

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of:)	
Tobi Pledger, et al.)	
)	
Complainants,)	
)	
v.)	Case No. 04-1059-WW-CSS
)	
Capital Properties Management, Ltd.,)	
)	
Respondent.)	

ENTRY ON REHEARING

The Commission finds:

- (1) On July 1, 2004, Tobi Pledger and Mary Sliwinski of Copley Ohio (Complainants) filed a complaint against Capital Properties Management, Ltd. (Respondent) related to the water and sewer service they receive through Respondent at the residential apartment complex owned and managed by Respondent.
- (2) On August 16, 2004, the attorney examiner found that Respondent's affirmative defense of lack of subject matter jurisdiction presented in its answer should be treated, for the purposes of this case, as a motion to dismiss for lack of subject matter jurisdiction under Rule 4901-9-01, Ohio Administrative Code, and ordered that Complainants respond to that motion within 15 days. On August 31, 2004, Complainants filed a responsive pleading. Further, on September 3, 2004, Respondent filed a reply memorandum in support of its motion to dismiss.
- (3) On October 6, 2004, the Commission issued its entry dismissing the case for lack of subject matter jurisdiction (entry). That entry also granted the voluntary dismissal without prejudice of the complaint as to Tobi Pledger.
- () On November 2, 2004, complainants timely filed a request for rehearing. Respondent filed its memorandum contra that request for rehearing on November 4, 2004. In the application for rehearing, complainants assert the following assignments of error:

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First Assignment of Error - The Commission erred in interpreting the phrase found in the *Shroyer* case, "in the business of supplying" to be "primarily in the business of supplying." *Inscho, et al. v. Shroyer's Mobile Homes*, Case Nos. 90-182-WS-CSS, 90-252-WS-CSS, 90-350-WW-CSS, Opinion and Order (February 27, 1992) (*Shroyer*).

Second Assignment of Error - The Commission erred in finding that respondent landlord is the "consumer" referred to in the definition of a water utility under Section 4905.03(A)(8), Revised Code.

Third Assignment of Error - The Commission erred in holding that its jurisdiction does not lie in this case even though respondent landlord is charging its tenants more than the tariff rate of its supplier.

Fourth Assignment of Error - Additionally, complainants seek rehearing on the Commission's finding that respondent landlord has not availed itself of special benefits available to public utilities.

Fifth Assignment of Error - Lastly, complainants object to the granting of a voluntary dismissal, without prejudice, of the complaint as to Tobi Pledger.

- (5) Regarding the first assignment, we find no basis for the assertion. In reviewing the October 6, 2004, entry dismissing the complaint, the word "primarily" appears only once, and that is in the context of the respondent landlord being, "primarily in the business of being a landlord." Entry at 3. This objection is unsubstantiated by the record and should be denied.
- (6) The Commission finds that the second assignment is not well taken. The well established rule in Ohio that the landlord is the consumer referred to in Section 4905.03(A)(8), Revised Code, was recently reaffirmed by the Ohio Supreme Court, "...office buildings, apartment houses and shopping center are 'consumers' of electricity even though these consumers may resell, redistribute, or submeter part of the electricity to their tenants. *Jonas v. Swetland Co.* (1928), 119 Ohio St. 12, 6 Ohio Law Abs. 357, 162 N.E. 45; *Shopping Centers Assn. v. Pub. Util. Comm.* (1965), 3 Ohio St. 2d 1, 32 Ohio Op. 2d 1, 208 N.E. 2d 923." *FirstEnergy Corporation, et al. v. Public Utilities Commission of Ohio*

(2002) 96 Ohio St. 3d 371. Complainants have not provided any basis for altering this rule of law, and this objection should be denied.

- (7) In support of the third assignment regarding the Commission's determination that it lacks subject matter jurisdiction over the complaint, complainants cite Finding of Fact and Conclusion of Law 14 in *Shroyer*. "This Commission lacks the statutory authority to insert ourselves into the landlord-tenant relationship and regulate directly the redistribution of water service as long as the landlord's actions are consistent with the tariffs of the regulated utility from which the service is obtained." *Shroyer* at 7. However, as Finding 4 of the entry stated,

Respondent landlord provides its tenants water and sewer services that it receives from the City of Akron Water Department and Summit County Department of Environmental Services respectively. *Id.* Neither of those service providers is jurisdictional to this Commission. Complainants sole complaint is that the landlord marks up the costs of these services by ten percent and then bills its tenants that marked up amount.

In the instant case, there is both a lack of jurisdiction by this Commission over the instant situation in which the landlord is the customer of the utility, and is providing those services to its tenants, and the fact that the utilities supplying the landlord are themselves not jurisdictional to this Commission. Therefore, complainants have not provided any new reasons for altering the November 6, 2004, decision to dismiss for lack of subject matter jurisdiction.

- (8) In its fourth assignment, complainants continue to make the argument that because respondent's submeters are not sealed by the Ohio Department of Agriculture, it is therefore a regulated utility. Again, complainants have not offered anything new that was not previously considered by the Commission, and that objection should be denied.
- (9) In the fifth assignment of error, the assertion that the Commission erred in granting Tobi Pledger's written request to be removed as a complainant because the request originated with the complainant rather than counsel is not well taken.

Counsel had ample time, over two months, to raise the issue prior to the issuance of the dismissal entry.

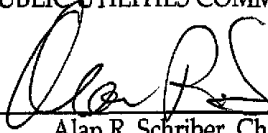
- (10) For the above reasons, we find that the objections of complainants noted in the application for rehearing should be denied.

It is, therefore,

ORDERED, That complainants' application for rehearing is denied. It is, further,

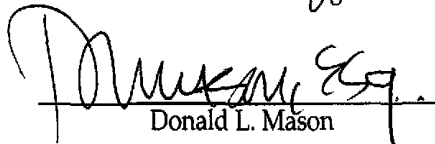
ORDERED, That a copy of this entry be served upon the complainants, respondent, their counsel and all other parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

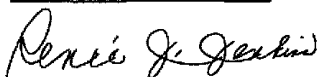

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Entered in the Journal
NOV 23 2004



Renee J. Jenkins
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