

In the Matter of the Application of)
Columbia Gas of Ohio, Inc. for Authority) Case No. 08-606-GA-AAM
to Defer Environmental Investigation and)
Remediation Costs)

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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the Ohio Consumers' Counsel ("OCC") explains through these Comments that there are ample reasons for rejecting the Company's proposed deferral of certain costs identified in the 2011 Deferral Report, for the following reasons: 1) in the 2011 Deferral Report Columbia seeks deferral authority inconsistent with the Company's Application previously approved by the Commission,² 2) the 2011 Deferral Report includes a request for deferral authority for costs incurred outside of the reporting period, and 3) the 2011 Deferral Report includes a site sold during the reporting period; therefore, any gain on the sale should be credited to the deferral account to the benefit of Columbia's customers who bear the risk of investigation and remediation of the site. There are also additional issues that deserve further consideration by the Staff and the Commission for determining whether requested deferrals should be authorized.

II. PROCEDURAL HISTORY

On May 19, 2008, pursuant to R.C. 4905.13, Columbia filed an application ("Application") with the Commission for authority to modify its accounting procedures.³ Specifically, Columbia sought authority to defer certain environmental costs on its books pertaining to environmental investigation and remediation activities associated with two MGP sites.⁴ The costs that Columbia is seeking to defer relate to the following matters as stated in the Application:

- A. A search of background and corporate history to confirm if Columbia or one of its corporate predecessors has any corporate connection to the former site.

² Id.

³ Application at 1.

⁴ Id.

- B. Phase I Environmental Site Assessment (“PHI ESA”) costs are incurred where a corporate connection to the former site is identified. The PHI ESA will include research on the MGP property using available public records such as historic Sanborn Fire Insurance maps, Environmental Protection Agency (“EPA”) databases and a myriad of other information sources. The purpose of the PHI ESA is to determine if there are any potential Recognized Environmental Conditions in the form of stressed vegetation, settlement of building foundations, cracks in support walls, history of industrial use, or proximity to sensitive receptors. Based on the result of the PHI ESA, Columbia will begin to formulate a work plan for a Phase II Site Investigation which is a more detailed study of the property and includes the collecting of soil, sediment, ground water and other samples,
- C. Site Investigation costs are incurred to determine if there are impacts due to the former MGP. Considerable effort may be required to negotiate access with third party land owners, including compensation for claims made for damages. If impacts are present, additional investigations are necessary to define the vertical and horizontal extent of any MGP impacts within the soil, sediment and/or ground water. Examples of the work typically completed include: test pitting with backhoes to find former MGP structures; surface and subsurface soil sampling and chemical analysis; ground water sampling and chemical analysis from existing and new wells; soil vapor evaluations; indoor building air quality evaluations; and specialized evaluations such as geophysics or other remote sensing technologies.
- D. Risk Assessment (“RA”) costs are incurred to identify and prioritize those areas of the property that may contain unacceptable risks or potential future risk associated with human and/or ecological health. The RA defines those areas where remediation is required and those areas that may be controlled through passive means.
- E. Feasibility Study costs are incurred during the preparation of a study to review all data collected during previous investigations, to evaluate the available technologies that may be considered to create a remedial alternative, and evaluate these alternatives based upon the ability to implement, as well as cost and technical merits.
- F. Remedial Work Plan costs are incurred for the development of a plan that describes, in detail, the remedy. The Remedial Work Plan may also include the actual engineering design and specifications that are typically provided to the Ohio EPA for approval or used by

Columbia for remediation in those cases where no EPA approval is required.

- G. Design and bid specification costs result from the retention of an engineering company to develop the standard engineering design and bid specifications for the chosen remedy.
- H. Remediation costs which will be impacted by such factors as the current and use; future land use; in addition to type of remediation. and
- I. Other costs.⁵

On September 24, 2008, the Commission issued an Entry (“Entry”) that authorized Columbia to modify its accounting procedures and to defer costs related to the environmental investigation and remediation costs with automatic approval subject to the conditions established in the Entry.⁶ On November 25, 2008, Columbia filed its annual deferral report (“2008 Deferral Report”). On December 1, 2009, Columbia filed its annual deferral report (“2009 Deferral Report”).

On December 21, 2009, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a Motion to Intervene⁷ and Comments in a case where Columbia was seeking to defer costs that it eventually will ask customers to pay through distribution rates.

⁵ Id. at 4-6.

⁶ Entry at 3. (Prior to their deferral on its books, we require Columbia to make an annual finding 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.)

⁷ The Commission has not ruled on OCC’s Motion. See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶13-20 (2006). (In a case involving deferrals the Court stated: “whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO. The Consumers’ Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.”).

The Commission established an Automatic Approval process that gave the Commission 30 days to suspend said approval. The Commission failed to suspend the approval; therefore, the Automatic Approval of the costs included within the 2009 Deferral Report was effective on December 31, 2009. On January 29, 2010, OCC filed an Application for Rehearing to challenge the Commission's Automatic Approval. On February 8, 2010, the Company filed a Memorandum Contra OCC's Application for Rehearing. By operation of law, OCC's Application for Rehearing was denied.⁸

On November 24, 2010, the Company filed its Annual Deferral Report ("2010 Deferral Report") for the reporting period December 2009 through November 2010. On December 6, 2011, the Company filed its 2011 Deferral Report. OCC takes exception to certain activity described in the 2011 Deferral Report, and recommends that the Staff object to certain costs which Columbia seeks authority to defer. The Commission should deny deferral treatment for certain costs for being beyond the scope of the application and outside of the timeframe of the deferral reporting period. Furthermore, the Commission should off set any deferral by the gain from the sale of the Toledo Land and Structure - Manufactured Gas Plant site. Finally, the Commission should conduct an evidentiary hearing to further review the Company's deferral request through an open process that allows participation by all interested parties.

III. COMMENTS

There are ample reasons for objecting to certain costs contained in the Company's 2011 Deferral Report as explained below. The Staff has until January 5, 2012, to file an

⁸ 4903.10 (B).

objection. As previously stated, the PUCO established this time line by Entry.⁹ The PUCO should consider the following OCC objections:

A. The 2011 Deferral Report Seeks Deferral Authority Inconsistent with the Company's Application Approved by the Commission in 2008.

The Company's Application requested authority to defer investigation and remediation costs associated with sites that the Company no longer owned or were no longer used and useful. The Company Application stated:

The August 5, 1999 Entry issued by the Commission in Case No. 99-195-GA-AAM does not address the proper accounting for environmental cleanup costs in those situations where **Columbia no longer owns the site in question, or where the site is owned by Columbia but not used and useful in the rendition of gas service to customers. This Application covers those situations, most of which are related to former Manufactured Gas Plant ("MGP") sites.**¹⁰

The Company's Application was approved by the Commission in an Entry issued on September 8, 2008.¹¹

In the 2011 Deferral Report, Columbia seeks authority to defer costs associated with the Toledo Land and Structure - Manufactured Gas Plant. However, the Toledo site was owned by the Company up until March 2011, and was admittedly used and useful during this same period of time. In the 2011 Deferral Report the Company states:

The former Toledo Gas Light and Coke Company site located at 333 South Erie Street, Toledo, was owned and operated by Columbia as a Service Center until it sold the property and building in March 2011.¹²

⁹ Entry at 3 (September 24, 2008).

¹⁰ Application at 2 (May 19, 2008). (Emphasis added).

¹¹ Entry at 2-3 (September 24, 2008).

¹² 2011 Deferral Report at Attachment 5.

The fact that the site was owned by Columbia and was used and useful during this same period of time contravenes the intent of the Company's deferral request in its Application, and should cause the Commission to deny deferral authority for the requested costs.

Specifically, the Company has provided documentation that between January 2008 and November 2010, it incurred \$743,780.97 for investigation and remediation costs at the Toledo site.¹³ In addition, there are costs identified for December 2010 (\$1,981.56), February 2011 (\$450.26) and March 2011 (\$1,976.82).¹⁴ All of these costs were incurred during a point in time when Columbia owned the site and during which the site was supposedly also used and useful as a service center, and thus should not be eligible for deferral treatment in this proceeding, because these costs fall outside of the intent of the deferral request as contained in Columbia's Application.

B. The 2011 Deferral Report Includes A Request for Deferral Authority for Costs Incurred Outside of the Reporting Period.

When the Commission approved the Company's Application, the Commission established specific reporting requirements for the review of the Company's deferral requests. The Commission stated

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.¹⁵

¹³ Id. at Attachment 6.

¹⁴ Id.

¹⁵ Entry at 3 (September 24, 2008). (Emphasis added).

The 2011 Deferral Report includes costs for deferral consideration for the period December 2010 through November 2011. Essentially, the Company is attempting to change classification of these costs based on events that occurred after the spending occurred. Nothing in Columbia's Application changes the fact that the costs were properly accounted for at the time they were spent. It is inappropriate to now defer the costs after the fact based on actions taken by the Company, actions that were solely in the control of the Company.

Because the Company's 2011 Deferral Report has included costs that were incurred outside of the "prior 12 month period." Specifically, Columbia has included certain costs that were incurred between January 2008 and November 2010, for the investigation and remediation at the Toledo Land and Structure -- Manufactured Gas Plant site.¹⁶ These costs were incurred outside of the 2011 Deferral Report reporting period, and should be excluded from deferral treatment in this proceeding.

C. The Deferral Report Includes a Site Sold During the Reporting Period; Therefore, Any Gain on the Sale Should Be Credited to the Deferral Account to the Benefit Of Columbia's Customers Who Bear The Risk Of Investigation and Remediation of the Site.

The 2011 Deferral Report identifies a site in which the Company sold the property during the reporting period. The 2011 Deferral Report states:

The former Toledo Gas Light and Coke Company site located at 333 South Erie Street, Toledo, was owned and operated by Columbia as a Service Center until it sold the property and building in March 2011.¹⁷

Furthermore, it appears that the sale of the property was contingent on the remediation of the site. The 2011 Deferral Report states:

¹⁶ 2011 Deferral Report at Attachment 6 (Company incurred \$743,780.97).

¹⁷ Id. at Attachment 5.

Columbia sold the property in March 2011 to R3 II under an agreement that involves the remediation of the site and construction of a new commercial office building.¹⁸

The Company has identified investigation and remediation costs at the Toledo Land and Structure -- Manufactured Gas Plant site that were incurred prior to and after the sale of the site.¹⁹ The Company should, therefore, be required to offset the deferred costs identified in the 2011 Deferral Report, as well as any future investigation and remediation costs deferred for recovery from customers, by the net gain realized from the sale of the Toledo Land and Structure -- Manufactured Gas Plant site.

There is precedent that supports the allocation of net gain proceeds from the sale of utility property to customers. The regulatory standard that has been applied across the country, to address the gain on sale of utility assets, is set forth in *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), (“*Democratic Central Committee*). The standard is to be applied on a case by case basis and is premised upon two principles:

(1) the right to capital gains on utility assets is tied to the risk of capital losses (gain follows losses principle)

(2) he who bears the financial burden of particular utility activity should also reap the resulting benefit (benefit follows burden principle).²⁰

In *Democratic Central Committee* the D.C. Circuit Court of Appeals decided that because ratepayers had borne the economic burdens associated with both the depreciable and non-

¹⁸ Id.

¹⁹ Id. at Attachment 6.

²⁰ *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973).

depreciable property in question, they were entitled to a gain on the sale of the utility assets.²¹

The above standard is consistent with the way the PUCO has addressed this issue in the past. In one case, the Commission addressed a utility's request to transfer assets from a regulated utility to a third party. The Commission appeared to directly adopt the benefit follows burden principle from *Democratic Central Committee*.²² That case involved a joint application by Ohio Bell Telephone Company and Ameritech Mobile Services, seeking Commission approval of the transfer of certain assets of Ohio Bell associated with providing mobile telephone and signaling services. Noting that the investments in the services and assets had been supported by the general body of Ohio Bell's ratepayers, and the revenues derived from those services had been recorded above the line, the Commission determined that the gain on the sale of the assets should benefit the general body of ratepayers.²³ The Commission stated:

The investments in IMTS and Bellboy have been supported by the general body of Ohio Bell's ratepayers and the revenues derived from those services have been recorded above the line, contributing to Ohio Bell's overall revenue requirement. Were we to approve this transaction at the proposed transfer price, we would be authorizing the erosion of the company's revenue requirement to the detriment of the general body of ratepayers. We, therefore, believe that any gain on the sale of assets involved in proceedings should benefit the general body of ratepayers. Our holding on this issue is consistent with 86-111, which recognized, in accordance with *Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973), that since ratepayers bear the economic burden on most utility assets, they are entitled to the gains resulting from their sale (86-111,

²¹ Id. at 115-116.

²² *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order (October 18, 1990).

²³ Id at 30-31.

Order on Reconsideration, 2 FCC Rcd Vol. 21, at 6295 [October 16, 1987]).²⁴

Likewise in this case, the benefit from the sale of the property should follow the burden to investigate and remediate the environmental issues that Columbia's customers are saddled with, and that were critical to the sales agreement.

In this case, the Company negotiated an agreement for the sale of a site that had significant environmental liability associated with it. The economic burden attached to the environmental remediation of the site fell to Columbia's customers in the amount of \$2,455,167.65 between January 2008 and November 2011,²⁵ and those customers should receive all the gains from the sale of the assets.

Customers have traditionally borne all of the ordinary burdens of taxes and insurance, operations and maintenance, and depreciation and return on investment during the time the property was in use by the utility. In this case, customers may be required to cover out-of-the-ordinary expenses -- deferred environmental related investigation and remediation expenses -- associated with the Toledo Land and Structure - Manufactured Gas Plant property. These costs were critical to the sale of the property. Therefore, because the economic burden of investigation and remediation of the environmental issues associated with the site will potentially be borne by customers, the capital gain from the sale of the site should also be allocated to customers to offset past and future environmental investigation and remediation costs the Company seeks to defer and eventually recover from customers.

²⁴ Id.

²⁵ 2011Deferral Report at Attachment 6.

The Commission should establish a procedural schedule, including an evidentiary hearing, to further review the Company's deferral request through an open process that allows participation by all interested parties and to address the issues OCC raised herein.

D. Other Issues that Deserve PUCO Consideration.

1. As noted in Attachment 1 to the 2011 Deferral Report, this site was sold to the Columbia Remainder Corporation. However, there is no explanation of who the Columbia Remainder Corporation is and whether there is any affiliation between the Columbia Remainder Corporation and Columbia. There is also no discussion of how much Columbia Remainder Corporation paid for the site, and whether fair market value was paid.

There is also the question of what will be done with the site after the remediation. If the remediation makes the site marketable in the future, would Columbia get any of the proceeds from a subsequent sale from Columbia Remainder Corporation? To the extent that there is a net capital gain from the sale, then it should be applied to the costs to remediate the site, inasmuch as the remediation made the site marketable.

2. As noted in Attachment 5 to the 2011 Deferral Report, Columbia sold the Toledo service center. Again, there is no discussion of the sale price or how the proceeds from the sale were or will be accounted for.

3. As noted in Attachment 7 to the 2011 Deferral Report, Columbia states: "There is a documented history of multiple parties discharging to the creek." There is no discussion of who the other multiple parties are and whether those other parties are also contributing to the environmental investigation and remediation costs. To the extent that multiple parties contributed to the alleged problem, then Columbia -- and its customers -- should not bear the

entire cost of any remediation. In this regard, it should be determined whether others beside ratepayers owe some or most of the costs. The PUCO should ensure that captive customers of monopoly utilities like Columbia are not used as convenient sources of funds in the place of others with responsibility.

4. As noted in Attachment 13 to the 2011 Deferral Report, Columbia to date, has spent \$475,000 on investigation and remediation of the Goodale site. It is presumed that at some time previous to the 2011 Deferral Report filing, that this site was sold by Columbia, and since being sold, this site has been developed into a successful commercial site with shops and a Hyatt Place Hotel. It is believed that Columbia's remediation efforts made the sale of this property possible and most likely helped increase the value of the site. Thus any net capital gain from the sale of this valuable commercial property should be used to offset all past and any future environmental investigation and remediation costs.

IV. CONCLUSION

For all the reasons stated above and consistent with OCC's positions, the PUCO Staff should object to certain costs that the Company proposes for recovering from customers in the 2011 Deferral Report. The Commission should deny deferral treatment for certain costs for being beyond the scope of the application and outside of the timeframe of the deferral reporting period. Furthermore, the Commission should off set any deferral by the gain from the sale of the Toledo Land and Structure - Manufactured Gas Plant site. Finally, the Commission should establish a procedural schedule, including an evidentiary hearing, to address any objections filed by the Staff and to address the arguments OCC raised herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these *Comments* was served on the persons stated below via first class U.S. Mail, postage prepaid, this 21st day of December 2011.

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