

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbia Gas of Ohio, Inc. for Authority)	Case No. 21-637-GA-AIR
to Amend its Filed Tariffs to Increase the)	
Rates and Charges for Gas Services and)	
Related Matters.)	

In the Matter of the Application of)	
Columbia Gas of Ohio, Inc. for Approval)	Case No. 21-638-GA-ALT
of an Alternative Form of Regulation.)	

In the Matter of the Application of)	
Columbia Gas of Ohio, Inc. for Approval)	Case No. 21-639-GA-UNC
of a Demand Side Management Program)	
for its Residential and Commercial)	
Customers.)	

In the Matter of the Application of)	
Columbia Gas of Ohio, Inc. for Approval)	Case No. 21-640-GA-AAM
to Change Accounting Methods.)	

**MOTION TO STRIKE OPAE’S USE OF NON-RECORD INFORMATION
IN ITS REPLY BRIEF**

**BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Ohio Consumers’ Counsel files this Motion for fairness and the integrity of the process in presenting evidence for the PUCO’s decision. In this regard, efforts were made by parties to arrange for an orderly presentation of evidence in the hearing of this case. Never even contemplated was the approach used by the Ohio Partners for Affordable Energy (“OPAE”) to cite non-record information in its reply brief. It is wrong. OPAE’s information should be stricken from the record.

PUCO precedent on this issue is straightforward:

- Parties can cite record evidence.¹
- Parties can cite PUCO Orders and Entries.²
- Parties cannot cite facts not in evidence.³
- Parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed.⁴

This precedent is reasonable and fair to all parties. The PUCO gives parties ample opportunity to present evidence and allows other parties to test that evidence. This is done by permitting all parties to (i) file testimony, (ii) attend a hearing before an Attorney Examiner, (iii) present documents and request that they be admitted into the record, (iv) request administrative notice of documents, and (v) cross-examine witnesses at the hearing.

To protect the integrity of the PUCO's administrative process—which in this case will affect over 1.4 million consumers—the Office of the Ohio Consumers' Counsel (“OCC”) respectfully moves to strike the portions of OPAE’s post-hearing reply brief that rely on non-record allegations, opinions, and assertions. It is unfair for parties, on

¹ Order on Remand at 9-10, *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO (granting a motion to strike portions of AEP's initial post-hearing brief that included non-record information); 5th Entry on Rehearing at 169-72, *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (October 12, 2016) (granting motions to strike portions of rehearing briefs that included information and statements that were not part of the evidentiary record).

² Opinion & Order ¶ 31, *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (December 31, 2016).

³ *Supra* note 2.

⁴ Opinion & Order at 37, *In re Application of [FirstEnergy] for Authority to Provide a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (March 31, 2016) (granting motions to strike portions of reply briefs that cited to documents filed in other PUCO proceedings); *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (December 31, 2016) (striking portion of a post-hearing brief that cited a motion filed in the same case because the motion was not admitted into the evidentiary record); *Canton Storage & Transfer Co. v. PUCO*, 72 Ohio St.3d 1, 8 (1995).

brief and after the fact, to rely on information that was not subject to scrutiny by other parties and was not subject to the PUCO's reasonable administrative process.

The PUCO should strike the following portions of OPAE's reply brief:

- Page 4-5, beginning with "As Columbia previously," and ending with "gas DSM Program," including all related footnotes.
- Page 7, beginning with "For example," and ending with "Duke case?," including all related footnotes.
- Page 8, beginning with "Again in 2020," and ending with "three years ago," including all related footnotes.

As described in the attached memorandum in support, the PUCO should strike these portions of the brief because they cite to information that is not evidence in this proceeding and constitutes hearsay. Allowing non-record, untested information is prejudicial to OCC and consumer interests. It is inappropriate for the PUCO to rely on such information that OPAE, for whatever reason, did not seek to adduce through the hearing process where purported evidence can be contested.

Respectfully submitted,

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/s/ Angela D. O'Brien
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The record in this case was closed on November 16, 2022.⁵ But now, in its post-hearing brief, OPAE cites to documents that that it did not seek to have admitted into the record and that accordingly were not subject to the hearing process for contesting purported evidence. OPAE offers this non-record information for the purpose of speculating about OCC's motives for signing the Stipulation. This should not be permitted, consistent with PUCO precedent.

⁵ Tr. at 162:24-25.

II. RECOMMENDATIONS

The PUCO's precedent regarding post-hearing briefs is fair and reasonable.

Parties can cite record evidence in their briefs. Parties can cite documents that have been administratively noticed.⁶ Parties can cite PUCO orders and entries.⁷ *Parties cannot cite facts not in evidence.*⁸ *Parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed.*⁹ The PUCO's precedent gives parties a fundamental right to challenge information that a party seeks to introduce.

But OPAE does not follow the legal convention of what cannot be included in a post-hearing brief. OPAE relies on information that is not part of the record in this case. OPAE instead cites to documents filed in *other* PUCO proceedings.

The PUCO should strike the portions of OPAE's brief that rely on information that has not been admitted as evidence in this proceeding and that constitutes hearsay. The PUCO should not consider or rely on that information, which is outside a fair hearing process, in deciding the merits of this case affecting over 1.4 million consumers.

⁶ *Canton Storage & Transfer Co. v. PUCO*, 72 Ohio St.3d 1, 8 (1995).

⁷ Opinion & Order ¶ 31, *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (December 31, 2016).

⁸ Order on Remand at 9-10, *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO (granting a motion to strike portions of AEP's initial post-hearing brief that included non-record information); 5th Entry on Rehearing at 169-72, *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (October 12, 2016) (granting motions to strike portions of rehearing briefs that included information and statements that were not part of the evidentiary record).

⁹ Opinion & Order at 37, *In re Application of [FirstEnergy] for Authority to Provide a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (March 31, 2016) (granting motions to strike portions of reply briefs that cited to documents filed in other PUCO proceedings); *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (December 31, 2016) (striking portion of a post-hearing brief that cited a motion filed in the same case because the motion was not admitted into the evidentiary record).

OPAE's reply brief relies on (i) OCC's Initial Brief in Case No. 21-887-EL-AIR,¹⁰ (ii) Columbia's Initial Brief in 19-1940-GA-RDR,¹¹ and (iii) Direct Testimony of Kenneth Costello in Case No. 19-1940-GA-RDR.¹² These documents were not admitted into the evidentiary record. OPAE did not offer these documents as evidence. OPAE offered no testimony supporting the information in these documents. Yet now, when there is no opportunity to test OPAE's assertions, it relies on this non-record information in its arguments to the PUCO. This is unfair and should not be permitted, consistent with PUCO practice.

OPAE's reliance on non-record information is improper and violates PUCO precedent. The PUCO has continuously rejected efforts by parties to include information in a brief that is not part of the record, including information that was submitted in other PUCO proceedings.¹³ In doing so, the PUCO has defended fairness in its processes by noting: "If we were to allow evidence to be admitted in such a manner, any document in question would not be supported by testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document."¹⁴

Because OPAE did not seek admission of these documents into the record, OCC had not had the opportunity to test OPAE's extra-record information. This prejudices

¹⁰ Reply Brief, footnotes 10, 11, and 13.

¹¹ *Id.* at footnotes 18, 20.

¹² *Id.* at footnote 19.

¹³ *Supra* note 6.

¹⁴ *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, PUCO Case No. 06-786-TR-CVF, Opinion and Order at 3 (November 21, 2006).

OCC and the consumers it represents. The PUCO should strike the following portions of OPAE's reply brief, consistent with PUCO precedent:

- Page 4-5, beginning with "As Columbia previously," and ending with "gas DSM Program," including all related footnotes.
- Page 7, beginning with "For example," and ending with "Duke case?," including all related footnotes.
- Page 8, beginning with "Again in 2020," and ending with "three years ago," including all related footnotes.

III. CONCLUSION

The PUCO should grant OCC's motion to strike.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike OP&E's Use of Non-Record Information in its Reply Brief was served on the persons stated below via electronic transmission this 6th day of January 2023.

/s/ Angela D. O'Brien
Angela D. O'Brien
Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Motion Motion to Strike OPAE's Use of Non-Record Information in Its Reply Brief by Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of O'Brien, Angela D.