

In the Matter of the Application of)
Columbia Gas of Ohio, Inc. for Approval) Case No. 11-5515-GA-ALT
of an Alternative Form of Regulation.)

The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE") and Ohio Farm Bureau Federation ("Farm Bureau") (collectively, the "Consumer Advocates" or "Appellants"), hereby submit this Interlocutory Appeal¹ to the Public Utilities Commission of Ohio ("PUCO" or "the Commission") and respectfully request the Commission to reverse the Attorney Examiner's May 1, 2012 Entry issued May 1, 2012 (attached hereto) in the above-referenced proceeding. That ruling is a departure from Ohio law and can be interpreted to impose limits on the ability of the Consumer Advocates to advocate for the customers of Columbia Gas of Ohio, Inc. ("Columbia" or "the Company"). The Attorney Examiner's May 1, 2012 Entry grants the Company's waiver requests.

Granting the Company's waiver requests will cause severe prejudice to Appellants, who negotiated and signed the Stipulation in the Company's last distribution rate case ("2008 Rate Case") that included the Company's implementation of its

¹ The appeal is filed pursuant to Ohio Adm. Code 4901-1-15.

infrastructure replacement program (“IRP”), and specifically negotiated the limitation that any extension of the IRP would be considered in conjunction with a distribution base rate case filing. The Attorney Examiner’s Entry circumvents that negotiated settlement.

In this case, Columbia requests, through an alternative regulation application, to extend its IRP for an additional five-year period. However, Columbia has filed its request without a contemporaneous filing for a review of its base rates as was agreed to as a precondition to any extension of Columbia’s IRP in the 2008 Rate Case Stipulation. The Consumer Advocates urge the Commission to find that Columbia’s request for waivers violates the Rate Case Stipulation.

The reasons supporting this Interlocutory Appeal are set forth in the attached Memorandum in Support.

Respectfully submitted,

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Company's Motion to Strike. On January 23, 2012, the Company filed its Reply to OPAE's Memo Contra.

On March 5, 2012, Columbia filed an Amended Notice of Intent to File an Application for Approval of an Alternative Regulation Plan ("Amended PFN"). In that filing, Columbia asked the Commission to approve the extension of the IRP for another 5 years (recovery of investments for 2013 through 2017)³ but deleted the ED proposal.

On March 16, 2012, Columbia, OCC, the Staff of the Commission and OPAE filed a Joint Stipulation Regarding Procedural Matters such that the prior pleadings regarding the Columbia waiver request would serve to address the same waiver request associated with Columbia's Amended PFN without the need for the parties to re-file and resubmit the various pleadings. On March 19, 2012, the Attorney Examiner issued an Entry that adopted the stipulated modifications to the procedural schedule. The Entry also granted OCC and OPAE Motions to Intervene. On May 2, 2012, the Farm Bureau filed a Motion to Intervene.

Although Columbia made an amended alternative regulation filing, the Amended PFN did not alter Columbia's plan to extend the IRP program without a review of its base rates. Columbia's plan is evidenced by the Amended Motion for Waiver of Standard Filing Requirement ("Amended Motion") that is similar to the Motion for Waiver that the Company filed on March 5, 2012. The Columbia Amended Motion asks the Commission to waive certain standard filing requirements because the Company does not intend to file an application for review of its base rates in conjunction with its request to extend its IRP for an additional five years. However, this waiver request violates the Rate Case

³ Amended PFN (December 9, 2011) at Exhibit 5. (Rider IRP provides Columbia with the ability to continue to track and recover, on an annual basis, the costs of an infrastructure replacement program.)

Stipulation which requires Columbia to file for a review of its base rates in conjunction with a request to modify or extend its IRP. In spite of its violation of the Rate Case Stipulation, on May 1, 2012, the Attorney Examiner issued an Entry that granted the Company's waiver request.⁴

II. REQUEST FOR CERTIFICATION AND APPLICATION FOR REVIEW

Ohio Adm. Code 4901-1-15(B) states:

Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless [1] he or she finds that: the appeal presents a new or novel question of interpretation, law, or policy, or [2] is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

The Consumer Advocates' Appeal meets both criteria for certification.

A. The Ruling Represents a New or Novel Question of Interpretation, Law or Policy.

The ramifications of the Attorney Examiner's Entry are far reaching and problematic for the impact it has on the Rate Case Stipulation. The Entry grants the Company's waiver request that permits Columbia to escape base rate review in conjunction with the IRP extension request. The Company argues this outcome is lawful because the recent changes to R.C. 4929.05 and 4929.051 allow the filing of alternative

⁴ Entry (May 1, 2012) at 6.

rate plan applications without the filing of a base rate case. And the Attorney Examiner aligns its decision with the Company's position, never addressing or deciding the issue of the commitment the Company made to the signatory parties of the Rate Case Stipulation.⁵

The granting of waivers is contingent upon the Commission finding good cause has been shown. In reviewing whether or not good cause is shown the Attorney Examiner noted five factors to be used in making that determination.⁶ One of those factors is "whether granting the waiver is in the public interest."⁷ The Entry is void of any discussion as to whether it was in the public interest to grant the Company's waiver request and allow Columbia to circumvent the commitment it made to the signatory parties to the Rate Case Stipulation to file for base rate review in conjunction with a request to extend the IRP. The failure of the Entry to address this new and novel question of law and policy justifies certification of the interlocutory appeal.

B. The Attorney Examiner's Entry is a Departure from Past Precedent.

The Attorney Examiner's entry granting the Company's waiver request has the effect of modifying the Rate Case Stipulation. However under past PUCO precedent it has been established that the PUCO does not have the authority to modify the Rate Case Stipulation after the fact, without sufficient justification. The Ohio Supreme Court has ruled that sufficient justification is contingent upon changed circumstances that warrant a change. In a 2005 Dayton Power and Light ("DP&L") Case⁸ ("DP&L Case") the Commission's decision to modify a prior stipulation was upheld on appeal. In the DP&L

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, Opinion and Order (December 28, 2005).

Case, DP&L filed a stipulation (“2005 Stipulation”) that circumvented and changed certain terms of the Rate Stabilization Stipulation approved by the PUCO in 2003.⁹ The PUCO noted the existence of changed circumstances as rationale for the approval of modifications to the Rate Stabilization Stipulation. The changed circumstances noted by the PUCO were: (a) the failure of the competitive market to develop;¹⁰ (b) only 0.03 percent of DP&L’s total load has switched to a competitive supplier;¹¹ (c) four rounds of competitive bidding under the voluntary enrollment program did not produce a single bidder;¹² and (d) fuel and environmental costs vastly exceeded the Commission’s expectations at the time the Rate Stabilization Stipulation was approved.¹³

The changed circumstances as noted by the PUCO in the DP&L Case were **circumstances residing outside of the utility’s control**. In this case, the changed circumstances that Columbia relies upon are those that were brought about as a result of Columbia’s own legislative efforts. The passage of House Bill 95 (“HB 95”) was accomplished with the advocacy of Columbia and Ohio’s other large natural gas companies.¹⁴ The PUCO should not recognize the changed circumstances brought about by the passage of HB 95, and allow Columbia to circumvent the obligations it agreed to in the Rate Case Stipulation.

⁹ *Id.* at 10.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Testimony of Jack Partridge, President of Columbia, before the House Public Utilities Committee (February 23, 2011) at 1.

Furthermore, the Rate Case Stipulation¹⁵ that Columbia signed with Consumer Advocates and others in 2008 resulted in the initial implementation of the Company's IRP, subject to certain agreements, and controls any subsequent extension of the IRP. It should also be noted that at the time Columbia signed the Rate Case Stipulation -- prior to the passage of HB 95 -- an alternative regulation application required the companion rate case filing. Columbia readily admits that fact in its Amended Motion.¹⁶ Therefore, the Commission should enforce the Company's obligations agreed upon in the Rate Case Stipulation.

Finally, should the Company comply with the 2008 Rate Case Stipulation and file for a review of base rates pursuant to R.C. 4909.18 or by filing a proposal to establish base rates pursuant to an alternative method of regulation pursuant to Section 4929.05, as was agreed upon as part of the Rate Case Stipulation, Columbia would not be in violation of R.C. 4929.05 as currently crafted with the passage of HB 95. Therefore, the Commission should require Columbia to file the appropriate case for review of its "base rates" (per paragraph 10A of the Rate Case Stipulation) under the circumstance where Columbia requests reauthorization of its IRP.

C. An Immediate Determination is needed to Prevent Undue Prejudice.

The recent changes to R.C. 4929.05 and 4929.051 allow the filing of alternative rate plan applications without the filing of a base rate case. The end result of the legislative changes was to allow the Commission to consider an extension of an existing

¹⁵ *In re Columbia Gas of Ohio Base Distribution Rate Case*, Case No. 08-72-GA-AIR, et al. Joint Stipulation and Recommendation (October 24, 2008) at 9.

¹⁶ Columbia Amended Motion (March 5, 2012) at 3.

alternative rate plan “an application not for an increase in rates.”¹⁷ However, it cannot be denied that in the Company’s Amended PFN, Columbia seeks authorization from the Commission to increase the IRP caps for the small general service tariffs from \$6.20 per customer per month during the first year of the IRP extension with annual increases to the cap of \$1.00 per customer per month ultimately increasing to \$10.20 per customer per month in the fifth year.¹⁸ As proposed by Columbia, over the next 5 years, Columbia could collect from residential customers approximately \$200 million¹⁹ in additional IRP revenues -- without the quid pro quo of the review of Columbia’s base rates that Consumer Advocates negotiated in the Rate Case Stipulation. The undue prejudice created by the Attorney Examiner’s Entry justifies certification of the interlocutory appeal for an immediate determination.

III CONCLUSION

The Commission should certify the interlocutory appeal and, upon review, reverse the Examiner decision so as to now deny the Company’s waiver request. The Commission should also require the Company to file for base rate review in conjunction with the alternative regulation filing to extend Columbia’s IRP.

¹⁷ R.C. 4929.051, See also Entry (May 1, 2012) at 6.

¹⁸ Amended PFN (March 5, 2012) at Exhibit 5 page 9.

¹⁹ Columbia is proposing the IRP Rider rate cap to increase by \$1.00 per month each year for the next 5 years. \$12 increase per customer in year 1 = \$14.4 million, \$24 increase per customer in year 2 = \$28.8 million, \$36 increase per customer in year 3 = \$43.2 million, \$48 increase per customer in year 4 = \$57.6, and \$60 increase per customer in year 5 = \$72.0 million. ($\$14.4 + 28.8 + 43.2 + \$57.6 + \$72.0 = \216 million).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Interlocutory Appeal was served upon the persons listed below, electronically, this 7th day of May 2012.

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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. 11-5515-GA-ALT

ENTRY

The attorney examiner finds:

- (1) On December 3, 2008, the Commission approved and adopted a stipulation regarding applications filed by Columbia Gas of Ohio, Inc. (Columbia), for approval of an increase in gas distribution rates (Case No. 08-72-GA-AIR); for approval of an alternative rate plan for its gas distribution service (Case No. 08-73-GA-ALT); for approval of an application to modify certain accounting methods (Case No. 08-74-GA-AAM); and for authority to revise its depreciation accrual rates (Case No. 08-75-GA-AAM).¹ See *Columbia Gas of Ohio, Inc.*, Case Nos. 08-72-GA-AIR, et al. (October 24, 2008) (*Rate Case Stipulation*).
- (2) On December 9, 2011, Columbia filed a notice of intent to file an application for approval of an alternative rate plan pursuant to Rule 4901:1-19-05, Ohio Administrative Code (O.A.C.). Attached to its notice, Columbia provided several prefiling notice exhibits, including a summary of the alternative rate plan. According to the summary, Columbia sought authority to implement an alternative rate plan consisting of a five-year extension of the infrastructure replacement program (IRP) portion of its alternative rate plan, which was originally approved pursuant to the *Rate Case Stipulation*, as well as a new economic development cost recovery mechanism.
- (3) On December 22, 2011, Columbia filed a motion for a waiver of certain provisions contained in Rule 4901:1-19-05(C), O.A.C., regarding standard filing requirements (SFRs) required to be filed with alternative rate plan applications. In support of its

¹ The Ohio Consumers' Counsel and Ohio Partners for Affordable Energy were signatories to the stipulation.

motion, Columbia asserted that the SFRs set forth in Rule 4901:1-19-05(C), O.A.C., were based on previous language in Section 4929.05, Revised Code, which contemplated an alternative rate plan being filed only in conjunction with a base rate proceeding. Columbia claimed in its motion for waiver, however, that recent changes to Section 4929.05, Revised Code, by Am. Sub. H. B. 95 allowed the filing of an alternative rate plan without an accompanying base rate case. Columbia asserted that, consequently, there was no need to file exhibits associated with base rate proceedings, including sections (A) through (E) of Section 4909.15, Revised Code. Columbia concluded that it was entitled to a waiver of all sections in Rules 4901:1-19-05(C)(1) and (2), O.A.C., that reference a base rate proceeding.

- (4) On January 6, 2012, the Ohio Consumers' Counsel (OCC) filed a memorandum contra Columbia's motion for a waiver of the SFRs. In its memorandum contra, OCC argued that, pursuant to the *Rate Case Stipulation*, Columbia agreed that reauthorization of its IRP beyond the initial five-year term would only be done with a contemporaneous filing of a base rate proceeding. OCC stated that it does not concede that Am. Sub. H. B. 95 modified Section 4929.05, Revised Code, as Columbia proposed, but argued that, even if it did, the changes in the statute do not excuse Columbia from fulfilling the terms of the *Rate Case Stipulation*. OCC urged the Commission to deny Columbia's motion for a waiver and require Columbia to file for reauthorization of its Rider IRP in conjunction with a base rate case.
- (5) On January 11, 2012, Columbia filed a reply memorandum to OCC's memorandum contra. In its reply, Columbia reiterated its position that the recent changes to Sections 4929.05 and 4929.051, Revised Code, allow the filing of alternative rate plan applications without the filing of a base rate case. Further, Columbia argued that OCC's interpretation of the *Rate Case Stipulation* was incorrect, and that the terms provide that extension of Rider IRP beyond the original five-year term may be accomplished by either the filing of a base rate case or an alternative rate plan pursuant to Section 4929.05, Revised Code.

- (6) Also on January 11, 2012, Ohio Partners for Affordable Energy (OPAE) filed a reply memorandum to OCC's memorandum contra. In its reply, OPAE argued that, under the terms of the *Rate Case Stipulation*, Columbia must file its request for an extension of its alternative regulation plan in conjunction with a review of base rates. Further, OPAE asserted that Am. Sub. H. B. 95 does not preclude Columbia's fulfillment of the terms of the *Rate Case Stipulation*.
- (7) Thereafter, on January 13, 2012, Columbia filed a motion to strike and a memorandum in reply to OPAE's reply memorandum to OCC's memorandum contra. In its motion to strike, Columbia argued that the Commission has recognized that rules authorizing the filing of memoranda contra do not authorize the filing of memoranda in support of another party's motion. Columbia argued that OPAE's filing merely supported OCC's memorandum contra and, consequently, should be stricken. Additionally, Columbia contended that OPAE's filing fails on substantive grounds. On January 19, 2012, OPAE responded with a memorandum contra Columbia's motion to strike. Thereafter, on January 23, 2012, Columbia filed a reply memorandum to OPAE's memorandum contra.
- (8) On March 5, 2012, Columbia filed an amended notice of intent to file an application for approval of an alternative rate plan. In its amended notice, Columbia stated that it intends to file its application pursuant to Section 4929.051(B), Revised Code. Columbia stated in its amended notice that its application will seek authority to continue the IRP portion of its alternative regulation plan for another five-year period. Additionally, Columbia stated that its application will clarify the scope of its IRP.

Contemporaneously, Columbia filed an accompanying amended motion for waiver of the SFRs. In its amended motion for a waiver of the SFRs, Columbia stated that it intends to file its application requesting authority to implement an alternative regulation plan in April 2012. Columbia further stated that recent modifications to Section 4929.051(B), Revised Code, by Am. Sub. H. B. 95 eliminated the requirement that an applicant file a base rate case in conjunction with an alternative rate plan case, as the statute now provides that, where the

applicant seeks authorization to continue a previously approved alternative rate plan, the application shall be considered not for an increase in rates. Columbia argued that, consequently, the Commission is no longer required to determine just and reasonable base rates under Section 4909.15, Revised Code, as part of an alternative rate plan application filed pursuant to Section 4929.051(B), Revised Code. Therefore, Columbia argued that it is unnecessary to file exhibits (A) through (E) of Section 4909.15, Revised Code, or any of the exhibits in Appendix A that support a base rate proceeding. Thus, Columbia stated that the portions of Rules 4901:1-19-05(C)(1) and (2), O.A.C., that reference a base rate proceeding, should be waived.

- (9) On March 16, 2012, Columbia, Staff, OCC, and OPAE filed a joint stipulation regarding procedural matters in this case, whereby the parties agreed that the pleadings filed on January 6, 2012, and on January 11, 2012, should apply to Columbia's amended motion for waiver, that Columbia's January 13, 2012, motion to strike and reply memorandum should be considered only a reply memorandum to OPAE's January 11, 2012, pleading, that Columbia withdraws its motion to strike, and that the pleadings filed on January 19, 2012, and January 23, 2012, are moot. By entry issued March 19, 2012, the attorney examiner adopted the joint procedural stipulation and granted OCC and OPAE intervention in this proceeding.
- (10) Section 4929.05, Revised Code, as amended by Am. Sub. H. B. 95 provides:
 - (A) A natural gas company may request approval of an alternative rate plan by filing an application under section 4909.18 of the Revised Code, regardless of whether the application is for an increase in rates. After investigation, which may include a hearing at the discretion of the public utilities commission, the commission shall authorize the applicant to implement an alternative rate plan if the natural gas company has made a showing and the commission finds that all of the following conditions are met:

- (1) The natural gas company is in compliance with section 4905.35 of the Revised Code and is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code.
 - (2) The natural gas company is expected to continue to be in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code after implementation of the alternative rate plan.
 - (3) The alternative rate plan is just and reasonable.
 - (B) The applicant shall have the burden of proof under this section.
- (11) Further, Section 4929.051(B), Revised Code, as amended by Am. Sub. H. B. 95, provides:
- An alternative rate plan filed by a natural gas company under section 4929.05 of the Revised Code and seeking authorization to continue a previously approved alternative rate plan shall be considered an application not for an increase in rates.
- (12) As an initial matter, the attorney examiner notes that the amendments to Section 4929.05, Revised Code, make it clear that a natural gas company may request approval of an alternative rate plan without filing an accompanying base rate case. However, the revisions do not eliminate the Commission's responsibility under Section 4909.18, Revised Code, to determine whether such an application is for an increase in rates. Instead, the revisions carve out situations set forth in Sections 4929.051, Revised Code, under which alternative rate plans shall be considered applications not for an increase in rates, including under division (B) where the application seeks to continue a previously approved alternative rate plan. Consequently, the current and applicable versions of

Sections 4929.05 and 4929.051, Revised Code, permit the filing of an alternative rate plan without an accompanying base rate case only where the application meets the specific requirements set forth in Section 4929.051, Revised Code.


- (13) Furthermore, the attorney examiner notes that Rule 4901:1-19-03, O.A.C., governing waivers, provides that the Commission may waive any provisions in Chapter 4901:1-19, O.A.C., for good cause shown. In determining whether good cause has been shown, the rule states that the following factors may be taken into consideration: (1) whether other information, which would be provided if the waiver is granted, is sufficient for the Commission's Staff to review the application; (2) whether the information required to be filed by the rules is relevant to the Commission's consideration of the application; (3) whether the information that is the subject of the waiver request is reasonably available to the applicant; (4) the expense to the applicant in providing the information at the subject of the waiver request; and (5) whether granting of the waiver is in the public interest.
- (14) Here, Columbia's amended notice of intent sets forth that it will seek a continuation of the IRP portion of its alternative rate plan for an additional five years and that the application will be filed pursuant to Section 4929.051(B), Revised Code. The attorney examiner finds that, upon review of Columbia's amended notice of intent filed on March 5, 2012, it appears that Columbia intends to make an filing under Section 4929.051(B), Revised Code. Additionally, the attorney examiner finds that Columbia's amended motion for a waiver appropriately sets forth the factors enumerated in Rule 4901:1-19-03, O.A.C., that are to be taken into consideration in determining whether good cause has been shown. Upon consideration of the pleadings, the attorney examiner finds that, at this time, Columbia should be permitted to file its application without the information required by the sections of Rules 4901:1-19-05(C)(1) and (2), O.A.C., that reference a base rate proceeding. Therefore, the attorney examiner concludes that Columbia's motion for waiver should be granted, contingent upon the Commission's final review and consideration. If the Commission later finds that additional information is needed, Columbia may be required to submit the requisite information at that time.

It is, therefore,

ORDERED, That, pursuant to Finding (14), Columbia's motion for waiver is granted contingent on the Commission's final review and consideration, and Columbia may, at this time, file its application without the information required by the sections of Rules 4901:1-19-05(C)(1) and (2), O.A.C., that reference a base rate proceeding, pursuant to Finding (13). It is, further,

ORDERED, That a copy of this entry be served upon all interested parties of record.

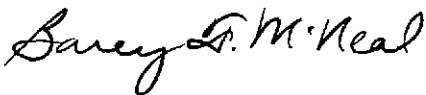
THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Mandy L. Willey
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Entered in the Journal

MAY 01 2012



Barcy F. McNeal
Secretary

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Case No(s). 11-5515-GA-ALT

Summary: Request Interlocutory Appeal by the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy and Ohio Farm Bureau Federation electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.