

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation. ) Case No. 16-2422-GA-ALT )

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**MEMORANDUM CONTRA  
COLUMBIA’S MOTION FOR ADMINISTRATIVE NOTICE  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

This case involves the request of Columbia Gas of Ohio, Inc. (“Columbia”) to extend its pipeline replacement program for another five-year period, and increase a monthly charge to residential consumers from \$10.20 (in 2017) to approximately \$16.20 (in 2022).<sup>1</sup>

Contrary to its agreement with OCC (approved by the PUCO), Columbia now seeks to rebut OCC's testimony. Columbia asks the PUCO for expansive administrative notice of thousands of pages of documents including applications, stipulations, and pre-filed testimony in eight different proceedings, as well as documents Columbia cited in its application, but chose not to move into evidence. Columbia's Motion for Administrative Notice<sup>2</sup> should be denied.

**II. BACKGROUND**

On February 27, 2017, Columbia filed its Application in this proceeding. On August 18, 2017, a Joint Stipulation and Recommendation (“Settlement”) was signed by

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<sup>1</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation*, PUCO Case No. 16-2422-GA-ALT, Joint Stipulation and Recommendation at 3 (August 18, 2017) (“Settlement”).

<sup>2</sup> PUCO Case No. 16-2422-GA-ALT, Motion for Administrative Notice of Columbia (October 3, 2017) (“Columbia Motion”).

certain parties. OCC opposes the Settlement. On September 20, 2017, Columbia filed a joint motion to revise the procedural schedule.<sup>3</sup> This motion also notified the PUCO that all parties had agreed to waive cross-examination and admit certain documents into evidence, including testimony that would be filed by OCC opposing the Settlement.<sup>4</sup>

Eight days later, on September 28, 2017 OCC filed its direct testimony opposing the Settlement. On October 2, 2017, the evidentiary hearing was held in this proceeding. After cross-examination was waived, all agreed-to evidence was admitted into the record, and a briefing schedule was established, Columbia made a request for administrative notice, which OCC opposed.<sup>5</sup> At the direction of the Attorney Examiner, Columbia filed a written Motion for Administrative Notice on October 3, 2017 (“Motion”). In its Motion, Columbia requested that two indeterminate sets or categories of material be admitted into the record, including documents cited in OCC's testimony:

1. documents cited in the Application and all pre-filed testimony that are not otherwise in the evidentiary record; and
2. applications, pre-filed testimony, and stipulations from eight other proceedings: Columbia’s 2007,<sup>6</sup> 2008,<sup>7</sup> and 2011<sup>8</sup> Infrastructure

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<sup>3</sup> See PUCO Case No. 16-2422-GA-ALT, Joint Motion to Revise Procedural Schedule (September 20, 2017).

<sup>4</sup> The documents that the parties agreed to admit into evidence were: the Application, the Settlement, the Staff Report and Recommendation, OCC’s Objections to the Staff Report, and **all** pre-filed testimony.

<sup>5</sup> Columbia did seek parties’ agreement to the administrative notice of the documents included in its motion immediately before the hearing began. OCC did not agree to Columbia’s proposal.

<sup>6</sup> *In re Application of Columbia Gas of Ohio for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC (“Columbia 2007 IRP Proceeding”).

<sup>7</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-73-GA-ALT, et seq.

<sup>8</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation*, Case No. 11-5515-GA-ALT.

Replacement Program (“IRP”) proceedings and its annual Rider IRP proceedings.<sup>9</sup>

OCC does not object to the PUCO taking administrative notice of the documents cited in OCC’s testimony.<sup>10</sup> However, OCC objects to administrative notice of all the other documents that Columbia seeks to add into the record at this late date.

### **III. ARGUMENT**

Under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to fill factual gaps in the record. The Supreme Court of Ohio (“Court”), in *Allen v. Pub. Utils. Comm’n.*, has held that when considering a motion for administrative notice, the Public Utilities Commission of Ohio (“PUCO”) should consider whether the complaining party had prior knowledge of the evidence, had an adequate opportunity to explain and rebut the evidence, and would be prejudiced by its introduction.<sup>11</sup> The Court also stated that determinations of administrative notice are resolved on a case-by-case basis.<sup>12</sup> As explained more below, Columbia’s Motion should be denied because it does not satisfy this standard.

#### **A. The evidence should not be administratively noticed because OCC has not had an adequate opportunity to explain or rebut the evidence.**

Columbia’s Motion should be denied because OCC has not had an adequate opportunity to explain and rebut this new evidence, particularly in the context of the

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<sup>9</sup> PUCO Case Nos. 09-1036-GARDR, 10-2353-GA-RDR, 11-5803-GA-RDR, 12-2923-GA-RDR, and 16-2236-GA-RDR.

<sup>10</sup> See Columbia Motion at 5.

<sup>11</sup> See *Allen v. PUC*, 40 Ohio St.3d 184, 186 (1988).

<sup>12</sup> *Allen* at 185.

current Settlement. Columbia did not give OCC sufficient notice of the specific facts and evidence that it would ultimately use. As a result, OCC was not able to explain or rebut this evidence.

Tellingly, Columbia does not even explicitly argue that OCC has had an opportunity to rebut the new evidence. Instead, Columbia argues that the simple fact that OCC was an intervening party in these prior proceedings proves that OCC's opportunity has come and gone.<sup>13</sup> Columbia would then have carte blanche to refer to the evidence without the obligatory and essential step of: (1) including the evidence in its current application; (2) including the evidence in its current pre-filed direct testimony; or (3) introducing the evidence through cross-examination at the current evidentiary hearing.

This is unreasonable. The evidence from prior proceedings (some nearly ten years old) cannot be added to the record in a current proceeding simply because the complainant (OCC) was a party to the prior proceeding. The evidence must be examined and rebutted under current circumstances and, specifically, under the current Settlement. Participation in prior proceedings, under completely different circumstances, does not count as opportunity to explain and rebut the evidence in the context of the Settlement in this proceeding.

Further, it is important to note that OCC was not a party to one of the cited proceedings and OCC signed or agreed not to oppose settlement agreements in all the other proceedings.<sup>14</sup> It is common knowledge that parties' agreement to sign a settlement "does not necessarily reflect the position that one or more of the Parties would have taken

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<sup>13</sup> It is important to note that OCC was not a party to PUCO Case No. 16-2236-GA-RDR.

<sup>14</sup> OCC was not a party to PUCO Case No. 16-2236-GA-RDR. OCC was a signatory to the settlements in PUCO Case Nos. 07-478-GA-UNC, 08-73-GA-ALT, 09-1036-GA-RDR, 10-2353-GA-RDR, 11-5803-GA-RDR, 11-5515-GA-ALT. OCC neither supported nor opposed the Settlement in PUCO Case No. 12-2923-GA-RDR.

if these issues had been fully litigated.”<sup>15</sup> Nor should Columbia be able to use OCC's past non-opposition to evidence, as a result of a settlement, against OCC in this proceeding. Indeed, the settlements that OCC signed or agreed not to oppose in past Columbia IRP proceedings, like the majority of other settlements, prohibit such action.<sup>16</sup>

**B. The evidence should not be administratively noticed because to do so would cause OCC irreparable harm and prejudice.**

Granting Columbia's Motion at this stage of the proceeding would cause OCC irreparable harm and prejudice. OCC's litigation strategy and the evidence it included in its testimony was strategically formulated in response to the current evidence in the record. If OCC had known that this additional evidence would be considered evidence in this proceeding, it would have certainly impacted OCC's litigation strategy. As it stands, if this large amount of vaguely defined evidence is admitted into the record, OCC will have no opportunity to address it. Instead, the evidence would come into the record—unexplained and un rebutted. Such a result is extremely harmful and prejudicial to residential consumers and, if allowed, this harm could not be undone in the future.

OCC would also be prejudiced if Columbia's motion were approved because of the timing of Columbia's request. As directed at the evidentiary hearing, Columbia filed a written motion for administrative notice on October 3, 2017. OCC filed this Memorandum Contra Columbia's Motion on Friday, October 6, 2017. A decision from

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<sup>15</sup> Columbia 2007 IRP Proceeding, PUCO Case No. 07-478-GA-UNC, Amended Stipulation and Recommendation at 2 (2007) (This is the Settlement from the 2007 Columbia IRP case which OCC signed).

<sup>16</sup> See PUCO Case Nos. 07-478-GA-UNC, Stipulation at 2 (December 28, 2007); PUCO Case No. 08-0073-GA-ALT, Joint Stipulation and Recommendation at 24 (October 24, 2008); PUCO Case No. 09-1036-GA-RDR, Joint Stipulation and Recommendation at 2 (April 14, 2010); PUCO Case No. 10-2353-GA-RDR, Joint Stipulation and Recommendation at 2 (April 7, 2011); PUCO Case No. 11-5803-GA-RDR, Joint Stipulation and Recommendation at 1-2 (April 10, 2012); PUCO Case No. 11-5515-GA-ALT, Joint Stipulation and Recommendation at 2 (September 26, 2012); PUCO Case No. 12-2923-GA-RDR, Joint Stipulation and Recommendation at 1-2 (April 9, 2013) (OCC agreed not to oppose).

the attorney examiner would not be issued until Tuesday, October 10, 2017, at the earliest.<sup>17</sup> Initial briefs in this proceeding must be filed by October 23, 2017. Thus, at the earliest, parties will only have 12 days (9 business days) to completely write (or rewrite) their initial briefs to address hundreds (or maybe thousands) of pages of additional documents that have been added into evidence. This will clearly prejudice residential consumers.

**C. The evidence should not be administratively noticed because Columbia agreed, at its own risk, to waive-cross examination and admit certain documents into the record before testimony in opposition was filed and the evidentiary hearing began.**

Columbia's primary argument in support of its Motion is that without the evidence it will be "hampered" in its ability to rebut the arguments in OCC's testimony.<sup>18</sup> This argument is meritless and disingenuous. If Columbia desired any additional evidence (e.g., documents from its citations or prior PUCO proceedings) to be considered by the parties and, ultimately, the PUCO, then it should have included it in its initial application or direct testimony. It chose not to.

In addition, if Columbia wanted to rebut the specific arguments in OCC's testimony with additional record evidence, then it shouldn't have agreed to waive-cross examination at the evidentiary hearing and admit the current evidence (which includes

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<sup>17</sup> Monday, October 9, 2017, is a state and federal holiday.

<sup>18</sup> See Columbia Motion at 6 ("In order to properly discuss and/or rebut the parties' contentions regarding those prior case filings, the parties will likely need to cite and discuss other filings in those same cases that address the same or similar point. For example, where OCC has cited Staff testimony from the 2008 IRP Rate Proceeding to support its contentions, other testimony from the same proceeding may rebut those contentions. Moreover, information provided in Columbia's prior annual IRP filings will provide useful context for rebutting OCC's arguments in this proceeding, as OCC has relied on the most recent annual IRP proceeding to bolster its arguments"); See Columbia Motion at 3 ("If the Commission were to deny this Motion, Columbia could be hampered in its ability to rebut the OCC's contentions regarding and interpretations of the cited documents, diminishing the value that the parties' briefs provide to the Commission. In effect, OCC would be permitted to rely on documents outside the evidentiary record, but Columbia and the other parties would be prohibited from characterizing those same documents.").

OCC's testimony) into the record before OCC even filed its testimony, or it should have reserved the right to file rebuttal testimony. Neither of which did Columbia do.

Rebutting arguments in opposing testimony is the purpose of cross-examination or rebuttal testimony. Columbia agreed to this arrangement of its own free will and at its own peril. In doing so, Columbia clearly took the risk of being unable to rebut the arguments in OCC's testimony. And, as explained above, OCC agreed to the arrangement with the same knowledge and on the same basis: that the current evidence—not the evidence from eight other PUCO proceedings—would be the only evidence admitted into the record. Both parties must now live with the consequences of the agreement. Columbia should not now be allowed to expand the evidentiary record after the hearing is over, essentially adding dozens of supporting arguments to its position. This would be extremely prejudicial to OCC.

#### **IV. CONCLUSION**

For these reasons, OCC respectfully requests that Columbia's motion to take administrative notice be denied. Columbia's Motion does not satisfy the *Allen* standards and taking administrative notice of the information in the Motion would be extremely prejudicial to OCC.

Respectfully submitted,

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/s/ Kevin Moore

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Take Administrative Notice has been served electronically upon those persons listed below this 6<sup>th</sup> day of October 2017.

/s/ Kevin Moore

Kevin Moore

Assistant Consumers' Counsel

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

**Commission of Ohio Docketing Information System on**

**10/6/2017 4:19:32 PM**

**in**

**Case No(s). 16-2422-GA-ALT**

Summary: Memorandum Memorandum Contra Columbia's Motion for Administrative Notice by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Moore, Kevin F. Mr.