

**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    | ) | Case No. 16-2422-GA-ALT |
| Regulation to Extend and Increase Its | ) |                         |
| Infrastructure Replacement Program.   | ) |                         |

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**MEMORANDUM CONTRA  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S  
APPLICATION FOR REHEARING  
OF COLUMBIA GAS OF OHIO, INC.**

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**1. Introduction**

On January 31, the Commission adopted a joint stipulation between Columbia Gas of Ohio, Inc. ("Columbia"), Commission Staff, and Ohio Partners for Affordable Energy that recommended the continuation of Columbia's Infrastructure Replacement Program ("IRP"), and the cost-recovery mechanism for that program ("Rider IRP"), for another five years. Among other holdings, the Commission's Opinion and Order sets new maximum limits on the Rider IRP rates to be paid by Columbia's Small General Service ("SGS") Class customers and new guaranteed minimum levels of O&M savings for Columbia's Accelerated Mains Replacement Program ("AMRP") for the next five years.<sup>1</sup>

The Office of the Ohio Consumers' Counsel ("OCC") now asserts the Commission's Opinion and Order was unlawful and unreasonable because the Commission failed to do two things OCC never asked it to do: (1) make the Rider IRP tariff "subject to refund"; and (2) recalculate the Rider IRP rate caps to reflect recent changes in the federal corporate tax rate. Had OCC wanted the Commission to address these points based on developments after the closing of evidence, it could have moved to reopen these proceedings to allow further evidence on these points. It did not do so, and it is too late to do so now.

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<sup>1</sup> Opinion and Order at 9, 33-35.

Nevertheless, there is no need to add tariff language stating that Rider IRP is “subject to refund” because the Rider IRP rates are not effective until after a full review process occurs, including intervention, Staff review, and even a hearing if necessary. This process has worked well for almost a decade, and OCC has not shown that the addition of language permitting a refund of Rider IRP rates is necessary to protect Columbia’s customers or the public interest. Nor is it necessary to recalculate the maximum Rider IRP rates for the SGS class to reflect recent changes in federal tax law. Columbia has already accounted for the tax rate reduction in its latest annual Rider IRP filing, which proposes a rate reduction for SGS Class customers. Further, Columbia has committed to adjusting the Rider IRP, in its next annual filing, for additional impacts associated with the change in deferred taxes as a result of tax reform. For these reasons, as further explained below, OCC’s requested relief is unsupported, unnecessary, and inappropriate, and the Commission should deny it.

**2. OCC Has Not Demonstrated That the Commission’s Opinion and Order Was In Any Respect Unjust or Unwarranted, or Should Be Changed.**

**2.1. The Commission should not revise the Rider IRP tariff to make Rider IRP rates “subject to refund.”**

OCC’s first assignment of error asks the Commission to amend Columbia’s tariff to state that Rider IRP “is being collected, subject to refund, based on the PUCO’s findings in the annual filing or under any Supreme Court of Ohio decision.”<sup>2</sup> OCC contends this revision is necessitated by the decision in *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (“*FirstEnergy*”), which the Supreme Court of Ohio issued two weeks before the Commission issued its Opinion and Order.

OCC did not previously ask the Commission to include such language in Columbia’s Rider IRP tariff. And it provided no testimony or other evidence to support this request. OCC did not move to reopen this proceeding “prior to the issuance of a final order,” as the Commission rules permit,<sup>3</sup> to present evidence regarding the purported need for an amendment to the tariff language. Yet even if OCC had presented evidence to support its request before the time passed to do so, it would still be inappropriate and unnecessary to include refund language in the Rider IRP tariff.

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<sup>2</sup> OCC App. for Reh’g, Mem. Supp. at 5-6.

<sup>3</sup> Ohio Adm. Code 4901-1-34(A).

OCC begins by arguing that, under *FirstEnergy*, the Commission “may not be able to order Columbia to refund money it has overcharged customers under its IRP Rider, and may not be able to prevent Columbia from charging customers for imprudent costs.”<sup>4</sup> Yet the existing annual Rider IRP application process addresses both OCC’s over-recovery and prudence concerns. As Columbia’s approved tariff for Rider IRP makes clear, the rider rate is calculated annually, based on “actual calendar year data.”<sup>5</sup> That annual process, which was first set out in the joint stipulation approved in Columbia’s 2008 rate case,<sup>6</sup> requires a Staff investigation; opportunities for intervenors to object; and an expedited hearing, if Staff concludes the application is unjust or unreasonable or any intervening party files an objection that Columbia cannot resolve.<sup>7</sup> The Staff investigation includes a review and evaluation of “costs, compliance with program directives and the accuracy and sufficiency of program records.”<sup>8</sup> The annual filing must also present “the incremental revenue requirement for each year and for each component of the IRP” and “a reconciliation of costs recoverable and costs actually recovered \* \* \*.”<sup>9</sup> Thus, “the projected total cost of Columbia’s IRP will be aligned with actual costs in the annual review of Rider IRP and aspects of the IRP reviewed and evaluated.”<sup>10</sup> The Commission is following this process in the current annual Rider IRP proceeding.<sup>11</sup>

In sum, before Columbia charges a single penny for any of its capital investments for Columbia’s AMRP or hazardous customer service line maintenance, repair, and replacement, Columbia’s proposed Rider IRP adjustment undergoes a full review. Staff and intervenors may issue discovery to

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> P.U.C.O. No. 2, Fourteenth Revised Sheet No. 27.

<sup>6</sup> See *In re Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case Nos. 08-72-GA-AIR *et al.* (“2008 Columbia Rate Case”), Joint Stipulation and Recommendation (Oct. 24, 2008); see also *2008 Columbia Rate Case*, Opinion and Order (Dec. 3, 2008).

<sup>7</sup> *2008 Columbia Rate Case*, Joint Stipulation and Recommendation, at ¶ 11.

<sup>8</sup> Opinion and Order at 25.

<sup>9</sup> *2008 Columbia Rate Case*, Joint Stipulation and Recommendation, at ¶¶ 10.B., 10.C.

<sup>10</sup> Opinion and Order at 33.

<sup>11</sup> See *In re Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 17-2374-GA-RDR (“2017 Rider IRP Adjustment Case”), Application, Schedules AMRP-10, R-10, and AMRD-10 (Feb. 27, 2018) (showing reconciliations); *2017 Rider IRP Adjustment Case*, Entry, ¶¶ 2-5 (Mar. 6, 2018) (discussing annual rider adjustment process and schedule for the current year’s proceeding); *2017 Rider IRP Adjustment Case*, Prepared Direct Testimony of Diana M. Beil at 4 (Feb. 27, 2018) (discussing the need for an annual true-up).

inspect and ensure that the capital investment is in use. There is also an opportunity for a hearing. Rider IRP rates increase each year only after the full process occurs and the Commission issues an order allowing the rates to increase. As such, there is no need for an additional future review, which would only serve to needlessly increase costs to customers and create inappropriate and unnecessary risk for the utilities.

OCC suggests (but does not state outright) that the Supreme Court of Ohio's *FirstEnergy* opinion prohibits riders "that are subject to regular true-ups, reviews, and automatic adjustments" without "explicit tariff language allowing for a refund of excessive, unlawful, or imprudent charges."<sup>12</sup> But Rider IRP has no "automatic adjustments"; as discussed above, Commission Staff investigates Columbia's proposed adjustments to Rider IRP, and intervenors may comment on the proposed adjustments as well. And *FirstEnergy* does not reference "true-ups" or reconciliations. The rider at issue in *FirstEnergy* (Rider AER)<sup>13</sup> was amended quarterly, with FirstEnergy's requested charges effective one month after filing "'unless otherwise ordered by' the commission."<sup>14</sup> The Court found no fault with that process. Instead, the Court held that the Commission acted unlawfully when it audited and disallowed FirstEnergy's quarterly Rider AER adjustments years after it had allowed those adjustments to go into effect without objection, and then ordered a refund of "costs [that] were already recovered."<sup>15</sup> Because Columbia's Rider IRP is reconciled and reviewed *before* the Commission approves any rate adjustments, the holding in *FirstEnergy* does not apply here.

OCC further contends that Rider IRP should be revised to allow for refunds of any Rider IRP charges later found to be "unreasonable, imprudent, or unlawful by \* \* \* the Supreme Court of Ohio."<sup>16</sup> Yet, refunds of approved rider

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<sup>12</sup> OCC App. for Reh'g, Mem. Supp. at 1.

<sup>13</sup> Rider AER served as the mechanism for FirstEnergy to recover its costs to procure Renewable Energy Certificates to comply with Ohio's Renewable Energy Portfolio Standard (*see FirstEnergy*, Slip Opinion No. 2018-Ohio-229, ¶¶ 5-7), "including the cost of administering [an] RFP [to obtain the RECs] and the carrying charges on any unrecovered balances, including accumulated deferred interest" (*In re Application of Ohio Edison Co. et al. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Second Opinion and Order, at 9 (Mar. 25, 2009)).

<sup>14</sup> *FirstEnergy* at ¶ 18.

<sup>15</sup> *See id.*

<sup>16</sup> OCC App. for Reh'g, Mem. Supp. at 6.

rates are traditionally forbidden by Ohio law.<sup>17</sup> Ohio Revised Code section 4905.32 states that “[n]o public utility shall refund or remit directly or indirectly, any rate \* \* \* or charge [specified in its schedule filed with the public utilities commission] \* \* \*.”<sup>18</sup> And although the *FirstEnergy* opinion suggests an exception to that blanket prohibition where the Commission includes a “refund clause [as] part of the tariff[,],”<sup>19</sup> OCC has not shown that *this* case should be an exception to the general rule. No party has so much as sought rehearing in any of Columbia’s last eight Rider IRP adjustments, much less filed an appeal to the Supreme Court of Ohio that overturned an approved Rider IRP rate adjustment.<sup>20</sup> Given the typically uncontentious process by which Rider IRP rates are set, and the lack of any significant disputes over such rates in the past, there is no reason to include refund language in the Rider IRP tariff. OCC has not justified the relief requested in its first assignment of error, and that assignment of error should be denied.<sup>21</sup>

## **2.2. The Commission does not need to recalculate the stipulated and approved maximum Rider IRP rates for SGS Class customers.**

OCC’s second assignment of error asks the Commission to recalculate the maximum Rider IRP rates to be paid by Columbia’s SGS Class customers for 2018 to 2022, in order to reflect recent reductions in the federal corporate income tax rate.<sup>22</sup> This request for relief, like OCC’s first, is unsupported by the evidentiary record and unnecessary.

OCC could not have presented evidence on this issue at hearing, because the Tax Cuts and Jobs Act of 2017 was not introduced in Congress until

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<sup>17</sup> See *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus (holding that a Court ruling that an approved tariff rate is “unreasonable or unlawful” “affords no right of action for restitution of the increase in charges” “in the absence of a statute providing therefor”); see also *id.* at 257 (interpreting R.C. 4905.32 to mean that “a utility \* \* \* is clearly forbidden to refund any part of the rates [set by the commission and] so collected.”).

<sup>18</sup> R.C. 4905.32.

<sup>19</sup> *FirstEnergy* at ¶ 66 (Kennedy, J., concurring).

<sup>20</sup> See generally Case Nos. 09-1036-GA-RDR, 10-2353-GA-RDR, 11-5803-GA-RDR, 12-2923-GA-RDR, 13-2146-GA-RDR, 14-2078-GA-RDR, 15-1918-GA-RDR, and 16-2236-GA-RDR.

<sup>21</sup> At the very least, the Commission’s decision should be deferred for future annual proceedings – the proceedings in which Rider IRP rates are actually determined – and reserved for use only when OCC provides a basis for questioning the legitimacy of a particular annual adjustment. Additionally, any such language should be symmetrical; rates should be made “subject to *adjustment*,” down or up, depending on any subsequent Commission or Court review.

<sup>22</sup> See OCC App. for Reh’g, Mem. Supp. at 6-7.

November 2017. But it was signed into law on December 22, 2017<sup>23</sup> – more than a month before the Commission issued its Opinion and Order – and OCC did not move to reopen this proceeding<sup>24</sup> to present evidence regarding the Act’s effects. Accordingly, there is no record evidence to support the relief OCC seeks. Nor does OCC’s Application for Rehearing explain what the revised Rider IRP rate caps would be if the Commission recalculated them using the lower tax rate.

Even if OCC had submitted the necessary evidence to support its second assignment of error, however, its requested relief would be unnecessary. OCC speculates that “Columbia’s spending under the IRP will be unlawfully high and higher than the PUCO [originally] contemplated” if the Commission does not recalculate the rate caps.<sup>25</sup> OCC does not explain what it means by “unlawfully high.” But the rate caps are only maximum limits. The *actual* rates for 2019 to 2023 will be set through Columbia’s annual Rider IRP adjustment proceedings.<sup>26</sup> If the Commission concludes Columbia is spending more than it originally contemplated, it can address that in those annual proceedings. However, Columbia underspent its maximum SGS class rates for its calendar year 2008 to 2017 investments,<sup>27</sup> and OCC offers no reason to believe this pattern will change going forward, no matter what the federal tax rate is. In fact, Columbia proposed an SGS class rate decrease in the current Rider IRP adjustment proceeding.<sup>28</sup> If approved, the 2018 Rider IRP rate will reflect a reduction of 5 cents from the current rate (for over \$207 million in incremental capital investment in 2017)<sup>29</sup> instead of the noticed \$1.24 increase.<sup>30</sup>

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<sup>23</sup> See H.R. 1, 115th Cong. (2017), Actions, <https://www.congress.gov/bill/115th-congress/house-bill/1/actions>.

<sup>24</sup> See Ohio Adm. Code 4901-1-34(A).

<sup>25</sup> OCC App. for Reh’g, Mem. Supp. at 7.

<sup>26</sup> See, e.g., *2017 Rider IRP Adjustment Case*, Entry, ¶ 2 (Mar. 6, 2018).

<sup>27</sup> See Columbia Ex. 4 (Thompson Direct Testimony) at 4 (showing maximum and actual Rider IRP SGS Class rates for calendar year 2008 to 2016 investments); see also *2017 Rider IRP Adjustment Case*, Prepared Direct Testimony of Diana M. Beil at 15 (Feb. 27, 2018) (proposing an SGS class rate of \$8.91/month despite a \$10.20/month cap).

<sup>28</sup> See *2017 Rider IRP Adjustment Case*, App. to Adjust Rider IRP and Rider DSM Rates of Columbia Gas of Ohio, Inc., Case No. 17-2374-GA-RDR, at Attachment A (Feb. 27, 2018).

<sup>29</sup> See *2017 Rider IRP Adjustment Case*, Prepared Direct Testimony of Diana M. Beil at 15 (Feb. 27, 2018).

<sup>30</sup> See *2017 Rider IRP Adjustment Case*, Notice of Intent to File an Application to Adjust Rider IRP and Rider DSM Rates, PFN Exhibit 3 (Proposed Tariff Sheets) (Nov. 28, 2017).

In a footnote, OCC also contends that Columbia's handling of the tax cuts is "improper" because "[c]ustomers should not be forced to wait until 2019 to receive the rate decrease that the federal government ordered \* \* \*."<sup>31</sup> But Columbia's most recent Rider IRP annual filing, proposing the Rider IRP rates to be effective May 1, 2018, does not make customers wait to see the benefits of the rate decrease; it incorporates the reduced federal income tax rate *and* includes an adjustment that passes back over-collection for federal taxes from January 1 to April 30, 2018, as a result of the rate reduction.<sup>32</sup> Thus, customers will see the benefits of the corporate tax rate reduction this year.

For these reasons, the Commission does not need to recalculate the approved Rider IRP rate caps. Columbia's past spending under Rider IRP has kept the rate well under the Commission's rate caps. Columbia's future spending will be subject to an annual Commission review, with opportunities for comment by OCC and other interested parties. Columbia's customers should see the benefit of the recent federal tax rate reduction in the upcoming Rider IRP adjustment. And, Columbia will, of course, continue to reflect the appropriate tax rate in future annual filings. OCC's second assignment of error should be denied.

### **3. Conclusion**

For the reasons provided above, Columbia respectfully requests that the Commission deny the Office of the Ohio Consumers' Counsel's Application for Rehearing and affirm the Commission's Opinion and Order.

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<sup>31</sup> OCC App. for Reh'g, Mem. Supp. at 7.

<sup>32</sup> See *2017 Rider IRP Adjustment Case*, Prepared Direct Testimony of Diana M. Beil, at 8.

Respectfully submitted,  
**COLUMBIA GAS OF OHIO, INC.**

/s/ Eric B. Gallon (0071465)  
(COUNSEL OF RECORD)  
Mark S. Stemm (0023146)  
Porter Wright Morris & Arthur LLP  
41 South High Street  
Columbus, OH 43215  
Telephone: (614) 227-2190  
Facsimile: (614) 227-2100  
Email: egallon@porterwright.com  
mstemm@porterwright.com

(Willing to accept service by e-mail)

Stephen B. Seiple, Asst. General Counsel  
(0003809)  
Joseph M. Clark, Senior Counsel  
(0080711)  
P.O. Box 117  
290 W. Nationwide Blvd.  
Columbus, Ohio 43216-0117  
Telephone: (614) 460-4648  
(614) 460-6988  
E-mail: sseiple@nisource.com  
josephclark@nisource.com  
(Willing to accept service by e-mail)

Attorneys for  
**COLUMBIA GAS OF OHIO, INC.**



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kevin.moore@occ.ohio.gov  
Jamie.williams@occ.ohio.gov  
cmooney@ohiopartners.org  
fdarr@mwncmh.com  
mpritchard@mwncmh.com  
steven.beeler@ohioattorneygeneral.gov  
john.jones@ohioattorneygeneral.gov  
William.Wright@ohioattorneygeneral.gov

/s/ Eric B. Gallon

Eric B. Gallon

Attorney for  
**COLUMBIA GAS OF OHIO, INC.**

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