

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Regulation of the |) | |
| Purchased Gas Adjustment Clauses |) | |
| Contained Within the Rate Schedules of |) | Case No. 04-221-GA-GCR |
| Columbia Gas of Ohio Inc. and Related |) | |
| Matters. |) | |
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| Columbia Gas of Ohio Inc. and Related |) | |
| Matters. |) | |

**MEMORANDUM CONTRA TO THE MOTION FOR CONTINUANCE
OF COLUMBIA GAS OF OHIO
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), the state advocate for COH's 1.2 million residential consumers, is an intervener in this case and has actively participated via discovery, preparation and filing of testimony and otherwise since its intervention on March 30, 2005. Pursuant to Ohio Adm. Code 4901-1-12(B)(1), the OCC submits for the Public Utilities Commission of Ohio ("PUCO" or "Commission") this Memorandum Contra in response to Columbia Gas of Ohio, Inc's ("COH" or "Company") Motion for Continuance ("Motion") in the above captioned matters.

The attempt by COH to further delay these proceedings is not appropriate for the following reasons: The Commission may choose to rule on COH's Motion at the hearing without a need for additional delay. Any delay in these proceedings caused by time COH needs to assemble the subpoenaed documents must be determined by the Attorney

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Examiner. However, the requested two weeks seems excessive. Therefore, the Commission should deny COH's Motion.

II. CASE HISTORY

On October 9, 2003 COH filed a pleading entitled: "Fourth Amendment to Joint Stipulation and Recommendation in Case No. 94-987-GA-AIR and Second Amendment to Joint Stipulation and Recommendation in Case No. 96-1113-GA-ATA and Stipulation in Case No. 03-1459-GA-ATA" or, in short, the "2003 Stipulation." As the title indicates, the 2003 Stipulation was the latest in a long series of such filings made by Columbia. Unlike for the previous filings, certain key affected parties -- OCC and Commission Staff ("Staff") -- actively opposed the 2003 Stipulation.

Columbia filed the 2003 Stipulation on behalf of itself and other entities, most notably several competitive retail natural gas marketers and a few large transportation customers, especially industrial customers. For the most part, the parties that joined Columbia in the filing use Columbia's pipeline facilities only to transport natural gas. They do not pay Columbia for gas purchased through Columbia's regulated gas cost recovery ("GCR") rate. Columbia's GCR customers are mainly residential and commercial customers.

OCC actively opposed the 2003 Stipulation in its comments,¹ reply comments,² applications for rehearing,³ and other pleadings before the PUCO.⁴ The Staff also opposed the deal. In addition to the opposition of OCC and the PUCO Staff, some competitive suppliers also opposed the 2003 Stipulation.⁵ Through a series of rulings, the Commission through its Entry⁶ and Entries on Rehearing⁷, modified and ultimately approved the 2003 Stipulation. The OCC appealed the Commission's decision to the Ohio Supreme Court,⁸ and that appeal was dismissed on procedural and not substantive grounds.⁹

The Commission in its Entry on Rehearing reserved the authority for the Management Performance Auditor ("M/P Auditor") to review off-system sales ("OSS") and capacity release ("CR") revenues, and the sharing of those revenues under the 2003

¹ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase Rates and Charges for Gas Service ("2003 Stipulation Case")*, Case No. 94-987-EL-AIR, et al., OCC Initial Comments (December 8, 2003).

² Id. Reply Comments (December 22, 2003).

³ Id. OCC Application for Rehearing (April 9, 2004, and OCC Second Application for Rehearing (May 14, 2004).

⁴ Id. OCC Motion to Dismiss (April 19, 2004).

⁵ *2003 Stipulation*, Comments filed by Dominion Retail, Inc., and Shell Energy Services Company, LLC in opposition to the 2003 Stipulation. (December 8, 2003).

⁶ Id. Entry March 11, 2004.

⁷ Id. Entry on Rehearing (May 5, 2004) and Entry on Rehearing (June 9, 2004).

⁸ *OCC v. PUCO*, S. Ct. No. 04-144, Notice of Appeal (July 29, 2004).

⁹ Id., Opinion granting PUCO and COH Motion to Dismiss (March 23, 2005). (The appeal was dismissed for failure to include within the Notice of Appeal the Certificate of Filing, a statement which certifies that the document had been filed with the PUCO. Despite the fact that the document had been filed with the Commission, and the Motions to Dismiss were not filed until all briefing of the case had been completed, the appeal was dismissed for this procedural technicality only, not on the substance or merits of OCC's appeal.

Stipulation within the GCR audit process.¹⁰ The current Audit period in part covers the first year under the 2003 Stipulation. The M/P auditor raised, *inter alia*, OSS and CR revenue issues, and OCC has filed testimony addressing these and other GCR issues relating to the 2003 Stipulation.

On January 2, 2004 and January 12, 2005, the Commission opened the 2004¹¹ and 2005¹² gas cost recovery ("GCR") cases respectively. On March 30, 2005, OCC filed a Motion to Intervene in the 2004 GCR case. These cases were consolidated in a Commission Entry dated September 14, 2005,¹³ and OCC intervention in both cases was granted by the Commission's Entry on November 17, 2005.¹⁴ The M/P Audit Report was filed on September 15, 2006. The Company filed testimony on November 29, 2006, and OCC filed testimony on December 8, 2006. The Staff filed testimony on December 13, 2006.

Motions to Intervene were filed by Honda of America Mfg., Inc. ("Honda") and Industrial Energy Users-Ohio ("IEU-Ohio").¹⁵ On January 11, 2007 a Motion for

¹⁰ Entry on Rehearing at 10-11 (May 5, 2004).

¹¹ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia GAS of Ohio, Inc., and Related Matters ("2004 GCR Case")*, Case No. 04-221-GA-GCR.

¹² *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia GAS of Ohio, Inc., and Related Matters ("2005 GCR Case")*, Case No. 05-221-GA-GCR.

¹³ Entry at 6 (September 14, 2005).

¹⁴ Entry at 2 (November 17, 2005).

¹⁵ Although IEU-Ohio has intervened on behalf of "active gas consumers and transporters on the Columbia System" (IEU-Ohio Motion to Intervene at 3), the Motion to Intervene does not list any of the actual consumers and transporters alleged in the Motion, thus making it impossible to confirm or disprove this claim. This is in stark contrast to the Ohio Marketers Group that specifically listed the individual Marketers asking to participate.

Limited Intervention was filed by Ohio Marketers Group.¹⁶ On January 19, 2007, Dominion Retail, Inc. (“Dominion”) filed its Motion to Intervene, and on January 22, 2007 the Ohio Farm Bureau Federation (“OFB”) also filed a Motion to Intervene and Comments.

On December 14, 2006, Columbia filed a Motion to Strike Testimony of the OCC and PUCO Staff and to Limit the Scope of Cross Examination (“Motion to Strike”), and a Motion for Continuance, seeking a partial continuance pending Commission action on COH’s Motion to Strike. This was the Company’s first attempt to delay these proceedings, however the Commission continued the hearing for other reasons the following day.

The evidentiary hearing was originally scheduled for December 15, 2006, but was continued to give the Staff an opportunity to file supplemental testimony on a new issue being addressed by the M/P Auditor. The Supplemental testimony was filed on December 20, 2006, and the original testimony filed on December 13, 2006 was withdrawn on January 17, 2007. The Commission filed an Entry on December 29, 2006 denying COH’s Motion to Strike.¹⁷

On January 25, 2007, OCC served COH with a subpoena *duces tecum* and Energy Gateway with a subpoena. The subpoena *duces tecum* requests COH to bring to the hearing certain documents regarding off-system sales (“OSS”) and capacity release (“CR”) transactions, as well as, side agreements that may exist between COH and Honda of America Mfg, Inc. (“Honda”) and Industrial Energy Users-Ohio (“IEU-Ohio”).

¹⁶ The Ohio Marketers Group is comprised of Commerce Energy, Inc., Direct Energy Services, LLC, Hess Corporation, MxEnergy Inc., and Vectren Retail, LLC.

¹⁷ Entry at 5 (December 29, 2006).

III. ARGUMENT

COH states in its Motion for Continuance that it plans to file a Motion to Quash OCC's subpoenas prior to the scheduled start of the hearing.¹⁸ OCC's Motion for Subpoena was signed by the Attorney Examiner in these cases, and COH was served within the time limits of the Commission's rules.¹⁹ The Company received the subpoena *duces tecum* five days before the start of the hearing, and has an opportunity to file its Motion to Quash in accordance with the Commission's rule.²⁰

OCC's subpoenas are contemplated by the rules and do not present the Commission with any unique procedural issues that the PUCO is not prepared to address at the hearing. COH's only stated reason for the two week continuance is that the Attorney Examiner will have little or no time in which to rule upon COH's Motion to Quash.²¹ The Commission should not need two weeks to address COH's Motion to Quash, and therefore COH's Motion should be denied.

It is impossible to know exactly what to argue without the benefit of seeing COH's Motion to Quash, but it would be OCC's intention, unless COH makes an unexpected argument that would require legal research and a written reply, to respond orally to COH's Motion to Quash at the hearing. The Attorney Examiner would then be in a position, after a recess, if necessary, to make a ruling and continue with the hearing.

¹⁸ Motion at 3 (January 26, 2007).

¹⁹ Ohio Adm. Code 4901-1-25(E).

²⁰ Ohio Adm. Code 4901-1-25(C).

²¹ Motion at 3 (January 26, 2007).

COH's Motion is another attempt to delay these proceedings, and the Commission should not entertain these tactics.

OCC's subpoenas are seeking relevant information to these proceedings:

- i) all documents (all forms, including hard copies of information stored on electronic media) containing agreements as well as any and all agreements between Columbia or companies affiliated with Columbia and the following Customers: Amerada Hess, Inc., BP Energy, Delta, Equitable, Honda, Ohio Schools Council, and IGS pertaining to off-system sales²² and capacity release²³ transactions; ii) all documents (all forms, including hard copies of information stored on electronic media) containing correspondence related to these agreements with (by way of example only) Columbia customers, and representatives of Columbia or any companies affiliated with Columbia, and iii) all documents (all forms, including hard copies of information stored on electronic media) in the possession and control of Columbia or companies affiliated with Columbia pertaining to the aforementioned agreements. The period of time covered by the aforementioned materials should include all documents that support the off-system sales and capacity release transaction which occurred during the period beginning November 1, 2004 and ending October 31, 2005.

²² The term "Off-System Sales" shall refer to arrangements that result in revenues earned by Columbia during the period November 1, 2004 through October 31, 2005, between Columbia and a buyer for the sale of unbundled or rebundled gas supply and capacity products, including the sale of a right to such arrangements, that create value from both the GCR and the non-GCR gas supply and capacity assets available to Columbia, excluding "Capacity Releases." Such arrangements shall include, but not be limited to, flowing gas sales, incremental gas sales, physical gas options, exchanges, and contract management fees. The point of sale of these arrangements will occur upstream of Columbia's utility service delivery points. All Off-System Sales revenue is net of related costs, as illustrated in the testimony of Columbia witnesses in PUCO Case No. 95-223-GA-GCR in which net revenues related to flowing sales, incremental sales and exchanges are defined. Off-System Sales revenue includes additional savings generated from arrangements that result in avoided costs. Operational sales, as defined in the testimony of Columbia witnesses in PUCO Case No. 95-223-GA-GCR, shall be excluded from the definition of "Off-System Sales."

²³ The term "Capacity Release" shall refer to arrangements to sell in the secondary capacity market both GCR and non-GCR related interstate pipeline transportation and/or storage capacity held under contract by Columbia, where the revenue from such arrangements is earned by Columbia beginning November 1, 2004 through October 31, 2005. However, capacity released to marketers under the provisions of Columbia's tariffs that apply to the Customer Choice program (Columbia tariff sheet nos. 76f, 77 and 77a), shall not be included within the definition of "Capacity Release."

The reason that the issues surrounding the 2003 Stipulation²⁴ have been raised by the OCC and Staff is that the Commission specifically called upon the M/P Auditor to review the off-system sales ("OSS") and capacity release ("CR") revenue transactions in the GCR audit cases by stating:

We also wish to clarify that nothing in our approval of OSS and CR revenue sharing is intended to limit our examination of Columbia's identification and handling of OSS and CR revenues (in GCR audits or otherwise). The language that we provided in Provision 16 of the 2003 Stipulation could easily lead someone to believe that such revenues cannot be audited. Columbia indicated during our April 29, 2004 Commission meeting, that it has accepted that OSS and CR revenue sharing can be an issue for consideration in the GCR audits (beginning November 2004). We wish to expound upon this and clearly reflect that we are determining that the OSS and CR revenues (not just revenue sharing) are an area subject to GCR auditor other Commission investigation/review over the November 1, 2004 to November 1, 2008 period.²⁵

The fact that GCR assets are predominantly used by COH in order to generate OSS and CR revenues makes this review by the Commission important in a GCR proceeding. Moreover, because the 2003 Stipulation established a sharing mechanism which dictates treatment of these revenues, the stipulation cannot escape the Commission's review in this area. Therefore, the Company should be required to produce the requested documents at hearing in compliance with the subpoena.

²⁴ *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*, Fourth Amendment to Joint Stipulation and Recommendation in Case No. 94-987-GA-AIR and Second Amendment to Joint Stipulation and Recommendation in Case No. 96-1113-GA-ATA and Stipulation in Case No. 03-1459-GA-ATA ("2003 Stipulation") filed October 9, 2003, as modified by the Commission's Entry (March 11, 2004), and Entries on Rehearing (May 5, 2004 and June 9, 2004).

²⁵ *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-EL-AIR, et al., Entry on Rehearing at 10 (May 5, 2004).

In addition, this GCR proceeding is the first opportunity to review the GCR-related matters that are an outgrowth of the 2003 Stipulation. These issues could not have been reviewed in the context of the GCR criteria of fair, just and reasonable rates for GCR customers prior to this proceeding. The late entry by Honda and IEU-Ohio into the proceedings after the discovery cut-off and in an apparent effort to support the Company's defense of the 2003 Stipulation has made the inquiry into the side agreements all the more relevant.

The agreements entered into by Columbia underlying off-system sales and capacity release transactions in some instances may constitute side agreements similar to the type of agreements that were the subject of the Ohio Supreme Court's recent remand of Case Nos. 03-93-EL-ATA, et al. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (November 22, 2006). Side agreements figured prominently in the Court's recent decision, and in this case may call into question the seriousness of the bargaining underlying the 2003 Stipulation, and should be produced by the Company in compliance with the subpoena.²⁶

In the event, the Commission denies in whole, or in part, COH's Motion to Quash, the COH unreasonably requests a two-week continuance to assemble all the information requested in OCC's subpoena *duces tecum*. A reasonably limited continuance to comply with the subpoena could be considered, but a full two weeks would be excessive.

²⁶ *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, et al. Stipulation ("2003 Stipulation") (October 9, 2003).

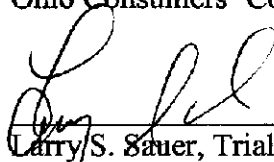
IV. CONCLUSION

For all the above stated reasons, the Commission should deny COH's Motion.

The Commission should not grant a two-week continuance to consider COH's Motion to Quash. If the Motion to Quash is denied in whole or in part, then the Commission should strictly limit any continuance that Columbia may seek.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's *Memorandum Contra to COH Motion for Continuance* was served on the persons stated below via first class U.S. Mail, prepaid, this 29th day of January 2007.



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