

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Application of )  
Columbia Gas of Ohio, Inc. for Approval )  
of a General Exemption of Certain Natural )  
Gas Commodity Sales Services of ) Case No. 08-1344-GA-EXM  
Ancillary Services from Chapters 4905, )  
4909, and 4935 except Sections 4905.10, )  
4935.01, and 4935.03, and from specified )  
sections of Chapter 4933 of the Revised )  
Code. )

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APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the June 1, 2011, Entry ("June 1 Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). The Commission erred by establishing an over-accelerated procedural schedule that does not allow for sufficient discovery under law or rule.<sup>1</sup> Through this Application for Rehearing, OCC seeks to have the Commission re-issue a procedural schedule that provides the parties with adequate and reasonable time for discovery, so that the parties to this proceeding are not prejudiced, and Columbia Gas Company of Ohio, Inc.'s ("Columbia" or "the Company") customers' interests are adequately represented at hearing.

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<sup>1</sup> See *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales or Ancillary Services*, Case No. 08-1344-GA-EXM, June 1, 2011, Entry, where the testimony deadline is scheduled for June 23, 2011, and the hearing is scheduled for six-days later on June 29, 2011.

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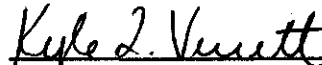
Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the June 1 Entry was unjust, unreasonable and unlawful in the following regards:

1. The Commission erred in adopting a procedural schedule that does not allow for adequate discovery, and thus, the Commission should adopt a reasonable procedural that allows for discovery until "the commencement of the hearing" as required by Ohio Adm. Code 4901-1-17(A).
2. The Commission erred in establishing an over-accelerated procedural schedule, and should modify the June 1 Entry by extending the deadline for filing testimony from June 23, 2011, to August 23, 2011, and the hearing date from June 29, 2011, to September 1, 2011. In addition, the Commission should establish a briefing schedule in lieu of closing statements.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10, and the OCC claims of error, the PUCO should grant rehearing.

Respectfully submitted,

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CONSUMERS' COUNSEL



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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On April 15, 2011, Columbia filed a Revised Program Outline ("Revised Outline") requesting the Commission to approve Columbia's implementation of an initial retail Standard Choice Offer ("SCO") Auction in February of 2012.<sup>2</sup> On May 9, 2011, the OCC consequently filed an Objection to the Standard Choice Offer Auction and Petition to Suspend Columbia's Proposed SCO Auction in favor of another wholesale Standard Service Offer ("SSO") Auction, pursuant to the Commission's December 2, 2009, Opinion and Order.<sup>3</sup>

On January 30, 2009, Columbia filed an Application for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services

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<sup>2</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 08-1344-GA-EXM, Revised Outline (April 11, 2011) at 1 ("Revised Outline").

<sup>3</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 08-1344-GA-EXM, Opinion and Order (December 2, 2009) at 9 ("Opinion and Order").

("Application").<sup>4</sup> Attached to that Application was a Program Outline ("Program Outline"), which explained how Columbia planned to implement wholesale Standard Service Offer ("SSO") and retail Standard Contract Offer ("SCO") Auction processes in place of a Gas Cost Recovery ("GCR") mechanism.<sup>5</sup> The auction process involves residential non-Choice sales customers being served by Marketers who bid for the right to serve those customers in place of the Company controlled Request for Proposal ("RFP") process. The auction process impacts the rate that customers pay for the natural gas commodity portion of their bill -- a portion that can be as much as 60 percent of the total bill during the winter heating season.

In August of 2009, the parties to the proceeding reached an agreement in principle to settle the issues in the case, and filed a Joint Stipulation and Recommendation ("Stipulation") which recommended approval of Columbia's Application on October 7, 2009. The Commission approved the Stipulation on December 2, 2009, by Opinion and Order ("Opinion and Order").<sup>6</sup>

According to the Stipulation, Columbia would conduct two wholesale SSO auctions in order to implement two consecutive, one-year long, SSO periods, starting in April 2010, and April 2011.<sup>7</sup> In addition, Columbia was to conduct a third auction for the annual period beginning 2012.<sup>8</sup> This third auction was to be a retail SCO auction.<sup>9</sup>

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<sup>4</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 08-1344-GA-EXM, Application (January 30, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *See* Opinion and Order, generally.

<sup>7</sup> Opinion and Order at 7.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.*

On April 15, 2011, Columbia filed a Revised Program Outline (“Revised Outline”) requesting the Commission to approve Columbia’s implementation of an initial retail SCO Auction in February of 2012.

On May 30, 2011, OCC filed a Petition opposing the SCO auction because the SCO will impose quantifiable and unavoidable higher costs on residential customers. OCC argued that there are no tangible, objectively quantifiable benefits for residential customers as a result of the proposed change, and because the change to the SCO results in considerable customer confusion.<sup>10</sup> On June 1, 2011, the Commission issued an Entry which set-forth an expedited procedural schedule for this proceeding.<sup>11</sup>

While OCC appreciates that the Commission has set-forth a procedural schedule for this proceeding, including an evidentiary hearing, the proposed schedule will not allow the parties to conduct adequate discovery, and will not allow for a meaningful review of Columbia’s request. Therefore, as set forth in this Application for Rehearing, the procedural schedule presented would prejudice the development of fully informed advocacy on behalf of Columbia’s customers.

Upon review, the Commission should: (1) modify the June 1 Entry by extending the deadline for filing testimony from June 23, 2011, to August 23, 2011, and the hearing date from June 29, 2011, to September 1, 2011; (2) require service of discovery by email; (3) set-forth a discovery deadline under the operation of Ohio Adm. Code 4901-1-17 (A); and (4) establish a briefing schedule in lieu of closing statements. This proposal will allow additional time for intervening parties to receive, review and incorporate results

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<sup>10</sup> See Petition, generally.

<sup>11</sup> See June 1 Entry.

from discovery conducted in this case, and adequately prepare this case for hearing.

## II. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”<sup>12</sup> Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”<sup>13</sup>

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”<sup>14</sup> Furthermore, if the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same \* \* \*.”<sup>15</sup>

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

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<sup>12</sup> R.C. 4903.10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

### III. ARGUMENT

**A. The Commission Erred in Adopting a Procedural Schedule That Does Not Allow for Adequate Discovery, and Thus, the Commission Should Adopt a Reasonable Procedural that Allows for Discovery Until “the Commencement of the Hearing” as Required by Ohio Adm. Code 4901-1-17(A).**

An immediate determination by the Commission is needed to prevent undue prejudice to OCC and to Columbia’s residential customers. The undue prejudice will result from the denial of adequate and ample discovery under the current time-line, which will not be rectifiable if the Commission later determines when it resolves this case that the procedural schedule provided too little preparation time.

**1. Under the Commission’s Entry Interested Parties are Denied Their Rights to Ample Discovery Under the Law.**

The June 1 Entry, in establishing an imminent testimony deadline of June 23, 2011, does not provide OCC, or any other interested party, with the “ample rights of discovery” or the “full and reasonable discovery” as required by a law.<sup>16</sup> The parties will essentially be required to draft and file testimony before they have the opportunity to complete the discovery process, including resolving any discovery disputes. Therefore, OCC, and the residential customers OCC represents, will be unduly prejudiced by being unable to adequately use discovery responses in support of their testimony.

The Commission has adopted Ohio Adm. Code 4901-1-16(A) that provides:

The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the **prompt and expeditious** use of prehearing discovery in order to facilitate **thorough and adequate preparation for participation in commission proceedings.** (Emphasis added).

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<sup>16</sup> See R.C. 4903.082.

This rule, with its focus on thorough preparation, directly supports OCC's application. OCC, in its advocacy for residential customers, must have sufficient time to conduct reasonable discovery, employ the discovery answers received in the preparation of its testimony, and in prepare for the hearing which is currently set for June 29, 2011.

In support of the need for an immediate determination, it should be recognized that Ohio law and rule provide for parties to have adequate case preparation in advance of opportunities to advocate to the Commission. R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery." OCC properly intervened in this proceeding on February 11, 2009, and thus is a party according to Ohio Adm. Code 4901-1-16(H).<sup>17</sup>

Additionally, R.C. 4903.082 directs the Commission to ensure that parties are allowed "full and reasonable discovery" under its rules. This will not be the case if the Commission's current procedural schedule remains in place. On April 28, 2011, OCC served Columbia with the First Set of Discovery in the SCO Auction proceeding. On May 9, 2011, Columbia filed a Motion to Stay Discovery. The Commission's June 1 Entry addressed this controversy by stating:

The Commission finds that, in light of the fact that a hearing has been scheduled in this matter, the portion of the motion requesting a stay of discovery, unless and until the hearing determination is made, should be denied. With regard to Columbia's request that discovery be limited to the issues pertaining to the matters to be considered at the hearing, the Commission finds that such request is well made and should be granted.

Consequently, at this point in this proceeding, the Commission finds that discovery should be limited to information that is reasonably calculated to lead to the discovery of admissible

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<sup>17</sup> Ohio Adm. Code 4901-1-16(H) states: "For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term "party" includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed."



evidence pertaining to the issues to be deliberated at the hearing. The issues to be deliberated at the hearing are: the parties' positions regarding the benefits of an SCO auction, as well as evidence in opposition to such positions; and the parties' positions regarding the benefits of an SSO auction, as well as evidence in opposition to such positions. Accordingly, Columbia's motion to stay is granted, in part, and denied, in part.<sup>18</sup>

Columbia's refusal to respond to OCC discovery has resulted in further delay in OCC's preparation for hearing that is rapidly approaching under the established procedural schedule. Moreover, Columbia only partially responded to OCC's First set of Discovery on June 6, 2011. The failure of Columbia to more fully respond to OCC's discovery requests has denied OCC an opportunity to conduct follow up discovery within the time frame set forth in the June 1 Entry.

Discovery is crucial to this proceeding as this issue at hand will **directly affect** residential customers due to the inherent differences in the SSO and SCO auction processes. Discovery is crucial so that OCC can have the opportunity to examine these issues. Under the procedural schedule established by the Commission, the discovery response time was shortened to five calendar days.<sup>19</sup> As such, OCC requests that the Commission extend the hearing date to September 1, 2011, and accordingly, the discovery deadline would be "prior to the commencement of the hearing" under the operation of Ohio Adm. Code 4901-1-17(A).

In sum, the modifications to the procedural schedule proposed by OCC will prevent the undue prejudice that would result from the current procedural schedule.

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<sup>18</sup> June 1 Entry at 4.

<sup>19</sup> June 1 Entry at 3.

**B. The Commission Erred in establishing an Over-Accelerated Procedural Schedule, and Should Modify the June 1 Entry by Extending the Deadline for Filing Testimony from June 23, 2011, to August 23, 2011, and the Hearing Date from June 29, 2011, to September 1, 2011. In Addition, the Commission Should Establish a Briefing Schedule in Lieu of Closing Statements.**

As previously indicated, OCC discovery may provide additional, substantive information as to the differences in costs and benefits between SCO and SSO auctions which will affect customers. In order to file informed and complete testimony, and to adequately prepare for hearing, OCC must have sufficient time to draft and review responses to discovery. In order to do so, the testimony filing deadline should be modified from June 23, 2011, to August 23, 2011, and the hearing date should be modified from June 29, 2011, to September 1, 2011. These modifications will allow discovery to be incorporated into OCC's testimony, and allow OCC to adequately prepare for hearing.

In its Revised Program Outline, Columbia stated that it needed a Commission decision by September 1, 2011.<sup>20</sup> Given that any SCO auction would not be conducted until sometime in the February - March, 2012 timeframe, there has been no justification for Columbia to have nearly six months time to prepare for the SCO auction. This is especially true in light of the fact that Columbia has indicated that "Administering an SCO auction is very similar to administering an SSO auction."<sup>21</sup>

Since Columbia has not provided any specific information as to what needs to be completed internally in order to move from an SSO auction to an SCO auction, then the Commission should recognize the arbitrary nature of the September 1, 2011 deadline, and

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<sup>20</sup> Revised Program Outline at 2 (April 15, 2011).

<sup>21</sup> See Columbia response to OCC Interrogatory No. 19 Attachment 1.

modify the procedural schedule in accordance with OCC's proposal. To the extent that there may be a need for six months worth of work that must be performed by Columbia in order to implement the SCO auction, then those costs should be quantified in order to include such costs in the evaluation of the costs/benefits of the SCO auction.

The Commission, through the parties' testimony and the hearing, will be able to make an informed decision. Again, an SCO auction could likely adversely affect residential customers because it will 1) result in higher costs from higher tax rates to customers, 2) potentially cause customer confusion, and 3) reduce competitive pressure on the SCO price due to a loss of bidders. Thus, it is important for the PUCO to have testimony and a hearing opportunity to adequately inform them about the differences between the two types of auctions, and the ramifications of Columbia's requested switch from SSO to SCO. Discovery is a crucial part of the information gathering in this case. Therefore, the Commission should allow these discovery activities to be completed and employed in this case. As such, the Commission should modify the June 1 Entry and extend the procedural comment deadlines, for the reasons stated above.

In addition, the June 1 Entry states as follows:

(c) In lieu of briefs, at the conclusion of the evidentiary hearing, each party will have an opportunity to make a closing statement.<sup>22</sup>

While OCC appreciates the opportunity to make a closing statement with respect to this proceeding, OCC requests that the Commission set forth a briefing schedule instead. A reasonable briefing schedule in lieu of a closing statement would still allow the Commission to issue an Order by mid-October. To this end, OCC proposes that

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<sup>22</sup> See June 1 Entry at 3.

initial briefs be due September 13, 2011, and reply briefs due one week later on September 20, 2011.

The Commission should grant the OCC's requests, for serving discovery requests and responses by email, and finally, the Commission should establish a briefing schedule in lieu of a closing statement.


#### **IV. CONCLUSION**

For the reasons set forth above, the Commission should grant OCC's Application for Rehearing. This case, in which Columbia seeks to switch from an SCO to SSO auction, undoubtedly presents the Commission with an important question as the Commission's decision will likely impact Columbia's customers. Columbia has failed to fully explain why a Commission decision on the SCO auction is required by September 1, 2011. OCC's proposed modifications to the procedural schedule should be adopted. Upon review, the Commission should modify the *Entry* by: (1) modifying the June 1 Entry by extending the deadline for filing testimony from June 23, 2011, to August 23, 2011, and the hearing date from June 29, 2011, to September 1, 2011; (2) requiring service of discovery by email; (3) set-forth a discovery deadline under Ohio Adm. Code 4901-1-17 (A); and (4) establishing a briefing schedule in lieu of closing statements.

This will eliminate the likelihood of undue prejudice and allow OCC, and the other parties to this proceeding, to complete discovery activities and employ the information for preparation of testimony.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

A handwritten signature in dark ink, appearing to read "Kyle L. Verrett", is written over a horizontal line.

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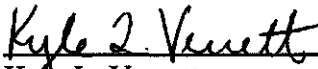
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served on the persons stated below by regular U.S. Mail, this 9th day of June, 2011.

  
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