**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| **In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code.** | **)** **)** **)** **)** **)** | **Case No. 11-5590-GA-ORD** |

---

# APPLICATION FOR REHEARING OF COLUMBIA GAS OF OHIO, INC.

---

Pursuant to Section 4903.10, Revised Code ("R.C."), and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Columbia Gas of Ohio, Inc. ("Columbia") respectfully files this Application for Rehearing of the Commission's December 12, 2012 Finding and Order issued in the above-captioned proceeding. The Commission's December 12, 2012 Finding and Order is unreasonable and unlawful in the following respects:

1. A number of the rules that the Public Utilities Commission of Ohio ("Commission") adopted in its December 12, 2012 Finding and Order unlawfully add to the requirements of the statute and manifestly contradict the revisions to R.C. 4929.05 effected by Am. Sub. H.B. 95.

2. Certain rules that the Commission adopted in its December 12, 2012 Finding and Order impose procedural requirements that are contrary to law.

3. The rules that the Commission adopted in its December 12, 2012 Finding and Order fail to give proper effect to both R.C. 4929.05 and R.C. 4909.18.

For these reasons, as explained in detail in the attached Memorandum in Support, the Commission should grant this Application for Rehearing and modify the alternative rate plan and exemption rules to be promulgated in O.A.C. Chapter 4901:1-19 so that they comport with Ohio law.

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

/s/ Stephen B. Seiple

Eric B. Gallon
Christen M. Blend
Porter Wright Morris & Arthur LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2190/2086
Fax: (614) 227-2100
Email: egallon@porterwright.com
cblend@porterwright.com

Stephen B. Seiple, Assistant General Counsel
Brooke E. Leslie, Counsel
200 Civic Center Drive
Columbus, OH 43216-0117
Tel: (614) 460-4648
Fax: (614) 460-6986
Email: sseiple@nisource.com
bleslie@nisource.com
**Attorneys for**
**COLUMBIA GAS OF OHIO, INC.**

## MEMORANDUM IN SUPPORT

## 1. INTRODUCTION

Columbia appreciates the thorough and thoughtful consideration given by the Commission and its Staff to the comments submitted on the Commission's proposed revisions to its alternative rate plan and exemption rules. The Commission's final revisions to Rules 4901:1-19-01 through 4901:1-19-13, O.A.C, address many of Columbia's concerns with the rule revisions Staff originally proposed. The Commission's December 12, 2012 Finding and Order is unreasonable and unlawful in certain respects, however, and it should be modified or revised on rehearing. Specifically, several of the rules that the Commission adopted in the December 12, 2012 Finding and Order conflict with the law that they purport to implement. The rules at issue – Rules 4901:1-19-06(C)(1), (C)(2), and (C)(3), and 4901:1-19-07(C) and (D), O.A.C. – essentially require a natural gas company to prepare and file a base rate proceeding as a condition of filing an alternative rate plan application. Such requirements are contrary to law and disregard the General Assembly's intent in enacting Am. Sub. H.B. 95. Moreover, compliance with the rules will impose substantial costs that will discourage natural gas companies from availing themselves of the alternative rate plan option that the General Assembly plainly afforded them through the recent changes to R.C. 4929.05. Columbia respectfully requests that the Commission grant rehearing and revise the rules in question in order to correct these flaws.

## 2. BACKGROUND

By entry dated November 22, 2011, the Commission proposed extensive amendments and rescissions to O.A.C. Chapter 4901:1-19. On December 12, 2011, the Commission issued an entry extending the due date for initial comments to January 23, 2012, and for reply comments to February 23, 2012. A number of parties, including Columbia, filed initial and reply comments. Thereafter, Staff summarized the parties' comments and made additional recommendations regarding the proposed rule amendments.

On July 2, 2012, the Commission issued an entry directing Staff "to send its attached comment summary, recommendations, drafts of the proposed rules, and [business impact assessment] evaluation to [the Common Sense Initiative Office] for review and recommendations in accordance with [R.C.] Section 121.82." Entry at 3 (July 2, 2012). At the time of the July 2, 2012 Entry, it was

unclear to a number of parties, including Columbia, whether that Entry was intended to be the Commission's final decision regarding the proposed rules. Accordingly, on August 1, 2012, Columbia, Duke Energy Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio, and Vectren Energy Delivery of Ohio filed jointly an application for rehearing of the July 2, 2012 Entry.

The Commission denied the July 2, 2012 application for rehearing on August 22, 2012, finding that it was "premature" because there was "no final order or matter determined by the Commission in this proceeding" at that time. Entry at 4 (Aug. 22, 2012). The Commission went on to direct that the application for rehearing be treated as additional comments on Staff's revised recommended changes to the proposed rule amendments, and it permitted all parties to file supplemental comments and reply comments by September 4, 2012, and September 11, 2012. *Id.* Several parties filed supplemental comments and reply comments. On December 12, 2012, the Commission issued its Finding and Order adopting the proposed rule amendments with Staff's additional recommendations.

## 3. ARGUMENT

### 3.1. A Number Of The Rules That The Commission Adopted In Its December 12, 2012 Finding And Order Unlawfully Add To The Requirements Of R.C. 4929.05 And Manifestly Contradict The Revisions To R.C. 4929.05 Effected By Am. Sub. H.B. 95.

Several of the rules that the Commission adopted in its December 12, 2012 Finding and Order unreasonably and unlawfully require an alternative rate plan applicant to effectively make a full base rate case filing any time an alternative rate plan is sought. In particular, Rules 4901:1-19-06(C)(1), (C)(2), and (C)(3), O.A.C., as well as Rules 4901:1-19-07(C) and (D), O.A.C., impose numerous burdensome and inappropriate obligations on an alternative rate plan applicant. By adopting each of those rules, the Commission has impermissibly reinstated requirements that the General Assembly eliminated by statute through the enactment of Am. Sub. H.B. 95. Columbia respectfully asks the Commission to bring its new rules into compliance with Ohio law by deleting those requirements that are contrary to current statute.

### 3.1.1. Am. Sub. H.B. 95 eliminated the automatic imposition of base rate case filing requirements.

R.C. 4929.01(A) defines an "alternative rate plan" as "a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges." Despite this definition, before Am. Sub. H.B. 95's enactment, the Commission was required to "determin[e] just and reasonable rates * * * pursuant to section 4909.15" as a condition of approval of an alternative rate plan application. *See* Am. Sub. H.B. 95 at 19.[1] This essentially required every applicant seeking an alternative rate plan to submit a full base rate case filing.

Am. Sub. H.B. 95 expressly deleted R.C. 4929.05's prior requirement that the Commission determine just and reasonable rates "pursuant to" R.C. 4909.15 when considering an alternative rate plan application. *Id.* Instead, an alternative rate plan need only be "just and reasonable." *Id.* at 20; R.C. 4929.05(B)(3). The rules that the Commission adopted in its December 12, 2012 Finding and Order, however, unfortunately do not comport with or reflect these changes to R.C. 4929.05.

### 3.1.2. The Commission's rules impermissibly, automatically impose base rate case filing requirements and other requirements that are not applicable to alternative rate plans under existing statute.

Despite Am. Sub. H.B. 95's elimination of the requirement that the Commission determine just and reasonable rates pursuant to R.C. 4909.15, the rules that the Commission adopted on December 12, 2012, continue to require an applicant for an alternative rate plan to file voluminous exhibits so that the Commission may "determine just and reasonable rates under section 4909.15." *See* Finding and Order, Attach. A at 9-10 (July 2, 2012) (Rule 4901:1-19-06(C)(1)). This is directly contrary to statute. In addition, alternative rate plan applications now must include "the exhibits described in divisions (A) to (D) of [R.C.] 4909.18" and "standard filing requirements pursuant to rule 4901-7-01 of the Administrative Code." *Id*. But these requirements also contradict Am. Sub. H.B. 95. They impose the same filing requirements applicable to an application for an increase in rates to alternative rate plan applications, despite a clear legislative

[1] A copy of Am. Sub. H.B. 95, as enacted, is available at www.legislature.state.oh.us/BillText129/129_HB_95_EN_N.pdf.

directive that such requirements should not be applicable and despite the General Assembly's clear direction that certain alternative rate plan filings "shall be considered an application *not* for an increase in rates * * *." (Emphasis added.) Am. Sub. H.B. 95 at 20. Moreover, the filing requirements are costly, time-consuming, and burdensome to comply with.

In even greater contravention of the recent statutory changes, Rules 4901:1-19-06(C)(2) and (C)(3), O.A.C. impose additional informational and procedural requirements that are not provided for by statute. Specifically, Rule 4901:1-19-06(C)(2), O.A.C. requires an applicant to provide a number of additional documents and information regarding the grounds, rationale, justification, and proposed impact of its application. *See id.* at 10. Rule 4901:1-19-06(C)(3), O.A.C. obligates an applicant, under certain circumstances, to detail the commitments that it is willing to make to promote state policy pursuant to R.C. 4929.02. *Id*. Because these requirements conflict with existing statute, the Commission should revise them on rehearing.

Similarly, Rule 4901:1-19-07(C), O.A.C. requires the Commission Staff to file a written report that addresses "at a minimum, the reasonableness of current rates" and, under certain circumstances, R.C. 4909.15. *Id.* at 12. Subpart (D) of that rule permits the Commission to hold a full blown evidentiary hearing for an application for an alternative rate plan, as well as local public hearings to be conducted following the procedures set forth in R.C. 4903.083 (which, by its heading, the General Assembly intended to be applicable only to applications for an increase in rates). *Id.* (Rule 4901:1-19-07(D)). As discussed previously, however, the General Assembly specifically deleted the requirement that the Commission determine just and reasonable rates pursuant to R.C. 4909.15. *See* Am. Sub. H.B. 95 at 19. Moreover, an alternative rate plan is, by definition, an "alternative to the method of section 4909.15 of the Revised Code." R.C. 4929.01(A). Thus, it is inappropriate and contrary to legislative intent for the Commission to grant itself the discretion to hold public hearings, otherwise only applicable to applications for an increase in rates under R.C. Chapter 4905, on alternative rate plan applications filed under R.C. Chapter 4929.

In addition to the above requirements, the Commission's new rules *also* require that an applicant "demonstrate that the alternative rate plan is just and reasonable." *See* Finding and Order, Attach. A at 11 (July 2, 2012) (Rule 4901:1-19-06(C)(2)(f)). This requirement seems to reflect the change in Am. Sub. H.B. that an alternative rate plan be "just and reasonable" rather than just and reasonable "pursuant to R.C. 4909.15." *See* Am. Sub. H.B. 95 at 19; R.C. 4929.05(A)(3). Yet,

while Am. Sub. H.B. 95 replaced a stringent requirement with a more flexible one, the Commission's new rules now impose *both* requirements on alternative rate plan applicants. Those unlawful and unreasonable dual requirements should be revised and corrected on rehearing to reflect only the current statutory standard provided for by Am. Sub. H.B. 95.

### 3.2. The Commission May Not Impose Procedural Requirements That Are Contrary To Statute.

As discussed above, the requirements that the Commission approved in adopting Rule 4901:1-19-06(C)(1), (C)(2), and (C)(3), O.A.C. and Rule 4901:1-19-07(C) and (D), O.A.C. are contrary to the General Assembly's decision that alternative rate plan applications should not automatically trigger base rate case filing requirements. Ohio law does not permit the Commission to take such action.

As the Commission well understands, the Commission's role in rulemaking is to discern the guidance of the General Assembly, not to reverse or undermine legislative decisions. *See In re Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, ¶ 21 (stating that "the commission is obligated to follow its legislative mandate"); *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 17 Ohio St.2d 45, 47 (1969) ("The commission is a creature of statute and has only those powers given to it by statute."). *Cf. Van Meter v. Pub. Util. Comm.*, 165 Ohio St. 391, 403 (1956) (stating that the Supreme Court of Ohio "has authority to determine what the General Assembly meant by what it said; but it has no power * * * to add to legislation something which was not enacted as legislation by the General Assembly").

The Supreme Court of Ohio's decision in *Ohio Bell Tel. Co*. is particularly relevant to the issues here. There, the Court reversed the Commission's attempt to apply the exhibit filing requirement set forth in R.C. 4909.18 (applicable to applications for an increase in rates) to applications for the filing of a rate for a new service under that statute. The Commission took the position that its broad powers gave it authority to require utilities to follow such procedures. *Ohio Bell Tel. Co.*, 17 Ohio St.2d at 47. The Court disagreed, finding that the Commission's "position [was] not supported by the language of the statute." *Id.* The Court explained that if the statute's streamlined procedures for filing new rates were not followed, a proposed new service could "not be made effective until a lengthy and often long-delayed review" by the Commission, and that this in turn would delay the availability of the benefit of the new rate or service. *Id.* at 48. The

Court accordingly reversed the Commission's ruling, finding that the procedural delay was contrary to law because it contradicted "the procedures established by the General Assembly." *Id.* at 48-49.

Similarly, here, the General Assembly manifestly decided to relieve alternative rate plan applicants of the mandatory burden of the Commission's standard base rate case filing requirements. In disregard of that decision, the Commission's new rules reinstate those procedural burdens and add more. No less than in *Ohio Bell Tel. Co.*, this imposition unreasonably and unlawfully contradicts the procedures established by law. The Commission should correct its actions on rehearing and should revise and eliminate the requirements set forth in Rules 4901:1-16(C)(1), (C)(2), and (C)(3) and 4901:1-17(C) and (D), O.A.C. that contradict with statute.

### 3.3. The Rules That The Commission Adopted In Its December 12, 2012 Finding And Order Fail To Give Proper Effect To Both R.C. 4929.05 And R.C. 4909.18.

The Commission's December 12, 2012 Finding and Order also is unlawful and unreasonable because the new rules adopted therein fail to give proper effect to R.C. 4929.05 and R.C. 4909.18. In its December 12, 2012 Finding and Order, the Commission determined that the additional requirements imposed by Rule 4901:1-19-06(C), O.A.C. are appropriate because "rate applications filed pursuant to Section 4929.05, Revised Code, must be filed pursuant to Section 4909.18, Revised Code * * *." Finding and Order at 33 (Dec. 12, 2012). That position is untenable.

The Commission should construe the requirement that alternative rate plan applications filed under R.C. 4929.05 be filed "under section 4909.18" as adopting R.C. 4909.18's procedural requirements (to the extent they are consistent with R.C. 4929.05) only. It should not construe that requirement as imposing the substantive standards applicable to a base rate case in an alternative rate plan proceeding because doing so would be inconsistent with the specific substantive standards governing alternative rate plan applications set forth in R.C. 4929.05. *See* R.C. 4929.05(A)(1)-(3) (stating that the Commission "shall" approve an alternative rate plan if three specific showings – none of which require a base rate determination – are made).

Where two statutes appear to impose inconsistent requirements, the Commission should apply the more specific provision rather than the more

general rule. *Summerville v. Forest Park,* 128 Ohio St.3d 221, 2010-Ohio-6280, ¶ 26-27; R.C. 1.51. R.C. 4909.18, therefore, should apply to alternative rate plan applications only to the extent that it is consistent with R.C. 4929.05. It should not be construed to impose additional, inconsistent requirements upon applicants, particularly when Am. Sub. H.B. 95 expressly eliminated such requirements.

It is also unlawful and unreasonable to rely upon applicants to file a request for waiver of the new requirements adopted in Rule 4901:1-16(C), O.A.C. as the December 12, 2012 Finding and Order appears to recommend. *See* Finding and Order at 33 (Dec. 12, 2012). Giving applicants the possibility of obtaining a waiver of the inappropriate extra-statutory application requirements does not change the fact that the requirements are contrary to law and legislative intent. Put differently, the fact that an improper regulation may be waived, at the Commission's discretion, does not make the regulation any less improper. Moreover, the extra-statutory requirements likely will discourage alternative rate plan applications under R.C. 4929.05 and certainly will delay their processing, regardless of the possibility that they may be waived. Equally importantly, the approach to rulemaking that the waiver option implies is fundamentally contrary to a law- and rule-based system of regulation. The Commission's suggestion that the ability to obtain a waiver of its new rules makes them reasonable and lawful, as well as the unreasonable and unlawful rules themselves, should be corrected on rehearing.

## 4. CONCLUSION

For the reasons set forth above, Columbia respectfully requests that the Commission grant rehearing and revise the following rules as follows:

**Rule 4901:1-19-06(C)(1)**

*Delete in its entirety.*

**Rule 4901:1-19-06(C)(2)**

(C) Exhibits to an alternative rate plan application

* * *

~~(2) In addition to the requirements of appendix A to rule 4901-7-01 of the Administrative Code, the applicant shall provide the following~~

~~information. This additional information shall be considered to be part of the standard filing requirements for a natural gas company filing an alternative rate plan. The applicant shall have the burden of proof to document, justify, and support its plan.~~

~~(a)~~ (1) The applicant shall provide a detailed alternative rate plan, which states the facts and grounds upon which the application is based, and which sets forth the plan's elements, transition plans, and other matters required by these rules. This exhibit shall also state and support the rationale for the initial proposed tariff changes for all impacted natural gas services.

~~(b) The applicant shall fully justify any proposal to deviate from traditional rate of return regulation. Such justification shall include the applicant's rationale for its proposed alternative rate plan, including how it better matches actual experience or performance of the company in terms of costs and quality of service to its regulated customers.~~

~~(c) If the alternative rate plan proposes a severing of costs and rates, the applicant shall compare how its proposed alternative rate plan would have impacted actual performance measures (operating and financial) during the most recent five calendar years. Include comparisons of the results during the previous five years if the alternative rate plan had been in effect with the rate or provision that otherwise was in effect.~~

~~(d)~~ (2) If the applicant has been authorized to exempt any services, the applicant shall provide a listing of the services which have been exempted, the case number authorizing such exemption, a copy of the approved separation plan(s), and a copy of the approved code(s) of conduct.

~~(e)~~ (3) The applicant shall provide a detailed discussion of how potential issues concerning cross-subsidization of services have been addressed in the plan.

~~(f)~~ (4) The applicant shall provide a detailed discussion of how the applicant is in compliance with section 4905.35 of the Revised Code, and is in substantial compliance with the policies of the state

of Ohio specified in section 4929.02 of the Revised Code. In addition, the applicant shall also provide a detailed discussion of how it expects to continue to be in substantial compliance with the policies of the state specified in section 4929.02 of the Revised Code, after implementation of the alternative rate plan. Finally, the applicant shall demonstrate that the alternative rate plan is just and reasonable.

~~(g)~~ (5) The applicant shall submit a list of witnesses sponsoring each of the exhibits in its application.

**Rule 4901:1-19-06(C)(3)**

*Delete in its entirety.*

**Rule 4901:1-19-07(C)**

The commission staff will file a written report which addresses, at a minimum, the justness and reasonableness of the proposed alternative rate plan~~current rates. If the application is for an increase in rates, the written report shall also address section 4909.15 of the Revised Code~~.

**Rule 4901:1-19-07(D)**

At its discretion, the ~~C~~commission may require a hearing to consider the application. ~~If the commission, at its discretion, requires local public hearings, such hearings shall be held in accordance with the criteria set forth in section 4903.083 of the Revised Code.~~

At a minimum, the Commission should recognize the Legislature's clear directive that certain alternative rate plan filings are not applications for rate increases (*see* Am. Sub. H.B. 95 at 20) and amend the filing requirements for alternative rate plan applications accordingly. The Commission has already acknowledged, in Rule 4901:1-19-07(C), O.A.C. that section 4909.15 of the Revised Code does not apply unless an "application is for an increase in rates[.]" The Commission should similarly amend Rule 4901:1-19-06(C)(1), O.A.C. to reflect that the statutory and regulatory filing requirements for rate increase applications found in R.C. 4909.18(A)-(D) and Rule 4901-7-01, O.A.C. do not apply unless an application is for an increase in rates.

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

/s/ Stephen B. Seiple
Eric B. Gallon
Christen M. Blend
Porter Wright Morris & Arthur LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 227-2190/2086
Fax: (614) 227-2100
Email: egallon@porterwright.com
cblend@porterwright.com

Stephen B. Seiple, Assistant General Counsel
Brooke E. Leslie, Counsel
200 Civic Center Drive
Columbus, OH 43216-0117
Tel: (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 on this 11th day of January, 2013, true and accurate copies of the foregoing Application for Rehearing of Columbia Gas of Ohio, Inc. were served via electronic mail upon the following parties:

William L. Wright
Section Chief
Devin D. Parram
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
william.wright@puc.state.oh.us
devin.parram@puc.state.oh.us

*Counsel for Staff of the Public Utilities Commission of Ohio*

Mark A. Whitt
Andrew J. Campbell
Whitt Sturtevant LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant com
campbell@whitt-sturtevant.com

*Counsel for The East Ohio Gas Company d/b/a Dominion East Ohio*

Larry S. Sauer
Joseph P. Serio
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
sauer@occ.state.oh.us
serio@occ.state.oh.us

*Counsel for the Office of the Ohio Consumers' Counsel*

Amy B. Spiller
Jeanne W. Kingery
Duke Energy Ohio, Inc.
139 E. Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, Ohio 45201
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com

*Counsel for Duke Energy Ohio, Inc.*

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com

*Counsel for the Ohio Gas Marketers Group and the Retail Energy Supply Association*

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney2@columbus.rr.com

*Counsel for Ohio Partners for Affordable Energy*

/s/ Eric B. Gallon

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**1/11/2013 10:28:31 AM**

**in**

**Case No(s). 11-5590-GA-ORD**

Summary: App for Rehearing of Columbia Gas of Ohio, Inc. electronically filed by Mr. Eric B. Gallon on behalf of Columbia Gas of Ohio, Inc.