BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Motion to	)	
Modify the December 2, 2009 Opinion	)	Case No. 12-2637-GA-EXM
and Order and the September 7, 2011	)	
Second Opinion and Order in Case No. 08-1344-GA-EXM	)	

MEMORANDUM CONTRA THE JOINT MOTION TO MODIFY ORDERS GRANTING EXEMPTIONS AND THE JOINT MOTION FOR BIFURCATION OF THE CAPACITY AND BALANCING ISSUES ON AN EXPEDITED BASIS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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October 11, 2012

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE"), on behalf of the 1.2 million residential natural gas customers of Columbia Gas of Ohio, Inc. ("Columbia" or the "Utility"), submits this Memorandum Contra to oppose two joint motions ("Joint Motions") that were filed by Columbia Gas, the PUCO Staff and natural gas marketers ("Marketers") —and not signed by any consumer advocate. The motion to modify the prior order would chart a course toward the potential future termination of customers' ability to choose an offer through the utility that has been providing them with low natural gas prices. The other motion (to bifurcate) would severely limit the regulatory process that exists for protecting Ohio customers in this case.

Specifically, the Joint Motions were signed by Columbia, the Ohio Gas Marketers Group ("OGMG"),[1] Retail Energy Supply Association ("RESA"),[2] Dominion Retail, Inc. and the PUCO Staff ("Staff") (collectively "Columbia, PUCO Staff and the Marketers"). It is worth noting that many of the members of OGMG are also members of RESA.

Among the issues addressed in the Joint Motion to Modify Orders Granting Exemption is Columbia's potential exit from the merchant function. The "exit," as it has become known, would result—if it occurs—in customers no longer having the option of buying natural gas from a utility-provided default service -- in this case the Standard Choice Offer ("SCO"). The SCO is a market-based rate established through an open auction process that has been spectacularly successful in providing Ohioans with a low-priced option for natural gas. Instead, if an exit were to occur in the future, customers would be required to take service from one of the marketers that signed the settlement or other marketers.

The potential exit from the merchant function by a local distribution company ("LDC") is one of the most significant issues facing natural gas customers today. Thus, this case, which could establish the parameters under which Columbia may someday file to exit from the merchant function, is of paramount importance to customers. Therefore, the Commission should deny the Joint Motion to Modify Orders Granting Exemption.

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[1] The Ohio Gas Marketers Group for purposes of this proceeding includes: Constellation NewEnergy, Inc., Direct Energy Services, LLC, Direct Energy Business, LLC, Interstate Gas Supply, Inc., Integrys Energy, Inc., Just Energy Group, Inc. and SouthStar Energy LLC.

[2] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.

Columbia, PUCO Staff and the Marketers have moved the Commission for Bifurcation of the Capacity and Balancing Issues. However, these are important issues in this proceeding affecting customers' rates. Those issues include the stipulators' proposed allocation of the revenues from off-system sales in a way that awards Columbia with up to $60 million that would otherwise go to customers. The favorable allocation of off-system sales revenues for the Utility was agreed upon in the Stipulation without any commensurate benefit to customers in exchange for the $60 million. Another issue is whether the proposed renewal of upstream interstate pipeline capacity contracts from Columbia's own affiliates. The associated costs for this upstream pipeline capacity is paid for by Columbia's customers. OCC and OPAE are raising concerns which includes whether the capacity (and its cost) are needed to provide service at just and reasonable rates. No customer parties have signed the Stipulation. Therefore, the Commission should deny the Joint Motion to Bifurcate the Capacity and Balancing Issues.

Columbia, Staff and the Marketers have also moved for expedited consideration. It is imperative for customers that the PUCO not rush its review of these important issues. Therefore the Commission should deny the Joint Motion and instead establish a fair and reasonable procedural schedule that permits a complete review of the proposal in an oral evidentiary hearing for the reasons discussed below.

II. ARGUMENT

A. The Joint Motion to Modify Orders Granting Exemption Should Be Denied.

Columbia, the PUCO Staff and the Marketers want to modify the exemption Orders that includes among other issues, a resolution of the Company's upstream pipeline capacity contract renewal, off-system sales revenue sharing mechanism and a potential exit from the merchant function. Presently, the exemption orders provide for the issues of contract capacity and off-system sales capacity contracts; however, there is no provision for Columbia to exit the merchant function. The Stipulators negotiated a Stipulation that lacks a consumer party, the opportunity to have the Commission decide these issues has been compromised by the settlement process in this case. The Utility has negotiated for $60 million in off-system sales derived from assets paid by customers, and protected upstream pipeline capacity that is potentially unnecessary in the provision of service at just and reasonable prices – both issues highly valued by the utility, in exchange for the potential exit from the merchant function – an issue highly valued by the Marketers.

These parties argue that the Commission has authority to modify or abrogate the Orders[3] that granted Columbia's Exemption from GCR regulation.[4] The authority relied upon is found in R.C. 4929.08. R.C. 4929.08 states:

> (A) The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code. As to any such company, the commission, upon its own motion **or upon the motion of any person adversely affected** by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority **only under both of the following conditions**:
>
> > **(1) The commission determines that the findings upon which the order was based are no longer valid and that**

[3] *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 Service,* Case No. 08-1344-GA-EXM, Opinion and Order (December 2, 2009) and Second Opinion and Order (September 7, 2011) ("Exemption Orders").

[4] Joint Motion Memorandum in Support at 6-7 (October 4, 2012).

the abrogation or modification is in the public interest; (Emphasis added).

Although citing to R.C. 4929.08, Columbia, Staff and the Marketers have failed to explain how they are **adversely affected by the Exemption Orders**, how the Exemption Orders are based upon findings that are no longer valid, or how granting the requested modifications would be in the public interest. Therefore, the Joint Motion to Modify Orders Granting Exemption should be denied.

1. The Exemption Orders' Establishment of the SCO Auction should not be Modified.

Columbia, the PUCO Staff and the Marketers state "the auction process is no longer new or novel, and there is no longer uncertainty about the auction process."[5] In fact, "[t]he Retail Price Adjustment in Columbia's second and third auctions decreased from that in the first and second auctions respectively."[6] Far from an adverse impact, this result is a strong indication that the SCO has continued to reduce prices for the customers of Columbia. Ohioans would think of this result as a good thing and not something to be abandoned.

There is no explanation in the Joint Motion as to how Columbia, the PUCO Staff or Marketers have been adversely affected by the auction process that has been providing lower prices for customers than the prior Gas Cost Recovery ("GCR"). And there is no explanation as to how it would be in the public interest to abandon the auction process at this juncture of Columbia's participation in standard service offer ("SSO") / standard choice offer ("SCO") auctions.

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[5] Joint Motion Memorandum in Support at 8 (October 4, 2012).

[6] Id.

Further, it would be especially problematic for Columbia, the PUCO Staff and the Marketers to suggest that the findings with regard to the auction upon which the Exemption Orders are based do somehow now fit the statutory standard of being "invalid." Columbia has not completed providing SCO service through even a single winter heating season.[7] And, as stated, the excellent result for customers, if anything, validates the exemption orders for protecting customers' natural gas bills. Therefore, the Commission should view the exemption orders as not invalid or otherwise infirm under Ohio law, and deny Columbia, Staff and the Marketers' request

2. The Exemption Orders' Approval of the Upstream Interstate Capacity Contracts should not be Modified as Columbia, Staff and the Marketers Propose.

Columbia, the PUCO Staff and the Marketers do suggest that the upstream interstate pipeline capacity under contract represent findings in the Exemption Orders that are no longer valid. The Joint Motion states:

> While there is now less uncertainty about the auction process, since the 2009 Stipulation was approved in December 2009, the introduction of Marcellus shale gas into the marketplace has created greater uncertainty about Columbia's best use of interstate pipeline capacity. The introduction of **Marcellus shale gas, and subsequently Utica shale gas, has created the potential for new gas supply opportunities in Ohio.** How these opportunities will develop is unknown, but **the opportunities could potentially impact Ohio utilities' use of interstate pipeline capacity**. It will likely take several years to fully assess the full impacts of shale gas on Ohio markets, and **until all market participants can assess these impacts it makes sense not to make long-term interstate pipeline capacity contract decisions that could adversely impact Columbia's ability to make the best use of all pipeline**

[7] *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 Service*, Case No. 08-1344-GA-EXM, Finding and Order at 1 (February 14, 2012) (Columbia's first SCO auction was conducted on February 14, 2012 for service to be provided April 1, 2012 through March 31, 2013).

> **capacity available to it.** Consequently, the factual assumptions underlying Columbia's capacity contracts have changed since the Commission issued the Exemption Orders. Yet, the 2009 Stipulation approved by the Exemption Orders provides for a peak day capacity portfolio that is not geared to meet Columbia's needs during the period after the Stipulation's initial term.[8] (Emphasis added).

The Joint Motion states that the introduction of shale gas creates uncertainty about how this interstate capacity is "best used." However, the Joint Motion fails to mention, let alone explain how the findings in the Exemption Orders are invalid, or how Columbia, Staff and the Marketers are adversely affected by this provision of the Exemption Orders.

Yet, Columbia, Staff and the Marketers claim that it is in the public interest for the Commission to permit Columbia and its stakeholders to maintain flexibility, **particularly with regard to interstate pipeline capacity, while the market for shale gas develops.[9]** However, despite this acknowledgement, Columbia, Staff and the Marketers have agreed to extend the upstream interstate contracts -- including Columbia's affiliate contracts -- for five years. Therefore, the opportunity to review Columbia's contracts should be available periodically throughout the term of the Stipulation thereby maintaining needed flexibility as the market for shale gas develops and its effects on natural gas commodity markets and prices are known. Because the pace of the shale market development is unknown retaining flexibility with the upstream interstate pipeline capacity (and protecting customers against paying for unneeded capacity) may be advantageous for customers, who are asked to pay these capacity costs.

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[8] Joint Motion Memorandum in Support at 8 (October 4, 2012).

[9] Joint Motion Memorandum in Support at 8 (October 4, 2012 (emphasis added)).

Columbia, Staff and the Marketers may argue that five years is not long term; however, a simple look back five years in the natural gas industry supports a contrary conclusion. Over the past five years, there have been drastic and dramatic changes to natural gas commodity prices, and the means by which customers acquire the commodity from the Utility. Five years ago gas prices were approximately $7.25 per Mcf according to the New York Mercantile Exchange ("NYMEX") compared to today's price of approximately 3.25 per Mcf.[10] Much of that price decline is attributable to a combination of decreased industrial demand due to the economic downturn and the introduction of Appalachian shale gas into the market place.[11] Yet five years ago shale gas was not a part of the Ohio regulatory lexicon, while today, shale gas is seen as an enormous boon for Ohio's economic recovery. Finally, five years ago, customers purchased gas from Columbia under the GCR,[12] whereas today the SCO auction is the default service for customers.[13] The Commission should make sure that any Stipulation provides the necessary flexibility to take full advantage of the developing shale gas industry in Ohio.

The renewal of Columbia's upstream interstate pipeline capacity contracts has the effect of closing the door on any immediate investment that would provide for shale gas opportunities in Ohio during the next five years. The contract renewals (for obtaining natural gas from the Gulf of Mexico) without PUCO review could preclude infrastructure

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[10] http://www.igsenergy.com/uploads/files/nymex%209-13-12.jpg (NYMEX Natural Gas 12 month strip (average) price).

[11] http://www.igsenergy.com/uploads/files/nymex%209-13-12.jpg (NYMEX Natural Gas 12 month strip (average) price).

[12] *In re Columbia 2008 GCR Case,* Case No. 08-221-GA-GCR, at III-14 Final Report Management/Performance Audit by The Liberty Consulting Group (November 20, 2008).

[13] *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 Service,* Case No. 08-1344-GA-EXM, Finding and Order at 1 (February 14, 2012) (Columbia's first SCO auction was conducted on February 14, 2012 for service to be provided April 1, 2012 through March 31, 2013).

investment in Ohio which is necessary to develop shale opportunities into the future, and which is in direct contrast to the acknowledgement in the Joint Motion. The Commission should not approve the provisions in the Stipulation that provide for insufficient "flexibility."[14]

With regards to the upstream interstate pipeline capacity that is under contract with Columbia's affiliate, the Stipulation provides the following:

> Columbia shall renew 100% of its existing Columbia Gulf FTS-1 capacity through March 31, 2016. Thereafter, Columbia will renew its Columbia Gulf FTS-1 contracts to cover 75% of the volume under contract prior to March 31, 2016, and such renewal shall be for the two-year period April 1, 2016 through March 31, 2018.[15]

Furthermore, the Stipulation provides:

> There will be no contract capacity review via the Second Agreement during the term of the Second Agreement

The Stipulation does not build in flexibility to address changes to the natural gas market in Ohio due to the introduction of shale gas. The Stipulation does permit Columbia to renew these upstream capacity contracts with Columbia's affiliate for 100% of currently existing capacity under contract for the first three years of the Stipulation term (April 1, 2013 through March 31, 2016), and assures that there will be no review of Columbia's capacity contracting decisions during the five-year term of the Stipulation. Columbia, Staff and the Marketers' means of addressing the desired flexibility on the interstate pipeline capacity issue in the Stipulation was to create no flexibility at all. Therefore, the Joint Motion should be denied because Columbia has failed to demonstrate the capacity is necessary to provide services to its customers at just and reasonable prices.

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[14] Joint Motion Memorandum in Support at 8 (October 4, 2012).

[15] Stipulation at 4 (October 4, 2012).

3. The Exemption Orders should not be Modified to Implement an Exit from the Merchant Function as Columbia, Staff and the Marketers Propose.

Columbia, Staff and the Marketers also suggest that Columbia's recent contemplation of a potential exit from the merchant function somehow results in the findings upon which the Exemption Orders are based to no longer be valid.[16] The Joint Motion fails to provide any argument to support this statement, or explain how Columbia, Staff and the Marketers are adversely affected by a market-based SCO auction option for customers. Columbia, Staff and the Marketers allege that "it would be in the public interest to allow Columbia to exit the merchant function entirely if certain levels of shopping is achieved. *** by promoting an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905 and 4909 of the Revised Code[.]" R.C. 4929.02(5), (6), and (7).[17]

The arguments that Columbia, Staff and the Marketers make are superficial at best. First, the SCO already provides Columbia with exemption from regulation of natural gas services and goods under R.C. 4905 and R.C. 4909.[18] Furthermore, the shopping level threshold that the Stipulation provides for is 70%.[19] But Hess

[16] Joint Motion Memorandum in Support at 8 (October 4, 2012).

[17] Joint Motion Memorandum in Support at 9 (October 4, 2012).

[18] Joint Motion Memorandum in Support at 8 (October 4, 2012. ("The exemption from regulation granted Columbia in Case No. 08-1344-GA-EXM was the first such exemption for Columbia. In abandoning the GCR and implementing gas supply auctions, Columbia was initiating a new method of supplying gas to customers.")

[19] Stipulation at 5-9 (October 4, 2012)

Corporation[20] points out in its Motion to Intervene that 70% is too low a threshold.[21] According to Hess, if Columbia, the PUCO Staff and the Marketers were to actually proceed with an exit for residential customers under that metric, approximately 360,000[22] customers would be forced to become Choice customers. Hess opposes the Stipulation and makes points favorable to continuing the auctions. Contrary to the Joint Motion, if the customers' decision to remain on the SCO has been an educated and conscious decision, then a decision to select a supplier in Columbia's Choice Program because the SCO option has been eliminated does not make these customers to "willing buyers." In no circumstance does the elimination of the SCO option transform a customer that prefers the SCO into a "willing buyer." Therefore, the Commission should deny the Joint Motion.

4. The Exemption Orders should not be Modified to Implement Changes to the Balancing Fee or to the Billing System as Columbia, Staff and Marketers Propose.

There are other modifications to the Exemption Orders that Columbia, Staff and the Marketers allege are in the public interest to modify. The Joint Motion states:

> The other substantive modifications to the Exemption Orders are also in the public interest. [1] Modifying the Balancing Fee, which is currently charged to Suppliers (and factored into Suppliers' charged rates), **to instead charge it directly to customers would improve transparency in the way marketers' rates are set**. [2] The proposed modifications would allow Columbia to upgrade its computer systems to allow for more varied and diverse marketing services.* * *.[23]

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[20] Hess Corporation Motion to Intervene at 6 (October 11, 2012). (Hess won tranches in COH's standard service offer ("SSO") auction in 2010-2011 and SCO auction in 2012-2013.)

[21] Hess Corporation Motion to Intervene at 6 (October 11, 2012).

[22] See also Hess Corporation's Motion to Intervene at 5 ((October 9, 2012). (1.2 million Columbia customers x .30 (percentage of remaining SCO customers) = 360,000 customers.)

[23] Joint Motion Memorandum in Support at 9 (October 4, 2012) (emphasis added).

With regard to these modifications, Columbia, Staff and the Marketers fail to allege that the findings in the Exemption Orders are no longer valid, or that these signatory parties are adversely affected by these provisions. Furthermore, the allegation by Columbia, Staff and the Marketers that these modifications are in the public interest is unfounded.

With regard to the modification to the balancing fee, the Stipulation states:

> The Balancing Fee will be reduced from $.32/Mcf to $.27/Mcf. The Balancing Fee will also be charged directly to customers instead of being charged to Suppliers.[24]

The reduction in the charge from $0.32 / Mcf to $0.27 / Mcf might appear to be a good modification for Columbia's customers. But proposing the modification to the Exemption Orders that modifies how this cost will be charged to customers' needs further consideration. This charge is currently included in the SCO rate and in the rates paid by Choice and Aggregation customers. Absent a corresponding decrease in the current rates that customers pay to SCO, Choice and Aggregation suppliers, then customers will be subject to being charged twice for the same balancing fee--once, as part of their current contracts that include the balancing charge, and then a second time as a direct charge from Columbia. The modification can be addressed in future SCO auctions to assure that the bids exclude the cost of the balancing service, and customers will only be charged for this service once. However, in order to prevent this inappropriate outcome from harming Choice and governmental aggregation customers, there must be an opportunity and a requirement that current contracts be modified to reflect the reduced charges from Columbia. Such an opportunity or requirement is not included as part of the Stipulation

[24] Stipulation at 3.

in this case. Therefore, to the extent customers could be billed twice for the same service, this modification is not in the public interest.

The proposed modification to permit Columbia to upgrade its billing system to provide for more varied and diverse billing services has additional problems, not the least of which is that there is no proof that Columbia needs to make these proposed and un-quantified modifications but for a potential future exit from the merchant function. The Stipulation provides for specific enhancements to the billing system.[25] However, the Stipulation makes no attempt to quantify the potential costs the Utility could incur as a result of making the billing system enhancements. Nor does the Stipulation describe the nature or extent of the review of these costs of the billing system enhancements. Nevertheless the Stipulation provides for the costs of the billing system enhancements to be passed on to Columbia's customers.

The Stipulation states:

> The Parties agree that Columbia may continue to include within the CHOICE/SCO Reconciliation Rider ("CSRR") the costs of implementing the CHOICE education program, the pre-exit-the-merchant-function education programs, **and the billing system changes described above**. The above program costs shall be subject to review during the Commission's annual audit of the CSRR.[26] (Emphasis added).

The fact that there is no estimate of what Columbia could potentially spend on enhancing the billing system, nor is there any provision for a review of the costs by an independent auditor to ascertain the prudence of Columbia's expenditures. The annual audit of the CSRR is merely a financial audit, by the Company's outside auditor. The enhancements that are sought do not, of course, come free, and the Utility, Staff and the Marketers

[25] Stipulation at 11-12 (October 4, 2012).

[26] Stipulation at 12 (October 4, 2012).

propose that customers pay for the changes. Therefore, this modification to the Exemption Orders should not be considered in the public interest.

5. The Exemption Orders should not be Modified to Implement Changes to the Security Requirements as Columbia, Staff and Marketers Propose.

Moreover, there are proposed modifications in the Stipulation that are not mentioned by Columbia, Staff and Marketers in the Joint Motion to Modify Orders Granting Exemption. One such modification involves SCO supplier Security Requirements. The Stipulation states:

> In addition to the Letter of Credit, SCO Suppliers will be required to provide Columbia with a cash deposit in the amount of ten cents per Mcf multiplied by the initial estimated annual delivery requirements for the SCO Program Year of the tranches won by that SCO Supplier.[27]

There is no explanation provided for why SCO customers should incur a $10 per Mcf charge from SCO suppliers that is not also levied on Choice suppliers. This charge is discriminatory. The charge will only serve to give Choice Suppliers added "headroom" necessary to make their offers more favorable in comparison to the SCO, and thereby assist moving Columbia's Choice participation levels towards the 70 % threshold required to initiate an exit. This provision was not proposed, as required by R.C. 4929.08, because the Utility was adversely affected by the Exemption Orders or because the findings the Exemption Orders were based on are invalid or that the modification is in the public interest.

[27] Stipulation at 3 (October 4, 2011).

Furthermore, Columbia, Staff and the Marketers also cite to two cases this year in which the Commission granted modifications to existing exemption orders.[28] *See In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM*, Case No. 11-6076-GA-EXM, Opinion and Order, at 5 (Feb. 14, 2012) ["Dominion Exemption Case"]; *In the Matter of the Application and Joint Stipulation and Recommendation of Vectren Energy Delivery of Ohio, Inc., for Approval of its Exemption Authority Granted in Case No. 07-1285-GA-EXM*, Case No. 12-483-GA-EXM, Opinion and Order, at 5 (May 16, 2012) ["Vectren Exemption Case"].[29] The statute provides the Commission the authority that Columbia, Staff and the Marketers assert. However, there is a significant difference between the Dominion Exemption Case and the Vectren Exemption Case (cited by Columbia, Staff and the Marketers) and this case. The cited cases were much more narrow in scope in comparison to the much more expansive modifications sought through the Stipulation in this case.

The Dominion Exemption Case modified the Exemption Order by combining the SSO and SCO auctions into a single SCO auction.[30] The Vectren Exemption Case modified the Exemption Order by: 1) In the event that VEDO's Uncollectible Expense Rider is altered, a discount to the purchase of SCO and Choice suppliers' accounts receivable is necessary, as is a provision for adjustment to the then-effective SCO Retail Price Adjustment. 2) VEDO intends to retire its liquid propane ("LP") plants and pipeline prior to the Winter of 2012-2013. This will change the system capacity and supply

[28] Joint Motion Memorandum in Support at 7 (October 4, 2012).

[29] Id.

[30] In re Dominion Exemption Case, Case No. 11-6076-GA-EXM, Stipulation at 2 (December 28, 2011).

requirements which must be addressed. 3) The currently approved SCO Auction Contingency Plan provides for reversion to a Standard Sales Offer ("SSO") Service auction in the event that the SCO and back-up SCO auctions both fail, followed by a reversion to GCR Service provided by VEDO if the SSO auction should fail. In the current environment, it is unlikely that an SSO auction will succeed after two SCO auctions have failed. Also, after further evaluation by VEDO, it has been determined that the reversion to GCR Service would require the unwinding of certain key aspects of the Choice Program such as cooperative balancing and coordinated Provider of Last Resort ("POLR") Service that had not previously been ascertained. Accordingly, in the event of SCO auction failures, a new third option is indicated for 2012 in order to ensure continuity of service and provide time for the members of the Exit Working Group to study and address the cause of the failures and new options going forward. 4) VEDO's Exit Transition Cost ("ETC") Rider has remained relatively stable over the years in which it has been effective. It is, therefore, administratively confusing and unnecessary to continue filing it quarterly.[31] And neither of these two Exemption Cases proposed a potential automatic exit from the merchant function

Finally, taken as a whole, the Stipulation raises fundamental concerns about wheher customers will be provided with adequate benefits from competition with the prospect of reducing the ability of the market to provide lower prices to customers. The ability of marketers to compete to find the lowest priced pipelines capacity is virtually eliminated. Customers would now be directly liable for balancing fees, eliminating the ability of marketers to compete through discounting those fees. Loss leader offers,

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[31] In re Vectren Exemption Case, Case No.12-483_GA-EXM, Stipulation at 2-3 (January 31, 2012).

designed to attract new customers, are a common feature of a competitive market and the Stipulation minimizes the ability of marketers to compete in this area. The Stipulation further reduces competitive options for SCO auction participants by requiring more expensive credit provisions than those applied to other marketers. There has never been a default by a winner of the SCO auction, in contrast with the failure of three marketers on the Columbia system in the winter of 2000 in the face of substantial price increases. The final challenge for competition is the elimination of the SCO auction altogether. The auction has proven to be an effective competitive option in terms of price than the bilateral market. Overall, the proposed Stipulation fails to ensure the benefits of competition for customers.

For all the reasons stated above, the Commission should deny the Joint Motion to Modify Orders Granting Exemption.

B. Joint Motion for Expedited Ruling Should Be Denied.

The Joint Motion requests an expedited ruling on the Joint Motion to Modify Orders Granting Exemption.[32] However, the Joint Motion was filed pursuant to R.C. 4929.08(A) which requires notice and a hearing before the previous Commission orders may be modified. Therefore, an expedited ruling on the Joint Motion would be unlawful.[33]

Columbia, the PUCO Staff and the Marketers ask the Commission for expedited ruling in this proceeding. The Joint Motion states:

[32] Joint Motion Memorandum in Support at 10 (October 4, 2012).

[33] See Hess Corporation's Memorandum Contra Joint Motions (October 9, 2012).

> Due to the fact that the supplier education meeting for the next SCO auction will be held on or about December 4, 2012, the Joint Movants respectfully request an expedited ruling on this Joint Motion. For the same reason, the Joint Movants further request that the Commission bifurcate this proceeding, so as to allow for a determination on the time-sensitive capacity-related issues in the attached Joint Stipulation and Recommendation (as well as the other issues not related to Columbia's potential exit of the merchant function and Monthly Variable Rate Program) in sufficient time for Columbia to incorporate the necessary revisions to the SCO Auction process into the materials and presentation for its supplier education meeting – ideally, by November 30, 2012.[34]

There are several reasons for the Commission to deny this Motion for expedited ruling.

The December 4, 2012 date is not cast in stone, and should not be the basis for expedited consideration. The education meeting is for Choice suppliers who may wish to bid on tranches in the next SCO auction. However, Columbia should not need much lead time prior to the auction to educate suppliers on changes to the SCO auction that will not take place until February 2013, and which suppliers are already familiar with.

Furthermore, Columbia, Staff and the Marketers have been responsible for the delays that created what they now claim is the need for the request for expedited consideration. Between March 6, 2012 and June 4, 2012 there were six stakeholder meetings. At the June 4, 2012 meeting it was understood that Columbia, Staff and the Marketers had reached an agreement in principle, and were going to start drafting a Stipulation. On September 5, 2012, three months later, that agreement in principle was reduced to a Stipulation that was shared with the remaining stakeholders. On October 4, 2012, another month later, the Joint Motion and Stipulation were filed with the Commission.

[34] Joint Motion Memorandum in Support at 10 (October 4, 2012).

Columbia, the PUCO Staff and the Marketers needed four months to prepare and file a stipulation. But they now want the Commission to approve it in six weeks, by November 30, 2012, on an expedited basis, which incredibly would also include the time for non-stipulating parties to litigate the issues.[35] "The Joint Movants respectfully suggest that expedited discovery (if necessary), followed by a hearing and oral argument (in lieu of briefs) on **the non-exit-related provisions of this Joint Motion**, may best allow for a timely ruling on those issues."[36]

It is unclear from the Joint Motion why parties that oppose the Stipulation should have their ability to present their proposals to the PUCO compromised -- and basic due process rights trampled -- because the Company, Staff and Marketers took the time they did to present their Stipulation to the Commission. Therefore, the Commission should deny the Joint Motion for Expedited Consideration in this proceeding.

C. The Stipulation and Recommendation Should Not Be Bifurcated.

The Commission relies upon a three-prong test for evaluating Stipulations. The Court in *Consumers' Counsel* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit ratepayers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?[37]

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[35] Joint Motion Memorandum in Support at 10 (October 4, 2012).

[36] Joint Motion Memorandum in Support at 10 (October 4, 2012) (emphasis added). (Nowhere in the Joint Motion does Columbia, Staff and the Marketers explain what provision constitute the "non-exit-related provisions.")

[37] *Consumers' Counsel*, 64 Ohio St.3d at 126, 592 NE 2nd at 1373.

However, if this proceeding is bifurcated as requested by Columbia, Staff and the Marketers, the Commission will be unable, under the three-prong test, from considering whether the entire "settlement, as a package, benefit[s] [customers] and the public interest." It would seem impossible for the Commission to rely on bifurcated issues that presumably will be adjudicated in a subsequent phase of this proceeding to make a determination required under the second prong of the Commission' standard.

Another consideration for the Commission is that in the absence of customer advocates (including OCC and OPAE) signing the Stipulation, the Stipulation lacked a sufficient tension for addressing the marketers' interests and Columbia's interest in furthering their business models. The Staff is only considered a party for purposes of entering into the Stipulation.[38] And the PUCO's three-prong standard for settlements that are not signed by all parties invites this result because it unfortunately and unfairly offers to those who do sign an advantage (against other parties) in obtaining approval of their proposals that will be considered as a package.

Under the facts in this case, the Commission has been presented a Stipulation that resolves issues that affects the financial interests of the Utility's customers, yet the Stipulation has no customer support. The limited participation in this Stipulation should cause the Commission pause when looking at the contrast in participation in the initial Columbia exemption case, Case No. 08-1344-GA-EXM. In the 08-1344-GA-EXM Case, the signatory parties on the Stipulation were many: Columbia, PUCO Staff, OCC, OGMG, Dominion Retail, Inc., OPAE, Energy, DTE Energy Trading, Inc., Timken Company, Glen Gery Corporation, Honda of America, Inc., Northwest Ohio Aggregation

[38] Stipulation at 1, see also Ohio Adm. Code 4901-1-30.

Coalition, Ohio Energy Group, Ohio Farm Bureau Federation, Ohio Schools Council, Stand Energy Corporation, Proliance Energy, LLC, the National Energy Marketers Association and Walmart Stores, Inc. There was a much greater diversity of participation in the 08-1344-GA-EXM Case that included residential, farm, commercial and industrial customer participation, also governmental aggregation, a council of schools, and low-income weatherization providers were also among the signatory parties. The component that the settlement be representative of the numerous stakeholders is missing from the Stipulation filed in this case.

With regards to the specific request in the Joint Motion for Bifurcation, Columbia, Staff and the Marketers have not been clear as to exactly which provisions of the Stipulation would be bifurcated and considered on an expedited basis and which ones would not. The Joint Motion states: "For the same reason, the [Columbia, Staff and the Marketers] further request that the Commission bifurcate this proceeding, so as to allow for a determination on the time-sensitive capacity-related issues in the attached Joint Stipulation and Recommendation (as well as the other issues not related to Columbia's potential exit of the merchant function and Monthly Variable Rate Program) * * *."[39] However, those particular provisions are not specifically defined in the Stipulation nor enumerated in the Joint Motion. Nevertheless, it is presumed that one of the issues the Utility would be interested in achieving an expedited approval on – although not mentioned in the Joint Motion -- would be the off-system sales provision.

[39] Joint Motion Memorandum in Support at 10 (October 4, 2012).

With regards to the off-system sales issue, the Commission should not lose sight of the customers' financial interests in this case. Customers who did not sign the Stipulation are proposed to give up $60 million in off-system sales transaction revenues to Columbia, and will be required to pay for upstream interstate pipeline capacity that may not be needed that can be used to help generate the off-system sales. And customers may ultimately be deprived of an SCO auction option despite its very favorable impact on their natural gas bills.

The off-system sales and capacity release revenue sharing mechanism has been an issue of significant importance to residential customers for a number of years. The reason is that those revenues are generated by the Utility using assets paid for in their entirety by customers. In the Stipulation in this case, the Utility is provided a cap of up to $60 million in off-system sales transaction revenues. This is significant level of revenues for Columbia to potentially retain, and is accomplished by essentially continuing the structure of the revenue sharing mechanism that was in place during the term of the 08-1344-GA-EXM Case Stipulation. The 08-1344-GA-EXM Stipulation awarded the additional off-system sales transaction revenues to Columbia as part of a quid-pro-quo in which customers received other benefits commensurate with the value of the of-system sales transaction revenues,. There is no such exchange of value in this case. Instead, Columbia is merely being enriched by up to $60 million.

That structure results in Columbia retaining the majority of these revenues rather than returning the majority of these revenues to customers. In the 08-1344-GA-EXM Case Stipulation, OCC had negotiated for a more favorable sharing mechanism. That Stipulation stated:

> The OSS/CR Program's revenue sharing mechanism is limited to a three-year term (April 1, 2010 through March 31, 2013). **That mechanism does not continue unless agreed to by the OCC and the Staff. Absent an agreement on an extension of the OSS/CR Program's revenue sharing mechanism, the default mechanism is 80% of the revenues to customers and 20% to Columbia.** Columbia, Staff, or the OCC may petition the Commission for a change to the default mechanism, whereas the other Parties retain the right to oppose any such changes.[40] (Emphasis added).

A more favorable sharing mechanism should replace the existing mechanism that would provide customers 80% of the off-system sales and capacity release revenues, as contemplated by the 08-1344-GA-EXM Stipulation.

Columbia's off-system sales and capacity release sharing mechanism was scrutinized by the auditor in the Utility's final gas cost recover ("GCR") management/performance ("M/P") audit. The M/P Auditor stated:

> Determining the sharing percentages (the percent allocation for sharing of incremental revenues between the LDC and ratepayers) is a balancing act between providing an incentive to the LDC to actively market its unutilized assets, while not providing such a strong incentive so as to encourage the LDC to acquire more assets than would ever be required solely to reap the benefits of its share of the incremental revenues.
>
> In Liberty's experience, LDC shares of capacity release and net off-system sales revenues is typically in the 10% to 20% range, with some jurisdictions requiring all revenues to be flowed through to ratepayers. COH's share has been as high as 100% for some time periods in the past and is allowed to be as high as 65% under the current stipulation. While the incentive is intended to align the interests of COH with the continuing success of the CHOICE program, **it may have the perverse incentive of motivating the**

[40] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Service,* Case No. 08-1344_GA-EXM, Stipulation at 8 (October 7, 2009).

Company to acquire significantly more excess capacity than would ever be required.[41]

Under the present Stipulation, Columbia has retained nearly 60% of the off-system sales and capacity release revenues,[42] an amount that far exceeds the 10-20% recommended by the M/P auditor.

Further, there are issues about the need for (and paying for) some of Columbia's upstream pipeline capacity that it buys from its own affiliates. As noted in the audit report above, the M/P Auditor raised the circuitous issue of the incentive to retain excess capacity under contract if there are off-system sales revenues to be derived therefrom.

That same auditor on cross-examination testified that some of the capacity the Utility had under contract was excessive. The auditor stated:

> Q. Turn to Page III-14 of the audit report.
>
> A. Yes.
>
> Q. Under Item No. 8, the second paragraph, if you look at the second half of the last sentence in that paragraph, "It may have the perverse incentive," do you see that?
>
> A. Yes.
>
> Q. Using your words, what is the perverse incentive that you're talking about there?
>
> A. Generally, the higher the percentage of the revenues from capacity releases and off-system sales that an LDC receives, the more

[41] *In re Columbia 2008 GCR Case*, Case No. 08-221-GA-GCR, at III-14 Final Report Management/Performance Audit by The Liberty Consulting Group (November 20, 2008) (emphasis added).

[42] The Off-system sales revenue sharing mechanism was skewed in the customers' favor because of a significant transaction involving Storage Sales that in April 2010, and the annual $20 million cap provision that has been negotiated out of the current Stipulation. That transaction is excluded in deriving the above sharing percentages which reflects more normal off-system sales activity.

> incentive it has to acquire more capacity because it gets a higher reward.[43]
>
> * * *
>
> Q. Now, the end of your sentence there it says, "To acquire significantly more excess capacity than would ever be required." You use the words "more" and "excess." Does that mean that there is excess capacity within the system right now?
>
> MR. SEIPLE: Objection. Asked and answered.
>
> HEARING EXAMINER PRICE: Overruled.
> THE WITNESS: In my view, some of the capacity used to back up marketers is excess.[44]

The interesting point is that during the term of this M/P Audit, November 2005 through October 2008 was prior to the introduction of shale gas in Ohio, and the auditor at that time felt the capacity Columbia held under contract was excessive. It is without question that the introduction of shale gas has only exacerbated the likelihood that Columbia's capacity contracts include excess capacity.

The Commission may ask itself why would the Marketers give up on issues of importance such as off-system sales and contract capacity in exchange for an exit from the merchant function. The answer is fairly simple. The customers' share of off-system sales and capacity release revenues are used to offset the SCO/Choice program costs recovered from customers via the Choice/SSO/SCO Reconciliation Rider ("CSRR")

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[43] *In re Columbia 2008 GCR Case,* Case No. 08-221-GA-GCR, Tr. Vol. I (Teumim) at 67 (January 20, 2009).

[44] *In re Columbia 2008 GCR Case,* Case No. 08-221-GA-GCR, Tr. Vol. I (Teumim) at 67-68 (January 20, 2009).

mechanism.[45] So the Marketers have no claim to those revenues. In terms of the potential excess capacity under contract, the capacity is assigned to Marketers such that it matches the Choice/SCO suppliers' customer groups.[46] Because the capacity is allocated on a pro-rata basis based on the suppliers' served load, no supplier is put at a competitive disadvantage by holding excess capacity. The suppliers merely pass the costs of any excess capacity on to their customers.

The claim made in the Joint Motion is that the issues that are resolved by the Stipulation "involve interrelationships among complicated issues, including uncertainty as to how best contract for interstate pipeline capacity in a changing marketplace."[47] While it is true that the issues involve interrelationships, these issues may not be as complicated as Columbia, Staff and the Marketers are alleging.. For its part Columbia's revenues would be enhanced by maximizing the revenues it keeps from off-system sales transactions. And Columbia wants to protect its upstream capacity contracts that it has in place with its affiliate. The Off-system sales revenues are shared between the Utility and customers; however, the mechanism that establishes the relative sharing of those revenues is in dispute. The capacity that Columbia contracts for is ultimately paid for by customers. And Columbia wants these issues decided initially under the Motion for Bifurcation.

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[45] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Service,* Case No. 08-1344-GA-EXM, Stipulation at 14 (October 7, 2009).

[46] *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Service,* Case No. 08-1344-GA-EXM, Stipulation at 11 (October 7, 2009).

[47] Joint Motion Memorandum in Support at 9 (October 4, 2012).

The Marketers' businesses would be enhanced by an exit and elimination of a need to compete against the auction result that has been spectacularly successful in lowering Ohioans' bills for natural gas. That issue is supposedly to be resolved in a subsequent phase of the proceeding. An M/P Auditor in the most recent Columbia GCR Case stated the following with regard to the Columbia Choice Program:

> Since inception of the CHOICE Program, participating customers have paid nearly $545 million more for gas than they would have paid if they had remained GCR customers. Of this amount, $348 million occurred during the audit period [November 2008 through March 2010].[48]

These impacts to Choice customers reported by the M/P Auditor transpired with the availability of the GCR rate. While the impacts of the Choice program since that M/P audit are not known, the Commission should understand that the SCO rate represents a market-based rate established through an open auction process. If that option for customers is no longer available to customers either for service or to serve as a rate to tether choice supplier offers closer to the market price for natural gas commodity, the above impacts may be magnified.

III. CONCLUSION

For all the above reasons, the Commission should not rush the procedural process in this case and should provide interested parties their due process rights. There is no rational explanation for expediting this case in order to give the Utility and the Marketers the benefits of their bargain with each other and leave interested consumers on the outside to pay the costs of the Stipulation in the form of potentially higher natural gas

[48] *In re Columbia 2010 GCR Case,* Case No. 10-221-GA-GCR, Report to the Public Utilities Commission of Ohio on the Management and Performance Audit of Gas Purchasing Practices and Policies of Columbia Gas of Ohio, Inc. at 6-4 (November 18, 2010) (emphasis added).

commodity prices, higher capacity costs, and Choice/SCO program costs which will be higher than they should be because customers will not receive an appropriate share of off-system sales and capacity release revenues.

Therefore, the Commission should deny the Joint Motion to Modify Orders Granting Exemption and Motion to Bifurcation of the Capacity and Balancing Issues on an Expedited Basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memo Contra Joint Motion to Modify Orders Granting Exemption and Motion for Bifurcation of the Capacity and Balancing Issues on an Expedited Basis by the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic service, this 11th day of October, 2012.

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