

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**IN THE MATTER OF THE COMPLAINT OF  
SUBURBAN NATURAL GAS COMPANY,**

**COMPLAINANT,**

**CASE NO. 17-2168-GA-CSS**

**v.**

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

**RESPONDENT.**

**ENTRY**

Entered in the Journal on May 25, 2018

**I. SUMMARY**

{¶ 1} The reviewing attorney examiner denies the application for certification of interlocutory appeal filed by Suburban Natural Gas Company.

**II. DISCUSSION**

{¶ 2} Pursuant to R.C. 4905.26, the Commission has authority to consider written complaints filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 3} Columbia Gas of Ohio, Inc. (Columbia) is a natural gas company and public utility as defined in R.C. 4905.03 and R.C. 4905.02, respectively. As such, Columbia is subject to the Commission's jurisdiction.

{¶ 4} On October 20, 2017, Suburban Natural Gas Company (Suburban) filed a verified complaint and request for emergency relief against Columbia.<sup>1</sup> In its complaint, Suburban alleges that Columbia's use of financial incentives to builders and developers in competitive areas under certain programs violates a stipulated agreement between

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<sup>1</sup> Suburban is also a natural gas company and public utility as defined in R.C. Chapter 4905.

Suburban and Columbia (the 1995 Stipulation), which was approved by the Commission on January 18, 1996.<sup>2</sup> Collectively, Suburban submits that it has been harmed by Columbia's actions, all of which constitute violations of (1) the 1995 Stipulation, (2) the Order approving Columbia's Demand Side Management (DSM) program, (3) Columbia's DSM Rider, (4) Columbia's Main Extension Tariff, and (5) numerous statutory provisions.

{¶ 5} On October 27, 2017, Columbia filed a memorandum contra Suburban's request for emergency relief. Later, on November 13, 2017, Columbia filed its answer to Suburban's complaint. Columbia's answer denies many of the allegations contained in Suburban's complaint and asserts several affirmative defenses.

{¶ 6} By Entry issued March 1, 2018, the attorney examiner scheduled an evidentiary hearing to commence on April 3, 2018, with testimony to be filed by March 16, 2018. Both parties filed direct testimony on March 16, 2018, as directed by the attorney examiner. In addition, on April 2, 2018, Columbia filed a motion to strike portions of the testimony filed by Suburban, as well as certain related exhibits attached to that testimony.

{¶ 7} The evidentiary hearing commenced, as scheduled, on April 3, 2018, and concluded on April 5, 2018.

{¶ 8} On April 9, 2018, Suburban filed an application for certification of an interlocutory appeal. Columbia filed a memorandum contra Suburban's application for certification of interlocutory appeal on April 16, 2018.

{¶ 9} Ohio Adm.Code 4901-1-15 sets forth the Commission's requirements for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from an attorney examiner's ruling unless it is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission under paragraph (B) of the rule. Ohio Adm.Code 4901-1-15(B) specifies that an attorney

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<sup>2</sup> *In re Columbia Gas of Ohio, Inc.*, Case No. 93-1569-GA-SLF, et al., Finding and Order (Jan. 18, 1996).

examiner shall not certify an interlocutory appeal to the Commission unless the examiner finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling that 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.

{¶ 10} In its application, Suburban requests that two oral rulings issued during the evidentiary hearing by the presiding attorney examiners be certified for interlocutory appeal. First, Suburban challenges the presiding examiners' decision to not allow Suburban to present rebuttal testimony. Second, Suburban contests the presiding examiners' ruling to strike Suburban Exhibit 3.1. As grounds for the application, Suburban submits that both of the rulings present a "new or novel question of interpretation, law or policy" and represent "a departure from past precedent" under Ohio Adm.Code 4901-1-15(B). In addition, Suburban characterizes the ruling regarding rebuttal testimony as "reversible error" and both rulings as "unfairly prejudicial."

#### *A. Rebuttal Testimony*

{¶ 11} At the close of the evidentiary hearing, the presiding examiners addressed the issue of rebuttal testimony. More specifically, the presiding examiners determined that rebuttal testimony would not help the Commission render a decision in this matter and that the evidence presented at hearing was ripe for briefing. Accordingly, the presiding examiners declined to extend Suburban the opportunity to present rebuttal. (Tr. Vol. III at 516.) Suburban challenges that ruling.

{¶ 12} Citing to an Ohio Supreme Court case addressing a tort action for wrongful discharge, Suburban first argues that a party has an unconditional right to present rebuttal testimony on matters first addressed in an opponent's case-in-chief. Suburban then states that the presiding examiners' decision to deny Suburban the opportunity to

present rebuttal testimony is highly unusual because rebuttal is routinely granted to parties who request it. Here, Suburban cites to several Commission matters in which rebuttal testimony was permitted. Suburban recognizes, however, that the Commission has upheld an attorney examiner's decision to disallow rebuttal testimony on at least one occasion.

{¶ 13} Further arguing, Suburban contends that it must be given the opportunity to address matters first raised in Columbia's prepared testimony. More specifically, Suburban insists it be given the opportunity to address and explain its intent for recording Exclusive Natural Gas Service Agreements in Delaware County. Suburban submits that these agreements were first introduced by Columbia in its case-in-chief to support Columbia's theory that Suburban is unlawfully attempting to create an exclusive service territory in Delaware County. Suburban argues that it could not have anticipated this "exclusive service territory" theory in its own case-in-chief and that, because Columbia made the intent of the agreements an issue in the proceeding, it is unfairly prejudicial to prevent Suburban from presenting rebuttal testimony regarding the intent behind and circumstances surrounding the execution of the agreements.

{¶ 14} In its memorandum contra, Columbia first asserts that Suburban simply fails to meet the criteria for certification of an interlocutory appeal to the Commission because it has not provided the grounds required under Ohio Adm.Code 4901-1-15(B). In this, Columbia contends that the appeal does not present a new or novel question of interpretation, law, or policy, nor represents a departure from past precedent. Columbia further asserts that no immediate ruling is necessary to prevent undue prejudice.

{¶ 15} Columbia declares that the Commission has never guaranteed a right to present rebuttal and, therefore, Suburban cannot expose a departure from past precedent or present this issue as new or novel to the Commission. Columbia points out Suburban's concession that the Commission has, in the past, denied a party's request to present rebuttal testimony. Columbia expounds on this concept, explaining and attaching

portions of a hearing transcript in which an attorney examiner denied the complainant's request to present rebuttal testimony. Columbia argues that the circumstances in this case are similar and that the presiding examiners reasonably exercised their discretion in disallowing rebuttal testimony.

{¶ 16} Columbia next addresses Suburban's claim of undue prejudice. Columbia disputes Suburban's contention that it must be given the opportunity on rebuttal to explain its intent with regard to the Exclusive Natural Gas Service Agreements because Columbia made that intent an issue in this proceeding. Here, Columbia clarifies that those portions of its witness's testimony that attempted to attribute any motive or intent to Suburban's use of the agreements were stricken by the presiding examiners upon Suburban's motion. Thus, Columbia argues there is no need for Suburban to explain its intent through rebuttal. Columbia further posits that, even assuming Suburban has shown that the disallowance of rebuttal testimony presents a new or novel question of interpretation, law, or policy, or constitutes a departure from past precedent, Suburban has not shown or explained what undue prejudice or expense justifies an immediate determination by the Commission. Finally, in the event that the reviewing examiner were to certify the appeal, Columbia submits that the presiding examiners' decision with regard to rebuttal testimony was a reasonable exercise of discretion that should be affirmed.

### ***B. Suburban Exhibit 3.1***

{¶ 17} Attached to the prefiled testimony of Suburban's President and Chief Operating Officer, Andrew Sonderman, Suburban Exhibit 3.1 was described as a memorandum Mr. Sonderman wrote to document a conversation among himself, Mr. Pemberton [Suburban's Chairman of the Board, director, and Chief Executive Officer], and Mr. Roll [Suburban's Vice President of System Development] with representatives of Romanelli & Hughes (Suburban Ex. 3 at 12). Columbia moved to strike Suburban 3.1 (the Exhibit) as inadmissible hearsay. After considerable discussion of the matter, including

debate as to whether various hearsay exceptions applied, the presiding examiners struck the Exhibit. Specifically, the presiding examiners held that the Exhibit constituted and contained hearsay statements that were not subject to a recognized hearsay exception. (Tr. Vol. I at 141-145.) Suburban contests this ruling, characterizing it as unfairly prejudicial.

{¶ 18} Suburban argues that, contrary to the presiding examiners' ruling, the Exhibit should not have been excluded from evidence, whether on hearsay or other grounds. Suburban then delineates the various reasons why it believes the Exhibit is not hearsay and does not contain hearsay statements but, according to Suburban, is probative, trustworthy evidence, the exclusion of which was erroneous and improper.

{¶ 19} In its memorandum contra, Columbia first suggests that this portion of Suburban's motion to certify an interlocutory appeal should be denied because there is nothing new or novel about an evidentiary ruling; nor is the ruling a departure from Commission precedent. Instead, according to Columbia, it is a run-of-the-mill evidentiary determination—made pursuant to the Ohio Rules of Evidence and in accordance with Commission precedent—that is not properly certified for interlocutory appeal. Columbia further submits that Suburban failed to show that an immediate determination by the Commission is needed to prevent undue prejudice or expense to the parties. Alternatively, and in the event that the ruling to strike the Exhibit is certified for interlocutory appeal, Columbia urges affirmance.

### *C. Conclusion*

{¶ 20} Upon review of the parties' arguments, the reviewing examiner finds that neither of the issues raised by Suburban satisfies the requirements for certification of an interlocutory appeal to the Commission under Ohio Adm.Code 4901-1-15(B).

{¶ 21} First, the reviewing examiner finds that the presiding examiners' decision with regard to rebuttal testimony does not present a new or novel question of

interpretation, law, or policy; nor is the decision a departure from past precedent. It is certainly common to allow rebuttal, specifically with regard to expert testimony; however, rebuttal testimony is not guaranteed in any proceeding. As Suburban concedes in its application for certification, the Commission has affirmed an attorney examiner's denial of a request to present rebuttal testimony in the past. *In re Cincinnati Bell Tel. Co.*, Case No. 84-1272-TP-AIR, et al., Entry on Rehearing (Dec. 17, 1985) at 1. Additionally, in a more recent case, the attorney examiner denied a complainant's request to present rebuttal testimony upon noting that rebuttal is typically reserved for expert testimony in Commission proceedings and that the pertinent issues were factual in nature, with each side having been given the opportunity to present its case. The ruling of the attorney examiner in that case was also upheld by the Commission. *Harris Design Services v. Columbia Gas of Ohio, Inc.*, Case No. 15-405-GA-CSS, Second Entry on Rehearing (Feb. 1, 2017) at ¶ 23.<sup>3</sup> That Suburban cites other cases in support of its arguments only underscores the observation that the issue of whether rebuttal will be permitted is not a new or novel question of interpretation, law, or policy; and, Suburban otherwise fails to support its stance that disallowing rebuttal is a departure from past precedent.

{¶ 22} Here, too, the reviewing examiner finds that Suburban's declared rationale for its need to present rebuttal testimony is not persuasive. At the outset, the reasons set forth during the hearing differ from those set forth in Suburban's brief. At the hearing, Suburban's counsel referenced the need for rebuttal testimony if necessary to lay foundation for a proffered exhibit (Tr. Vol. III at 363, 509) and to attempt to present evidence that was otherwise excluded "on technical evidentiary grounds" or "on relevance grounds" (Tr. Vol. III at 517). Only in its application for certification of interlocutory appeal does Suburban assert that it must be given the opportunity to present rebuttal testimony for its argued purpose: to address matters first addressed in

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<sup>3</sup> The attorney examiner's ruling in the case may be found at page 162 of the October 30, 2015 transcript. Similarly, in the instant matter, the presiding examiners noted that the evidence was ripe for briefing and that rebuttal was unlikely to help the Commission (Tr. Vol. III at 516).

an opponent's case-in-chief. *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 644 N.E.2d 286 (1994). It is certainly not a deviation from past Commission precedent to deny rebuttal where no recognized basis for the same is set forth at hearing.

{¶ 23} Second, the reviewing examiner finds that the presiding examiners' exclusion of the Exhibit does not present a new or novel issue of interpretation, law, or policy nor a departure from past precedent. To the contrary, attorney examiners presiding over evidentiary hearings are specifically tasked with the responsibility to regulate the course of the hearing, a responsibility that includes ruling on objections and procedural matters and preventing the presentation of irrelevant or cumulative evidence. Ohio Adm.Code 4901-1-27. In this instance, in a motion filed before and argued during the hearing, Columbia moved to strike the Exhibit (and certain testimony relating to the Exhibit) as inadmissible hearsay. After listening to the parties' numerous arguments for and against any action on the Exhibit, and applying the Ohio Rules of Evidence, the presiding examiners granted that portion of Columbia's motion to strike. Accordingly, the Exhibit was excluded from evidence. While Suburban clearly disagrees with that ruling, such disagreement does not render the ruling a new or novel question of interpretation, law, or policy, nor does the evidentiary ruling represent a departure from past precedent. In short, "the interpretation and application of evidentiary rulings \* \* \* are not new or novel issues" and such rulings do not require an immediate determination by the Commission. *In re Duke Energy Ohio, Inc.*, Case No. 14-1051-GE-RDR, Entry (Feb. 5, 2015) at 6; *see also In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 32-33 (denying interlocutory appeal where the attorney examiners' ruling was consistent with the Ohio Rules of Evidence and Commission practice).

{¶ 24} Finally, the reviewing examiner finds that Suburban fails to demonstrate that an immediate determination with regard to either rebuttal or the Exhibit is necessary to prevent undue prejudice or expense, should the Commission ultimately reverse the



ruling in question. Suburban specifically cites to Ohio Adm.Code 4901-1-15(B) as grounds for its application for certification. That rule specifies that the attorney examiner shall not certify an interlocutory appeal unless that examiner finds both a new or novel question of interpretation, law, or policy or a ruling that departs from past precedent *and* the need for an immediate determination to prevent the likelihood of undue prejudice or expense. The failure to demonstrate the second element, even where the first is satisfied, is fatal to any application for certification of an interlocutory appeal under Ohio Adm.Code 4901-1-15(B). Merely claiming that a ruling is prejudicial does not make it so; and, Suburban does not demonstrate that disallowing rebuttal or striking the subject exhibit unduly prejudiced its ability to prove its case.

{¶ 25} Because Suburban has not satisfied the requirements of Ohio Adm.Code 4901-1-15(B), and the rulings challenged do not fall within Ohio Adm.Code 4901-1-15(A), the reviewing examiner finds that Suburban's request for certification of its interlocutory appeal to the Commission should be denied.

### III. ORDER

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That Suburban's request for certification of its interlocutory appeal to the Commission be denied. It is, further,

{¶ 28} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

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By: Sarah J. Parrot  
Attorney Examiner

GAP/mef

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Summary: Attorney Examiner Entry denying the application for certification of interlocutory appeal. electronically filed by Ms. Mary E Fischer on behalf of Sarah J. Parrot, Attorney Examiner, Public Utilities Commission of Ohio