

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Columbia Gas of Ohio, Inc. for )  
Approval of a General Exemption of )  
Certain Natural Gas Commodity Sales )  
Services or Ancillary Services from ) Case No. 08-1344-GA-EXM  
Chapters 4905, 4909, and 4935 except )  
Sections 4905.10, 4935.01, and 4935.03, )  
and from specified sections of Chapter )  
4933 of the Revised Code. )

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MOTION OF COLUMBIA GAS OF OHIO, INC.  
TO STAY DISCOVERY

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Pursuant to Rules 4901-1-12(A) and 4901-1-14, Ohio Administrative Code ("O.A.C."), Columbia Gas of Ohio, Inc. ("Columbia") requests an entry staying service of responses to discovery served by the Office of Ohio Consumers' Counsel ("OCC"). The stay should remain in effect until such time as the Commission determines whether to conduct further proceedings in this matter. If the Commission ultimately decides not to hold a hearing, discovery should be permanently stayed. This Motion should be granted for the reasons stated in the attached Memorandum in Support.

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Respectfully submitted,  
**COLUMBIA GAS OF OHIO, INC.**

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Stephen B. Seiple (Counsel of Record)

Stephen B. Seiple, Asst. General Counsel  
Brooke E. Leslie, Counsel  
200 Civic Center Drive  
P. O. Box 117  
Columbus, Ohio 43216-0117  
Telephone: (614) 460-4648  
Fax: (614) 460-6986  
Email: sseiple@nisource.com  
bleslie@nisource.com

Attorneys for  
**COLUMBIA GAS OF OHIO, INC.**

## MEMORANDUM IN SUPPORT OF MOTION TO STAY DISCOVERY

On January 30, 2009, as supplemented on March 26 and 31, 2009, Columbia filed an application pursuant to Section 4929.04, Revised Code, for approval of a general exemption of certain natural gas commodity sales services or ancillary services contained in Chapters 4905, 4909, and 4935, Revised Code.

On October 7, 2009, the parties filed a Stipulation. The Stipulation was signed by all of the parties, with the exception of JP Morgan, NJR Energy, and Sempra Energy Trading LLC, which stated that they do not oppose the Stipulation.

The Stipulation provided that Columbia will conduct two auctions in order to implement two consecutive one-year long Standard Service Offer ("SSO") periods, starting in April 2010 and April 2011. Through those auctions, Columbia will obtain commodity gas supplies from alternative suppliers for both its PIPP and SSO requirements and pass the price of the gas on to its sales customers at a monthly SSO rate. Bid winners of the SSO auctions will be assigned an undivided percentage of the standard service customers' demand. The Stipulation also provided that Columbia will conduct a third auction for the annual period beginning April 2012. This auction will be a Standard Choice Offer ("SCO") auction. Bid winners of the SCO auction will be assigned to individual customers.

Three parties, including the OCC, stated in the Stipulation, that, "while they support the Stipulation, that support should not be interpreted as support for SCO auctions in general, or in this Stipulation."<sup>1</sup> Hess stated that while it supports the Stipulation as a whole, it does not support the proposed SCO auction.<sup>2</sup> The parties agreed that prior to the SCO auction date (February 2012), any party may petition the Commission to suspend the SCO auction in favor of another SSO auction. In the event that a party files an objection to an SCO auction the parties supporting the SCO auction agree to present evidence intended to demonstrate the anticipated benefits to be derived from an SCO auction.<sup>3</sup>

The Commission approved the Stipulation in an Opinion and Order dated December 2, 2009, and held, "We further find that the SSO and SCO auctions represent a reasonable structure through which to test the potential benefits of market-based pricing of the commodity sales by the company. Columbia is, therefore, authorized to proceed with the auctions."<sup>4</sup>

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<sup>1</sup> Joint Stipulation and Recommendation (October 9, 2009) at 2, 9, footnotes 6 and 9.

<sup>2</sup> Id. at 9, footnote 10.

<sup>3</sup> Id. at 9.

<sup>4</sup> Opinion and Order (December 2, 2009) at 14-15.

On April 15, 2011, Columbia filed a Revised Program Outline, which reflects the operational changes necessary to implement the initial SCO auction in February 2012. By Entry dated April 27, 2011, the Commission directed that any party desiring to comment upon the Revised Program Outline do so by May 9, 2011. In addition, the Entry provides that any petitions/objections requesting that the SCO auction be suspended must also be filed by May 9, 2011.

Apparently in response to the April 27, 2011 Entry, the OCC served a set of discovery requests upon Columbia on April 28, 2011 (attached hereto as Attachment A).

Many of the data requests appear to be overbroad, irrelevant and burdensome. While the nature of the OCC's discovery is a concern, Columbia's more immediate concern is that any discovery in this proceeding is wholly improper and premature at this time. The Commission has not indicated whether it intends to conduct further proceedings in this matter and, if so, what the nature of those proceedings will be. At a minimum, discovery should be stayed until the Commission decides the nature and scope of any further proceedings. If the Commission decides not to conduct a hearing, then no discovery should be had.

As noted above, in its December 2, 2009 Opinion and Order the Commission has already approved the SCO auction scheduled for February 2012. While the Stipulation does permit parties to petition the Commission to suspend the SCO auction, it does not require the PUCO to hold a hearing with respect to such petitions. The Commission's April 27, 2011 Entry establishes a schedule for the filing of comments and petitions/objections, but it did no more than that. Notably, the Entry did not set forth any process or procedure for reviewing the comments and objections, if any, nor did it schedule a hearing. Columbia should not be subject to the time and expense associated with responding to discovery until the Commission determines the scope and nature of any future proceedings. If the Commission determines that it is not going to hold a hearing, discovery should be permanently stayed. If the Commission determines that it is going to hold a hearing, it should direct that any discovery be strictly limited to only those relevant objections raised with respect to the Revised Program Outline, and to the issue of the transition from the SSO to the SCO.

Columbia's requested stay is consistent with prior Commission practice. In Case No. 05-732-EL-MER, Duke Energy Holding Corp. and Cinergy Corp. filed an application for consent and approval of a change in control of Cincinnati Gas and Electric. In a June 14, 2005 Entry, the Commission authorized interested parties to file comments which would "identify the issues which the Commission should consider."<sup>5</sup> The same Entry also imposed a stay on discovery and stated

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<sup>5</sup> Case No. 05-732-EL-MER, Entry (June 14, 2005) at 3.

that, “[f]ollowing the receipt of the comments and replies, the Commission will determine the scope and nature of its review.”<sup>6</sup> In a subsequent Entry, the Commission directed Staff to “examine the application and filed comments and to make appropriate recommendations.”<sup>7</sup> The OCC sought rehearing of the Entry, arguing, among other things, that the stay of discovery should be lifted. The Commission disagreed, and held, “[S]ince, in this case, we have not yet determined whether a hearing will be held, we find that it is not appropriate to lift the stay on discovery.”<sup>8</sup> The Commission ultimately approved a stipulation that resolved the application without discovery or a hearing.<sup>9</sup>

As in the Duke merger case the Commission has not established a procedural schedule, let alone set a hearing date. The Commission could conceivably reject some, all or none of any filed comments and objections, but has provided no indication of the process by which it will review these comments and objections. The scope and nature of any further review is totally unknown at this point in time. The Commission should therefore stay discovery until it determines how it will proceed, if it will proceed. Absent further guidance on how the Commission will proceed or what issues will be addressed in any further proceedings, it is impossible to know whether the discovery served by OCC is relevant or likely to lead to the discovery of admissible evidence. Columbia should not be subject to an open-ending fishing expedition by the OCC while the Commission deliberates about how it will proceed in this matter.

Merely because the Commission has provided parties with an opportunity to file comments or objections that opportunity does not automatically confer 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.**” (Emphasis added.) As discussed above, the Commission did not permit discovery in the Duke merger case because it decided not to hold hearings. Likewise, 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 take discovery. In Case No. 06-685-AU-ORD, 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

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<sup>6</sup> Id.

<sup>7</sup> Case No. 05-732-EL-MER, Entry (October 26, 2005) at 2.

<sup>8</sup> Case No. 05-732-EL-MER, Entry on Rehearing (December 7, 2005) at 4.

<sup>9</sup> Case No. 05-732-EL-MER, Finding and Order (December 21, 2005).

rule upon.”<sup>10</sup> OCC argued that this change was necessary to allow full participation in all Commission proceedings. The Commission found otherwise:

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.<sup>11</sup>

Similarly, in the Commission’s currently pending review of uncollectible expense riders,<sup>12</sup> the OCC filed discovery upon the LDCs. On July 14, 2010, the LDCs filed a Motion to Stay Discovery because the Commission had not scheduled a hearing. On August 31, 2010, the OCC filed a Motion to Compel Discovery. The Commission did not act upon either motion. However, by Entry dated November 3, 2010, the Commission acted upon other pending motions. The OCC filed an Application for Rehearing on December 3, 2010, alleging that the Commission erred by not acting upon the OCC’s Motion to Compel Discovery. The Commission did not rule upon the OCC’s Application for Rehearing within thirty days, and the OCC’s Application for Rehearing was thus denied by operation of law.

As in the cases cited above, the Commission should again reject any argument by OCC that by merely opening this docket and permitting comments, Columbia is automatically subject to OCC discovery. OCC’s discovery is premature and improper. For the reasons discussed above, the Commission should grant this Motion, and discovery should be stayed until the Commission decides the nature and scope of any further proceedings. If the Commission decides not to conduct a hearing, then no discovery should be had. If the Commission determines that it is going to hold a hearing, it should direct that any discovery be strictly limited to only those relevant objections raised with respect to the Revised Program Outline, and to the relevant objections to the transition from the SSO to the SCO.

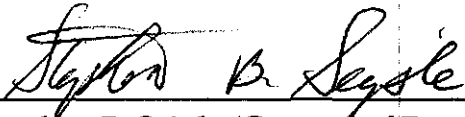
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<sup>10</sup> Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at 3.

<sup>11</sup> Id. at 3-4.

<sup>12</sup> Case No. 08-1229-GA-COI

Respectfully submitted,  
**COLUMBIA GAS OF OHIO, INC.**

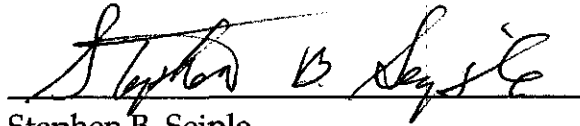
  
\_\_\_\_\_  
Stephen B. Seiple (Counsel of Record)

Stephen B. Seiple, Asst. General Counsel  
Brooke E. Leslie, Counsel  
200 Civic Center Drive  
P. O. Box 117  
Columbus, Ohio 43216-0117  
Telephone: (614) 460-4648  
Fax: (614) 460-6986  
Email: sseiple@nisource.com  
bleslie@nisource.com

Attorneys for  
**COLUMBIA GAS OF OHIO, INC.**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Stay Discovery was served upon all parties of record by regular U.S. Mail this 9th day of May, 2011.



Stephen B. Seiple

Attorney for

COLUMBIA GAS OF OHIO, INC.

## SERVICE LIST

M. Howard Petricoff  
Vorys, Sater, Seymour & Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008

Craig Goodman/Stacey Rantala  
National Energy Marketers Association  
3333 K. Street, N.W., Suite 110  
Washington, DC 20007

John Dosker  
Stand Energy Corporation  
1077 Celestial Street, Suite 110  
Cincinnati, OH 45202-1113

Barth E. Royer  
Bell & Royer Co., LPA  
33 South Grant Ave.  
Columbus, OH 43215-3927

David C. Rinebolt  
Colleen Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
P.O. Box 1793  
Findlay, OH 45839-1793

Thomas O'Brien  
Bricker & Eckler, LLC  
100 S. Third Street  
Columbus, OH 43215



Larry Gearhardt  
Ohio Farm Bureau Federation  
280 N. High Street  
P.O. Box 18283  
Columbus, OH 43218-2383

David Boehm  
Boehm, Kurtz and Lowry  
36 E. 7<sup>th</sup> Street, Suite 1510  
Cincinnati, OH 45202-4454

Steve M. Sherman  
Krieg DeVault LLP  
One Indiana Square, Suite 2800  
Indianapolis, IN 46204

Lisa M. Simpkins  
Constellation Energy Resources  
111 market Place, Suite 500  
Baltimore, MD 21202

Paul Goldberg  
5330 Seaman Rd.  
Oregon, OH 43616

Larry S. Sauer  
Office of Ohio Consumers' Counsel  
10 E. Broad Street, Suite 1800  
Columbus, OH 43215-3485

Christopher D. Young  
Constellation Energy Resources, LLC  
111 market Place, Suite 500  
Baltimore, MD 21202

Shelia H. McAdams  
Marsh & McAdams  
204 W. Wayne Street  
Maumee, OH 43537

Glenn Krassen  
Matthew W. Warnock  
Bricker & Eckler, LLP  
1001 Lakeside Avenue East, Suite 1350  
Cleveland, OH 44114

Samuel C. Randazzo  
McNees, Wallace & Nurik  
21 E. State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215-4228

Stephen A. Ariyan  
Sempra Energy Trading LLC  
58 Commerce Road  
Stamford, CT 06902

Michael D. Dortch  
Kravitz, Brown & Dortch, LLC  
65 E. State Street, Suite 200  
Columbus, OH 43215-4277

Lance M. Keiffer  
700 Adams St., Suite 250  
Toledo, OH 43064-5859

W. Jonathan Airey  
Vorys, Sater, Seymour and Pease LLP  
52 E. Gay Street/P.O. Box 1008  
Columbus, OH 43216-1008

Carrie E. Carbone  
Bacewell & Guiliani LLP  
1445 Ross Avenue, Suite 3800  
Dallas, TX 75202-2711

Thomas R. Hays  
3315 Centennial Rd., Suite A-2  
Sylvania, OH 43560

Paul Skaff  
Leatherman, Wintzler, Dombey & Hart  
353 Elm Street  
Perrysburg, OH 43551

Leslie Kovacik  
Department of Public Utilities  
420 Madison Ave., Suite 100  
Toledo, OH 43604

Stephen A. Reilly  
Assistant Attorney General  
Public Utilities Section  
180 E. Broad Street  
Columbus, OH 43215

James E. Moan  
4930 Holland-Sylvania Rd.  
Sylvania, OH 43560

Chris Hendrix  
Director of Markets & Compliance  
Energy Regulations & Legislation  
Wal-Mart Stores, Inc.  
2001 Southeast 10<sup>th</sup> Street  
Bentonville, AR 72716-0550

Dane Stinson  
Bailey & Cavalieri LLC  
10 West Broad Street, Suite 2100  
Columbus, OH 43215

Brian J. Bellenger  
Ballenger & Moore  
3401 Woodville Rd., Suite C  
Toledo, OH 43619

Shaun Forkin  
Mike Griffiths  
ProLiance Energy, LLC  
2 Prestige Place, Suite 150  
Miamisburg, OH 45342

Gary A. Jeffries  
Dominion Retail, Inc.  
501 Martindale Street, Suite 400  
Pittsburgh, PA 15212-5844

David M. Perlman  
Bracewell & Guiliani LLP  
2000 K. St., NW, Suite 500  
Washington, DC 20006-1872

John W. Bentine  
Mark S. Yurick  
Chester, Wilcox & Saxbe LLP  
65 E. State Street, Suite 1000  
Columbus, OH 43215

Gregory D. Russell  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, OH 43215