

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Suburban Natural Gas Company for an Increase in Gas Distribution Rates.)))	Case No. 18-1205-GA-AIR
In the Matter of the Application of Suburban Natural Gas Company for Tariff Approval.))	Case No. 18-1206-GA-ATA
In the Matter of the Application of Suburban Natural Gas Company for Approval of Certain Accounting Authority.)))	Case No. 18-1207-GA-AAM

**MEMORANDUM CONTRA
MOTION OF COLUMBIA GAS OF OHIO, INC.
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The PUCO should deny Columbia Gas of Ohio's request to interject itself into this case more than three years after it started,¹ and in the remand phase where the PUCO is charged only with assessing the extent to which Suburban's 4.9-mile pipeline extension was "useful" under R.C. 4909.15. Columbia has asked the PUCO for permission to file an *amicus curiae* brief in support of Suburban's application, particularly as it pertains to whether Suburban can charge consumers for the entirety of a 4.9-mile pipeline extension. Columbia should not be allowed to participate in this proceeding because (i) Columbia declined to seek intervention, and parties should not be allowed to circumvent the statutory intervention process by filing amicus briefs, and (ii) Columbia's participation in this case in no way aids the PUCO in reaching a just and reasonable decision.

¹ Motion of Columbia Gas of Ohio, Inc. for Leave to File *Amicus Curiae* Brief (Oct. 29, 2021) (the "Columbia Motion").

I. ARGUMENT

A. Columbia declined to participate in this proceeding for the past three years and should not be permitted to interject itself into the case at the eleventh hour.

Suburban initiated this case in July 2018, more than three years ago. The PUCO established a March 8, 2019 deadline for moving to intervene, more than 30 months ago.² OCC intervened in August 2018,³ and Ohio Partners for Affordable Energy intervened in September 2018.⁴ No one else, including Columbia, sought intervention.⁵

Suburban and the PUCO Staff (and no one else) signed a settlement that would allow Suburban, following a phase-in, to charge consumers for the entirety of a 4.9-mile pipeline extension.⁶ The PUCO established a procedural schedule to consider the settlement, including deadlines for testimony in support of the settlement (June 7, 2019) and testimony in opposition to the settlement (June 21, 2019).⁷

OCC filed the testimony of Ross Willis opposing the settlement. One of the primary purposes of Mr. Willis's expert testimony was to challenge Suburban's claim that the entire 4.9-mile pipeline extension was useful to consumers on the date certain.⁸

The PUCO then held a hearing in July 2019.⁹ Mr. Willis's testimony having been filed on the public docket, Columbia was on notice that the usefulness of the extension under R.C. 4909.15 was a primary issue in this case. Columbia did not seek to participate in the case; it did

² Entry ¶ 15 (Feb. 8, 2019).

³ Motion to Intervene by The Office of the Ohio Consumers' Counsel (Aug. 30, 2018).

⁴ Ohio Partners for Affordable Energy's Motion to Intervene (Sept. 7, 2018).

⁵ *See generally* Case No. 18-1205-GA-AIR, Docket Card (showing no other motions to intervene).

⁶ Stipulation and Recommendation (May 23, 2019).

⁷ *See* Transcript (filed June 4, 2019).

⁸ *See* Supplemental Direct Testimony of Wm. Ross Willis in Opposition to the Stipulation (June 21, 2019).

⁹ *See* Transcripts (filed July 22, 2019).

not ask permission to participate in the hearing; it did not ask permission to file an amicus brief after the hearing.

Following the PUCO's approval of the settlement over OCC's objections, OCC appealed to the Supreme Court of Ohio.¹⁰ The primary issue in that appeal was whether the PUCO erred in ruling that the entire 4.9-mile pipeline extension was useful to consumers on the date certain under R.C. 4909.15.¹¹ Columbia did not seek intervention in that appeal. Nor did it file an amicus brief, even though amicus briefs are permitted as a matter of right at the Court.¹²

Now that OCC has prevailed on appeal, and the case has been remanded to the PUCO, Columbia wants to participate in this case, for the first time, by filing an amicus brief.

In support of its request to file an amicus brief, Columbia cites four cases.¹³ But in none of these cases did the PUCO allow a party to file an amicus brief anywhere near as late in the game as Columbia wants to now.

In *In re Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, for example, it is true that the PUCO allowed Columbia to file an amicus brief.¹⁴ But in that case, Columbia's request for an amicus brief was made shortly after the PUCO's evidentiary hearing and less than a year after the case was filed, which stands in stark contrast with the current case.¹⁵

¹⁰ *In re Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224.

¹¹ *Id.*

¹² See S. Ct. Prac. R. 16.06(A) ("An amicus curiae may file a brief urging affirmance or reversal and leave to file an amicus brief is not required.").

¹³ See Columbia Motion at 3, note 1.

¹⁴ Case No. 12-1685-GA-AIR.

¹⁵ *Id.*, Motion for Leave to File Amicus Brief (June 6, 2013).

In *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*¹⁶ and *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer*,¹⁷ the PUCO allowed several parties to file amicus briefs. Suburban's reliance on these cases is unpersuasive, however, for several reasons.

First, these cases were some of the most contentious and complex cases to be litigated in recent PUCO history (and perhaps all of PUCO history). They involved complex issues not only about Ohio law (including the application of Ohio's electric security plan statutes) but about the interplay of state and federal energy law and markets. These cases affected the interests of parties that do not routinely participate in PUCO proceedings. They were extraordinary in every sense of the word. The fact that the PUCO may have liberally allowed entities to be heard through amicus briefs under extraordinary circumstances should not be used to allow Columbia to do the same in a much more typical base distribution rate case.

Further, once again, the parties in the AEP and FirstEnergy cases did not wait nearly as long as Columbia has. To the contrary, they all sought to participate by filing amicus briefs at the post-hearing briefing stage; none of them waited for three years to see the entire rehearing and appeals process play out before seeking to participate.

Finally, Suburban cites *In re Application of Dayton Power and Light Co. for a Waiver*.¹⁸ Suburban claims that in this case, the PUCO denied OCC's motion to intervene and instead considered "an *amicus curiae* brief submitted by the OCC and other organizations."¹⁹ Suburban's description of this DP&L case is not accurate. There, OCC filed a timely motion to

¹⁶ Case No. 14-1693-EL-RDR.

¹⁷ Case No. 14-1297-EL-SSO.

¹⁸ Case No. 05-1171-EL-UNC.

¹⁹ Suburban AFR at 3, note 1.

intervene, just two weeks after the utility filed its application.²⁰ At the same time, OCC also filed a memorandum contra the utility's application, and OCC was joined in that memorandum contra by two other parties, the Community Action Partnership and Communities United for Action.²¹ Neither OCC nor anyone else filed an "amicus curiae brief" as Suburban claims; the only filings were OCC's motion to intervene and OCC and the other entities' joint memorandum contra the utility's application. And of course, as with Suburban's other citations, the timing of the filings in this case were vastly different from Columbia's. In the DP&L case, OCC and its partners immediately opposed the utility's request rather than waiting years to attempt to be heard.

Moreover, although Columbia did not cite them, there have been instances in which the PUCO has denied a party's request to file an amicus brief. In a case involving Vectren, Columbia itself sought leave to file an amicus brief more than three years after the case had been filed.²² The PUCO found "no basis to justify permitting Columbia to file an amicus at this stage of the proceeding" and granted OCC's motion to strike Columbia's amicus filing.²³ Given the similarity in delay between that case and the current case, this case is most on point and supports denial of Columbia's motion.

²⁰ Case No. 05-1171-EL-UNC, Motion to Intervene by the Office of the Ohio Consumers' Counsel (Oct. 6, 2005).

²¹ Case No. 05-1171-EL-UNC, Memorandum Contra Application for Waiver (Oct. 6, 2005).

²² Case No. 02-220-GA-GCR, Motion for Leave to File Amicus Curiae Memorandum in Support of Application for Rehearing (July 14, 2005).

²³ Case No. 02-220-GA-GCR, Entry on Rehearing (Aug. 10, 2005).

In *In re Complaint of the Office of the Consumers' Counsel on Behalf of Jim and Helen Heaton*, the City of Columbus sought leave to file an amicus brief.²⁴ Citing the City's failure to seek intervention, among other things, the PUCO struck the City's amicus brief.²⁵

In light of Columbia's substantial delay in seeking to participate in this case, the PUCO should deny Columbia's motion.

B. Columbia's participation would duplicate Suburban's own participation and thus serves no purpose other than to clog the PUCO's docket and add administrative burden to this case.

In its motion, Columbia argues that its participation "will simply contribute to the full development and equitable resolution of the important legal issue that is before the Commission on remand."²⁶ The PUCO should reject this logic because Columbia's participation does nothing but duplicate the efforts of its fellow utility, Suburban.

In this regard, the United States Supreme Court's rules for amicus briefs are instructive:

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.²⁷

Here, Columbia is not bringing to the PUCO's attention any relevant matter not already brought to its attention. To the contrary, Columbia represents its interests as a utility, the same as Suburban, and it seeks only to bolster all the very same arguments already made by Suburban

²⁴ Case No. 83-1279-EL-CSS.

²⁵ 1985 Ohio PUC LEXIS 41, at *22-23 (Apr. 16, 1985). See also *In re Revision of the Minimum Telephone Service Standards*, Case No. 93-355-TP-UNC, 1993 Ohio PUC LEXIS 682, at *7 (Aug. 5, 1993) (denying Ohio Telephone Association's request to file an amicus pleading).

²⁶ Columbia Motion at 3.

²⁷ U.S. Sup. Ct. R. 37.1.

throughout this case. The PUCO should discourage this practice, which wastes the PUCO's time and administrative resources.

II. CONCLUSION

Columbia had many opportunities over the past three years to seek to participate in this case or the related appeal. It did not do so. The PUCO should deny Columbia's last-minute request to be heard in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served by electronic transmission upon the parties below this 15th day of November 2021.

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Case No(s). 18-1205-GA-AIR, 18-1206-GA-ATA, 18-1207-GA-AAM

Summary: Memorandum Memorandum Contra Motion of Columbia Gas of Ohio,
Inc. for Leave to File Amicus Curiae Brief by Office of The Ohio Consumers'
Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Healey,
Christopher