BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Motion to Modify the December 2, 2009 Opinion and Order and the September 7, 2011 Second Opinion and Order in Case No. 08-1344-GA-EXM	)))))	Case No. 12-2637-GA-EXM

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

1. Introduction

Pursuant to Rule 4901-1-12(B)(1), Ohio Administrative Code ("O.A.C."), Columbia Gas of Ohio, Inc. ("Columbia") files this Memorandum Contra the Interlocutory Appeal filed by the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE"). In that Motion, OCC and OPAE asked the Commission to certify an interlocutory appeal of the October 18, 2012 Entry in which Attorney Examiner Pirik set an expedited case schedule for this proceeding and instructed Columbia to publish notice of the hearing scheduled for December 3, 2012. OCC and OPAE argue that an interlocutory appeal is warranted because the case schedule is different than the schedule Attorney Examiner Stenman chose in Case No. 12-1842-GA-EXM. OCC and OPAE further argue that interlocutory appeal is warranted because the hearing notice Attorney Examiner Pirik wrote does not place more emphasis on Columbia's potential exit from the merchant function or tell customers that Columbia's revised capacity contracts, off-system sales revenue sharing mechanism, and SCO supplier security requirements will increase Columbia's customers' costs.

The Commission has repeatedly held that case schedules are not a proper subject for interlocutory appeals. The hearing notice that OCC and OPAE critique has already been published. And, OCC and OPAE have failed to explain why an interlocutory appeal of Attorney Examiner Pirik's notice would be legally justified under the Commission's rules. For all of these reasons, as further explained herein, OCC and OPAE's motion should be denied.

2. Law and Argument

A party may not take an interlocutory appeal to the Commission from a procedural ruling unless "the appeal [*1.a.*] presents a new or novel question of interpretation, law, or policy, or [*b.*] is taken from a ruling which represents a departure from past precedent and [2.] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties[.]" Rule 4901-1-15(B), Ohio Admin. Code ("O.A.C."). There are exceptions, but they are not present here.

None of OCC's complaints warrants an interlocutory appeal of Attorney Examiner Pirik's October 18th Entry. The Commission has repeatedly held that entries setting case schedules do not meet the requirements for interlocutory appeal. The Commission's schedule, though expedited, will provide OCC, OPAE, and the other parties adequate time to present their positions to the Commission. OCC and OPAE have failed to explain how the notice in the October 18th Entry meets the Commission's requirements for interlocutory appeal of a procedural entry. And, the legal notice in the October 18th Entry, which has already been published, adequately summarized the main issues presented in this proceeding.

2.1. The Commission should deny OCC and OPAE's motion to certify an interlocutory appeal of Attorney Examiner Pirik's case schedule, consistent with Commission precedent.

OCC and OPAE argue that the procedural schedule in this matter represents a "departure from past precedent" because it is different than the schedule followed in Case No. 12-1842-GA-EXM. (Mem. Supp. at 6.) They argue that this "departure" prejudices them in three ways. First, they complain that, although the Attorney Examiner has said she might bifurcate this proceeding *after* the hearing to decide certain issues first, OCC and OPAE will not find out what those issues are until two weeks before their pre-hearing testimony is due. (*Id*. at 7.) Second, they argue that three days after the hearing concludes is not enough time to draft briefs, particularly "where the subject matter (an exit from the merchant function) is of such importance to Columbia's 1.2 million residential customers." (*Id.* at 4.) And, third, they argue that prohibiting reply briefs will prevent them from responding to other parties' arguments. (*Id.*) For these reasons, OCC and OPAE ask for an additional week to file initial post-hearing briefs and one week to file reply briefs. They also request other, unspecified modifications to "allow[ ] * * * more time for * * * case preparation[.]" (*Id.* at 8.) None of these reasons justifies the extraordinary relief OCC and OPAE have requested.

OCC and OPAE's first grounds for complaint makes no sense. Knowing which portions of the Joint Stipulation might be considered first, if the Commission bifurcates this proceeding *after* the hearing, should have no effect on OCC and OPAE's *pre*-hearing testimony. Nevertheless, Columbia is happy to delineate the issues in the Joint Stipulation that it needs to have resolved expeditiously, in order to clear up any confusion on the part of the Commission or the intervenors. Those issues, listed by section heading and page number, are as follows:

- SCO Auction Goals, Objectives, Timing, and Calendar (Stipulation at p. 3);
- SCO Supplier Security Requirements (*id.*);
- SCO Supplier Payments (*id.*);
- Columbia Capacity Contracts (*id.* at p. 4);
- Capacity Allocation Process (*id.*);
- Daily Nominations – Demand and/or Supply Curves (*id.* at p. 5);
- Off-System Sales and Capacity Release (*id.* at pp. 3, 5);
- Enhancements to Billing for Competitive Retail Natural Gas Suppliers (*id.* at pp. 10-12, except the last paragraph).

OCC and OPAE's second argument is somewhat misleading. OCC and OPAE do not have only three days to draft their post-hearing brief. On September 5, 2012, Columbia circulated a pre-filing draft of the Joint Stipulation to its stakeholder group that was almost identical to the filed Stipulation. By the time the post-hearing briefs are due, OCC and OPAE will have had approximately three months to formulate their arguments. Even if they choose to wait to begin drafting their briefs until November 12, 2012, when they receive the joint movants' pre-filed testimony, OCC and OPAE will have three weeks to formulate their arguments. Moreover, OCC and OPAE's argument that "an exit from the merchant function[ ] is of * * * importance to Columbia's 1.2 million residential customers" and, thus, warrants extra time to file post-hearing briefs (*see* Mem. Supp. at 4) misinterprets the Joint Stipulation. The Joint Stipulation does not request authority to exit the merchant function for residential customers. It simply requests authority to file an application to exit the merchant function for residential customers, at some point in the future, if and when (1) Columbia has already exited the merchant function for non-residential customers and (2) residential customer participation in Columbia's CHOICE program has reached at least 70% for three consecutive months. (Joint Stipulation at 8.) OCC and OPAE's arguments for or against a residential exit can be more fully developed in that later proceeding, if Columbia files an application for a residential exit.

OCC and OPAE's remaining complaints about the case schedule also do not warrant an interlocutory appeal to the full Commission. The Commission's rules do not set a timeline for filing post-hearing briefs or reply briefs. In fact, the Commission's rules do not even require the filing of post-hearing briefs or reply briefs. *See* Rule 4901-1-31, O.A.C. The fact that some other Attorney Examiner set a different case schedule in another case cannot alone justify an interlocutory appeal, or else practically every order setting a case schedule could give rise to an interlocutory appeal.

Finally, OCC and OPAE will have plenty of opportunities to respond to arguments in support of the Joint Stipulation, even without reply briefs. OCC and OPAE have already filed a memorandum contra the Joint Motion to Modify, in which they laid out their concerns. After the signatory parties to the Joint Motion file their direct testimony on November 12, 2012, OCC and OPAE will have two weeks to draft responsive testimony. They will have an opportunity to present their counter-arguments, and respond to any new arguments from the signatory parties, at the hearing on December 3, 2012. They will also have an opportunity to address any new arguments raised at hearing in their post-hearing briefs. Thus, Attorney Examiner Pirik's case schedule provides OCC and OPAE multiple opportunities to express their positions.

The Commission has made clear that "[s]etting procedural schedules * * * is a routine matter with which the Commission and its examiners have significant experience, and, thus, does not raise any new or novel questions of interpretation, law or policy, and is not a departure from past precedent." *In the Matter of the Application of P.H. Glatfelter Co. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Entry, ¶ 10 (Oct. 15, 2009); *see also In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2010 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4), Revised Code, and Section 4901:1-40-06 of the Ohio Administrative Code*, Case No. 11-411-EL-ACP, Entry, ¶ 7 (Mar. 16, 2011); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Entry, ¶ 9 (May 2, 2012). For all of these reasons, OCC and OPAE's motion for certification of an interlocutory appeal of that case schedule should be denied.

2.2. The Commission should deny OCC and OPAE's motion to certify an interlocutory appeal of Attorney Examiner Pirik's hearing notice for failure to establish a legal basis for the motion.

OCC and OPAE do not provide a legal basis for their motion to certify an interlocutory appeal of the order instructing Columbia to publish a notice of the hearing in this proceeding. OCC and OPAE simply argue that the notice is insufficiently informative. (Mem. Supp. at 9.) In place of the notice, OCC and OPAE suggest a new, three-paragraph legal notice, which OCC and OPAE have drafted to highlight their main legal arguments against the Stipulation. (*See id.* at 10-11.) In particular, OCC and OPAE recommend a longer and more repetitive discussion of the exit-the-merchant-function provisions of the Joint Stipulation and new text to "inform" consumers that the capacity contract, off-system sales revenue sharing, and SCO supplier security provisions of the Joint Stipulation could or will "make the [SCO] more expensive for customers." (*Id.* at 11.)

OCC and OPAE's arguments are moot. The Attorney Examiner's October 18th Entry required Columbia to publish notice of the December 3, 2012 hearing by October 28, 2012, and Columbia has done so, at a cost of approximately $15,000. Regardless, OCC and OPAE's proposed revisions are biased and unnecessary. There is no need to refer to the potential exit from the merchant function for residential customers because that exit, if it happens, will be the subject of a future proceeding, as explained above. (*See* Joint Stipulation at 8.) There is no reason to add a reference to the mechanism by which Columbia shares revenue from off-system sales and capacity release with its customers because the mechanism will largely remain the same as it currently is; the only difference is that the average annual cap on Columbia's share of the earnings will be $2 million less. (*See id.* at 5.) And, OCC and OPAE's recommended references to Columbia's pipeline capacity contracts and SCO supplier security requirements are clearly written to advance OCC and OPAE's legal position (*see* Mem. Supp. at 11), which is entirely inappropriate for a Commission-mandated hearing notice.

As a legal matter, OCC and OPAE have not argued or demonstrated that the wording of the notice "presents a new or novel question of interpretation, law, or policy, or * * * represents a departure from past precedent." Rule 4901-1-15(B), O.A.C. OCC and OPAE also have not argued that an interlocutory appeal is necessary "to prevent the likelihood of undue prejudice or expense to one or more of the parties." *Id.* Because OCC and OPAE have not fulfilled the requirements of Rule 4901-1-15, O.A.C., OCC and OPAE are not entitled to certification of an interlocutory appeal on this issue as a matter of law.

3. Conclusion

For all of the reasons stated above, Columbia respectfully requests that the Commission deny OCC and OPAE's Interlocutory Appeal.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum Contra Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy's Interlocutory Appeal was served by electronic mail upon the following parties this 29th day of October, 2012:

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Summary: Memorandum Contra the Interlocutory Appeal of the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy electronically filed by Mr. Eric B. Gallon on behalf of Columbia Gas of Ohio, Inc.