BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted Columbia Gas of Ohio, Inc., in Case No. 08-1344-GA-EXM.	)))))	Case No. 12-2637-GA-EXM

ENTRY

The attorney examiner finds:

(1) By opinion and order issued on December 2, 2009, in *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*, Case No. 08-1344-GA-EXM (08-1344), the Commission approved the terms of a stipulation and recommendation (08-1344 stipulation) entered into by the parties in that proceeding. The 08-1344 stipulation provided, *inter alia*, that Columbia Gas of Ohio, Inc. (Columbia), would hold an auction to secure natural gas supplies, initially through a standard service offer (SSO) structure and, subsequently, through a standard choice offer (SCO) structure, and approved a Program Outline, which reflected the changes necessary to implement the SSO structure through March 31, 2012.

(2) On September 7, 2011, the Commission issued a second opinion and order in 08-1344, which, *inter alia*, authorized the continuation of the 08-1344 stipulation and approved a Revised Program Outline reflecting the changes necessary to implement the initial SCO auction in February 2012, for the 12-month period beginning April 1, 2012.

(3) On October 4, 2012, Columbia, Ohio Gas Marketers Group, Retail Energy Supply Association, Dominion Retail, Inc., and Staff (jointly referred to herein as joint movants) initiated the instant case and filed a joint motion to modify the December 2, 2009, and September 7, 2011, orders in 08-1344, in accordance with Section 4929.08(A), Revised Code (joint motion to modify), along with a Stipulation and Recommendation (Stipulation). According to joint movants,

the Stipulation would modify the details of Columbia's exemption granted in 08-1344 for a five-year term commencing on April 1, 2013 through March 31, 2018. As part of their October 4, 2012, filing, joint movants also filed a motion for bifurcation of the Commission's consideration of the issues addressed in the Stipulation.

(4) Section 4929.08, Revised Code, provides that, upon the motion of any person adversely affected by an exemption, and after notice and hearing, the Commission may modify any order granting such exemption.

(5) By entry issued on October 18, 2012, the attorney examiner presiding in this case (presiding examiner) granted the motions to intervene of the Ohio Consumers' Counsel (OCC), Hess Corporation, and Ohio Partners for Affordable Energy (OPAE), and established the procedural schedule in this matter. In addition, the presiding examiner denied the joint movants' motion for bifurcation, at that time, stating that, even with the SCO auction scheduled for the end of January 2013, the presiding examiner believed that due process, including discovery, notice, and a hearing, could be achieved within the necessary timeframe. Moreover, the presiding examiner noted that, while the process will move forward and the joint motion to modify and the Stipulation will be considered, in total, at the hearing, upon consideration of the record in this matter, the Commission may, subsequent to the hearing, consider joint movants' request to bifurcate consideration of the issues. The presiding examiner, *inter alia*: scheduled the hearing in this matter to commence on December 3, 2012; directed Columbia to publish notice of the hearing; found that briefs would be due three calendar days after conclusion of the hearing; determined that reply briefs would not be accepted; directed Columbia to arrange for same-day transcript, in order to accommodate the timely filing of briefs; and shortened the response time for discovery to five calendar days.

(6) On October 23, 2012, OCC and OPAE (jointly referred to herein as appellants) jointly filed an interlocutory appeal of the presiding examiner's October 18, 2012, entry, pursuant to Rule 4901-1-15(B), Ohio Administrative Code (O.A.C.),

asking that the interlocutory appeal be certified to the Commission for consideration. Columbia filed a memorandum contra the interlocutory appeal on October 29, 2012.

(7) Rule 4901-1-15, O.A.C., provides two avenues for parties who are adversely affected by an examiner's procedural ruling to file an interlocutory appeal to the Commission. First, paragraph (A) provides that an immediate interlocutory appeal may be taken to the Commission, if the ruling being appealed: grants a motion to compel discovery or denies a motion for protective order; denies a motion to intervene, terminates a party's right to participate, or requires the consolidation of examination or presentation of testimony; refuses to quash a subpoena; or requires the prosecution of documents or testimony over an objection based on privilege. Upon review of the request for interlocutory appeal filed by the appellants, it appears that the appellants agree that their request does not warrant an immediate appeal to the Commission under this provision.

(8) Secondly, paragraph (B) of Rule 4901-1-15, O.A.C., provides that, except as provided for in paragraph (A), no party may take an interlocutory appeal to the Commission, unless the appeal is certified to the Commission by an examiner. Moreover, this provision states that the reviewing examiner shall not certify an interlocutory appeal to the Commission, unless the appeal "presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the [C]ommission is needed to prevent undue prejudice or expense to one or more of the parties, should the [C]ommission ultimately reverse the ruling in question."

(9) In their interlocutory appeal, appellants argue that the presiding examiner's October 18, 2012, entry is a departure from precedent and imposes unfair limits on the ability of appellants to advocate for Columbia's customers in this matter. Initially, appellants note that the entry provides that the proceeding might be bifurcated after the hearing to decide certain issues; however, appellants are concerned that they will not know the issues that might be bifurcated until

two weeks before their prefiled testimony is due. In addition, appellants submit that the procedural schedule should be modified to allow for, at least, 10 days for briefs and a week for reply briefs. Finally, appellants assert that the legal notice required by the October 18, 2012, entry should be modified, such that it would reference provisions of the Stipulation regarding: the steps toward Columbia exiting the residential merchant function; Columbia's revised capacity contracts and off-system sales revenue sharing mechanism; and the payment for security that will be paid by SCO suppliers, but not Choice or other suppliers.

Appellants argue that their interlocutory appeal should be certified to the Commission, because the entry was a departure from past present, as it does not allow reasonable timeframes for the case process and adopts an unfair briefing schedule; therefore, an immediate determination by the Commission is needed in order to prevent the likelihood of undue prejudice or expense to interested parties who are denied an adequate opportunity to present their arguments on brief. In support of their argument, appellants note that the schedule established in the instant case differs from the one followed in *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. 12-1842-GA-EXM.

(10) In its memorandum contra, Columbia asserts that the arguments raised by appellants do not warrant an interlocutory appeal. Initially, Columbia points out that the Commission has repeatedly held that entries setting case schedules do not meet the requirements for interlocutory appeal. Furthermore, Columbia submits that the possibility that the Commission might bifurcate the issues after the hearing should have no effect on the appellants' prefiled testimony. Nevertheless, in its memorandum contra, Columbia set forth the issues that it needs resolved expeditiously, in an effort to clear up any confusion. Moreover, Columbia contends that the schedule, though expedited, will provide the appellants, and other parties, adequate time to present their positions to the Commission.

While appellants assert three days are not sufficient for briefs, Columbia notes that, by the time post-hearing briefs are filed, appellants will actually have had three months from the time they were provided a prefiling draft of the Stipulation. In addition, Columbia clarifies that, contrary to appellants' assertions, the Stipulation does not request authority to exit the merchant function for residential customers, it simply requests authority to file an application to do so in the future; therefore, appellants' argument on that issue can be fully developed in that later proceeding. Finally, Columbia maintains that appellants have failed to explain why an interlocutory appeal of the legal notice, which as already been published, would be legally justified under the Commission's rules.

(11) Upon consideration of the arguments made by the parties, the reviewing examiner finds that the issues raised by the appellants do not satisfy the requirements for certification to the Commission under paragraph (B) of Rule 4901-1-15, O.A.C. With regard to appellants' concern that the issues joint movants request be resolved expeditiously would not be submitted until shortly before testimony is due, the entry clearly states that the Stipulation will be considered, in total, at the December 3, 2012, hearing. Therefore, the reviewing examiner fails to find merit in appellants' concern on this ground, as appellants have been noticed that they must prepare for all issues. In any event, Columbia has resolved this concern by setting forth these issues in its memorandum contra. Appellants' claim that the schedule is a departure from past precedent is unfounded. A review of the entry shows that the presiding examiner went to great lengths to ensure that parties had ample time for discovery and the filing of testimony, and even went so far as to require Columbia to provide same-day transcripts. Likewise, appellants' assertion that the briefing schedule is a departure from past precedent is unsupported. In accordance with Rule 4901-1-31, O.A.C., briefs are optional and may be permitted, at the discretion of the examiner or the Commission. In fact, the reviewing examiner notes that, by entry issued June 1, 2011, in the predecessor case to this matter, 08-1344, briefs were not even permitted, as the examiner found that oral arguments were appropriate. With

> regard to the request that the legal notice be modified, the reviewing examiner agrees that appellants failed to set forth any rationale as to why this portion of their interlocutory appeal satisfied the requirements of the Commission's rules. In fact, appellants' appeal is devoid of any support relating to the requirements for certification set forth in Rule 4901-1-15(B), O.A.C. Accordingly, the reviewing examiner finds that appellants' request for certification of the interlocutory appeal should be denied.

It is, therefore,

ORDERED, That appellants' request that their interlocutory appeal be certified to the Commission is denied. It is, further,

ORDERED, That copies of the entry be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Katie Stenman

By: Katie L. Stenman
Attorney Examiner

JRJ/sc

This foregoing document was electronically filed with the Public Utilities

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10/31/2012 11:05:21 AM

in

Case No(s). 12-2637-GA-EXM

Summary: Attorney Examiner Entry ordered that the appellants' request that their interlocutory appeal be certified to the Commission is denied. - electronically filed by Sandra Coffey on behalf of Katie Stenman, Attorney Examiner, Public Utilities Commission of Ohio