

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

Suburban Natural Gas Company,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 17-2168-GA-CSS
	)	
Columbia Gas of Ohio, Inc.	)	
	)	
Respondent.	)	

---

---

**MOTION OF COLUMBIA GAS OF OHIO, INC.  
TO STRIKE EXHIBIT A  
OF THE COMPLAINANT’S REPLY BRIEF**

---

---

Pursuant to Ohio Adm. Code 4901-1-12, Columbia Gas of Ohio, Inc. (“Columbia”) files this Motion to Strike Exhibit A of the Complainant’s Reply Brief, for the reasons set forth in the attached Memorandum in Support.

Respectfully submitted,

/s/ Mark S. Stemm

Mark S. Stemm (0023146)

(COUNSEL OF RECORD)

Eric B. Gallon (0071465)

Porter Wright Morris & Arthur LLP

41 South High Street

Columbus, OH 43215

Telephone: (614) 227-2092

(614) 227-2190

Facsimile: (614) 227-2100

Email: mstemm@porterwright.com

egallon@porterwright.com

(Willing to accept service by e-mail)

Stephen B. Seiple, Asst. General Counsel  
(0003809)

Joseph M. Clark, Sr. Counsel (0081179)

Columbia Gas of Ohio, Inc.

290 W. Nationwide Blvd.

P.O. Box 117

Columbus, OH 43216-0117

Telephone: (614) 460-4648

(614) 460-6988

Email: sseiple@nisource.com

josephclark@nisource.com

(Willing to accept service by e-mail)

Attorneys for

**COLUMBIA GAS OF OHIO, INC.**

## MEMORANDUM IN SUPPORT

### 1. Introduction

During the hearing of this proceeding, Suburban Natural Gas Company (“the Complainant” or “Suburban”) requested permission to file rebuttal testimony. The Hearing Examiners denied the Complainant’s request.<sup>1</sup>

On April 9, 2018, the Complainant filed an Application for Certification of Interlocutory Appeal. In that pleading the Complainant took exception with the Hearing Examiners’ ruling that rebuttal testimony was unnecessary.<sup>2</sup> By Entry dated May 25, 2018, an Attorney Examiner denied the Complainant’s Application for Certification of Interlocutory Appeal.

On May 29, 2018, the parties filed their Reply Briefs. The Complainant’s Reply Brief contained the following statement:<sup>3</sup>

The request to rebut Columbia’s skewed and misleading presentation was denied. The Commission cannot consider Columbia’s arguments without a complete record, so rebuttal testimony that Suburban would have submitted, and should have been allowed to submit, is being proffered herewith as Exhibit A.

The Complainant neglected to attach Exhibit A to its Reply Brief, and instead separately docketed the attachment on May 30, 2018. The document labeled as Exhibit A to the Complainant’s Reply Brief is the Rebuttal Testimony of David L. Pemberton, Sr.

---

<sup>1</sup> Vol. III Tr. 516: 13-23.

<sup>2</sup> The Complainant also took exception with the Hearing Examiners’ decision to strike one of the Complainant’s exhibits.

<sup>3</sup> Suburban Reply Br. at 21.

## 2. Argument

The Commission's rules permit a party to contest the propriety of a Hearing Examiner's rulings so as to preserve the party's arguments for the Commission's consideration in the drafting of its order. Specifically, the rules provide that:

Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration *by discussing the matter as a distinct issue in its initial brief* or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.<sup>4</sup>

The Complainant's attachment of the full text of its purported rebuttal testimony to the Complainant's Reply Brief is inconsistent with Ohio Admin. Code 4901-1-15(F), and is prejudicial. Therefore, the Commission should strike Complainant's Attachment A to its Reply Brief for the reasons discussed below.

Pursuant to Ohio Admin. Code 4901-1-15(F), the Complainant has the right to *discuss* the Hearing Examiner's ruling denying the request for rebuttal testimony. However, the rule does not confer the right to attach a copy of the rebuttal testimony that the Complainant wishes to present. The May 25 Entry denying the Application for Certification of Interlocutory Appeal makes it clear that rebuttal testimony is not permitted in this case, and the Complainant should not be permitted to do an end run around the May 25 Entry by attaching the excluded testimony to a pleading that will be part of the record in this case. Excluded testimony should not be part of the record in the case – it is as simple as that.

What the Complainant should have done is *discuss* the rebuttal testimony issue without attaching the excluded testimony. This is what the plain language of the rule requires. By attaching the testimony to a document that will be part of the record, the Complainant has prejudiced Columbia. The Complainant apparently attached the excluded testimony in the hopes that the Commission would read it to better understand the additional information that the Complainant wanted to present, but which the Hearing Examiners found to be unnecessary. Complainant has prejudiced Columbia by attempting to provide information not in the record in an attempt to improperly influence the Commission. The Commission has held

---

<sup>4</sup> Ohio Admin. Code 4901-1-15(F) (emphasis added).

that “new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record.”<sup>5</sup>

The Complainant’s proffer of rebuttal testimony is clearly improper. The Commission has made it clear that:

The appropriate use of a “proffer” is simply to preserve a party’s right to appeal an evidentiary ruling excluding it. It is not, however, an additional opportunity to introduce new evidence into the record without providing parties sufficient opportunity to respond to it.<sup>6</sup>

The Commission should strike Exhibit A to the Complainant’s Reply Brief now. The Commission can later review the merits of the Complainant’s objection to the Attorney Examiners’ rulings denying rebuttal testimony if the Commission finds that the Complainant’s Reply Brief was an “appropriate filing” in which to preserve the issue pursuant to Ohio Admin. Code 4901-1-15(F). Notably, the Complainant asserted its claimed need for rebuttal testimony at the conclusion of hearing on April 5, and yet waited nearly two months until reply briefing to attempt a proffer. If the Commission is ultimately persuaded by the Complainant’s arguments, the Commission can, in its order, reopen the proceedings to permit rebuttal testimony, motions to strike and cross examination of the rebuttal testimony, and any additional surrebuttal testimony deemed necessary. It is only upon the issuance of such a Commission order that the Complainant should be permitted to file its rebuttal testimony in this proceeding. Unless and until the Commission issues such an order, Exhibit A to the Complainant’s Reply Brief should be stricken.

**WHEREFORE**, for the reasons discussed herein, the Commission should strike Exhibit A to the Complainant’s Reply Brief.

---

<sup>5</sup> *In the Matter of the Application 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 R.C. 4928.143 In The Form of an Electric Security Plan*, PUCO Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (October 12, 2016) at ¶376.

<sup>6</sup> *Id.*

Respectfully submitted,

/s/ Mark S. Stemm

---

Mark S. Stemm (0023146)

(COUNSEL OF RECORD)

Eric B. Gallon (0071465)

Porter Wright Morris & Arthur LLP

41 South High Street

Columbus, OH 43215

Telephone: (614) 227-2092

(614) 227-2190

Facsimile: (614) 227-2100

Email: mstemm@porterwright.com

egallon@porterwright.com

(Willing to accept service by e-mail)

Stephen B. Seiple, Asst. General Counsel

(0003809)

Joseph M. Clark, Sr. Counsel (0081179)

Columbia Gas of Ohio, Inc.

290 W. Nationwide Blvd.

P.O. Box 117

Columbus, OH 43216-0117

Telephone: (614) 460-4648

(614) 460-6988

Email: sseiple@nisource.com

josephclark@nisource.com

(Willing to accept service by e-mail)

Attorneys for

**COLUMBIA GAS OF OHIO, INC.**

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document is being served via electronic mail on the fourth day of June, 2018, upon the parties listed below:

*Suburban Natural Gas Company*  
whitt@whitt-sturtevant.com  
kennedy@whitt-sturtevant.com  
glover@whitt-sturtevant.com  
smartin@mmpdlaw.com

*Delaware County Board of Commissioners and Delaware  
County Engineer*  
AHochstettler@co.delaware.oh.us

/s/ Mark S. Stemm

Mark S. Stemm

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

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/4/2018 4:01:38 PM**

**in**

**Case No(s). 17-2168-GA-CSS**

Summary: Motion to Strike Exhibit A of the Complainant's Reply Brief and Memorandum in Support electronically filed by Cheryl A MacDonald on behalf of Columbia Gas of Ohio, Inc.