FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
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REPLY MEMORANDUM OF COLUMBIA GAS OF OHIO, INC. TO THE MEMORANDA CONTRA OF THE OHIO OFFICE OF THE CONSUMERS' COUNSEL AND OF THE PUCO STAFF

On December 14, 2006, Columbia Gas of Ohio, Inc. ("Columbia") filed a motion to strike testimony filed by the Ohio Office of Consumers' Counsel ("OCC") and by the Commission Staff. The motion also sought to limit the scope of cross-examination in this proceeding. The Staff filed a memorandum contra on December 21, 2006, and the OCC filed its memorandum contra on December 22, 2006. Pursuant to Ohio Administrative Code § 4901-1-12, Columbia files this Reply Memorandum.

REPLY TO THE STAFF'S MEMORANDUM CONTRA

Staff suggests that Columbia wants other parties to be precluded from examining Columbia's "method for determining if it must share revenues from its off-system sales and capacity releases with GCR and Choice customers." Staff Memorandum Contra at 1. This is simply inaccurate. Columbia does not suggest that its implementation of the 2003 Stipulation, as modified

by the Commission, is an improper issue for this proceeding. However, the initial testimony of Staff witness Puican filed on December 13, 2006, did not question Columbia's implementation of the 2003 Stipulation. It instead noted what it perceived to be an ambiguity in the Commission order adopting the 2003 Stipulation. The Staff believes that "the Commission's intent is ambiguous" and correctly notes that "Columbia seeks to avoid a discussion of that ambiguity." Staff Memorandum Contra at 2.

Staff believes that the initial testimony of Staff witness Puican does not address the 2003 Stipulation, but only the Commission's intent in issuing the orders that address the 2003 Stipulation. *Id.* Without quibbling about semantics with regard to Staff's statement, in the ordinary course of practice if any party feels that a Commission order is ambiguous the party may file an application for rehearing of the Commission's order. However, in the past parties have sometimes filed motions seeking clarification of ambiguities in Commission orders, and the Commission has treated such motions for clarification as an application for rehearing. In fact, the Commission just reviewed this matter in its review of procedural rules. The Commission held that,

> with increasing frequency in recent years, parties have filed motions for clarification following the issuance of a Commission order. Parties have sought reversal of substantive determinations made by the Commission in several of the motions. The Commission finds such requests not filed as part of an application for rehearing to be inappropriate. The staff proposed that a motion for clarification be considered an application for rehearing if the Commission's response resulted in any revision of the Commission's order. The Commission finds that the more appropriate action is just to eliminate motions for clarification. Therefore, future motions for clarification of a Commission order will be denied. A ruling denying a motion for clarification may be made by the Commission, the legal director, or an attorney examiner.

In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, 2006 Ohio PUC LEXIS 746 at 107-108, PUCO Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006).

As a result of the Commission order cited above parties must file applications for rehearing instead of motions for clarification. The end result is the same though – parties are expected to address ambiguities in Commission orders in applications for rehearing. Parties are not permitted to raise alleged ambiguities in a Commission order in subsequent proceedings as a means of improperly collaterally attacking a Commission order. If a party had an opportunity to address in an application for rehearing an ambiguity in a Commission order in the proceeding in which the Commission issued the order, that party is barred by the doctrines of res judicata and collateral estoppel from raising the ambiguity in subsequent proceedings. The doctrines of res judicata and collateral estoppel apply equally to issues litigated, as well as to issues that could have been litigated. The Supreme Court of Ohio has endorsed this aspect of the doctrine of res judicata holding that if a party,

> Fails to bring to the attention of the court all the reasons or grounds favorable to his contention, he should not be permitted, again, on that account, to harass and vex his opponent by bringing forward in a second action, the omitted reasons or grounds. That the plaintiff did not, in the first action advance all his grounds of relief, was his own fault, and the consequences of this omission, should be borne by him, and not by his opponent who was without fault in the matter. [Citation omitted.]

Cincinnati v. Emerson (1897), 57 Ohio St. 132, 140, 48 N.E. 667.

Staff suggests that the doctrines of res judicata and collateral estoppel do not apply in this case because the alleged ambiguity was created by the Commission's last entry on rehearing in Case Nos. 94-987-GA-AIR et al., thus "the Commission's intent could not be litigated *during* the

rehearing process." Staff Memorandum Contra at 4 (emphasis in the original). However, this argument ignores the fact that the Commission permits multiple entries on rehearing in a proceeding if an entry on rehearing itself creates issues. In Case Nos. 94-987-GA-AIR et al. such circumstances existed and the Commission permitted multiple applications for rehearing from the OCC. If any party felt that the Commission's June 9, 2004 Entry on Rehearing in this case was ambiguous then the party had an obligation to raise its concerns in an additional application for rehearing, or forever hold its peace. No party filed an application for rehearing questioning the ambiguity that Staff suddenly claims to exist.

Staff never raised this supposed ambiguity until December 13, 2006, long after the filing of the audit report in this case, and only two days before the scheduled hearing. The Commission should see the Staff's attempt for what it is – a veiled, after-the-fact attempt to alter the explicit terms of the 2003 Stipulation as modified and approved by the Commission.

As explained in Columbia's motion to strike, Staff witness Puican notes that the Commission found that "Columbia may retain OSS and CR revenues earned from November 1, 2004 to November 1, 2008 up to $25 million in any *calendar year* in that period." Prepared Testimony of Stephen E. Puican on Behalf of the Staff of the Public Utilities Commission of Ohio at 4 (emphasis added). Staff witness Puican opines that the reference to the term "calendar year" was inadvertent and goes on to suggest that the Commission clarify its intent. However, **there is no ambiguity** – the 2003 Stipulation explicitly referred to the term "calendar year." So did the Commission orders. The normal and ordinary interpretation of the term "calendar year" is the period from January 1 through December 31. Nowhere in the proceedings that led up to the Commission's orders in Case Nos. 94-987-GA-AIR et al. did any party ever so much as hint at

any different interpretation of the term "calendar year." The first and only time this alleged ambiguity was ever noted was in Staff's testimony filed at the last minute before hearing in this case. There is nothing at all ambiguous about the term "calendar year" and to the extent that the Staff believed the term "calendar year" was unclear or unreasonable it could have and should have raised that issue during the comment and rehearing process in Case Nos. 94-987-GA-AIR et al. Having failed to do so, the Staff is now precluded from doing so by the doctrines of res judicata and collateral estoppel.

REPLY TO THE OCC'S MEMORANDUM CONTRA

The OCC first argues that the doctrines of res judicata and collateral estoppel do not apply here "because there has not been a challenge to the 2003 Stipulation that has ever been decided on the merits...." OCC Memorandum Contra at 5. This statement is obviously inaccurate. One has to only read the first full paragraph of page 3 of the OCC's Memorandum Contra in which it describes its activities to actively oppose approval of the 2003 Stipulation to understand that there were repeated OCC and Staff challenges to the 2003 Stipulation, and that after reviewing the contentious record in Case Nos. 94-987-GA-AIR et al. the Commission decided, on the merits, to approve the 2003 Stipulation, with modifications.

The crux of this OCC argument appears to be based upon its failed attempt to appeal this case to the Supreme Court of Ohio. The OCC claims that its appeal to the Supreme Court of Ohio "did not result in a decision in a final judgment on the merits by the Court," and that Columbia improperly relied upon the "procedural dismissal of that appeal as a basis for moving to strike the OCC and Staff testimony." OCC Memorandum Contra at 6. The OCC is wrong on a couple of counts.

Columbia did note that the OCC fully exercised its right to litigate issues associated with its opposition to the 2003 Stipulation, ***both*** before the Commission and the Supreme Court of Ohio, and the doctrines of res judicata and collateral estoppel should be used to bar litigation of the same issues in a second administrative proceeding – i.e., the instant case. However, Columbia's argument was in no way based solely upon the fact that the OCC appealed the Commission's orders to the Supreme Court of Ohio. Columbia's arguments would have been the same had the OCC never filed an appeal with the Court. The OCC had more than ample opportunity to litigate before the Commission any issues it wished to contest in the proceedings in Case No. 94-987-GA-AIR, and it is that opportunity which prevents it from relitigating those issues in the current case.

One of the cases cited in Columbia's motion to strike illustrates this principle – it is the finality of the Commission's judgment that prevents relitigation of issues in subsequent Commission proceedings, based upon the doctrines of res judicata and collateral estoppel. The application of the doctrines does not depend on whether or not there is an appeal. In Columbia's 1990 GCR case the Commission found that the doctrines of res judicata and collateral estoppel precluded the relitigation of an issue that the OCC could have litigated in an earlier GCR case. *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*, PUCO Case No. 90-17-GA-GCR, Entry (January 9, 1991). The Commission found this to be true and there was no appeal at all to the Supreme Court of Ohio.

However, here the OCC did file a notice of appeal with the Supreme Court of Ohio. And the OCC is correct that the Court did dismiss the OCC's appeal because of the OCC's procedural

errors. Nonetheless, the Commission's dismissal of the appeal acts as an adjudication upon the merits and the OCC cannot refile its notice of appeal. Dismissal of an action with prejudice acts as an adjudication upon the merits, and any further action is vulnerable to the defense of res judicata. 63 O. Jur. 3d, *Judgments* §408 (2003); Ohio Civ. R. 41(B)(3).

The OCC also argues that it never had an opportunity to litigate issues associated with the 2003 Stipulation because the Commission did not conduct an evidentiary hearing. OCC Memorandum Contra at 7, 9. In making this argument the OCC has hypocritically ignored the repeated opportunities it had to contest the 2003 Stipulation as set forth on page 3 of its own Memorandum Contra. As the OCC well knows, there is no requirement for evidentiary hearings in all Commission cases, and the Commission can consider comments, pleadings and attachments as evidence without the necessity of an adversarial hearing. *Stephens v. Pub. Util. Comm.* (2004), 102 Ohio St. 3d 44, 2004 Ohio 1798, ¶12.

In its Memorandum Contra the OCC makes repeated references to a sentence in the May 5, 2004 Entry on Rehearing in this case in which the Commission stated:

> We further reserve our right to terminate our approval of the 2003 stipulation if we discover that Columbia is not *implementing* the Stipulation as we have been informed it would.

Entry or Rehearing (May 5, 2004) at 11 (emphasis added). However, having read Columbia's motion to strike the OCC now curiously downplays the fact that the cited sentence is premised upon a failure to implement the stipulation as approved. Instead, the OCC in its Memorandum Contra has contorted the referenced sentence to mean that the Commission can terminate the 2003 Stipulation "without limitation." See, e.g., OCC Memorandum Contra at 7, 10. Nonetheless, it is clear that the sentence upon which the OCC relies refers solely to a reservation of rights

based upon an alleged failure to properly implement the 2003 Stipulation. As explained in Columbia's motion to strike, the OCC testimony should be stricken because Columbia has, in fact, complied with every provision of the 2003 Stipulation. Instead, OCC witness Hayes makes the tortured argument that some of the projections provided during settlement discussions have allegedly proved to be inaccurate with the passage of the time, and that because these projections were not accurate the 2003 Stipulation has not been properly implemented.

The OCC's Memorandum Contra takes it contorted argument a step further and now claims that the settlement projections the OCC has singled out for criticism were provided to the Commission and that the Commission relied upon those projections in approving the 2003 Stipulation. OCC Memorandum Contra at 10, 13, 14. Nothing could be further from the truth. Columbia never filed with the Commission the projections about which the OCC complains. The estimates that the OCC references were not part of the record used to support the 2003 Stipulation, and could not have been relied upon by the Commission when it adopted and modified the 2003 Stipulation, despite the OCC's claims. See, OCC Memorandum Contra at 13.

The OCC's Memorandum Contra again claims that allegedly inaccurate projections "call into question the validity and impartiality of these projections." OCC Memorandum Contra at 13. In addition to the fact that the projections were not available to the Commission, nor relied upon by it, the OCC's complaints about inequitable benefits are not new. OCC witness Hayes' testimony notes instances in which projected benefits associated with the 2003 Stipulation allegedly differ from those provided during settlement negotiations. The OCC's Second Application for Rehearing in Case Nos. 94-987-GA-AIR et al., filed on May 14, 2004, also argued that the benefits to Columbia exceeded those for customers under the 2003 Stipulation. In OCC witness

Hayes' testimony, the OCC is simply recycling those same arguments in different packaging. The Commission, however, should see through this subterfuge, and refuse to countenance repeated litigation of issues already litigated by the OCC and decided by the Commission and the Supreme Court of Ohio.

The OCC attempts to argue that it is not recycling those same arguments, that this is the first opportunity it has had to discuss the "actual harm" allegedly caused by the 2003 Stipulation. OCC Memorandum at 16. The OCC admits that in earlier pleadings it made arguments "speculating as to the harm," and that it now wants to argue about "actual harm." *Id.* But the OCC has already had its day to argue about harm – speculative, actual or otherwise. The OCC made its arguments in Case Nos. 94-987-GA-AIR et al. and the Commission has made it clear it will revisit its approval of the 2003 Stipulation only if Columbia fails to properly implement the 2003 Stipulation. The OCC's claims about inaccurate projections simply do not equate to a failure to implement the 2003 Stipulation as approved by the Commission.

With regard to OCC witness Haugh's testimony the OCC alleges that Columbia "failed to cite any provision of the Stipulation that Mr. Haugh is attempting to undue [SIC]." OCC Memorandum Contra at 18. As Columbia explained in its motion to strike, the OCC is attempting to unravel the allocation of pipeline capacity costs embedded in the 2003 Stipulation. The 2003 Stipulation represents a carefully crafted balancing of interests, and if the OCC were to prevail and have the Commission unceremoniously dump millions of dollars of pipeline capacity costs upon transportation customers the entire 2003 Stipulation begins to unravel. Were the OCC's recommendations to be adopted, Columbia's 2003 Stipulation would be vacated, leaving a huge regulatory void for Columbia and all of its stakeholders. Nowhere does the OCC make any at-

tempt to explain how it would suggest that the regulatory vacuum be filled. The drastic recommendations of the OCC witnesses could only be implemented within the context of a multi-party collaborative process or rate case.

The OCC maintains that the resolution of a GCR capacity issues clearly belongs in a GCR case, and asks if not in a GCR case where then? OCC Memorandum Contra at 18. As explained in Columbia's motion to strike, the 2003 Stipulation covered a myriad of complex, interrelated issues – most of which are not appropriate for litigation in a GCR proceeding, which proceedings should be focused solely on gas cost issues. The 2003 Stipulation dealt with base rate, financial and accounting issues. It also dealt with transportation issues, including banking and balancing issues – both for CHOICE customers and traditional transportation customers. Industrial and commercial customers depend on stable energy programs, and desirable transportation programs are necessary in order to attract and retain industry. Similarly, marketers rely on Columbia's 2003 Stipulation to stay engaged in Columbia's CHOICE program. While the doctrines of res judicata and collateral estoppel preclude the litigation of issues raised and decided in prior actions, even were the Commission to permit any relitigation of issues associated with the 2003 Stipulation, a GCR case is not the vehicle in which to address such complex, interrelated issues. Given the multi-faceted nature of the 2003 Stipulation, any reexamination of issues or reopening of issues can only be effectively accomplished through a rate case or complaint case.

OCC witness Haugh suggests that the Commission should order Columbia to conduct a full cost of service study to be filed in this docket. Prepared Testimony of Michael P. Haugh at 9. However, even were the Commission to accept this recommendation, there is little that any party

can do with an allocation study in a GCR proceeding. Any reallocation of costs among different rate classes can only be accomplished through a base rate case, not a GCR case.

The drastic recommendations of the OCC witnesses could only be implemented within the context of a multi-party collaborative process or rate case. A GCR proceeding simply is not the procedural vehicle in which to address the OCC issues, and the testimony of the OCC witnesses should therefore be stricken from the record in this proceeding.

The OCC next argues that there was no evidence that the capacity allocation issued was a problem in Case Nos. 94-987-GA-AIR et al. OCC Memorandum Contra at 18. Again, Columbia and others should not now have to be vexed and harassed by the OCC because it did not thoroughly consider all the arguments that it could have made in PUCO Case Nos. 94-987-GA-AIR et al. The OCC is not complaining about Columbia's implementation of the pipeline capacity cost allocation in PUCO Case Nos. 94-987-GA-AIR et al., but is instead complaining after-the-fact about the actual allocation of pipeline costs agreed to. This is an issue that the OCC could have litigated in the earlier case and therefore should be precluded from litigating now. As if it somehow supports the OCC's argument the OCC notes that the management/performance auditor also expressed some concern about the allocation of pipeline capacity costs. OCC Memorandum Contra at 18. Interestingly though the OCC fails to explain that the auditor's recommendations on the issue were that the issue be reexamined prospectively in whatever regulatory arrangement succeeds the 2003 Stipulation.

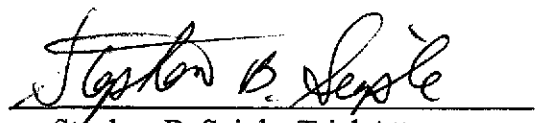
The OCC also makes the ridiculous argument that the pipeline capacity cost allocation issue "would not have been relevant in the 94-987-GA-AIR case because the COH Choice program had not yet started at the time of the 94-987-GA-AIR case." OCC Memorandum Contra at

19. This claim ignores the entire complex history of Case No. 94-987-GA-AIR et al. As the OCC well knows, there have been a series of stipulations in the rate case docket, and the last two stipulations were negotiated after the initiation of Columbia's CHOICE program. Thus, pipeline capacity cost allocation was an issue that all parties had an opportunity to discuss and contest during the negotiation of the last two stipulations in Case Nos. 94-987-GA-AIR et al.

WHEREFORE, for the reasons discussed above, and in Columbia's Motion to Strike, Columbia respectfully requests that the Commission strike all of the direct testimony of Staff witness Puican and OCC witness Bruce M. Hayes and the following portions of the testimony of OCC witness Michael P. Haugh – page 3, lines 1 through 6 and lines 15 through 17; page 4, line 4 through page 9, line 8; page 5, lines 3-7; and, page 17, lines 7 through 15. Columbia further requests that the scope of cross-examination be limited so that counsel may not cross-exam witnesses about the matters addressed in the testimony references above, nor about any issue related to Staff or OCC's attempt to collaterally attack the 2003 Stipulation.

Respectfully submitted,

COLUMBIA GAS OF OHIO, INC.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum of Columbia Gas of Ohio, Inc. to the Memoranda Contra of the Ohio Office of Consumers' Counsel and of the PUCO Staff was served upon all parties of record by regular U.S. Mail and by electronic mail this 28th day of December, 2006.

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