

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

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. )

Case No. 05-221-GA-GCR

Case No. 04-221-GA-GCR

MEMORANDUM IN SUPPORT OF COLUMBIA GAS OF OHIO, INC.'S MOTION FOR  
CONTINUANCE AND MOTION TO STRIKE THE TESTIMONY OF THE OHIO OFFICE  
OF THE CONSUMERS' COUNSEL AND TO LIMIT THE SCOPE OF CROSS-  
EXAMINATION

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December 14, 2006

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**MEMORANDUM IN SUPPORT OF COLUMBIA GAS OF OHIO, INC.'S MOTION FOR CONTINUANCE AND MOTION TO STRIKE THE TESTIMONY OF THE OHIO OFFICE OF THE CONSUMERS' COUNSEL AND TO LIMIT THE SCOPE OF CROSS-EXAMINATION**

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On January 2, 2004, and January 12, 2005, the Public Utilities Commission of Ohio ("PUCO" or "Commission") opened the 2004 and 2005 gas cost recovery dockets, now consolidated, to review the operation of the purchased gas adjustment clause and the gas purchasing practices and policies of Columbia Gas of Ohio, Inc. ("Columbia"). A September 14, 2005 Commission Entry set a public hearing in this matter for November 14, 2006, which was subsequently continued to December 15, 2006 by an Attorney Examiner ("AE") Entry granting a Motion to Continue filed by the PUCO Staff ("Staff") and agreed to by the other Parties to this case. Columbia and the Ohio Office of the Consumers' Counsel ("OCC") filed prepared testimony on November 29, 2006 and December 8, 2006, respectively. The Industrial Energy Users-Ohio ("IEU-Ohio") filed a Motion to Intervene on December 11, 2006 and Columbia filed, on December 14, 2006, a Motion for a Continuance as well as a Motion to Strike the Testimony of the Ohio Office of the Consumers' Counsel and to Limit the Scope of Cross Examination

("Motion to Strike"). In its Motion for a Continuance, Columbia suggests that the Commission proceed with the hearing in order to take the testimony of the auditor, but that the hearing then be continued in order to give the Parties an adequate opportunity to address OCC's testimony and the assertions contained within the testimony. In its Motion to Strike, Columbia urges the Commission to grant the Motion to Strike inasmuch as OCC already fully litigated the reasonableness of the 2003 Stipulation, the issues OCC raises are not appropriate for resolution in a GCR proceeding, and legal conclusions contained within OCC's testimony are inappropriate.

**A. Columbia's Motion for a Continuance**

OCC's testimony requests that the Commission terminate the Columbia 2003 Stipulation that created rate certainty on Columbia until 2008. IEU-Ohio members are active gas consumers and transporters on the Columbia system and highly value the rate certainty provided by the 2003 Stipulation. OCC's request to terminate the 2003 Stipulation, if granted by the Commission, would significantly impact both the price that IEU-Ohio's members pay for natural gas from Columbia as well as the ability of IEU-Ohio members to anticipate and plan for their natural gas costs.

IEU-Ohio supports Columbia's proposal to proceed with the December 15, 2006 hearing for the purpose of receiving the testimony of the auditor, and continue the remainder of the hearing pending a Commission decision on Columbia's Motion to Strike. If the Motion to Strike is granted, the scope of the hearing will include only the recommendations of the management/performance ("M/P") auditor and one OCC issue not subject to Columbia's Motion to Strike. In the unlikely event that Columbia's Motion to Strike is denied, Columbia, IEU-Ohio, and other intervening parties will have a

reasonable opportunity to take depositions of OCC's witnesses and to prepare for the newly-broadened scope that the proceeding would take on in order to address OCC's testimony. None of the Parties would be prejudiced by the requested continuance. Therefore, for the reasons and on the basis set forth above, IEU-Ohio respectfully supports Columbia's Motion for a Continuance of the December 15, 2006 hearing in this proceeding.

**B. Columbia's Motion to Strike the Testimony of OCC**

The Ohio Supreme Court has repeatedly made clear that *res judicata* and collateral estoppel bar relitigation of entire legal actions as well as individual legal issues. The Court previously held that "It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit,'" and that "the doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." *Nat'l. Amusements Inc., v. Springdale*, 53 Ohio St.3d 60, 62 (1990), quoting *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986). Additionally, the Court recently reaffirmed that collateral estoppel bars the relitigation of individual issues that have been decided by a court of competent jurisdiction. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 318, 2006-Ohio-5789. Both *res judicata* and collateral estoppel also apply to administrative proceedings. *Id.*

In the 2003 Stipulation proceeding, OCC fully participated in all aspects of the proceeding, including settlement discussions, even though it eventually opposed the Stipulation entered into between the other Parties. OCC filed initial and reply comments on the proposed Stipulation, Applications for Rehearing of the Commission's adoption of

the Stipulation, and a Motion to Dismiss Columbia's Application for Rehearing. OCC then took an appeal at the Ohio Supreme Court of the Commission's approval of the Stipulation. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 105 Ohio St.3d 1211, 2005-Ohio-1023. For the reasons below, OCC's attack on the 2003 Stipulation should not be permitted and Columbia's Motion to Strike should be granted.

**1. Testimony of Bruce Hayes**

In the Entry approving the 2003 Stipulation, the Commission reserved for itself the ability to terminate its approval of the Stipulation if Columbia did not implement the Stipulation as promised. OCC witness Hayes asserts that the Commission should revoke its approval inasmuch as Columbia has not properly implemented the Stipulation and observes that the Stipulation has not "been implemented as originally projected."

In his prepared testimony, Hayes does not point to a single instance where Columbia inappropriately *implemented* the Stipulation. Hayes spends a great deal of time discussing allegedly inaccurate projections and suggesting ways to address supposed over-recovery of costs by Columbia, but nowhere in his testimony does he allege that Columbia charged its customers or administered any program inconsistently with the terms of the Stipulation (as modified by the Commission). The fact that the actual collections were different from the projected estimates does not equate to faulty implementation of the Stipulation by Columbia.

Hayes' testimony is merely an OCC attempt to relitigate the result of the original litigation of this matter – exactly what the doctrines of *res judicata* and collateral estoppel are designed to prevent. OCC fully participated in the 2003 proceeding, as

evidenced by its multiple filings and pleadings and its subsequent unsuccessful appeal to the Court. OCC's current attempt to take a second bite at the apple is not permitted.

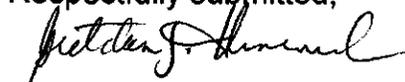
## **2. Testimony of Mike Haugh**

OCC witness Haugh argues that there should be a "more equitable allocation of the capacity costs between Choice and the GCR customers" and asserts that GCR customers should receive a refund for overcharged capacity costs amounting to approximately \$8.9 million. This portion of Haugh's testimony relates to the allocation of capacity costs, specifically addressed in the 2003 Stipulation. The issues raised by Haugh address fairness and allocation, do not allege any mistake or inclusion of improper costs in the GCR, and have no relevance to this hearing. The doctrines of *res judicata* and collateral estoppel bar Haugh and OCC from relitigating a matter that was raised and resolved in the previous litigation by the 2003 Stipulation, and, therefore, the portions of Haugh's testimony related to the allocation of capacity costs.

## **C. Conclusion**

In sum, IEU-Ohio supports Columbia's Motion for a Continuance as well as its Motion to Strike for the reasons stated herein and on the same bases as are set forth by Columbia in its motions filed this same day, as are fully incorporated herein for reference.

Respectfully submitted,



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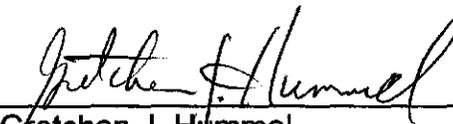
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Memorandum in Support of Columbia Gas of Ohio, Inc.'s Motion for Continuance and Motion to Strike the Testimony of the Office of the Ohio Consumers' Counsel and to Limit the Scope of Cross-Examination* has been sent via ordinary U.S. Mail, postage prepaid, this 14<sup>th</sup> day of December, 2006 to the following:

  
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