BEFORE
THE OHIO POWER SITING BOARD

In the Matter of the Application of Columbia Gas of Ohio, Inc., for a Certificate of Environmental Compatibility and Public Need For the Construction of the Northern Columbus Loop—Phase VII	)))))	Case No. 20-1236-GA-BTX

MEMORANDA CONTRA COMBINED MOTION TO STRIKE AND MOTION IN LIMINE REGARDING DIRECT TESTIMONY OF DAVID L. PEMBERTON BY SUBURBAN NATURAL GAS COMPANY

I. INTRODUCTION

This case concerns Columbia Gas of Ohio, Inc.'s (Columbia) Application for a Certificate of Environmental Compatibility and Public Need for Construction of the Northern Columbus Loop Phase VII Project (Project). Over the objections of Columbia and Columbia's request to limit the scope of Suburban Natural Gas Company's (Suburban) involvement in this case, the Ohio Power Siting Board (Board) granted, without limitation, Suburban's intervention on April 15, 2021. Specifically, the Entry stated that good cause existed to grant Suburban's intervention, recognizing Suburban's gas supply concerns:

> Upon review, the ALJ finds good cause exists to grant Suburban intervention in this proceeding. The ALJ observes that Suburban is more than just a general customer of Columbia, as it takes its supply from Columbia at two points of delivery, shares distribution systems with Columbia, and maintains a natural gas supply interconnection agreement with Columbia. As described by Suburban, the proposed project may impact Suburban's ability to supply its customers with natural gas. The ALJ therefore determines that Suburban has a real and substantial interest in this proceeding. The ALJ additionally notes that Suburban's interest is not represented by any other party and that Suburban's involvement will not unduly delay the proceeding or unjustly prejudice an existing party. As to Columbia's request to limit the scope of Suburban's involvement, the ALJ declines to do that

> at this time. The Board or the ALJ will address the relevancy of issues as they arise during the course of the proceeding.[1]

Columbia now requests, for a second time, to limit the scope of Suburban's involvement and to minimize the supply concerns at issue in this case, which are pertinent to the Board's approval and squarely fall within the scope of the Board's jurisdiction and Ohio law. The Board should once again reject this request outright.

After the filing of a partial Joint Stipulation and Recommendation (Stipulation), purporting to resolve all of the issues in this case, Suburban and the Delaware County Board of Commissioners filed testimony on June 1, 2021, opposing the partial Stipulation. On June 3, 2021, Columbia filed a "Combined Motion to Strike and Motion in Limine Regarding Testimony of David L. Pemberton and Request for Expedited Ruling" (Columbia's Motions). Pursuant to Ohio Adm.Code 4906-2-27(C) and (D), Suburban respectfully files its Memoranda Contra Columbia's Motions regarding the Direct Testimony of David L. Pemberton (Pemberton Testimony, Mr. Pemberton's testimony, or Suburban's testimony). For reasons explained further in the Memoranda, Suburban respectfully requests that the Board deny Columbia's Motions in their entirety.

II. MEMORANDUM CONTRA MOTION TO STRIKE AS IRRELEVANT

In its Motion to Strike, Columbia misstates Ohio law, the issues relevant to the application and Board's certification standard, and the issues relevant in the upcoming evidentiary hearing regarding the partial Stipulation. Columbia also mischaracterizes Suburban's testimony in relation to the relevant issues. As explained further below, Suburban's entire testimony is relevant to the application, the Board's standard for evaluating certificate applications, and the Board's standard

[1] Entry at ¶ 8 (April 15, 2021).

for evaluating stipulations. Not allowing such testimony on these issues would be unjust, unreasonable, and unfairly prejudicial. As such, Suburban respectfully requests that the Board reject, in its entirety, Columbia's Motion to Strike portions of the Pemberton Testimony as the portions subject to the Motion are most certainly relevant.

A. Suburban's testimony is relevant to Columbia's application and the Board's standard for evaluating certificate applications.

The Pemberton Testimony specifically addresses the Board's basis for granting or denying a certificate application. Pursuant to R.C. 4906.10, the Board "shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines," among other factors, "[the] basis of need for the facility,"[2] and "[that] the facility will serve the public interest, convenience, and necessity."[3]

Columbia asserts that significant portions of the Pemberton Testimony are irrelevant because the Board need only consider the needs and interest of Columbia and its customers.[4] Columbia is simply incorrect and ignores key provisions of Ohio law. Nowhere in R.C. 4906.10 does the law state that the Board shall only consider the needs and interests of the applicant and the applicant's customers. To the contrary, R.C. 4906.10 states that "[t]he Board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless [the Board] finds and determines *all* of the following," including "[t]he basis of the need for the facility" and "[t]that the facility will serve

[2] R.C. 4906.10(A)(1).

[3] R.C. 4906.10(A)(6).

[4] *See* Columbia's Motion at 4 (claiming that "the need for the [Northern Loop Project] is premised on *Columbia's* need…" and objecting to "access to a gas pipeline project by competitors"); Columbia's Motion at 5 (arguing that Columbia's Northern Loop Project should not be designed or built to serve customers other than Columbia's); Columbia's Motion at 7 (arguing that Columbia's Northern Loop Project should not be used "to meet the natural gas requirements of *all* of Delaware County regardless of which utility has the customer").

the public interest, convenience, and necessity."[5] Supply constraints and concerns on an interconnected system will impact every customer (including Suburban who is a customer of Columbia) on that system, regardless of which utility serves the customer.[6] A solution that only benefits some of those customers at the expense of Suburban's customers and Delaware County as a whole, certainly does not "serve the public interest, convenience, and necessity."[7] A project that increases supply for customers in one county at the expense of customers in another county, also cannot be said to serve the public interest, convenience, or necessity. To that end, testimony stating that Columbia should be required to "unequivocally establish that the Northern Loop Line's existing capacity is sufficient to serve all of the remaining natural gas requirements of Delaware County, including the areas served or to be served by Suburban, before authorizing any extension of that line"[8] is directly relevant to the public interest, convenience, and necessity requirement and whether the project satisfies the need or whether an alternative or modification is more appropriate with less impact.[9]

Moreover, when considering the basis of the need of the facility, Suburban's testimony addresses the ability of Columbia to supply Union County with the expansion Project by attaching documents to support the testimony and to demonstrate that Columbia currently may not have sufficient and adequate capacity on its system to satisfy its existing customers and future growth in Delaware County, and expanding Columbia's system to another county will exacerbate the

[5] R.C. 4906.10((A)(1), (6) (emphasis added).

[6] *See, e.g.,* Pemberton Testimony at 20.

[7] *See* R.C. 4906.10(A)(6).

[8] *See* Columbia's Motion at 4, *citing* Direct Testimony of David Pemberton On Behalf of Suburban Natural Gas Company at 20 (June 6, 2021) (Pemberton Testimony).

[9] R.C. 4906.10.

existing constraints and capacity concerns.[10] Attachments C, D, E, F, and G to Suburban's testimony are directly relevant to establish the history of supply constraints, Suburban's repeated attempts to secure more capacity through good-faith bargaining, Columbia's repeated denials of such attempts, and statements that additional capacity is not available in Delaware County, which directly contradict its claims in this case and which could negatively impact the desired outcome of expanding the pipeline to provide greater capacity to Union County.[11] The supply obligations and commitments made pursuant to an omnibus settlement agreement between Columbia and Suburban in Case No. 93-1569-GA-SLF (the 1995 Stipulation), as well as correspondence between the parties about the ability of Columbia to meet those supply obligations,[12] are very relevant as to whether the Project will fulfill its intended purpose and is needed as proposed. Neither the testimony supporting the Staff Report nor the testimony supporting the Stipulation adequately address these supply concerns. Similarly, concerns regarding access[13] and interconnectibility[14] are also relevant to the public interest.

Furthermore, even assuming Columbia's interpretation of Ohio law is accurate and only Columbia's interests and those of its customers need to be considered by the Board, Suburban's testimony does in fact raise concerns regarding supply issues for Columbia's existing and future customers in Delaware County, including itself.[15] Simply put, Suburban's testimony regarding the Project, Columbia's legal obligations to supply another public utility, Columbia's ability to meet

[10] *See, e.g.*, Pemberton Testimony at 14, 16-17, 20-21.

[11] *See id.* at Attachment C, Attachment D, Attachment E, Attachment F, Attachment G.

[12] *Id.*

[13] *See* Pemberton Testimony at 11-13.

[14] *See id.* at 2-4, 18.

[15] *See* Pemberton Testimony at 2-3, 10-14, 17-18, 22-24.

those supply obligations with the same capacity that it intends to utilize for new customers, issues with existing capacity constraints, future capacity concerns, interconnectibility, and access are all directly relevant to the basis for the need for the facility and whether the facility will serve the public interest, convenience, and necessity as required by R.C. 4906.10. Accordingly, Columbia's Motion to Strike should be denied in its entirety.

Additionally, and contrary to what Columbia implies,[16] the eight factors listed in R.C. 4906.10(A) are *not* the only issues relevant in the upcoming hearing. The Board is not only determining whether or not to grant or deny a certificate application, the Board is also determining whether or not to adopt the partial Stipulation, which involves a different set of criteria.

B. Suburban's testimony is relevant to the Board's standard for evaluating stipulations.

In addition to addressing the factors listed in R.C. 4906.10(A), the Pemberton Testimony also directly addresses the Board's three-part test for evaluating stipulations. The Board's rules require that "parties who file a full or partial written stipulation or make an oral stipulation must file or provide testimony that supports the stipulation," and allows parties opposing the stipulation to "offer evidence and/or argument in opposition."[17]

Stipulations are not binding upon the Board.[18] The ultimate issue for the Board's consideration is whether the stipulation is reasonable and should be adopted.[19] When determining

[16] *See* Columbia's Motion at 1 ("[Columbia] moves to strike portions of the testimony and related attachments of intervenor Suburban Natural Gas Company's witness David L. Pemberton, Sr., as irrelevant to any of the eight criteria subject to consideration by the Ohio Power Siting Board pursuant to R.C. 4906.10(A) regarding Columbia's proposed Northern Columbus Loop Project in the above-captioned case.").

[17] Ohio Adm.Code 4906-2-24(D).

[18] *Id.*

[19] *See, e.g., In the Matter of the Application of Arche Energy Project, LLC, for a Certificate of Environmental Compatibility and Public Need*, Case No. 20-979-EL-BGN, Opinion and Order at ¶ 77 (Apr. 15, 2021); *In the Matter of the Application of Big Plain Solar, LLC for a Certificate of Environmental Compatibility and Public Need to*

whether or not to adopt a stipulation or a partial stipulation, the Board uses a three-part test similar to that used by the Public Utilities Commission of Ohio (Commission). The Board considers:

1. If the settlement is a product of serious bargaining among capable, knowledgeable parties;
2. If the settlement, as a package, benefits ratepayers and the public interest; and
3. If the settlement violates any important regulatory principal or practice.[20]

These three factors are at issue in the evidentiary hearing, and Suburban's testimony is directly relevant to addressing these factors. The Board recognized that these factors are before the Board and at issue in the evidentiary hearing, when it granted, "for good cause shown," the Joint Motion by Suburban and the Delaware County Board of Commissioners to Continue the Procedural Schedule after the partial Stipulation was filed.[21] Suburban and [the Delaware County Board of Commissioners] noted that their testimony would "need to be revised and/or supplemented to address the Stipulation that was filed on April 30, 2021."[22] After the Board extended the deadline for filing testimony in light of the filing of a partial Stipulation, Suburban, Delaware County, and Staff all filed testimony addressing the partial Stipulation. It is absurd for Columbia to argue that such testimony, filed by parties both supporting and opposing the partial Stipulation[23] pursuant to a Board Entry establishing the procedural schedule for this case, is somehow not relevant to this case.

Construct a Solar-Powered Electric Generation Facility in Madison County, Ohio, Case No. 19-1823-EL-BGN, Opinion and Order at ¶ 76 (Mar. 18, 2021).

[20] *Id.*

[21] *See* Entry at ¶ 10 (May 6, 2021).

[22] *Id.* at ¶ 9.

[23] Columbia, unsurprisingly, does not posit that testimony *supporting* the Stipulation is irrelevant.

As explicitly referenced in the testimony itself, the testimony is directly relevant to both the second and third prongs of the Board's three-part test for evaluating settlements. Columbia seems to argue that the only relevant concerns in this case are those raised by Columbia regarding its customers and potential new customers in Union County.[24] Putting aside for a moment the fact that Suburban is a customer of Columbia, unfortunately for Columbia, the second prong of the test is not whether or not a stipulation benefits Columbia, its customers, and potential new customers; the second prong is whether or not a stipulation benefits ratepayers and the public interest.[25] As discussed above, testimony by Mr. Pemberton regarding the Project, Columbia's legal obligations to supply another public utility, Columbia's ability to meet those supply obligations with the same capacity that it intends to utilize for new customers, issues with existing capacity constraints, future capacity concerns, interconnectibility, and access are all directly relevant to the public interest, which is also the second prong of the Board's three-part test for evaluating the partial Stipulation.

Similarly, the Pemberton Testimony addresses the regulatory implications of the partial Stipulation. It is the policy of the State of Ohio to promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services; and to recognize the continuing emergence of competitive natural gas markets.[26] Mr. Pemberton offers detailed testimony regarding Suburban's interconnection with Columbia's system, the capacity issues in Delaware County, and how the partial Stipulation favors access to Columbia's customers or potential

[24] *See* Columbia's Motion at 4 (claiming that "the need for the [Northern Loop Project] is premised on *Columbia's* need…" and objecting to "access to a gas pipeline project by competitors"); Columbia's Motion at 5 (arguing that Columbia's Northern Loop Project should not be designed or built to serve customers other than Columbia's); Columbia's Motion at 7 (arguing that Columbia's Northern Loop Project should not be used "to meet the natural gas requirements of *all* of Delaware County regardless of which utility has the customer").

[25] *In the Matter of the Application of Arche Energy Project, LLC, for a Certificate of Environmental Compatibility and Public Need*, Case No. 20-979-EL-BGN, Opinion and Order at ¶ 77 (Apr. 15, 2021).

[26] R.C. 4929.02(A)(1), (6).

customers in Marysville and Union County at the expense of other customers, including Suburban and customers in Delaware County. This testimony, therefore, demonstrates that the Stipulation violates Ohio law and important regulatory principles and practices, by failing to ensure that customers have access to adequate, reliable, and reasonably priced natural gas, and by failing to encourage the continuing competition in natural gas markets as required by R.C. 4929.02.

Mr. Pemberton's testimony also addresses the regulatory implications of the partial Stipulation by referring to supply obligations and commitments made pursuant to an omnibus settlement agreement between Columbia and Suburban in the 1995 Stipulation. Both the Commission[27] and the Board[28] allow parties to enter into stipulations for the "resolution of some or all of the issues in a proceeding." Columbia argues that any testimony referring to the 1995 Stipulation is irrelevant, because the Commission, not the Board, should "resolve any dispute arising between the parties under the [1995] Stipulation."[29]

Columbia misses the point of the testimony. Contrary to Columbia's baseless assertions and improper disparagement,[30] Suburban is *not* asking the Board to enforce the 1995 Stipulation. Rather, as explained in Suburban's testimony, Suburban is providing background of the interconnected systems to explain that it is not practically feasible to move capacity from Delaware County to Union County without affecting the availability of capacity and service in Delaware

[27] Ohio Adm.Code 4901-1-30(A).

[28] Ohio Adm.Code 4906-2-24(A).

[29] Columbia's Motion at 7.

[30] *Id.* at 6-8. Given Columbia's disparaging remarks about prior complaints and Suburban's voluntary withdrawal of those complaints, it is important to note for the record the rationale for the withdrawal of the complaints. In 2007, the complaint was dismissed at the request of the indispensable developer who declined to participate as he did not want to get involved in the dispute. In 2013, counsel for Suburban had no choice but to dismiss the complaint the day before the hearing as Suburban's witness, Mr. Pemberton, was seriously ill and could not take the stand. Mr. Pemberton was recovering from a serious bacterial infection, which became septic and required two weeks of quarantine and blood transfusions. It is unfortunate (and unknown why) this information was not shared with Columbia or the Commission at the time.

County and to existing customers.[31] Without increasing capacity, Columbia's supply obligations to Suburban are directly relevant as to whether the proposed Project satisfies the public interest and whether it violates important regulatory principals or practices.

Additionally, even though the Commission retains "continuing jurisdiction…to supervise and assure [Columbia's and Suburban's] compliance with" the 1995 Stipulation,[32] the 1995 Stipulation remains binding on the parties and will affect Columbia's ability to supply gas to other areas and future customers. The Board should be aware of these facts when considering whether Columbia has met its burden of proof to show that the partial Stipulation is reasonable, as well as whether the Board's standard delineated in R.C. 4906.10 has been satisfied.

Further, allowing Columbia to enter into a new Stipulation that permits Columbia to violate the terms of the 1995 Stipulation while giving rise to reoccurrence of the same issues the 1995 Stipulation addressed, would also violate important regulatory principles underlying stipulations in the first place—allowing parties to resolve issues through a settlement. The Board should reject attempts by a public utility to enter into a settlement with others that directly violates prior settlements. There would be no point in entering into settlements if one party could unilaterally trump or dissolve the settlement simply by entering into a subsequent settlement with a different

[31] *See, e.g.*, Pemberton Testimony at 17 ("[Columbia], apparently, has capacity it should have made available to Suburban to render service from the Northern Loop Project to Union County and points beyond"); Pemberton Testimony at 20 (noting that Columbia is "the sole source of pipeline capacity for Suburban in central Ohio" and that Columbia has not explained how it will be able "to meet Delaware County's future gas requirements when it cannot meet its own and Suburban's requirements let alone the requirements of Union County and others by extending the Northern Loop Line"); Pemberton Testimony at 22-24 (noting that Columbia and Staff have described supply constraints but that the "partial Stipulation…fails to ensure that the Northern Loop Project and expansion of [Columbia's] pipeline to Union County will not decrease the natural gas supply to other parts of the region and…other customers in Delaware County").

[32] *In the Matter of the Self-Complaint of Columbia Gas of Ohio, Inc. Concerning Certain of its Existing Tariff Provisions*, Case Nos. 93-1569-GA-SLF, et al., Finding and Order, Exhibit 1 at 9 (Jan. 18, 1996) (1995 Stipulation).

party, promising the same bargained-for outcome or product to two different parties (here, capacity).

Suburban's testimony is directly relevant to both the second and third prongs of the Board's three-part test for evaluating settlements and not allowing such testimony would be unjust, unreasonable, and unfairly prejudicial. Accordingly, Columbia's Motion to Strike should be denied.

C. Suburban's testimony is relevant to addressing the procedural and factual history of this case.

Columbia mischaracterizes the background information provided by Mr. Pemberton in his testimony as "regaling of Suburban's corporate history."[33] As explained previously, this portion of the testimony is directly relevant to the factual development of this case and the interconnection of the systems. Suburban's interest in this proceeding and concerns with the Project, as noted by the Board, arise from Suburban's natural gas supply interconnection agreement with Columbia, and the interconnectedness of Suburban's system and Columbia's system.[34] By describing the growth of Suburban's system, and the development of Delaware County as a whole, Mr. Pemberton provides background into the manner in which the two systems came to be interconnected and the supply obligations and commitments that are directly relevant to the supply concerns raised in this case.[35] Attachments A, B, and H[36] to Suburban's testimony demonstrate the physical interconnectedness between the two systems, which underlies Suburban's interest in this

[33] Columbia's Motion at 10.

[34] *See* Entry at ¶ 12 (Apr. 15, 2021) ("The ALJ observes that Suburban is more than just a general customer of Columbia, as it takes its supply from Columbia at two points of delivery, shares distribution systems with Columbia, and maintains a natural gas supply interconnection agreement with Columbia. As described by Suburban, the proposed project may impact Suburban's ability to supply its customers with natural gas.").

[35] For example, that "Suburban was a wholesale customer of Columbia Gas Transmission Corporation…and its predecessor." *Id.* at 4, 10.

[36] *See* Pemberton Testimony, Attachments A, B, and H.

case.[37] Mr. Pemberton also describes the various agreements, discussions, and issues between the two parties in order to fully explain how capacity constraints currently exist which will likely affect the ability of Columbia to serve its existing customers, as well as future customers, in both Delaware and Union Counties, calling into question whether the proposed Project is needed and will serve the public interest, convenience, and necessity and whether it satisfies the Board's standard delineated in R.C. 4906.10.

The Pemberton Testimony is directly relevant to the Board's evaluation of certificate applications, the Board's process for choosing whether or not to adopt stipulations, and the procedural and factual history of this case and the underlying capacity concerns that have been raised throughout this proceeding. It would be unjust, unreasonable, and unfairly prejudicial to not allow an opposing party to present such testimony. Accordingly, Columbia's Motion to Strike should be denied in its entirety.

III. MEMORANDUM CONTRA MOTION IN LIMINE

In its Motion in Limine, Columbia also moved this Board, for a second time, for an order in limine to limit the scope of Suburban's participation in this case and to prohibit testimony about the 1995 Stipulation, Columbia's legal obligations as it relates to supply commitments, and Suburban's rights to capacity under the agreement.[38] As discussed above, Mr. Pemberton's testimony and attachments regarding capacity concerns with the Project given Columbia's existing capacity and supply obligations are directly relevant to the issues before the Board. Columbia is simply attempting, again, to restrict the admission of inconvenient facts and statements against its

[37] *See* Entry at ¶ 8 (April 15, 2021) ("The ALJ observes that Suburban is more than just a general customer of Columbia, as it takes its supply from Columbia at two points of delivery, shares distribution systems with Columbia, and maintains a natural gas supply interconnection agreement with Columbia. As described by Suburban, the proposed project may impact Suburban's ability to supply its customers with natural gas.").

[38] *See* Columbia's Motion at 10.

interests. Although Columbia has previously requested that the Board limit Suburban's involvement in this case,[39] the Board declined to do so when granting Suburban's intervention.[40] The Board should do so again.

Furthermore, such an Order in Limine would not help "avoid unnecessary delay" or "[prevent] the presentation of irrelevant or cumulative evidence" as required by the Board's rules.[41] Rather, this testimony provides the Board with the necessary background and factual information to appropriately and fully evaluate the application before it and to ascertain the basis of the need for the facility, as well as whether the facility will serve the public interest, convenience, and necessity, and whether the partial Stipulation satisfies the Board's three-part test.

Suburban's testimony has already been "reduced to writing, filed with the board, and served upon all parties and the staff prior to the time such testimony is to be offered"[42] as required by the Board's rules and Entry.[43] As such, pursuant to practice in cases before the Board, the introduction of this relevant testimony at the evidentiary hearing will consist of little more than a few minutes' worth of questioning to adopt the pre-filed testimony as written. To the degree Columbia does not want to address this testimony at the evidentiary hearing, it is free to avoid raising it. Otherwise, the witness will be subject to cross-examination and Columbia can question the witness on any relevant matter contained within his testimony and the attachments. On the

[39] *See* Entry at ¶ 9 (Apr. 15, 2021) ("If Suburban is granted intervention, however, Columbia asks the scope of the proceeding be limited to this specific project and that certain issues described by Columbia in its memorandum contra should expressly be found to be irrelevant and outside the scope of the proceeding.").

[40] *Id.* at ¶ 12 ("As to Columbia's request to limit the scope of Suburban's involvement, the ALJ declines to do that at this time. The Board or the ALJ will address the relevancy of issues as they arise during the course of the proceeding.").

[41] *See* Ohio Adm.Code 4906-2-09(B)(8)(a), (b).

[42] *See* Ohio Adm.Code 4906-2-09(B)(7).

[43] *See* Entry at ¶ 9 (May 19, 2021).

other hand, limiting Suburban's testimony on these relevant issues would be unjust, unreasonable, and unfairly prejudicial.

Because the Pemberton Testimony is directly relevant to the issues raised in the application, the partial Stipulation, and the supply concerns at issue in this case, and because an Order in Limine would not contribute to avoiding unnecessary delay or preventing the presentation of irrelevant or cumulative evidence, and because limiting Suburban's testimony would be unjust, unreasonable, and unfairly prejudicial, Columbia's Motion for Limine should be denied in its entirety.

IV. MEMORANDUM CONTRA MOTION TO STRIKE AS HEARSAY

Lastly, Suburban respectfully requests that the Board deny Columbia's unsubstantiated Motion to Strike as Hearsay in its entirety. Although the Ohio "[r]ules of evidence, as specified by the [Board], shall apply to the proceeding,"[44] Columbia's Motion to Strike fails to cite to any specific rules or law supporting its hearsay allegations. As such, Columbia's Motion to Strike should be denied on its face.

Nonetheless, Suburban will address the claimed hearsay per the Ohio Rules of Evidence, which the Board has specifically applied to its rulings in the past.[45] None of the statements listed by Columbia constitutes hearsay under Ohio Rules of Evidence as the statements are either not hearsay or fall under an exception to hearsay.

[44] R.C. 4906.09.

[45] *See, e.g.*, *In the Matter of the Application of Black Fork Wind Energy, L.L.C. for a Certificate to Site a Wind-Powered Electric Generating Facility in Crawford and Richland Counties, Ohio*, Case No. 10-2865-EL-BGN, Entry on Rehearing at ¶ 52 (Mar. 26, 2012).

As a preliminary note, the first statement highlighted by Columbia[46] appears to be an incorrect reference, as these lines are numbered and state as follows:

> 20 —ultimately, its Chief Operating Officer.
> 21 Q9. Why, how, and where did Suburban grow and expand its system?
> 22 A9. Around the same time, the Ohio General Assembly adopted a policy of encouraging—[47]

Clearly, these statements are not hearsay as Mr. Pemberton, the Chairman of the Board and General Counsel for Suburban, can speak to why, how, and where Suburban grew and expanded its system and when a law was adopted by the Ohio General Assembly that encouraged competition in the business that he is engaged in. It is clearly within the expertise of the Chairman of the Board and General Counsel of a public utility to opine on regulatory laws passed that affect the public utility. Furthermore, the date of any new law would be a matter of public record, and therefore is an exception to hearsay and is "not excluded by the hearsay rule" pursuant to Evidence R. 803.[48]

The remainder of the statements cited to by Columbia, according to Columbia, consist of "statements [Mr. Pemberton] claims were made by Columbia to…others."[49] Columbia takes issue with the following statements:

1. "COH suggested that both companies retain independent anti-trust lawyers to assure compliance with state and federal anti-trust laws."[50]
2. "According to COH's engineering department, the latter was over 100% capacity under design conditions and Suburban's immediate need for only 35 mcfh would

[46] *See* Columbia's Motion at 11 ("Page 5, unnumbered lines 20-22 (double hearsay)").

[47] Pemberton Testimony at 5.

[48] Evidence R. 803(8). ("Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency").

[49] Columbia's Motion at 11.

[50] Pemberton Testimony at 8-9. Again, this appears to be an incorrect citation, as Columbia cites to page 8, line 8, which reads ("…conduct. Suburban also agreed to incorporate the same language into its PUCO tariffs."), and to page 9, lines 1 to 2, which consist of the remainder of the statement.

require an investment of approximately $750,000, all of which would be Suburban's responsibility, according to COH, despite COH's obligation to maintain adequate capacity on this facility to service Delaware County since acquiring that line from TCO."[51]

3. "As Suburban would later discover, while COH's then President stated in a 2003 meeting with Suburban's management in response to an inquiry regarding the Northern Loop Line that there were no plans for moving forward on the Northern Loop Project in the next five years, i.e., not until 2008, by 2005 COH had already constructed over twenty miles of the Northern Loop Line from New Albany past Suburban's proposed POD which, had Suburban known, could have saved it and its customers the $8 million paid for its own supply line that same year."[52]
4. "After a delay of more than five months, a COH/NiSource attorney, in a letter dated October 24, 2011 to Suburban's attorney, a copy of which is also attached to my testimony (see Attachment E), denied my request asserting that COH did not have any capacity to serve Suburban; that a preliminary estimate indicated that it would take $41 million at a minimum to build another line from COH's New Albany POD to Suburban's proposed POD, essentially duplicating the Northern Loop Line; that 'prior to the construction of the Northern Loop project,' Suburban declined to participate in the project and informed COH that it would get its supply elsewhere; and that COH proceeded with the Northern Loop Project with the purported 'understanding' that Suburban would not be taking any supply from the Northern Loop Project which COH communicated to Suburban and constructed the Northern Loop Project accordingly."[53]
5. Attachment E, referenced in the above quotation.[54]
6. "And, since COH's lawyer's letter admits that the Northern Loop Line had already been constructed 'past Suburban's proposed POD location' before Suburban

[51] Pemberton Testimony at 13.

[52] Pemberton Testimony at 14, n.6.

[53] Pemberton Testimony at 15.

[54] Pemberton Testimony at Attachment E.

decided to build its own supply line, this decision could not have altered the design requirements which existed for the Northern Loop Line before Suburban constructed that line. Similarly, postulating a total duplication of the twenty miles of the Northern Loop Line from which Suburban would be served at an estimated minimum of $41 million as the answer to Suburban's service request is manifestly preposterous. No wonder it took more than five months to obfuscate a response to Suburban's May 12, 2011 service request."[55]

7. "COH alleged that it had no capacity available from the Northern Loop Line, reiterating the issues previously refuted in its legal counsel's letter rejecting my request for capacity from the Northern Loop Line in 2011."[56]
8. "COH's attorney advised Suburban that COH did not have any capacity for Suburban because Suburban had decided to build its own supply line in 2005 and elected not to participate in constructing the Northern Loop Line, instead."[57]
9. "Moreover, to accept COH's attorney's statement that Suburban 'chose' to build its own supply line rather than participate in the Northern Loop Project which was initially allegedly unavailable or to accept COH's unlawful and onerous conditions is ridiculous."[58]
10. "…it was told that COH needed all of the available capacity."[59]

None of these statements satisfy the definition of hearsay, and therefore, cannot constitute hearsay. Pursuant to Evid. R. 801, a statement is not hearsay if it is an admission by a party opponent.[60] This includes a statement offered against a party that is, among other things:

> (a) the party's own statement, in either an individual or a representative capacity, or
> (b) a statement of which the party has manifested an adoption or belief in its truth, or

[55] Pemberton Testimony at 16.

[56] Pemberton Testimony at 17.

[57] Pemberton Testimony at 19.

[58] *Id.*

[59] Pemberton Testimony at 20.

[60] Evid. R. 801(D)(2).

> (c) a statement by a person authorized by the party to make a statement concerning the subject, or
> (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.[61]

Thus, by the very definition of hearsay, none of the ten statements delineated above that are at issue in Columbia's Motion to Strike constitute hearsay. These statements were all made by Columbia, or employees of Columbia, and are being offered against Columbia. To the degree that Columbia asserts these statements were not made,[62] Columbia is free to contest this on a factual basis at the hearing. However, as Suburban notes, Columbia has adopted some of these statements in this proceeding (by arguing against providing more capacity to Suburban). Suburban has also provided exhibits verifying several of these statements. As such, it is clear, by the very definition of hearsay, these statements are not hearsay.

Additionally, Columbia cannot have it both ways. Columbia cannot argue in this proceeding that it has sufficient capacity to serve Delaware County, its existing customers, including Suburban, and Union County without also allowing Suburban to demonstrate that the opposite is true. Suburban has the right to challenge Columbia's assertions and produce contrary evidence to demonstrate that Columbia has not met its burden of proof and that Columbia has in fact stated that it does not have additional capacity. An admission by a party opponent is the very reason that the Ohio Rules of Evidence do not deem those contrary statements to constitute hearsay so that those statements can be used against the party opponent at the evidentiary hearing.

Given the baseless nature of Columbia's arguments, Suburban respectfully requests that the Board deny Columbia's Motion to Strike for Hearsay in its entirety.

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[61] *Id.*

[62] *See* Columbia's Motion at 11 ("statements [Mr. Pemberton] claims were made by Columbia").

V. CONCLUSION

In its Combined Motion to Strike and Motion in Limine Regarding Testimony of David L. Pemberton and Request for Expedited Ruling, Columbia has mischaracterized Suburban's testimony, misapplied Ohio law, misapplied Board rules, misapplied the Ohio Rules of Evidence, and misrepresented the issues at hand in this proceeding. As such, Columbia's Motions are entirely without merit. All of the issues raised in the Pemberton Testimony are not hearsay and are relevant to the issues before the Board, and striking or otherwise limiting Suburban's testimony and participation in this case would be unjust, unreasonable, and unfairly prejudicial. Accordingly, Suburban respectfully requests that the Board deny the Motions in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Ohio Power Siting Board of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on June 9, 2021 upon the parties of record.

/s/ Kimberly W. Bojko
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Summary: Memorandum Contra Combined Motion to Strike and Motion in Limine Regarding Direct Testimony of David L. Pemberton by Suburban Natural Gas Company electronically filed by Mrs. Kimberly W. Bojko on behalf of Suburban Natural Gas Company