**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand Side Management Program for its Residential and Commercial Customers.In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods.  | ))))))) | Case No. 16-1309-GA-UNCCase No. 16-1310-GA-AAM |

**MEMORANDUM CONTRA COLUMBIA GAS OF OHIO, INC.’S MOTION FOR EXTENSION OF PROTECTIVE ORDER**

**BY**

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# i. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) should deny Columbia’s Motion for Extension of Protective Order.[[1]](#footnote-2) In that motion, Columbia asks the PUCO to allow it to continue hiding from the public important information (the “Hidden Information”) about Columbia’s natural gas energy efficiency programs—programs that Columbia’s customers pay for. The Hidden Information is not a trade secret, and thus, transparency in PUCO proceedings demands that the public have access to it.

In fact, it was wrong for the PUCO to allow Columbia to deprive the public of this information in the first place. Nearly two years ago, the Office of the Ohio Consumers’ Counsel (“OCC”) filed an application for rehearing seeking, among other things, the public release of the Hidden Information. Unfortunately, despite a law requiring the PUCO to rule on applications for rehearing within 30 days,[[2]](#footnote-3) 669 days have passed with no substantive ruling on OCC’s application for rehearing. Had the PUCO timely granted OCC’s application for rehearing, the Motion for Extension would not have been necessary. And the public would have access to the Hidden Information, as it should.

The PUCO should deny the Motion for Extension and should also grant OCC’s pending application for rehearing so that consumers will no longer be kept in the dark. The public has a right to know about the operations of their State government.

# ii. BACKGROUND

OCC has been fighting for transparency in this case for over two years. In September 2016, Columbia filed a motion for protective order.[[3]](#footnote-4) In that motion, Columbia sought permission to deny the public access to important details about Columbia’s natural gas energy efficiency programs. This information (the Hidden Information) includes, among other things, the dollar value of rebates that customers pay for, the number of customers who receive subsidies under Columbia’s energy efficiency programs, and Columbia’s calculations regarding the cost-effectiveness of the programs that customers pay for.[[4]](#footnote-5) According to Columbia, this information is a “trade secret” and thus can be kept from the public, including Columbia’s customers, who pay for Columbia to create the very things that Columbia claims are trade secrets.

OCC opposed Columbia’s Motion for Protective Order.[[5]](#footnote-6) Consistent with Ohio laws requiring transparency in state government operations,[[6]](#footnote-7) the public—and especially Columbia’s customers, who pay for Columbia’s energy efficiency programs—deserve to know what they are paying for.[[7]](#footnote-8)

Columbia’s motion was not resolved in advance of the hearing in this case, and the scope of Columbia’s trade secret claims was wide. Thus, parties were required to cross-examine witnesses behind closed doors and heavily redact their post-hearing briefs. The amount of information kept from the public was substantial. This is because one of the key issues in the case was whether Columbia’s programs are cost-effective (*i.e.*, whether they save customers more money than they cost), but Columbia claimed that the majority of the information about cost-effectiveness was a trade secret.

Ultimately, in December 2016, the PUCO ruled that Columbia could continue to keep this information from the public for a period of two years.[[8]](#footnote-9) On January 20 2017, OCC applied for rehearing, urging the PUCO to reverse its finding and instead rule that this information should be publicly available. On February 8, 2017, the PUCO granted OCC’s application for rehearing for the limited purpose of giving itself more time to consider it.[[9]](#footnote-10) Now, 22 months later, the PUCO has not yet ruled on OCC’s application for rehearing.

In the December 2016 order, the PUCO allowed Columbia to seek an extension of that two-year period, which it has done through the Motion for Extension.

# III. RECOMMENDATIONS

## A. The PUCO should grant OCC’s application for rehearing—which has been pending for nearly two years—and deny Columbia’s Motion for Extension.

The issues that Columbia raises in its Motion for Extension are the same as those that the PUCO addressed two years ago in this case. At that time, OCC filed an application for rehearing, demonstrating that the information in question should be made publicly available. OCC argued that:

* PUCO precedent is that customer participation rates and energy efficiency program costs are not trade secrets.[[10]](#footnote-11)
* Columbia has publicly filed program participation rates and rebate amounts in the past, thus demonstrating that Columbia does not consider them trade secrets.[[11]](#footnote-12)
* Columbia does not derive economic value from keeping secret its cost-effectiveness model, and other parties would not obtain economic value from its disclosure or use.[[12]](#footnote-13)
* The inputs and data that Columbia plugged into its cost-effectiveness model are not trade secrets, even if the model they are plugged into is proprietary.[[13]](#footnote-14)
* Columbia does not have an independent business interest in competing in the market for energy efficiency services because energy efficiency programs are for the benefit of customers, not Columbia’s shareholders.[[14]](#footnote-15)

These same arguments apply now to Columbia’s Motion for Extension because the same Hidden Information at issue in the Motion for Extension was at issue in OCC’s application for rehearing.

OCC’s application for rehearing has been pending for 669 days and counting. Had the PUCO granted OCC’s application for rehearing and ordered Columbia to disclose the Hidden Information, Columbia’s Motion for Extension would not have been necessary because the Hidden Information would already be publicly available. The PUCO should grant OCC’s application for rehearing for the reasons stated therein, immediately release the Hidden Information (including all transcripts, briefs, discovery, and other documents), and deny Columbia’s Motion for Extension.

## B. The PUCO lacks statutory authority to approve Columbia’s Motion for Extension while OCC’s application for rehearing remains pending.

Ohio law guarantees parties like OCC the right to seek rehearing of PUCO orders. Under R.C. 4903.10, “any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding.” Once a party applies for rehearing, the PUCO has thirty days to act.[[15]](#footnote-16) If the PUCO grants rehearing, it “shall specify in the notice of such granting the purpose for which it is granted.”[[16]](#footnote-17) If the PUCO “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed,” then it must “abrogate or modify the order.”[[17]](#footnote-18) Otherwise, the law provides that “such order shall be affirmed.”[[18]](#footnote-19)

As explained above, OCC filed an application for rehearing regarding the PUCO’s December 21, 2016 Order in this case. The PUCO granted OCC’s application for rehearing on February 8, 2017 but did not address the substance of any of OCC’s arguments. Instead, it granted OCC’s application for rehearing for the limited purpose of giving itself more time to consider it.[[19]](#footnote-20)

Since the PUCO’s February 8, 2017 Entry on Rehearing, the PUCO has not taken any further action in this case. The law requires the PUCO to do one of two things in this case: (i) find that something in the Order is unjust, unwarranted, or should be changed, or (ii) affirm the Order.[[20]](#footnote-21) To date, the PUCO has not done these things. OCC’s application for rehearing is in limbo, and absent an entry on rehearing addressing the substance of OCC’s arguments, OCC has been prohibited from appealing the Order for nearly two years.[[21]](#footnote-22)

But now, Columbia asks the PUCO to rule that certain information from this case constitutes trade secret information that can be kept from public disclosure. This creates a problem under the law. If the PUCO grants Columbia’s Motion for Extension, it would effectively moot the portion of OCC’s application for rehearing addressing the very same issues addressed in the Motion for Extension. But the law requires the PUCO to rule on OCC’s application for rehearing, either by abrogating or modifying the Order or affirming it. The PUCO cannot sidestep the law and effectively dismiss a portion of OCC’s application for rehearing by proceeding on the parallel track of motion practice. This would unfairly deny OCC its statutory right to obtain a ruling on rehearing.

The PUCO must rule on OCC’s application for rehearing beforetaking any action with respect to the Motion for Extension. To do otherwise would contradict both the plain language and spirit of R.C. 4903.10, which is intended to give parties a meaningful opportunity for rehearing and judicial review of PUCO orders.

## C. Some of the Hidden Information is publicly available and thus is not trade secret.

### Columbia publicly publishes rebate amounts on its website, thus showing that Columbia does not consider this information a trade secret.

Columbia claims that the rebate amounts and energy audit costs for its energy efficiency programs are trade secrets.[[22]](#footnote-23) According to Columbia, “public disclosure of these numbers would provide competitors and bidders information used to model cost-effectiveness of the DSM programs and could lead bidders who seek to win bids to implement Columbia’s programs to bid up to those rates instead of bidding lower rates.”[[23]](#footnote-24) But Columbia’s own website shows that Columbia is not really concerned with third-parties knowing the amounts of its rebates—the website includes the following information for public viewing:

* Columbia will provide a Home Energy Assessment, which Columbia says has a $300 value, for $20.[[24]](#footnote-25)
* Columbia will provide a Home Energy Audit, which Columbia says has a $500 value, for $50.[[25]](#footnote-26)
* Columbia will install a Nest thermostat for $99 along with the Home Energy Assessment or Home Energy Audit.[[26]](#footnote-27)
* Columbia will perform a Multifamily Energy Audit, which Columbia says has a $500 value, for $100. Along with this audit, Columbia will provide free showerheads and programmable thermostats.[[27]](#footnote-28)
* Columbia will provide a $300 rebate on Energy Star natural gas furnaces, a $350 rebate on Energy Star natural gas boilers, a $50 rebate on Energy Star natural gas water heaters, and a $100 rebate for Energy Star natural gas tankless water heaters.[[28]](#footnote-29)
* Columbia will provide a $75 rebate for Energy Star smart thermostats, a $25 rebate for programmable thermostats, and a $10 rebate for efficient showerheads.[[29]](#footnote-30)

The law is clear: “once material is publicly disclosed, it loses any status it ever had as a trade secret.”[[30]](#footnote-31) The information that Columbia has voluntarily published on its public website thus cannot be considered trade secret information.

Moreover, by publishing some of its rebate amounts on its website, Columbia has shown that it does not believe that rebate amounts in general are trade secrets. While not every rebate is disclosed on these webpages, Columbia does not explain why some rebates must remain confidential while others can be publicly disclosed. There is nothing unique about the rebates that Columbia publicly disclosed which would suggest that third parties derive less value from this information than they would from knowing, for example, the amount of Columbia’s insulation rebates (which are not on the website). By publishing *some* of its rebate information on its website, Columbia has refuted its own claim that *any* rebate information needs to be protected as a trade secret.

The PUCO should reject Columbia’s claim that third parties can obtain value from knowing Columbia’s rebate amounts. Columbia’s own conduct confirms that Columbia does not believe this to be true.

### Columbia shares participation rates with its energy efficiency stakeholder group, a public forum that includes individuals and entities who are neither Columbia employees nor parties to this case.

Columbia shares information about program participation rates with its energy efficiency stakeholder group. The stakeholder group includes not only OCC and parties to this case, but various other entities that have not intervened in this case and do not generally participate in PUCO proceedings, including the Mid-Ohio Regional Planning Commission, Cornerstone Energy Conservation Services, Ohio Home Builders Association, the Ohio Board of Building Standards, Seventhwave, Atlas Butler, Neighborworks Toledo, and the Corporation for Ohio Appalachian Development.[[31]](#footnote-32) Columbia’s stakeholder group meetings are not confidential meetings.

At its most recent stakeholder meeting in April 2018, Columbia shared the number of participants in its programs for 2017:

|  |  |  |
| --- | --- | --- |
| **Program** | **Expected Participants** | **Actual Participants** |
| WarmChoice | 2,150 | 1,967 |
| Faucet Aerators | 5,287 | 2,049 |
| Showerheads | 6,802 | 2,371 |
| Thermostats | 6,183 | 13,687 |
| Appliances | 6,845 | 5,908 |
| Energy Audits | 6,000 | 4,561 |
| Efficiency Crafted Homes | 1,965 | 2,205 |
| Student Education (e3smart) | 21,000 | 21,153 |
| Home Energy Reports | 430,000 | 540,674 |

Yet now, in the Motion for Extension, Columbia claims that the number of customers projected to participate in its energy efficiency programs is a trade secret.[[32]](#footnote-33) According to Columbia, “[t]he expected program participation numbers have both actual and potential economic value to others who provide energy efficiency services and could use this information to copy Columbia’s Program for their own economic benefit.”[[33]](#footnote-34) If this were true, or if Columbia derived value from keeping this information secret from the public, Columbia would not have shared the information at its stakeholder group meeting, a public forum. The PUCO should rule that customer participation rates are not trade secrets.

## D. Even if the Hidden Information was a trade secret two or three years ago (which it wasn’t), it is now stale and thus no longer deserves trade secret protection.

It is well accepted that a trade secret can cease to be a trade secret if it loses its value over time.[[34]](#footnote-35) In this case, at least some of the Hidden Information is no longer valuable because it pertains to Columbia’s projections for 2017 and 2018 energy efficiency programs, which are complete or nearly so. For example, Columbia seeks to keep protected the number of customers it projected would participate in its programs in 2017 and 2018.[[35]](#footnote-36) Those projections are now worthless because 2017 is over, and 2018 will be over soon, so no party could derive any value from knowing how many customers Columbia expected to participate in the past. Indeed, Columbia itself appears never to have considered historical participation rates to be trade secrets. In its Application in this case, Columbia publicly filed the number of customers that participated in each of its programs from 2012-2015.[[36]](#footnote-37) Columbia did not consider that information a trade secret. Nor should participation rate information about 2017 or 2018 be considered a trade secret as 2019 approaches. The PUCO should not allow Columbia to continue to hide from the public the number of customers that it expected to participate in its programs in 2017 and 2018.

# IV. CONCLUSION

Columbia’s customers pay for its energy efficiency programs. But Columbia is denying those customers and the general public access to important information about the programs, including the number of customers that participate, the amount of rebates that customers receive, and information about whether the programs are cost-effective. The PUCO should have denied Columbia’s request for secrecy over two years ago, and it should do so here. Customers have a right to know what they are paying for.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 20th day of November 2018.

 /s/ *Christopher Healey*\_\_\_\_\_\_\_

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1. Motion for Extension of Protective Order of Columbia Gas of Ohio, Inc. (Nov. 5, 2018) (the “Motion for Extension”). [↑](#footnote-ref-2)
2. R.C. 4903.10. [↑](#footnote-ref-3)
3. Motion for Protective Order and Memorandum in Support of Columbia Gas of Ohio, Inc. (Sept. 7, 2016) (the “Motion for Protective Order”). [↑](#footnote-ref-4)
4. *See generally* Motion for Protective Order. [↑](#footnote-ref-5)
5. Memorandum Contra Motion by Columbia Gas to Keep Information Secret from the Public about the Energy Efficiency Programs that the Public Pays For by the Office of the Ohio Consumers’ Counsel (Sept. 22, 2016). [↑](#footnote-ref-6)
6. R.C. 4901.12 (with limited exceptions, “all proceedings of the public utilities commission and all documents and records in its possession are public records”); R.C. 4905.07 (with limited exceptions, “all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts. [↑](#footnote-ref-7)
7. *See generally id.* [↑](#footnote-ref-8)
8. Opinion & Order ¶ 25. [↑](#footnote-ref-9)
9. Entry on Rehearing (Feb. 8, 2017). [↑](#footnote-ref-10)
10. OCC AFR at 4-6. [↑](#footnote-ref-11)
11. OCC AFR at 6-9. [↑](#footnote-ref-12)
12. OCC AFR at 10-12. [↑](#footnote-ref-13)
13. OCC AFR at 12-14. [↑](#footnote-ref-14)
14. OCC AFR at 14-16. [↑](#footnote-ref-15)
15. R.C. 4903.10(B) (“If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.”). [↑](#footnote-ref-16)
16. R.C. 4903.10(B). [↑](#footnote-ref-17)
17. R.C. 4903.10(B). [↑](#footnote-ref-18)
18. R.C. 4903.10(B). [↑](#footnote-ref-19)
19. Order ¶¶ 11, 13 (Dec. 21, 2016). [↑](#footnote-ref-20)
20. R.C. 4903.10(B). [↑](#footnote-ref-21)
21. R.C. 4903.10(B) (“No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application [for rehearing].”). [↑](#footnote-ref-22)
22. Motion for Extension at 9. [↑](#footnote-ref-23)
23. Motion for Extension at 9. [↑](#footnote-ref-24)
24. *See* https://www.columbiagasohio.com/ways-to-save/home-energy-assessment (last visited Nov. 9, 2018). [↑](#footnote-ref-25)
25. *Id.* [↑](#footnote-ref-26)
26. *Id.* [↑](#footnote-ref-27)
27. *See* https://www.columbiagasohio.com/ways-to-save/multifamily-audit (last visited Nov. 9, 2018). [↑](#footnote-ref-28)
28. *See* https://www.columbiagasohio.com/ways-to-save/furnace-boiler-discounts (last visited Nov. 9, 2018). [↑](#footnote-ref-29)
29. *See* https://www.columbiagasohio.com/ways-to-save/simple-energy-solutions (last visited Nov. 9, 2018). [↑](#footnote-ref-30)
30. *State ex re. Rea v. Ohio Dep’t of Educ.*, 81 Ohio St.3d 527, 532 (1998) *See also* *United States v. Asgari*, 2018 U.S. Dist. LEXIS 56738, at \*32 (N.D. Ohio Apr. 3, 2018) (“publicly available information obviously cannot be a trade secret”). [↑](#footnote-ref-31)
31. *See* Application, Appendix A (June 10, 2016). [↑](#footnote-ref-32)
32. Motion for Extension at 7. [↑](#footnote-ref-33)
33. Motion for Extension at 7. [↑](#footnote-ref-34)
34. *See, e.g., Sys. Spray-Cooled, Inc. v. FCH Tech, LLC*, 2017 U.S. Disc. LEXIS 73909, at \*14 (May 16, 2017) (“a trade secret may lose its protected status upon a showing that the information has become stale or outdated”) (citing *Synergetics, Inc. v. Hurst*, 477 F.3d 949 (8th Cir. 2007); *Avtel Servs. v. United States*, 70 Fed. Cl. 173, 191 (2005) (“information loses its confidential nature once it becomes stale”); *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, 2016 U.S. Dist. LEXIS 79183, at \*9-10 (S.D. Ohio June 17, 2016) (“Courts have generally held that trade secret law does not protect ‘information that is merely momentary or ephemeral because it quickly becomes stale.’”) (quoting *State ex rel. Plain Dealer v. Ohio Dep’t of Ins.*, 80 Ohio St.3d 513 (1997)). [↑](#footnote-ref-35)
35. Motion for Extension at 7. [↑](#footnote-ref-36)
36. Application at 4. [↑](#footnote-ref-37)