

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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MEMORANDUM CONTRA  
OF COLUMBIA GAS OF OHIO, INC.  
TO THE INTERLOCUTORY APPEAL FILED BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
OHIO PARTNERS FOR AFFORDABLE ENERGY AND  
THE OHIO FARM BUREAU FEDERATION

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PROCEDURAL HISTORY

Columbia Gas Ohio, Inc.'s ("Columbia") last rate case was filed in 2008<sup>1</sup>. In that case Columbia proposed an increase in base rates, as well as an alternative rate regulation plan. The alternative regulation plan was proposed, in part, in order to implement Columbia's Infrastructure Replacement Program ("IRP").

A stipulation was agreed to in Columbia's 2008 Rate Case, in which all issues except rate design were resolved by agreement among the parties. The stipulation was filed on October 24, 2008, and approved in a Commission Opinion and Order dated December 3, 2008.

The 2008 Rate Case Stipulation, as approved by the Commission, authorized the initial five-year phase of Columbia's IRP. The stipulation also provided for possible revision of the IRP during its initial five-year term, as well as possible extension of the IRP after its initial five-year term.

On December 9, 2011, Columbia filed its Notice of Intent in this proceeding. In the Notice of Intent Columbia stated that it planned to file an alternative

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<sup>1</sup> Case Nos.08-0072-GA-AIR et al.

regulation plan application, the primary purpose of which would be to extend Columbia's IRP for another five years beyond the expiration of the initial five-year period authorized in the 2008 Rate Case.

On December 22, 2011, Columbia filed a Motion for Waiver, in which it requested that it not be required to file those Standard Filing Requirement exhibits that relate to the filing of a base rate case. This request was premised upon the fact that Ohio law no longer requires that alternative regulation plan applications be filed in conjunction with a base rate case. However, the Commission's rules have not yet been revised to comport with statutory changes regarding the filing of alternative regulation plan applications.

On January 6, 2012, the Office of the Ohio Consumers' Counsel ("OCC") filed a Memorandum Contra Columbia's Motion for Waiver. Columbia filed a Reply Memorandum on January 11, 2012.

On January 11, 2012, Ohio Partners for Affordable Energy ("OPAE") filed a pleading in this docket styled as a "Reply to the Memorandum Contra." The pleading explained that it is a reply to the memorandum contra filed by the OCC on January 6, 2012. On January 13, 2012, Columbia filed a Motion to Strike OPAE's Reply to Memorandum Contra because the substance of the OPAE pleading was in no sense a reply to any of the OCC arguments, but was instead a response to the substance of Columbia's January 11 Reply Memorandum.

On January 19, 2012, OPAE filed a Memorandum Contra Columbia's Motion to Strike. Columbia filed its Reply Memorandum on January 23, 2012.

On March 2, 2012, Columbia filed an Amended Notice of Intent along with an Amended Motion for Waivers. These amended pleadings were filed to clarify that Columbia's Application in this proceeding would be filed pursuant to Ohio Revised Code § 4929.051(B).

On March 16, 2012, Columbia, OCC, OPAE and the Staff of the Commission filed a Joint Stipulation Regarding Procedural Matters such that the prior pleadings regarding Columbia's waiver request would serve to address the same waiver request associated with Columbia's Amended Notice of Intent and Amended Motion For Waivers, without the need for the parties to re-file and re-submit the various pleadings. On March 19, 2012, the Attorney Examiner issued an Entry that adopted the stipulated modifications to the procedural schedule.

By Entry dated May 1, 2012, the Commission's Attorney Examiner granted Columbia's Amended Motion for Waiver ("May 1 Entry). On May 7, 2012, the OCC, OPAE and the Ohio Farm Bureau Federation (collectively referred to herein as "Appellants") filed an Interlocutory Appeal, contesting the granting of Columbia's Amended Motion for Waivers. Pursuant to Ohio Admin. Code § 4901-1-15(D), Columbia files this Memorandum Contra the Appellants' Interlocutory Appeal.

## THE STANDARD FOR INTERLOCUTORY APPEAL

The Appellants are not able to seek an immediate interlocutory appeal to the Commission under Ohio Admin. Code § 4901-1-15(A), and thus are requesting that the Legal Director or Attorney Examiner certify their interlocutory appeal to the Commission under Ohio Admin. Code § 4901-1-15(B).

Ohio Admin. Code § 4901-1-15(B) requires that a party meet two requirements in order to have an interlocutory appeal certified to the Commission. First, the party must demonstrate that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent. Second, the party must also demonstrate that an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties. The appealing party must satisfy both requirements in order to have an interlocutory appeal certified to the Commission.<sup>2</sup>

For the reasons discussed below, the Appellants' interlocutory appeal should not be certified to the Commission because the Appellants have failed to satisfy the standards required by Ohio Admin. Code § 4901-1-15(B).

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<sup>2</sup> *In Re the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO et al., 2008 Ohio PUC LEXIS 609, Entry (October 1, 2008), paragraph 13.

**First Requirement – The Appeal Does Not Present a New or Novel Question of Interpretation, Law or Policy Nor Does it Represent a Departure From Past Precedent**

The Appellants Have Failed to Demonstrate That Their Appeal Raises Any New or Novel Question of Interpretation, Law or Policy

The Appellants claim that the 2008 Rate Case Stipulation requires Columbia to file a base rate case in order to extend Columbia's IRP. The Appellants thus characterize the May 1 Entry as permitting "Columbia to escape base rate review," and allege that the May 1 Entry's "failure to address this new and novel question of law and policy justifies certification of the interlocutory appeal."<sup>3</sup> While the Appellants may believe they have raised a new and novel question of law and policy, that is simply not the case.

The Appellants' entire argument rests upon an interpretation of the 2008 Rate Case Stipulation that flies in the face of the plain meaning of that agreement. A reading of the agreement demonstrates that there is no question of law or policy, let alone a question that is new or novel.

The 2008 Rate Case Stipulation provides, in pertinent part:

At the conclusion of the five-year period specified herein, Columbia must request that the Commission reauthorize Rider IRP in order to continue the mechanism beyond the five-year period. *That request for reauthorization must be made as part of an application for an increase in rates pursuant to Section 4909.18, Revised Code, or Columbia's filing for an alternative method of regulation pursuant to Section 4929.05, Revised Code,* and shall include all applicable due process protections.<sup>4</sup>

The language is clear -- in order for Columbia to extend its IRP it must file a base rate case *or* it must pursue an alternative regulation proceeding. There is nothing unclear about the word "or" and interpretation of the word is not novel and it is not new. Contrary to the Appellants' assertion, the May 1 Entry did not permit Columbia to "escape base rate review" because the plain meaning of the Stipula-

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<sup>3</sup> Interlocutory Appeal at 3-4.

<sup>4</sup> Case Nos. 08-0072-GA-AIR et al., Joint Stipulation and Recommendation (October 24, 2008) at 9 (emphasis added).

tion language did not require the filing of a base rate case in order to extend Columbia's IRP. It follows that because there was no avoidance of a required base rate case, there is no issue of interpretation, law or policy, let alone an issue that is new or novel.

The Appellants Have Failed to Demonstrate That the May 1 Entry  
Represents a Departure From Past Precedent

The Appellants note that the Supreme Court of Ohio has held that the Commission can modify a previously approved stipulation only upon a showing of changed circumstances. The Appellants then characterize the passage of HB 95 as the changed circumstances that the Attorney Examiner relied upon to circumvent the 2008 Rate Case Stipulation.<sup>5</sup>

The precedent cited by the Appellants is inapplicable. As explained earlier herein, the May 1 Entry is consistent with the 2008 Rate Case Stipulation and did nothing to modify that agreement. The Appellants have mischaracterized the May 1 Entry to the extent that they suggest that the Attorney Examiner relied upon legislative changes as a reason for modifying the agreement. There is no modification of the 2008 Rate Case Stipulation, and thus no departure from the precedent cited by the Appellants.<sup>6</sup>—

**Second Requirement – the Appellants Have Failed to Demonstrate That  
an Immediate Determination is Needed to Prevent Prejudice or Expense**

The Appellants' sole claim of prejudice or expense is that Columbia proposes to collect IRP charges over the next five years "without the quid pro quo of the review of Columbia's base rates that Consumer Advocates negotiated in the Rate Case Stipulation."<sup>7</sup>

Again, this argument rests upon the assumption the 2008 Rate Case Stipulation required Columbia to file a rate case in order to extend its IRP beyond the initial five-year term. As discussed in the preceding sections of this pleading, the 2008 Rate Case Stipulation does not require the filing of base rate case in order to

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<sup>5</sup> Interlocutory Appeal at 4.

<sup>6</sup> That being the case, there is no need to discuss here HB 95 and the changes in the statutes that apply to alternative regulation applications. For a discussion of those matters, see Columbia's Reply Memorandum filed in this docket on January 11, 2012.

<sup>7</sup> Interlocutory Appeal at 7.

extend the IRP. The stipulation contains no requirement for a review of base rates in conjunction with an extension of the IRP, and if this was, in fact, so important to the Appellants they should have insisted upon language that clearly required a base rate review as a condition of extension of Columbia's IRP.

To the contrary, the 2008 Rate Case Stipulation language regarding continuation of the IRP was carefully crafted by the parties to recognize that changes to Ohio Revised Code § 4929.05 permitted future alternative rate plan applications to be filed without the necessity of filing base rate case applications. Ohio Revised Code § 4929.051 was enacted effective July 31, 2008, to permit the filing of alternative rate plan applications, under certain conditions, without the filing of a simultaneous rate case. The 2008 Rate Case Stipulation was not finalized and filed until October 24, 2008. The parties were aware of the enactment of the revisions to Ohio Revised Code § 4929.051 and fully intended to provide an alternative to a rate case filing in order to continue Columbia's IRP. Thus, when the Appellants allege, "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"<sup>8</sup> they are incorrect. The Appellant's are not prejudiced because the May 1 Entry is consistent with the 2008 Rate Case Stipulation that the Appellants signed.

## CONCLUSION

In order to have the interlocutory appeal certified to the Commission the Appellants must demonstrate that the appeal presents a new or novel question of interpretation, law or policy, or is taken from a ruling which represents a departure from past precedent. The Appellants must also demonstrate that an immediate determination is needed from the Commission in order to prevent the likelihood of undue prejudice or expense. The Appellants have failed on all counts because the May 1 Entry is consistent with the 2008 Rate Case Stipulation. For the reasons explained herein, the interlocutory appeal should not be certified to the Commission.

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<sup>8</sup> Interlocutory Appeal at 6.

Respectfully submitted,

**COLUMBIA GAS OF OHIO, INC.**

/s/ Stephen B. Seiple

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Columbia Gas of Ohio, Inc. was served upon all parties of record by electronic mail this 10<sup>th</sup> day of May, 2012.

/s/ Stephen B. Seiple

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Summary: Memorandum Memorandum Contra of Columbia Gas of Ohio, Inc. to the Interlocutory Appeal filed by the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy and the Ohio Farm Bureau Federation electronically filed by B. Moss on behalf of Columbia Gas of Ohio