

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Regulation of the	)	
Purchased Gas Adjustment Clause	)	Case Nos. 04-221-GA-GCR
Contained Within the Rate Schedules of	)	05-221-GA-GCR
Columbia Gas of Ohio, Inc., and Related	)	
Matters.	)	

ENTRY

The attorney examiner finds:

- (1) On January 2, 2004, the 2004 gas cost recovery docket was opened in order for the Commission to review the operation of the purchased gas adjustment clause and the gas purchasing practices and policies of Columbia Gas of Ohio, Inc. (Columbia). By Entry dated September 14, 2005, the Commission also consolidated the 2005 gas cost recovery proceeding with Columbia's 2004 gas cost recovery proceeding.
- (2) On December 8, 2006, the Ohio Consumers' Counsel (OCC) filed testimony by Bruce M. Hayes and Michael P. Haugh in this proceeding. Further, on December 13, 2006, the Commission Staff (Staff) filed testimony by Stephen E. Puican.
- (3) On December 14, 2006, Columbia filed a Motion to strike the testimony of OCC witnesses Hayes and Haugh, to strike the testimony of Staff witness Puican, and to limit the scope of cross-examination. Staff filed a memorandum contra Columbia's motion on December 21, 2006, OCC filed its memorandum contra on December 22, 2006, and Columbia filed a reply memorandum on December 28, 2006.
- (4) In its motion to strike, Columbia argues that the OCC and the Staff have already fully litigated the reasonableness of the stipulation approved by the Commission in *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, Entry on Rehearing (May 5, 2004) (2003 Stipulation), and, therefore, the doctrines of res judicata and collateral estoppel preclude relitigation of issues related to the 2003 Stipulation in this proceeding. In addition, Columbia alleges that the issues raised by the OCC are not appropriate for

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resolution in a gas cost recovery proceeding. Finally, Columbia contends that the testimony offered by the OCC's witnesses contains legal conclusions and that such testimony should be stricken.

- (5) With respect to the testimony of OCC witness Hayes, Columbia moved to strike his testimony in its entirety, arguing that the sole purpose of his testimony is to argue against the provisions of the 2003 Stipulation and to persuade the Commission to terminate the stipulation. Columbia claims that this argument is a sham and a disingenuous attempt by OCC to again attack the 2003 Stipulation, which OCC had opposed in the prior proceeding. Columbia notes that the testimony includes instances in which projected benefits associated with the 2003 Stipulation allegedly differ from those provided during settlement negotiations. Columbia argues that OCC's arguments about inequitable benefits are not new and that OCC fully exercised its right to litigate those issues when it opposed the adopting of the 2003 Stipulation by the Commission. OCC argues that *res judicata* and collateral estoppel does not apply in this case as OCC's appeal was dismissed on procedural grounds, not on the merits of the case. OCC further contends that the issues were kept open by the Commission's reservation of the right to terminate the 2003 stipulation and the M/P auditor raising the issues in its review in this proceeding. Columbia counters in its reply that *res judicata* and collateral estoppel apply notwithstanding the manner in which the appeal was dismissed or whether there was any appeal at all.

The attorney examiner notes that one of the specific purposes of the audit in this proceeding was to review issues related to Columbia's implementation of the 2003 Stipulation. *In the Matter of the Long-Term Forecast Report of Columbia Gas of Ohio, Inc., and Related Matters*, Case No. 02-121-GA-FOR, Opinion and Order (February 23, 2005) at 10-11. Further, although Columbia argues that the doctrines of *res judicata* and collateral estoppel preclude the relitigation of issues resolved by the 2003 Stipulation, the Commission, when it adopted the stipulation, noted that:

We further reserve our right to terminate our approval of the stipulation if we discover that

Columbia is not implementing the stipulation as we have been informed it would.

Case No. 94-987-GA-AIR, Entry on Rehearing (May 5, 2004) at 11.

Accordingly, *res judicata* and collateral estoppel do not preclude OCC, or any other party, from arguing in this proceeding that the Commission should exercise its right to terminate the 2003 Stipulation and from introducing evidence related to Columbia's implementation of the stipulation. Because the Commission used broad language in reserving its right to terminate the 2003 Stipulation, OCC is not precluded from arguing that the 2003 Stipulation should be terminated based upon discrepancies between projections, made by Columbia at the time the 2003 Stipulation was adopted, and Columbia's actual experience in implementing the Stipulation. Therefore, the attorney examiner finds that the testimony of OCC witness Hayes is relevant as to whether the 2003 Stipulation should be terminated. Further, the doctrines of *res judicata* and collateral estoppel do not preclude OCC from arguing that the 2003 Stipulation should be terminated simply because OCC made similar arguments when it opposed the adoption of the Stipulation. Accordingly, Columbia's motion to strike should be denied with respect to the testimony filed by OCC witness Hayes.

- (6) Likewise, Columbia moved to strike Staff witness Puican's testimony in its entirety, arguing that the Staff is precluded by *res judicata* and collateral estoppel from recommending that the Commission clarify its intent regarding the sharing mechanism in the 2003 Stipulation.

On December 21, 2006, the Staff filed a memorandum contra Columbia's motion to strike the testimony of Staff witness Puican. Staff argues that *res judicata* and collateral estoppel do not affect Staff witness Puican's testimony because the testimony presents an interpretative issue concerning what the Commission intended that has not been litigated and could not be litigated before now.

The attorney examiner notes that the implementation of the sharing mechanism was a significant part of the audit in this proceeding and that the proper interpretation of the provisions related to the sharing mechanism is at issue in this proceeding. Further, *res judicata* and collateral estoppel do not preclude the Staff, or any party, from disputing Columbia's interpretation of the 2003 Stipulation or from illustrating an unanticipated outcome resulting from the modification of the 2003 Stipulation by the Commission. Columbia's motion to strike, with respect to Staff witness Puican's testimony, should be denied.

- (7) With respect to the testimony filed by OCC witness Haugh, Columbia moved to strike the portions of his testimony related to the allocation of pipeline capacity costs. Columbia notes that *res judicata* precludes relitigation of both issues which were raised and decided in a prior proceeding and issues which could have been determined but were not. Columbia argues that OCC could have raised this issue at the time the Commission considered the adoption of the 2003 Stipulation. Because OCC did not raise this issue at that time, Columbia argues that it is improper for OCC to collaterally attack the resolution of that issue in this proceeding.

The examiner notes that the question of the proper allocation of pipeline capacity costs was raised in the audit report. Report on the Management/Performance Audit of the Gas Purchasing Practices and Policies of Columbia Gas of Ohio, filed September 15, 2006, at 5-16. Columbia addressed this issue in the testimony filed by Columbia witness Anderson. Because this issue was raised in the audit report and addressed by Columbia in its testimony, it would be unfair to preclude OCC from offering testimony on the issue. Columbia's motion to strike those portions of OCC witness Haugh's testimony regarding the allocation of pipeline capacity costs should be denied.

- (8) Columbia also claims that the testimony filed by the OCC witnesses contains legal conclusions and that such testimony should be stricken. The attorney examiner finds that, in the two examples raised by Columbia, the OCC witnesses were not making legal arguments; rather, they were merely providing their expert opinion regarding the costs and credits to be

included in the gas cost recovery rates charged to residential customers. Therefore, Columbia's motion to strike should be denied.

- (9) Further, Columbia moved to limit the scope of cross-examination at the hearing. Columbia based its motion on the same application of the doctrines of *res judicata* and collateral estoppel as its motion to strike. As discussed above, the attorney examiner has determined that the motion to strike should be denied. Therefore, the examiner finds that, because the motion to limit cross-examination relies on the same application of *res judicata* and collateral estoppel as the motion to strike, the motion to limit cross-examination also should be denied.
- (10) Finally, on December 14, 2006, Columbia filed a motion for a continuance of the hearing scheduled for December 15, 2006. The attorney examiner granted the motion at the hearing on December 15, 2006. Accordingly, the hearing should be rescheduled for January 30, 2007, at 10:00 a.m., at the offices of the Commission, 180 E. Broad St., Columbus, Ohio 43215.

It is, therefore,

ORDERED, That the motion to strike filed and the motion to limit the scope of cross-examination filed by Columbia Gas of Ohio, Inc., be denied. It is, further,

ORDERED, That a hearing be scheduled for January 30, 2007, at 10:00 a.m., at the offices of the Commission, 180 E. Broad St., Columbus, Ohio 43215. It is, further,

ORDERED, That a copy of this entry be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: Steven D. Lesser  
Attorney Examiner

RRG/ct

Entered in the Journal

DEC 29 2008



Renee J. Jenkins  
Secretary