OH 43452
(419) 732-3135

MEMORANDUM CONTRA

I. Complainant's Arguments regarding the burden of proof

under R.C. 4905.26 vs. R.C. 4909.18

One of Complainant's main arguments cited in support of

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CAMERA OPERATOR R. J. Smith DATE PROCESSED 8-9-90

his application for rehearing is that Complainant's original objections were not "correctly treated (pursuant to an August 24, 1988 entry)" by the attorney examiner. The complainant makes numerous incorrect statements regarding the August 24, 1988 Entry of the P.U.C.O. The August 24, 1988 Entry (attached hereto as Exhibit 1) is quite clear as to how the "Objections to Tariff" were treated. The Attorney Examiner considered them ". . . as a new ground of complaint in this same docket and handled pursuant to R.C. 4905.26 . . .". There was no new case number assigned and nowhere in the entry of August 24, 1988 is there the mention made of a "Supplemental Opinion and Order." Further, as was stated above, paragraph 2 of the Entry, makes it clear how and in what manner the objections of Complainant will be treated.

The fact that the "Objections to Tariff" were to be handled pursuant to R.C. 4905.26 was not lost upon Complainant. Complainant on September 9, 1988 filed a Request for Hearing with the Commission (see Exhibit 2). In his introductory statement, and throughout his pleading, Complainant "requests that a hearing be scheduled promptly under Section 4905.26."

Respondant submits that Complainant knew from the beginning (after the filing of his objections), that the objections were proceeding under R.C. 4905.26 and he has even approved, acknowledged and acquiesced to this in subsequent pleadings of his own. Complainant had ample notice and can claim no surprise that his objections were proceeding under R.C. 4905.26. Even assuming arguendo that Complainant could have proceeded under R.C. 4909.18,

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Complainant by his actions and pleadings has waived the right (if it indeed existed). For Complainant to assert now that his objections should have been handled under R.C. 4909.18 is inappropriate, inapplicable, "grasping at straws" and against the law.

Respondent submits that R.C. 4909.18 deals with the rate proposed in the initial filing application with the PUCO. See Public Utility Service vs. Pub. Utility Comm. (1930) 62 Ohio St. 2d 471. If the PUCO itself makes a determination under this section that among other things, the schedule of rates proposed is "unjust or unreasonable, the Commission shall set the matter for hearing . . ." "At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility."

The August 23, 1988 Entry of the Commission was essentially its approval under R.C. 4909.18 of the first filings of Gem Beach's tariffs. These first tariffs were considered just and reasonable by the Commission, therefore, there was not a need by the Commission to proceed with a hearing under R.C. 4909.18. However, because the Complainant filed objections to the rate design of the approved tariffs, the Commission appropriately set his complaint for hearing pursuant to R.C. 4905.26. This is the proper section of law under which objections or complaints are to be brought by customers of the utility company. The burden of proof at the hearings held on July 26, 1989 and August 8, 1989, was upon the Complainant because it was he who brought the

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CAMERA OPERATOR R. Adams DATE PROCESSED 8-9-90

complaint/objections. Grossman v. Public Utilities Commission
(1966) 5 Ohio St. 2d 189. Therefore, because the Complainant's
case was appropriately bought under 4905.26, his arguments that
the burden of proof applied at the hearings, violated the due pro-
cess clauses of the U.S. and Ohio Constitutions, is misplaced and
fails. Further, there is no evidence before the Commission and no
basis whatsoever for the statement by Complainant that there is a
930% disparity between summer cottages tarriffs and the dock
tariffs. There is a difference in the tariff charged for dock
water usage, but as set forth by the Commission's staff report and
the Respondent's expert, this is based upon the customer class and
usage.

II. As to Complainant's Arguments Regarding Transactions

Between a Utility and an Affiliate

Complainant beginning at page 3 of his memorandum argues
essentially that the dock customers of the Utility should be
paying the same amount as the summer cottages. Complainant further
states that the burden is upon the Respondent to prove that the
charges are just and reasonable because the utility company, which
is also a marina, happens to own the docks which are furnished
water by the utility company. By virtue of owning its own docks,
complainant asserts that this is tantamount to an "affiliate
relationship."

Again, as previously discussed, because the objections of
the Complainant proceeded under R.C. 4905.26, the burden of proof
was upon the Complainant to establish that the rates charged by

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the utility were unfair, unjust or unreasonable.

Further, there does not exist the "utility and affiliate relationship" here as argued and envisioned by Complainant. The cases cited by Complainant are clearly inapplicable. For example, Columbus v. Puc (1950) 154 Ohio St 107 was a case dealing with the multiple interrelationships between large (monopolistic) telephone utility companies and their subsidiary companies with whom the telephone utility companies had separate contracts under which they were obligated to purchase supplies and equipment at prices fixed by the subsidiaries. East Ohio Gas Co. vs. P.U.C. (1938) 133 Ohio St. 212 was also a case dealing with the interrelationships between a large monopolistic gas utility company and one of its affiliates from whom it purchased by contract, natural gas.

Here Gem Beach Marina, Inc., the marina, is also the utility company. There is no distinction between affiliates, subsidiaries or parent companies. There are no "exclusive" contracts for purchase of water by one affiliate from the other or by an affiliate from a subsidiary at a set price. In fact, the marina is itself, a paying customer at a price set by the PUCO for the water services it uses. The marina is in the same position as the other customers of the utility company. The utility company is small and generates approximately \$38,000.00 in operating revenue which is mostly offset by the expense costs of the operation. In fact, there are no customer meters and no fire services.

III. Evidence Presented at Hearings

The Complainant argues that he did provide enough evidence to

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overcome his burden of proof and that the staff and Respondent failed to produce any evidence whatsoever. Once again, Complainant has failed to grasp the basis of his own complaints/objections. Complainant objected to the "rate design" of the tariffs approved by the PUCO. As such, expert testimony was required to be introduced by Complainant to establish that the tariffs were unjust or unreasonable. Instead, Complainant chose to attempt to introduce by testimony, facts allegedly (which were appropriately objected to by Respondents) regarding water usage not, rate design which was biased, self-serving and lacked any scientific or factual supporting data or documentation. Contrary to Complainant's misstatements, there was not introduced as credible evidence, "years and thousands of hours of observation of dock and cottage water use" by Complainants. Complainants in particular were unable to prove that the amounts of water used by the boaters at the docks was similar or identical to that used by the cottage owners.

In fact, the Respondent's expert made it clear that there is really no valid comparison that can be made between the water usage at the docks and by the cottage owners. He was of the opinion that these were two totally different users of water services. Respondents expert also indicated that the rates were fair and reasonable because again the customer base is small and similar (mainly domestic consumption), the revenue requirements are in the form of operating expense and that there was no industry in the area.

Again, contrary to the misstatement of complainant, one

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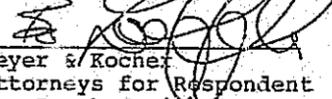
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of the reasons, among others, why the PUCO staff recommended a \$10.00 per year charge for summer dock water usage was its concern for customer shock to the utility. The staff report of the PUCO and their testimony at the hearings, also demonstrates that in approving the tariffs, they considered the different costs affiliated with the varying customer base of the utility and approved rates consistent with their differences.

IV. Conclusion

Wherefore, based upon the foregoing, the Respondent's respectfully submit that the Complainant's Application for Rehearing should be denied.

Respectively submitted,


Meyer & Kocher
Attorneys for Respondent
Gem Beach Marina, Inc.
by one of its attorneys
D. Bowen Loeffler
Ohio S.C. No. 0030562
101 1/2 Madison Street
P.O. Box 37
Port Clinton, OH 43452
(419) 732-3135

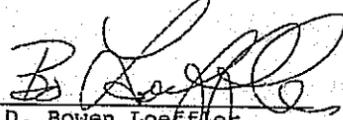
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent Gem Beach Marina's Memorandum Contra to Complainant Ken Meek's Application for Rehearing was sent by regular U.S. Mail to William Wright, Attorney for PUCO, Public Utilities Section, 180 East Broad St., 7th Floor, Columbus, Ohio 43266-0573 and to David R. Pheils, Jr.,

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attorney for complaintant, Crandall, Pheils and Wisniewski, 410 Louisiana Ave., Perrysburg, Ohio 43551, this 7 day of August, 1990.


D. Bowen Loeffler

#13G2-G4

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EXHIBIT 1

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)
Ken Meek,)
Complainant,)
v.) Case No. 85-1891-WS-CSS
Gem Boat Service, Inc.,)
Gem Beach Marina, Inc.,)
and)
Paul Grummel,)
Respondents,)
Relative to alleged failure to)
charge in conformity with approved)
tariffs and unauthorized abandon-)
ments.)

ENTRY

The Attorney Examiner, pursuant to the authority granted by Rule 4901-1-14 of the Ohio Administrative Code (O.A.C.), finds:

- (1) On August 23, 1988, the Commission issued an entry in this matter which, inter alia, approved the proposed tariffs of Gem Beach Marina, Inc., but indicated that this matter would remain open and that the Commission would address the complainant's "Objections to Tariff", docketed on April 26, 1988, in a subsequent entry. In that document, the complainant disputed the now-approved rate design. He noted that the commercial and dock customers are not arm's length third parties to Gem Beach, and he alleged that the then-proposed rates minimize the amount paid by the respondent for service to its business operations while putting as much of the burden as possible on the other customers. The filing included a Certificate of Service.
- (2) The Attorney Examiner concludes that the "Objections to Tariff" should be regarded as a new ground of complaint in this same docket, and handled pursuant to Section 4905.26, Revised Code, and Rule 4901-9-01, O.A.C.

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85-1891-WS-CSS

-2-

- (3) In that Gem Beach has already been served with a copy of the complainant's filing, it shall be afforded twenty days from the date of service of this Entry to file its answer or motion in accordance with Rule 4901-9-01, O.A.C. After reviewing that filing, the Commission will take appropriate additional action in this matter.

It is, therefore,

ORDERED, That Gem Beach file its answer or motion as detailed in Finding (3). It is, further,

ORDERED, That copies of this Entry be served upon Ken Meek and his counsel; Gem Boat Service, Inc., Gem Beach Marina, Inc., Paul Grummel, and their counsel; the Ohio Environmental Protection Agency; Carl E. Koebel, Ottawa County District Board of Health; and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Georganne R. Higgins
By: Georganne R. Higgins
Attorney Examiner

/vrt
[initials]

Entered in the Journal
AUG 24 1988
A True Copy
Nancy L. Wolpe
Nancy L. Wolpe
Secretary

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-2-

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ORDERED, That Gem Beach file its answer or motion as detailed in Finding (3). It is, further,

ORDERED, That copies of this Entry be served upon Ken Meek and his counsel; Gem Boat Service, Inc., Gem Beach Marina, Inc., Paul Grummel, and their counsel; the Ohio Environmental Protection Agency; Carl E. Koebel, Ottawa County District Board of Health; and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Georganne R. Higgins
By: Georganne R. Higgins
Attorney Examiner

/vrt
[initials]

Entered in the Journal
AUG 24 1988
A True Copy
Nancy L. Wolpe
Nancy L. Wolpe
Secretary

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EXHIBIT 2

RECEIVED
SEP 9 1988
DOCKETING DIVISION
PUBLIC UTILITIES COMMISSION OF OHIO

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the matter of objections
to the proposed tariffs by:

Case No. 85-1891-WS-CSS

Ken Meek
805 Harmon Street
Fremont, Ohio 43420,

REQUEST FOR HEARING

Complainant, Individually
and as representative member
of a class composed of Water
and Sewer Customers
of the Respondent

-vs-

Gem Beach Marina, Inc.
P. O. Box 606
Port Clinton, Ohio 43452,

Respondent.

David R. Pheils, Jr.
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177
Attorney for Complainant

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David R. Pheils, Jr.
& Associates
Attorneys and
Counselors at Law
410 LOUISIANA AVENUE
PERRYSBURG, OHIO
43551
(419) 874-3177

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the
Complaint of Ken Meek,

Complainant,

Case No. 85-1891-WS-CSS

-vs-

Gem Boat Service, Inc.,
Gem Beach Marina, Inc.,
and
Paul Grummel,

Respondents.

REQUEST FOR HEARING

Complainant hereby requests that a hearing be scheduled promptly under Section 4905.26, O.R.C. on Complainant's objections to tariff.

MEMORANDUM IN SUPPORT

On August 23rd, 1988 this commission ordered that the revised tariffs filed by Respondents on August 15th, and 22nd, 1988 be approved as first filings but that it will not be bound in any subsequent proceeding as to their justness or reasonableness. On August 24th the attorney examiner confirmed the commission's findings with an order treating Complainant's objections as a new ground of complaint, in this same docket and affording Respondents 20 days to respond.

Complainant's attorney received a copy of such response on September 3rd, 1988 which admitted the kind of use by Respondents' boat dock customers alleged by Complainant and

David R. Phib, Jr.
& Associates
Attorneys and
Counselors at Law
21 TUSANA AVENUE
COLUMBUS, OHIO
43251
619-674-3177

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failed to deny Complainant's allegations of water use by Respondents' commercial marina operation. Such admissions and failure to deny should be treated as either admissions under 4901-1-22 or stipulations under 4901-1-30 supporting this commission modifying Respondents' tariffs as requested by Complainant without further hearing.

If this commission does not wish to do so, then a prompt hearing should be scheduled as required by Section 4905.26, O.R.C., Allnet v. PUCO, 32 O.S. 3d 115 (1987); Coalition v. PUCO, 49 O.S. 2d 207 (1977). Then this commission should fix new rates as requested by Complainant and order them substituted for the existing ones. Ohio Utilities Co. v. PUCO, 58 O.S. 2d 153 (1979).

Respectfully submitted,

David R. Pheils, Jr.
David R. Pheils, Jr.
Attorney for Complainant

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF THE FOREGOING INSTRUMENT WAS SERVED UPON EACH PARTY HERETO BY MAILING TO EACH PARTY OR THE ATTORNEY OF RECORD THEREFOR AT THE ADDRESS FOR EACH AS DISCLOSED BY PREVIOUS FILINGS HEREIN, ON 9/7/88.

David R. Pheils, Jr.

David R. Pheils, Jr.
Attorney and
Counselors at Law
410 LOUISIANA AVENUE
PRYSEBURG, OHIO
43551
419-874-3177

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in

Case No(s). 85-1891-WS-CSS

Summary: Service Notice (Originally filed 8/7/1990) electronically filed by Docketing Staff on behalf of Docketing