

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY OF COLUMBIA GAS OF OHIO, INC., IN SUPPORT OF ITS
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND
MEMORANDUM CONTRA THE OFFICE OF OHIO CONSUMERS'
COUNSEL'S MOTION TO STRIKE**

1. Introduction

The Office of the Ohio Consumers' Counsel ("OCC") filed two separate documents to challenge the *amicus curiae* brief that Columbia Gas of Ohio, Inc. ("Columbia") seeks leave to file in this proceeding. On November 15, 2021, OCC filed a Memorandum Contra Columbia's Motion for Leave, and on the same day OCC docketed a separate Motion to Strike Columbia's *amicus curiae* brief, asking the Commission to assign "no weight" to the brief and to strike it from the record.

The Commission has complete discretion as to whether or not to accept Columbia's proposed *amicus curiae* brief and as to what weight, if any, to assign to Columbia's arguments. Columbia respectfully submits that the Commission should allow Columbia's voice to be heard as the Commission applies, for the very first time, the new "used and useful" standard announced by the Ohio Supreme Court in its recent Opinion.¹ For the additional reasons set forth below, OCC's

¹ *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224.

contentions lack merit, and the Commission should grant Columbia’s Motion for Leave and deny OCC’s perfunctory Motion to Strike.

2. The Commission should accept and consider Columbia’s *amicus curiae* brief in this important proceeding on remand.

The Ohio Supreme Court’s September 21 Opinion in this case interpreted for the first time the word “useful” in the key phrase “used and useful” in R.C. 4909.15(A).² That phrase underpins every Ohio utility’s opportunity to include infrastructure investments in rate base. As such, it is only natural that Columbia, like Suburban Natural Gas Company (“Suburban”), has a keen and compelling interest in how the Commission applies the Court’s newly announced standard on remand to the pipeline extension project at issue.

OCC’s primary objection to Columbia’s *amicus curiae* brief appears to be its timing. OCC complains about Columbia’s request “to interject itself into this case more than three years after it started”;³ complains that Columbia did not previously seek to participate in the case or submit an *amicus curiae* brief to the Ohio Supreme Court;⁴ and casts aspersions on Columbia’s desired participation so “late in the game.”⁵

Putting aside the fact that there are no timing restrictions (indeed, no restrictions at all) on *amicus curiae* briefing in the Commission’s procedural rules,⁶ OCC’s focus on timing overlooks the important point that Columbia’s interest in submitting an *amicus curiae* brief only ripened when the Ohio Supreme Court issued its September 21, 2021 decision, announced its new standard for “used and useful” in that decision, and ordered the Commission to apply that new standard for the very first time on remand. Like the parties whose *amicus curiae* briefs were accepted in the *Duke*,⁷ *PPA*,⁸ and *SSO*⁹ cases addressed in Columbia’s Motion and

² See generally *id.*

³ OCC Mem. Contra at 1.

⁴ *Id.* at 2-3.

⁵ *Id.* at 3.

⁶ See generally Ohio Adm.Code Chapter 4901-1.

⁷ Case No. 12-1685-GA-AIR.

⁸ Case No. 14-1693-EL-RDR.

⁹ Case No. 14-1297-EL-SSO.

OCC's Memorandum Contra, Columbia has properly and timely submitted an *amicus curiae* brief to assist the Commission in addressing a significant regulatory principle with a statewide impact.

Notably, Columbia does not seek to intervene as a party, which underscores the minimal impact of the Commission's acceptance and consideration of Columbia's proposed *amicus curiae* brief. Columbia is not seeking to preserve the right to file rehearing or appeal. With its proposed *amicus curiae* brief, Columbia merely wants to aid the Commission in its review of the case on remand and its application of the Ohio Supreme Court's just-announced standard for what is "used and useful." Columbia's submission of the *amicus curiae* brief will in no way impair the Commission's timely consideration of the critical issues before it on remand. If the Commission were to adopt OCC's position, and deny key stakeholders leave to submit *amicus curiae* briefs in proceedings whenever those stakeholders elected not to intervene in some prior phase of the cases, then the likely response will surely be a marked increase in proposed interventions in nearly every case by stakeholders concerned about the risk that the Supreme Court could – as it did in this case – announce changes to fundamental regulatory principles.

The Ohio Supreme Court welcomes *amicus curiae* briefs in its Rules of Practice, whether at the jurisdictional phase when the court is first deciding whether to accept discretionary review over a case,¹⁰ at the merit briefing stage,¹¹ or at the reconsideration stage.¹² The Supreme Court does not require leave for the submission of *amicus curiae* briefs at any of these stages; nor does it preclude friends of the court from submitting a brief at a later stage if they elected not to do so at an earlier stage. Presumably, the Supreme Court welcomes *amicus curiae* briefs at multiple phases of the appeals that it hears because it understands the value that such briefs can add to the Court's consideration of the issues of statewide impact that it reviews. Indeed, the Supreme Court has even accepted and considered briefs of *amici curiae* under circumstances when the party the *amici* support failed to appear.¹³ Instead of adopting OCC's perspective on when and how an *amicus*

¹⁰ S.Ct.Prac.R. 7.06.

¹¹ S.Ct.Prac.R. 16.06.

¹² S.Ct.Prac.R. 18.02.

¹³ E.g., *Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, ¶ 19 ("This court accepted appellant's discretionary appeal. * * * Although appellee has not appeared before this court, numerous *amici* have ably presented argument in support of the lower courts' judgments.")

curiae brief may properly be submitted, the Commission should follow the Ohio Supreme Court’s flexible approach, grant Columbia’s Motion for Leave, review Columbia’s brief, and assign – in its sound discretion – whatever value the Commission deems appropriate for Columbia’s arguments regarding the “used and useful” nature of Suburban’s pipeline extension.

3. The Commission should deny OCC’s Motion to Strike.

OCC separately asks the Commission to strike Columbia’s *amicus curiae* brief so that it is “not considered part of the record on remand.”¹⁴ The sole authority that OCC cites in support of its Motion to Strike is the Commission’s 1985 Opinion and Order *In re Complaint of the Office of the Consumers’ Counsel on Behalf of Jim and Helen Heaton*.¹⁵ But OCC’s vintage authority is inapposite. The entity seeking leave to file the *amicus curiae* brief in *Heaton* – the City of Columbus – was seeking to inject an entirely irrelevant subsidy issue into a proceeding that concerned whether the utility had violated the Ohio Administrative Code and the company’s tariff by failing to offer proper rural line-extension plans.¹⁶ Here, in stark contrast, Columbia’s proffered *amicus curiae* brief bears directly on the issues presented by the Ohio Supreme Court’s decision and its remand to the Commission. Both sections of argument in Columbia’s proffered *amicus curiae* brief expressly address the “used and useful” test, the Commission’s application of that test, and the specific pipeline extension at issue in these proceedings. The Commission’s 35-year-old Opinion and Order in *Heaton* thus fails to support OCC’s Motion to Strike.

Because OCC offers no other legal basis in support of its perfunctory Motion, the Commission should decline to strike Columbia’s *amicus curiae* brief. Instead, for the reasons set forth above and in Columbia’s Motion for Leave, the Commission should accept and consider Columbia’s *amicus curiae* brief as the Commission has done in the numerous other proceedings cited in Columbia’s Motion.

¹⁴ OCC Mem. in Supp. at 1.

¹⁵ Case No. 83-1279-EL-CSS, 1985 Ohio PUC LEXIS 41, at *22-23 (Apr. 16, 1985).

¹⁶ *See id.*

Respectfully submitted,

/s/ L. Bradfield Hughes

Joseph M. Clark, Asst. Gen. Counsel
(0080711) (Counsel of Record)

P.O. Box 117

290 W. Nationwide Blvd.

Columbus, Ohio 43216-0117

Telephone: (614) 813-8685

E-mail: josephclark@nisource.com

Eric B. Gallon (0071465)

L. Bradfield Hughes (0070997)

Porter, Wright, Morris & Arthur LLP

41 South High Street, Suite 3000

Columbus, Ohio 43215-6194

Telephone: (614) 227-2000

Email: egallon@porterwright.com

bhughes@porterwright.com

(Willing to accept service by e-mail)

Attorneys for

COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio’s e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket cards who have electronically subscribed to the cases. In addition, the undersigned hereby certifies that a true and accurate copy of the foregoing Reply in Support of Motion for Leave to File *Amicus Curiae* Brief and Memorandum Contra The Ohio Consumers’ Counsel’s Motion to Strike was served by electronic mail upon the following parties this 19th day of November, 2021:

Kimberly W. Bojko
Angela Paul Whitfield
Carpenter Lipps & Leland LLP
bojko@carpenterlipps.com
paul@carpenterlipps.com

Attorneys for
SUBURBAN NATURAL GAS COMPANY

Christopher Healey
Angela D. O’Brien
christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov

Attorneys for
OFFICE OF THE OHIO CONSUMERS’ COUNSEL

Robert A. Eubanks
Werner L. Margard III
Robert.Eubanks@OhioAGO.gov
Werner.Margard@OhioAGO.gov

Attorneys for
STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Robert Dove
Kegler Brown Hill + Ritter L.P.A.
65 East State Street, Suite 1800
Columbus, Ohio 43215
rdove@keglerbrown.com

Attorney for
OHIO PARTNERS FOR AFFORDABLE ENERGY

/s/ Eric B. Gallon _____
Eric B. Gallon

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

Summary: Reply in Support of its Motion for Leave to File Amicus Curiae Brief and Memorandum Contra the Office of Ohio Consumers' Counsel's Motion to Strike electronically filed by Mr. Eric B. Gallon on behalf of Columbia Gas of Ohio, Inc.