

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Cameron )  
Creek Apartments, )  
 )  
Complainant, )  
 )  
v. ) Case No. 08-1091-GA-CSS  
 )  
Columbia Gas of Ohio, Inc., )  
 )  
Respondent. )

ENTRY

The attorney examiner finds:

- (1) On September 17, 2008, Cameron Creek Apartments (complainant) filed a complaint against Columbia Gas of Ohio, Inc. (Columbia).
- (2) By entry issued April 24, 2009, the attorney examiner, *inter alia*, established the procedural schedule to be followed in this case and scheduled a prehearing conference for May 5, 2009.
- (3) On May 4, 2009, the complainant filed a motion to compel discovery. Specifically, the complainant alleges that Columbia's answers and responses to Interrogatory Nos. 10, 11, 12, 21, 22, and 24, and Requests for Production Nos. 2, 6, 13, and 15 are incomplete, evasive, and nonresponsive.
- (4) At the May 5, 2009, prehearing conference, the parties agreed to attempt to resolve informally the discovery issues that prompted the May 4, 2009, motion to compel filed by the complainant.
- (5) By entry issued May 12, 2009, the examiner, *inter alia*, set forth the process agreed to by the parties at the May 5, 2009, prehearing conference for consideration of the complainant's May 4, 2009, motion to compel discovery. The examiner directed the complainant to file a document on June 1, 2009, informing the examiner of the status of the parties' efforts to resolve the discovery issues. In its June 1, 2009, filing, the

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complainant was to state whether it wishes to pursue all or portions of its May 4, 2009, motion to compel and to set forth, with specificity, those issues it wishes the examiner to consider. Columbia was then provided an opportunity to file a response to the complainant's filing by June 5, 2009, and the complainant was permitted to file a reply by June 9, 2009.

- (6) During a teleconference with the examiner on May 22, 2009, Columbia agreed to provide a privilege log listing all documents requested by the complainant that Columbia asserts it does not need to provide because said documents are covered under either the attorney-client privilege or the work-product doctrine. In addition, Columbia agreed to provide the examiner a copy of the documents listed in the privilege log for an *in camera* review.
- (7) On May 29, 2009, as clarified on June 1, 2009, Columbia filed a memorandum contra the complainant's motion to compel arguing that certain documents requested by the complainant are protected under the attorney-client privilege and the work-product doctrine.
- (8) On June 1, 2009, Columbia filed its privilege log listing those documents which Columbia maintains it does not need to provide to the complainant because they are covered under either the attorney-client privilege or the work-product doctrine. On June 8, 2009, as supplemented on June 9, 2009, and clarified on July 8, 2009, Columbia provided copies of the documents listed in the privilege log to the examiner for an *in camera* review.
- (9) On June 5, 2009, the complainant filed its statement setting forth the issues from its May 4, 2009, motion to compel which the complainant wishes the examiner to consider. In this filing, the complainant notes that the parties had agreed that the complainant could file its statement on June 5, 2009, rather than June 1, 2009, as previously agreed to by the parties and delineated in the examiner's May 22, 2009, entry. On June 11, 2009, Columbia filed a response to the complainant's statement. The discovery issues still disputed by the complainant and the arguments made by the parties are set forth below.

In Camera Review

- (10) As stated previously, on June 8, 2009, as supplemented on June 9, 2009, and clarified on July 8, 2009, Columbia provided copies of the documents listed in the privilege log to the examiner for an *in camera* review. The documents include: documents that had been provided to the complainant by Columbia, with the alleged protected portions redacted, and documents that Columbia withheld in their entirety because Columbia asserts that they are protected.
- (11) Columbia maintains that the documents listed in the privilege log filed on June 1, 2009, and provided to the examiner, contain information that is protected under the attorney-client privilege or the work-product doctrine. In its May 29, 2009, memorandum, Columbia states that it has asserted the attorney-client privilege for communications between Columbia employees, officers, or agents and both in-house and outside counsel relating to the dispute between the parties in this case. With regard to Columbia's assertion of the work-product doctrine protection, it states that there are two primary categories of these types of documents. The first category includes Columbia's internal administrative documents, created by Columbia's legal department, to categorize and plan for ensuring representation and funding for this matter. The second category includes documents that specifically discuss the pleadings, discovery requests, and settlement conference in this case or any other event relating to this case, where such documents were created for the purpose of this case and not in the normal course of business.
- (12) In its June 5, 2009, statement, the complainant questions whether in-house counsel for Columbia truly managed and directed all of the company's actions and decisions in this case. The complainant believes that "an analysis of the privilege log should distinguish between the provision of legal advice and opinions from basic corporate management and decision making that is not privileged." In addition, the complainant identifies 63 documents contained in the privilege log filed by Columbia that the complainant states the examiner need not review *in camera*.

- (13) The examiner conducted an *in camera* review of the documents provided by Columbia on June 8, 2009, as supplemented on June 9, 2009, and clarified on July 8, 2009, to determine if they contained protected information. In considering whether the items, or parts thereof, contain protected information as alleged by Columbia, the examiner considered the content of the document, as well as the expectation of the client that the information be protected consistent with either the attorney-client privilege or the work-product doctrine. Upon review of the documents, taking into consideration the arguments made by the parties, the examiner finds that the documents fall into one of three categories:
- (a) The entire document should not be released because the attorney examiner finds that, as delineated by Columbia in the privilege log, the document either contains information that is protected under the attorney-client privilege or the work-product doctrine. As numbered in the first column on the privilege log filed on June 1, 2009, those documents are: 1-6; 10; 17-29; 31-36; 38-41; 43-48; 51-56; 59; 64-67; 69-92; 94; 96-101; 104; 108-110; 112-120; 122-138; 144; 150-151; 153-160; 164; 166; 168; 172; 175; 180-183; 185; 188-192; 195; 199-213; 215-216; 220-222; 224-225; 227; 232; and 235-237.
  - (b) The entire document should be released because the attorney examiner finds that the document does not contain information that is protected under the attorney-client privilege or the work-product doctrine. As numbered in the first column on the privilege log filed on June 1, 2009, those documents are: 7; 11-12; 42; 121; and 229.
  - (c) A portion of the document should not be released because attorney examiner finds that, as delineated by Columbia in the privilege log, a portion of the document either contains information that is protected under the attorney-client privilege or the work-product doctrine. As numbered in the first column on the privilege log filed on June 1, 2009, those documents are:

148-149 - With regard to these documents, the portions of the documents that are from Charles McCreery to Rob Smith should not be released, the portions of the documents that are from Rob Smith to Charles McCreery should be released.

Accordingly, the examiner finds that Columbia should provide the documents, or portions thereof, which the examiner has found should not be protected and should be released, as set forth above, to the complainant as soon as possible, but no later than noon on July 10, 2009.

Interrogatory No. 22 and Requests for Production No. 2, 6, and 13

- (14) Interrogatory No. 22 and Request for Production No. 6 seek information on whether Columbia has enforced or attempted to enforce versions of the National Fuel and Gas Code (NFGC) at other pre-1996 apartment complexes, according to the complainant. The complainant believes that red tags, e-mails, documents, records, incident reports, internal memoranda, training materials, or other communications exist that would be responsive to these requests; therefore, the complainant asks that Columbia be required to put forth "greater effort" in locating those communications. With regard to Interrogatory No. 22, the complainant states that, in response to its inquiry, it would be satisfied with a stipulation from Columbia stating that Columbia has not determined it necessary or attempted to force reconstruction or retrofitting of other pre-1996 buildings based on Columbia's view of the applicability of the NFGC; however, if Columbia cannot so stipulate, then the complainant requests that Columbia provide a reasonable sample of the communications.

In response to this request, Columbia states that it has, to the best of its ability, provided a sample of red tags from its database regarding Columbia's service calls relating to code violations in the prior seven years. Columbia notes, however, that it is not able to determine whether these violations relate to buildings constructed before 2006 because its database does not contain information regarding the age of the buildings. In addition, Columbia does not believe that it has any training materials that are specifically related to red-tagging appliances at older apartment buildings for NFGC combustion air

violations. Furthermore, Columbia submits that searching for e-mails and other documents responsive to the complainant's request would be unduly expensive and burdensome because the request is so general and there is no systematic way to search for responsive documents. Finally, Columbia states that it will not enter into a stipulation regarding the enforcement and applicability of the NFGC, as requested by the complainant.

The examiner notes that it appears that Columbia has provided a sample of red tags that are responsive to the complainant's requests. However, the complainant seems to believe that additional documents exist, such as e-mails, incident reports, internal memoranda, training materials, or other communications, that would be responsive to these requests. To the extent Columbia has additional documents that would be responsive to the complainant's request and Columbia is able to identify and locate those documents without incurring undue and excessive hardship and expense, Columbia should provide those documents. To the extent additional documents exist, the complainant's motion to compel is granted.

- (15) Requests for Production Nos. 2 and 13 request all evaluations, test results, and/or calculations performed at Cameron Creek, according to the complainant. The complainant requests that Columbia either clarify whether it is claiming privilege for the items covered under this request or produce the responsive documents.

While Columbia objects to this request as vague and ambiguous, it responds by stating that it has no additional documents that are responsive to the complainant's request. According to Columbia, it has provided the complainant with screen shots of all entries in its database related to visits to Cameron Creek and the results of any tests taken are provided on those documents.

The examiner believes that, as requested by the complainant, Columbia has clarified that it is not claiming that these documents are protected as privileged; rather, Columbia is asserting that it has provided all of the information that is responsive to the requests. In that it appears that the

information requested has been provided, the examiner finds that the complainant's motion to compel should be denied.

- (16) Request for Production No. 13 also relates to Columbia's "theory that excessive moisture in the bathroom...contributed to the release of excessive carbon monoxide..." according to the complainant. The complainant asserts that recent deposition testimony points to internal training material at Columbia that promotes this theory; therefore, the complainant requests that Columbia either clarify whether it is claiming privilege for the items covered under this request, stipulate that there were no such documents, evaluations, or tests supporting Columbia's theory, or produce the responsive documents.

In response, Columbia states that it will stipulate that it possesses no internal training materials indicating that excessive moisture in a bathroom can contribute to the release of excessive carbon monoxide.

Upon review of the filings on this issue, the examiner notes that Columbia has responded to the complainant's inquiry on this point. Therefore, the examiner finds that the complainant's motion to compel should be denied.

- (17) In its June 5, 2009, statement, in addition to setting forth the issues from its May 4, 2009, motion to compel which the complainant wishes the examiner to consider, for the first time, the complainant mentioned Requests for Production Nos. 5 and 7.

With regard to Requests for Production Nos. 5 and 7, the complainant requests that Columbia produce any internal training material and/or policy manuals relating to red tagging for NFGC compliance purposes, as well as any premise audit forms showing the red tag history at Cameron Creek. Columbia notes that these issues should not have been raised in the complainant's June 5, 2009, filing because they were not part of the original motion to compel. However, in response to the complainant's issue regarding Request for Production No. 5, Columbia states that it provided a copy of Columbia's policy manual to the complainant in February 2009. Because the complainant is now asking for training materials on the policies, Columbia offers that it will review its files and quickly

provide the materials that may be responsive to the complainant's inquiry. As for Request for Production No. 7, Columbia states that it will determine if any premise audit information is available and, if it is available, it will provide it to the complainant.

The examiner acknowledges that the complainant inappropriately included issues pertaining to Requests for Production No. 5 and 7 in its June 5, 2009, filing when the complainant was suppose to only to address items in the complainant's May 4, 2009, motion to compel that were still at issue. However, since Columbia has responded by stating that it will provide any materials that are responsive to the complainant's issues, the examiner will consider the complainant's motion to compel regarding these two items. In that Columbia has attested that it will provide responsive materials to the complainant, the examiner finds that the complainant's motion to compel should be denied.

- (18) As a final matter, the examiner notes that, in accordance with the entry issued April 24, 2009, the parties' prefiled testimony was due to be filed on July 1, 2009. Columbia filed hard copies of its testimony, in accordance with the Commission's procedural rules contained in Chapter 4901-1, Ohio Administrative Code (O.A.C.), on July 1, 2009. However, the complainant utilized the Commission's electronic filing process to file its testimony. On July 2, 2009, the examiner contacted the complainant and required the complainant to file its testimony in accordance with the Commission's procedural rules which require the filing of hard copies, noting that parties have not been authorized pursuant to the process established in Case No. 06-900-AU-WVR, *In the Matter of the Expansion of the Electronic Filing Pilot Project and Waiver of Procedural Rules 4901-1-02 through 4901-1-04, Ohio Administrative Code*, to file documents at the Commission utilizing the electronic filing system. Therefore, the testimony that was electronically filed by the complainant will be disregarded<sup>1</sup> and the appropriate

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<sup>1</sup> The examiner notes that the testimony of Robert J. Schutz on behalf of the complainant was electronically filed on July 2, 2009, due to the fact that it was date stamped at 5:33 p.m. on July 1, 2009. To be clear, the hard copy version of Mr. Schutz testimony filed on July 2, 2009, will be considered in this case, not the version that was electronically filed on July 2, 2009.



testimony to be considered in this case will be the hard copy testimony filed by the complainant on July 2, 2009.

It is, therefore,

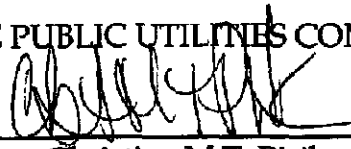
ORDERED, That, in accordance with finding (13), Columbia provide the unprotected documents, or portions thereof, to the complainant as soon as possible, but no later than noon on July 10, 2009. It is, further,

ORDERED, That the complainant's motion to compel discovery is granted, in part, and denied, in part, as set forth in this entry. It is, further,

ORDERED, That, in accordance with finding (18), the complainant's hard copy testimony filed on July 2, 2009, will be considered in this case. It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Christine M.T. Pirik  
Attorney Examiner

/vrn

Entered in the Journal

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Renee J. Jenkins  
Secretary