

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Columbia Gas of Ohio, Inc. for Au-) Case No. 08-0606-GA-AAM
thority to Defer Environmental Inves-)
tigation and Remediation Costs)

**MEMORANDUM CONTRA
OF COLUMBIA GAS OF OHIO, INC.
TO THE MOTION TO COMPEL DISCOVERY
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

On February 27, 2012 the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Compel Discovery in this docket. The OCC's Motion should be denied because the discovery propounded by the OCC is moot and lacks relevance.

BACKGROUND

On May 19, 2008, Columbia filed its Application in this docket, requesting authority to defer on its books environmental investigation and remediation costs. By Entry dated September 24, 2008, the Commission approved the Application and established an annual procedure for the recording of accounting deferrals for environmental investigation and remediation costs. Paragraph 11 of said Entry provides:

Prior to their deferral on its books, we require Columbia to make an annual filing in this docket detailing the costs incurred in the prior 12-month period covered by the deferrals and the total amount deferred to date. Unless the Staff files an objection to any of the requested deferrals within 30 days of the filing, deferral authority shall be considered granted.

Pursuant to the Commission's September 24, 2008 Entry, Columbia Gas of Ohio, Inc. ("Columbia") docketed its Annual Deferral Report ("2011 Report") in

this docket on December 6, 2011. In the report, Columbia detailed the deferrals it planned to record for six different environmental remediation projects.

On January 5, 2012, Staff filed its Objections to the 2011 Report. In the Objections, Staff objected to the booking of deferrals for one of the environmental remediation projects – the Toledo MGP site. The Staff stated that it had no objection to the creation of deferrals for the other five sites.

Because the Staff objected to the creation of deferrals for the Toledo MGP project, Columbia did not book any deferrals for this environmental remediation project. To ensure that the record is clear Columbia filed on February 9, 2012 an explanatory supplement to its 2011 Report. In that supplement Columbia explained that upon receipt of Staff's Objections and Columbia's review thereof, Columbia accepted Staff's recommendation and reclassified as a capitalized expenditure the Toledo MGP site investigation and environmental expenses. However, pursuant to the procedure established by the Commission's September 24, 2008 Entry, the remaining deferrals for the other five sites were deemed approved on January 6, 2012 and Columbia has recorded those deferrals.

The OCC waited until late in the day on December 29, 2011, a mere week before the deadline for Staff to file any objections to the 2011 Report, before it served a set of data requests upon Columbia. As noted in the OCC's Motion to Compel, responses to the data requests were due on January 23, 2012. Columbia did not respond to the data requests because the deferral issues were resolved on January 6, 2012 – 17 days before the due date for the data requests.

On February 27, 2012 – 52 days after the issues in this case were resolved and 35 days after the due date for discovery responses – the OCC filed its Motion to Compel Discovery.

ARGUMENT

1. There Is No Obligation To Respond To Data Requests After The Issues In A Case Have Been Resolved

As explained above, the responses to the OCC's data requests were not due until well after the issues in this matter had been resolved. However, the Commission's discovery rules impose no obligation for a party to respond to discovery requests after the issues in a matter have been resolved. In fact, the rules contemplate that data requests are only appropriate in cases in which there will

be a hearing. In such cases, the rules contemplate that discovery will be completed prior to the hearing.

Discovery in this case was inappropriate in and of itself because there was no hearing. The mere filing of a pleading (e.g., the 2011 Report in this case) does not automatically confer upon intervenors a right to discovery. The rules contemplate that discovery should be reserved only for "proceedings" that ultimately result in a hearing. Rule 4901-1-17(A) authorizes discovery "immediately after a proceeding is commenced," but in the very next sentence confirms that "discovery must be completed *prior to the commencement of the hearing*." In this docket, not only was a hearing not scheduled, but pursuant to the procedures established by the Commission in its September 24, 2008 Entry it was apparent that there would be no hearing in this case. This is not at all unusual because this matter involves only accounting authorization – not recovery of any costs.

In a recent rulemaking concerning the Commission's discovery rules, the Commission specifically rejected the idea that every docketed case constitutes a "proceeding" that entitles parties to intervene and conduct discovery. In Case No. 06-685-AU-ORD, the OCC proposed a definition of "proceeding" in Rule 4901-1-01 to encompass "any filing, hearing, investigation, inquiry, or rulemaking which the Commission is required or permitted to make, hold or rule upon."¹ The OCC argued that this change was necessary to allow full participation in all Commission proceedings. The Commission found otherwise, and held:

The Commission agrees that the proposed definition is overly broad and unnecessary. If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases. This request is denied."²

¹ Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at 3.

² *Id.* At 3-4.

2. The OCC's Data Requests And Its Motion To Compel Were Untimely

As explained above, discovery was inappropriate in this case because there was no hearing. However, even if discovery had been appropriate it would have been incumbent upon the OCC to serve its data requests so that responses would have been due before the expiration of the 30-day limit for Staff objections. Nonetheless, the OCC waited 23 days before it filed its data requests, knowing that any issues related to the 2011 Report would be resolved well before responses would be due. The fact that the discovery became moot because responses were not due until after the Staff objection deadline is solely a result of the OCC's dilatory discovery efforts.

As a result of the pre-established procedure in this case and the filing of the Staff's Objections on January 5, 2012, the accounting deferrals were approved for five of Columbia's six environmental remediation projects. If the OCC felt aggrieved by this result, then it should have filed for rehearing. The deadline for such an application for rehearing was February 6, 2012 (thirty days after January 6, 2012). The OCC did not file an application for rehearing, so matters related to the 2011 Report were resolved as of January 6, 2012, and no discovery responses are required after that date. The OCC's filing of a Motion to Compel after January 6, 2012, is untimely. Discovery after the conclusion of a proceeding serves no practical purpose and is unreasonable and burdensome. This is particularly true in a case that deals only with accounting, and not cost recovery.

3. The OCC's Data Requests Lack Relevance

Not only are the OCC's data requests inappropriate and untimely, but the data requests lack relevance. This is a case that involves only accounting, and not rate recovery. The OCC's data requests are more appropriate for a subsequent case in which recovery of costs is at issue.

Furthermore, some of the data requests will now no longer be relevant even in a later case where cost recovery is at issue. OCC interrogatory numbers 19-33, and request to produce numbers 5 and 6 all relate to the Toledo MGP site. As noted earlier herein, pursuant to Staff's Objections, Columbia did not defer the environmental remediation costs for the Toledo MGP site, and thus at this juncture none of the OCC's questions related to the Toledo MGP site will ever be relevant.

WHEREFORE, for the reasons discussed above the Commission should deny the OCC's Motion to Compel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Columbia Gas of Ohio, Inc. was served upon parties of record by electronic mail this 13th day of March 2012.

/s/ Stephen B. Seiple
By: Stephen B. Seiple
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3/13/2012 3:56:52 PM

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Case No(s). 08-0606-GA-AAM

Summary: Memorandum Memorandum Contra of Columbia Gas of Ohio, Inc. to the Motion to Compel Discovery of the Office of the Consumers' Counsel electronically filed by B. Moss-Scott on behalf of Columbia Gas of Ohio