

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of )  
The Manchester Group, LLC, )  
 )  
Complainant, )  
 )  
v. )  
 )  
Columbia Gas of Ohio, Inc., )  
 )  
Respondent. )

Case No. 08-360-GA-CSS

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MEMORANDUM CONTRA OF COLUMBIA GAS OF OHIO, INC.  
TO THE MANCHESTER GROUP, LLC'S MOTION TO COMPEL

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I. INTRODUCTION

Approximately one month ago, the Public Utilities Commission of Ohio ("Commission") issued an entry in this matter that generally declined to compel Respondent Columbia Gas of Ohio, Inc. ("Columbia") to produce documents that were (1) unrelated to the billing services that are the topic of this lawsuit and/or (2) not in Columbia's possession. Nevertheless, Complainant The Manchester Group, LLC ("Manchester") is asking the Commission once again to compel Columbia to produce documents that are (1) unrelated to the billing services that are the topic of this lawsuit and (2) not in Columbia's possession.

This time, Manchester is asking Columbia to produce the universe of documents relating to a sales agreement between two companies that are not parties to this dispute. Manchester is seeking documents and correspondence relating to the spin-off of Columbia Service Partners from Columbia's parent company, Columbia Energy Group, to CSP Acquisition Company six years ago. Although this request is narrower than the requests at issue in Manchester's first motion to compel, Manchester's request is still overbroad and inappropriate.

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Yet again, Manchester is seeking documents that, on their face, have nothing to do with billing services. And, yet again, Manchester is trying to obtain discovery from third parties – Columbia’s affiliates, subsidiaries, and parent companies – by serving document requests on Columbia. For the same reasons that the Commission largely rejected Manchester’s previous motion to compel, Columbia respectfully asks the Commission to reject Manchester’s latest motion to compel.

## **II. BACKGROUND**

On September 11 of this year, Manchester filed a Motion to Compel (“Manchester’s First Motion to Compel”), asking the Commission to compel Columbia to locate, review, and produce a broad swath of documents. Manchester sought: (1) all agreements between Columbia and Columbia Retail Services (“CRS”), Columbia Service Partners (“CSP”), or Utility Service Partners (“USP”), ever, on any topic; (2) all correspondence between key personnel at Columbia and CSP, CRS, or USP for the last five years, on any topic; and (3) the same categories of documents from Columbia’s affiliates and subsidiaries, which are not even parties to this case.

Columbia objected to this discovery on the grounds that it was overbroad, unduly burdensome, and sought documents from other companies not subject to Ohio statute or the Commission’s rules. (*See generally* Manchester’s First Motion to Compel, Exh. B.) In its Memorandum Contra Manchester’s Motion to Compel (filed September 21, 2009) (“Columbia’s First Memo Contra”), Columbia repeated these objections. Columbia also explained that Manchester’s attempts to seek discovery into matters unrelated to Columbia’s offering of billing services to CRS and CSP went beyond the Commission’s jurisdiction in this matter. (*See* Columbia’s First Memo Contra at 12.)

In an Entry issued on October 2, 2009, the Commission agreed with many of the positions expressed in Columbia’s First Memo Contra. The Commission agreed that

Manchester's requests were "overbroad," "inasmuch as [they extend] to matters not related to billing[.]" (October 2 Entry at 2; *see also id.* at 3 and 4.) The Commission also rejected Manchester's attempt to seek discovery from Columbia's parent companies, subsidiaries, and affiliates. The Commission ordered Columbia to provide "additional agreements . . . which relate to billing services" only "to the extent Columbia has access to such agreements." (*Id.* at 2.) The Commission also required Columbia to produce correspondence discussing billing services between Columbia's affiliates or subsidiaries and CRS or CSP only where such "documentation [was] in the possession of Columbia[.]" (*Id.* at 3.) Thus, the Commission rejected Manchester's efforts to obtain wide-ranging discovery on issues unrelated to this action and from companies that are not parties to this action.

While Manchester's First Motion to Compel was pending, Manchester served a second set of discovery requests. Like the first set, the second set requested documents unrelated to billing services and from companies that are not parties to this action. Manchester directed Columbia to "provide all Documents and Correspondence of Columbia and Columbia's affiliate[s], subsidiaries and parent companies," including "Columbia's former parent Company, Columbia Energy Group," "that relate to the sale of [CSP] to CSP Acquisition Company[.]" (Manchester's Second Set of Discovery Requests, Request for Production No. 10 (*see* Manchester's Second Motion to Compel, Exh. A).) Columbia objected on the same grounds it raised in response to Manchester's first discovery requests (*see* Manchester's Second Motion to Compel, Exh. B), as those objections had already been upheld in the Commission's entry on Manchester's First Motion to Compel. Manchester, however, appears to disagree.

### **III. LAW AND ARGUMENT**

For much the same reasons provided in Columbia's First Memo Contra, the Commission should reject Manchester's Second Motion to Compel.

First, Manchester's request is overbroad and seeks irrelevant information. Manchester is asking Columbia to produce all documents relating to Columbia's parent company's sale of CSP in September 2003 (the "CSP Sales Documents"). Manchester's argument that such documents are relevant is as follows:

- (1) Certain terms in Columbia's billing agreement with CSP (the "CSP Billing Agreement") are allegedly unlawful; and
- (2) The CSP Billing Agreement was attached to the contract by which Columbia Energy Group sold CSP to CSP Acquisition Co. (the "CSP Sales Agreement") (*see id.*).

(*See Second Motion to Compel at 4.*) Based on nothing more than the fact that the CSP Billing Agreement was an attachment to the CSP Sales Agreement, Manchester disingenuously asserts that "the CSP Sales Documents . . . are a central part of Manchester's claims" (*id.* at 3) and concludes that, "[i]n order to come to a just and reasonable outcome in this proceeding, the Commission must know the entire circumstances surrounding the sale of CSP" (*id.* at 5). But Manchester makes no link between its argument and its conclusion. Manchester never explains why the attachment of the CSP Billing Agreement to the CSP Sales Agreement justifies broad discovery into the parts of the CSP Sales Agreement that have nothing to do with billing.

At base, Manchester falls back on its argument that the Commission's rules "'allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.'" (*Id.* at 3 (citation omitted).) But, as in Manchester's first Motion to Compel, Manchester fails to explain how the CSP Sales Documents are relevant to the subject matter of this proceeding, *i.e.*, billing. Manchester may have an argument that it is entitled to discovery regarding the circumstances surrounding the drafting of the CSP Billing Agreement (though it has presented no such argument, and it is unlikely that any such documents still exist). It has no argument, however, to justify broad discovery into the sale of CSP on a whole.

The second reason for denying Manchester's Second Motion to Compel is that Manchester is seeking documents from the wrong company. Respondent Columbia Gas of Ohio, Inc. has offered to produce documents in its possession that relate to the sale of CSP. Manchester's counsel declined that request, however, because Columbia is not likely to have responsive documents. Columbia Gas of Ohio, Inc. was not a party to the CSP Sales Agreement. The CSP Sales Agreement was between Columbia Energy Group and CSP Acquisition Company. (*See* Second Motion to Compel at 1.)

Manchester insists that this Commission has already required Columbia to obtain documents from Columbia's affiliates and subsidiaries and should do so again. (*See id.* at 6-7.) Obviously, the Commission knows best what it required in its October 2 Entry. However, Columbia believes Manchester is incorrect. As stated above, the Commission's Entry required Columbia to produce additional billing agreements, but only "to the extent Columbia has access to such agreements"; correspondence relating to billing services between any affiliate or subsidiary of Columbia and any third party to whom Columbia is providing, or has provided, billing services," but only "to the extent the . . . documentation [is] in the possession of Columbia"; and correspondence between Columbia and CRS, CSP, or USP relating to billing services. (October 2 Entry at 2-4.) The Entry did not require Columbia to attempt to obtain documents from its affiliates, subsidiaries, and/or parent companies.

Nor should the Commission choose at this juncture to require Columbia to obtain documents from separate companies that are not even involved in this complaint case. The Commission's rules do not permit Manchester to obtain the documents of Columbia's affiliates, subsidiaries, or parent companies by serving requests for production on Columbia. To the contrary, the Commission's rules make clear that Manchester can require Columbia only to

produce documents in **Columbia's** possession, custody, or control. The Commission's rules state, in relevant part:


- (A) Subject to the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, any party may serve upon any other party a written request to:
  - (1) Produce and permit the party making the request, or someone acting on his or her behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, or data compilations, **which are in the possession, custody, or control of the party upon whom the request is served.**

Rule 4901-1-20(A)(1), Ohio Administrative Code (O.A.C.) (emphasis added). Under the plain language of the Rule, *Columbia* has no obligation to gather, review, and produce documents that are in the possession, custody, or control of another corporation. *Cf. Sedgwick v. Kawasaki Cycleworks, Inc.*, 24 Ohio App.3d 109, 111, 493 N.E.2d 308 (Franklin App. 1985) (holding that a trial court erred in sanctioning a corporation for failing to produce documents in the possession, custody, or control of its parent company and its subsidiary, as there was no evidence that the corporation "either had possession of [the requested documents] or the legal right to obtain it").

#### IV. CONCLUSION

The fact that the CSP Billing Agreement referenced in Manchester's First Amended Complaint was attached to a sales agreement to which *Columbia* was not even a party provides no justification for requiring *Columbia* to produce the universe of documents relating to that sales agreement. Moreover, under Rule 4901-1-20(A)(1), O.A.C., Manchester cannot require *Columbia* to attempt to search through other companies' files for documents relating to that sales agreement. For these reasons, *Columbia Gas of Ohio* respectfully requests that this Commission reject Manchester's efforts and deny Manchester's Motion to Compel.

Respectfully submitted,

A handwritten signature in black ink, reading "Eric B. Gallon". The signature is written in a cursive style with a horizontal line underneath.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of November, 2009, a true and accurate copy of the foregoing Memorandum in Opposition was served by First-Class United States Mail, postage prepaid, and electronic mail upon the following:

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