

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter of The Complaint of)	
Antuan Burrell-El)	
)	
Complainant,)	Case No. 21-298-GA-CSS
)	
v.)	
)	
Duke Energy Ohio, Inc.)	
)	
Respondent.)	

**DUKE ENERGY OHIO, INC.’S MEMORANDUM CONTRA TO
COMPLAINANT’S MOTION FOR RECONSIDERATION/REHEARING**

I. INTRODUCTION

The Public Utilities Commission of Ohio (Commission) should deny the Motion for Reconsideration/Rehearing¹ filed by Complainant Antuan Burrell-El (Complainant) on both procedural and substantive (or lack thereof) grounds. Procedurally, Complainant undeniably failed to file his Application within the 30-day deadline imposed by R.C. 4903.10, thereby obviating any need to address the so-called merits of Complainant’s Application. Substantively, the Commission correctly dismissed the Complaint in this action for lack of subject matter jurisdiction, and Complainant has not demonstrated how the Commission’s Entry dated September 7, 2022, was unreasonable or unlawful. Accordingly, the Commission should deny the Application and put this matter to rest for the last time.

¹ There is no procedural device under the Rules governing these proceedings for a motion for “reconsideration” in complaint proceedings. This filing is governed by ORC 4903.10 and OAC 4901-1-35.

II. COMPLAINANT IS NOT ENTITLED TO A REHEARING UNDER R.C. 4903.10.

Complainant's Application is nothing more than an effort to continue rehashing meritless claims. In granting the Motion to Dismiss filed by Respondent Duke Energy Ohio, Inc. (DE-Ohio or the Company), the Commission properly determined that it does not have jurisdiction over claims relating to damages to Complainant's furnace. Nothing raised by Complainant in his Application justifies giving him yet another bite at the apple in that regard. And, considering that Complainant did not file his Application within 30 days of the Commission's Entry dated September 7, 2022, the Commission understandably could deny the late-filed Application without addressing Complainant's incomprehensible and unfounded arguments.

A. Complainant's Application for Rehearing of the September 7, 2022, Entry was not timely filed and, therefore, must be denied.

R.C. 4903.10 provides that applications for rehearing "shall be filed within thirty days after the entry of the order upon the journal of the commission." See also, Rule 4901-1-35(C). The deadline is neither suggestive nor subject to excuse or apology. As confirmed by well-established and binding precedent, the "statutory deadline is jurisdictional, is not subject to Commission waiver, and has been consistently upheld by the Commission. *See, e.g., Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 362, 176 N.E.2d 416 (1961); *Dahl v. The East Ohio Gas Co.*, Case No. 17-1822-GA-CSS, 2021 OHIO PUC LEXIS 879 at *12, Entry (Dec. 1, 2021); *Tandy v. Cleveland Elec. Illuminating Co.*, Case No. 12-2102-EL-CSS, Entry on *Rehearing* (May 1, 2013) at 3; *Paquelet v. Ohio Edison Co.*, Case No. 11-4177-EL-CSS, Entry on *Rehearing* (Oct. 31, 2012) at 2; *Mustric v. Columbia Gas of Ohio, Inc.*, Case No. 01-2472-GACSS, Second Entry on *Rehearing* (Mar. 25, 2003) at 2.

Here, Complainant seeks a rehearing of the September 7, 2022, Entry granting DE-Ohio's Motion to Dismiss for lack of subject matter jurisdiction. The docket of these proceedings reflects that Complainant's Application was not filed until October 11, which is thirty-five (35) days after that Entry. As such, the Commission must deny Complainant's untimely Application for Rehearing of the September 7th Entry.

- B. The Commission correctly dismissed the Complaint in this action because the Commission lacks jurisdiction over claims relating to damage to Complainant's furnace.

Complainant's Application is a hodgepodge of references to inapplicable administrative, statutory, and constitutional citations which have nothing to do with the claims and issues set forth in his Complaint. In the introductory paragraph of his Application, Complaint cites to R.C. 4913.25 and 4913.251 even though his Complaint does not involve facts and claims relating to underground utility damage. Thereafter, in paragraphs 3, 11 and 15 of his Application, Complaint cites to portions of the Code of Federal Regulations, none of which have any bearing on this case. Paragraph 11 also contains confusing references to the Fifth Amendment of the U.S. Constitution, as well as references to the Ohio Constitution's provisions about eminent domain and municipal bonds. Once the Commission bypasses the inapplicable and irrelevant citations and related "arguments" strewn throughout the Application, the Commission will conclude that Complainant has failed to explain how and where the Commission was unreasonable or unjust in dismissing his Complaint against DE-Ohio by Entry on September 7, 2022.

In that Entry [at ¶¶11-15], the Commission aptly cited to the arguments and legal authorities referenced in DE-Ohio's Motion to Dismiss. The Commission further agreed with DE-Ohio's legal analysis and found, "The case law cited by Duke articulates the breadth of the Commission's jurisdiction." Entry at ¶16. When discussing the two-part test for determining the

Commission’s jurisdiction, as established by the Ohio Supreme Court in *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*,² the Commission applied that test to the specific allegations of the Complaint in these proceedings. Entry at ¶¶19-20. As the Commission found, the “real issue presented in this case” revolves around DE-Ohio’s alleged inability to get Complainant’s “furnace to work.” Entry at ¶20. Based on applicable precedent, the Commission properly determined that its expertise was neither necessary nor appropriate for a property damage claim of that nature, and that such issues fall well outside the scope of the Commission’s jurisdiction under R.C. 4905.26. Entry at ¶¶18, 21-22.

Whereas the Commission explained the parameters of its exclusive jurisdiction, including the areas in which its administrative expertise lies, Complainant simply repeats the same or similar arguments without undergoing the *Allstate Insurance* test or demonstrating how the Commission erred in following that binding precedent. Complainant also seemingly tries to recharacterize the allegations of his Complaint with references to underground pipe safety regulations which have no relevance to the “real issue” in his Complaint, namely the alleged failure by DE-Ohio’s contractor to get Complainant’s furnace to work. Regardless of how Complainant strains to justify how various administrative, statutory, and constitutional provisions somehow apply to his claims against DE-Ohio, the Commission properly followed and applied Ohio law in dismissing the Complaint for lack of subject matter jurisdiction. Entry at ¶24.

For all of these reasons, and for the reasons more fully set forth in DE-Ohio’s Motion to Dismiss, Reply Memorandum in Support and the Commission’s Entry dated September 7, 2022, Complainant’s untimely and unfounded Application must be denied.

² *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 2008-Ohio-3917, ¶¶12-13, 119 Ohio St.3d 301.

Respectfully submitted,

/s/ Robert A. McMahon

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by regular U.S. Mail on this 13th day of October, 2022:

Antuan Burrell-El
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/s/ Robert A. McMahon

Robert A. McMahon (0064319)

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Case No(s). 21-0298-GA-CSS

Summary: Memorandum DUKE ENERGY OHIO, INC.'S MEMORANDUM IN
CONTRA TO COMPLAINANT'S MOTION FOR
RECONSIDERATION/REHEARING electronically filed by Mr. Robert A. McMahon
on behalf of Duke Energy Ohio, Inc.