BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters.	)	Case No. 21-637-GA-AIR
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation.	)	Case No. 21-638-GA-ALT
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a Demand Side Management Program for its Residential and Commercial Customers.	)	Case No. 21-639-GA-UNC
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods.	)	Case No. 21-640-GA-AAM

OHIO PARTNERS FOR AFFORDABLE ENERGY MEMORANDUM CONTRA OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO STRIKE

I. Introduction

On January 6, 2023, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Strike seeking to strike certain portions of Ohio Partners for Affordable Energy's ("OPAE") Reply Brief. Specifically, OCC seeks to strike those portions of OPAE's Reply which OCC deems "non-record information." Pursuant to Ohio Admin. Code 4901-1-12(B)(1), OPAE hereby files this Memorandum Contra to OCC's Motion to Strike.

II. OCC's Motion to Strike is Meritless Based on the Express Language of Ohio Rules of Evidence 801.

OCC asks the Commission to strike portions of OPAE's Reply Brief. Specifically, OCC seeks to strike the following three sections:

1. As Columbia previously stated in Case No. 19-1940-GA-RDR,

> Ohio law recognizes the "consumer interest in energy efficiency and energy conservation" and announces that it is state policy to "[p]romote an alignment of natural gas company interests" with consumers' interests in DSM.[9] Ohio law also directs the Commission to "initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs."[10]
>
> The Commission, too, "has long recognized that conservation and efficiency should be an integral part of natural gas policy."[11] The Commission has consistently supported gas industry DSM programs that produce demonstrable benefits, reasonably balance total costs, and minimize the impact to non-participants are consistent with Ohio's economic and energy policy objectives.[12] Indeed, three (3) of the four (4) major gas utilities in Ohio currently have some form of a
>
> natural gas DSM Program[13] and historically all four (4) of the major gas utilities have had a natural gas DSM Program.[14]

[1]

[1] Pub. Util. Comm. Case No. 19-1940-GA-RDR, Columbia Merit Brief pp. 3-4. (Citing [9] R.C. § 4929.02(A)(12); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs for its Residential and Commercial Customers*, Case Nos. 16-1309-GA-UNC, et al., Opinion and Order at 3, 62. ("DSM Program Extension Case."); [10] R.C. § 4905.70; DSM Program Extension Case, Opinion and Order at 3, 62.; [11] DSM Program Extension Case, Opinion and Order at 63, citing *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, Opinion and Order at 22-23 (Oct. 15, 2008).; [12] DSM Program Extension Case, Opinion and Order at 54, citing *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 051444-GA-UNC, Opinion and Order (Sept. 13, 2006) ("Vectren 2005 DSM Case"); *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, et al.. Opinion and Order (Oct. 15, 2008) at 22-23; *In re The Cincinnati Gas and Electric Co.*, Case No. 95-656-GA-AIR, Opinion and Order (Dec. 12, 1996); 2008 Distribution Rate Case, Opinion and Order (Dec. 3, 2008) at 10; Vectren 2005 DSM Case, Supplemental Opinion and Order (June 27, 2007); *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 14-747-GA-RDR, Finding and Order (May 28, 2014).; [13] *See In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval to Continue Demand Side Management Program for its Residential, Commercial, and Industrial Customers*, Case No. 19-2084-GA-UNC; *See also In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case Nos. 07-829-GA-AIR, et al., Opinion and Order at 7 (October 15, 2008).; [14] *In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Opinion and Order at 28-29, FN 12 (April 10, 2019).

2. For example, in the recently approved Duke rate case, OCC called the proposed return on equity of 9.5% a "generous profit"[2] yet in this case OCC agrees to a higher return on equity of 9.6%. Similarly, OCC balked at 92.4% of the rate increase going to residential customers in Duke[3], but in this case has agreed to an allocation of up to 94.596% to the Small General Service class (which includes residential consumers).[4] Further, OCC called for a 6.5% rate of return in Duke[5] but agrees to a 7.08% rate of return in this case. What is OCC gaining from joining the Stipulation that is worth agreeing to significantly higher increases for residential customers than those it vociferously attacked in the Duke case?

3. Again in 2020, OCC, in Columbia's IRP and DSM Rider adjustment case, attempted to move funds from weatherization to bill payment assistance and terminate the non-low-income DSM programs.[6] An OCC Witness in that case event testified that it was OCC's desire to permanently end Columbia's DSM program.[7]

   In each of these cases, Columbia zealously opposed OCC's position. Going so far as to request the Commission "reject OCC's manipulation of the COVID-19 pandemic and inappropriate use of [the Rider] case to accomplish a policy goal it could not accomplish three years ago."[8]

OCC argues that those sections are improper either because they rely on facts not in evidence and they rely on hearsay. "[T]he PUCO should strike these portions of the brief because they cite to information that is not evidence in this proceeding and constitutes hearsay."[9] OCC is wrong.

OCC's argument fails because it relies on a fundamental misunderstanding of the nature of hearsay. This is unsurprising as the Motion to Strike fails to cite the Ohio Rules of Evidence definition of hearsay. A charitable explanation may be that the OCC did not think it necessary since the Public Utilities Commission of Ohio ("Commission") is not strictly bound by the Rules

[2] Case No. 21-887-EL-AIR, OCC Initial Brief p. 5.
[3] Id.
[4] Joint Exhibit 1 p. 3.
[5] Case No. 21-887-EL-AIR, OCC Initial Brief p. 11.
[6] Case No. 19-1940-GA-RDR, Columbia Initial Brief pp. 5-11.
[7] Case No. 19-1940-GA-RDR, Direct Testimony of Kenneth Costello at 3.
[8] Case No. 19-1940-GA-RDR, Columbia Initial Brief p. 5.
[9] OCC Motion to Strike p. 3; Memorandum in Support p. 2.

of Evidence.[10] However, even if the Commission is not strictly bound by the Rules, the Commission has acknowledged that it is guided by the Rules of Evidence.[11] Therefore, Ohio Rule of Evidence 801(C), the Hearsay Rule, is foundational to OCC's Motion to Strike.

A. Statements made by Columbia or OCC are not hearsay.

Evidence Rule 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement." However, statements which would otherwise be inadmissible under the Hearsay Rule are **not hearsay**, if they meet certain exceptions.

> A statement is not hearsay if:
> * * *
> (2) The statement is offered against a party and is (a) the party's own statement, in either an individual or representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, * * * .[12]

Said another way, **a statement made by a party or adopted by a party is not hearsay if it is offered against that party**.

Both Columbia and OCC are parties to this proceeding and signatory parties (putting them in opposition to OPAE). Therefore, Columbia and OCC are party opponents to OPAE in this proceeding. Thus, statements made or adopted by either Columbia or OCC are not hearsay. All three categories of statements OCC asks this Court to strike are statements made by a party opponent and are not hearsay.

First, OCC asks the Commission to Strike language from a brief written and filed by Columbia extolling the benefits of Columbia's demand side management programs.[13] As an

[10] In the Matter of the Application of the Dayton Power and Light Co., Case No. 16-395-EL-SSO, Opinion and Order, ¶16 (Nov. 21, 2019.)
[11] Id.
[12] Ohio Rule of Evidence 801(D)(2)
[13] OCC Motion to Strike p. 3, first bullet seeking to strike OPAE Reply brief Page 4-5 beginning with "As Columbia previously," and ending with "gas DSM Program".

initial matter, it should be noted that Columbia did not object to OPAE's use of Columbia's prior statement. The fact that Columbia does not object to OPAE's reliance on those past statements highlights how perplexing it is for OCC to tilt at this windmill.

Further, as noted above, Columbia is a party to this case, and the entirety of the portion requested to be stricken (except for "[a]s Columbia previously stated in Case No. 19-1940-GA-RDR") qualifies as a statement of a party opponent and therefore is not hearsay. Additionally, the language OPAE quoted from Columbia's prior pleading is meant to support OPAE's statement immediately subsequent to the block quote, "[i]n the past Columbia has been committed to helping customers use natural gas more efficiently by implementing and supporting effective DSM program." Therefore, the language is not being offered to prove the truth of the matter the language is asserting (this, of course is fundamental to any claim of hearsay) but rather to support OPAE's point that Columbia previously supported DSM programs.

Second, OCC asks the Commission to strike a portion of OPAE's Reply Brief where OPAE compares OCC's arguments against specific levels of return on equity, rates of return, and residential customer allocation in the pending Duke rate case with the levels of the same it is agreeing to in this case.[14] In that section, OPAE concludes the paragraph by asking the Commission to consider what OCC may stand to gain through this stipulation which contains higher numbers respectively than the numbers OCC attacked in the pending Duke rate case. OPAE did not offer any of the language as proof of the matter it asserted, and again, the statements OPAE relied upon were statements made by OCC in a pleading in a prior case and therefore constitute statements made by a party opponent – if such exception was necessary, which it was not.

[14] OCC's Motion to Strike, p. 3, second bullet point.

Third, OPAE asks the Commission to strike a combination of statements made by Columbia, statements made by OCC's witness in a prior case, and OCC's adopted position in a prior case.[15] That selection is broken down as follows. The first and third sentences are a recitation of OCC's position in a prior case and Columbia's response to that position. Those sentences are not offered for the truth of the matter asserted and would be excepted by the Hearsay Rule as party-opponent statements. And, even if they were out of court statements offered for the truth of the matter asserted, the Commission is aware of those positions as it decided those cases as cited in the immediately subsequent sentence. The second sentence in that paragraph, which ends with footnote 19, is a statement made by OCC's witness and therefore qualifies as a statement of a party opponent and is not hearsay. The fourth sentence in that cited section, ending with footnote 20, is a quote from a prior Columbia brief and therefore also constitutes the statement of a party-opponent and is not hearsay.

None of what OCC asks this Court to strike qualifies as hearsay. As such, the Commission should reject OCC's baseless hearsay arguments and deny OCC's Motion to Strike.

B. OPAE was not required to offer the subject statements at the hearing on this matter.

OCC argues that OPAE was required to offer the foregoing statements into the record during the hearing where the statements could be contested.[16] "These documents were not admitted into the evidentiary record. OPAE did not offer these documents as evidence. OPAE offered no testimony support the information in these documents." What OCC is arguing is that the documents were not authenticated by testimony, and it now does not have an opportunity to test whether the documents are what they purport to be. That argument is meritless.

[15] OCC Motion to Strike, p. 3, third bullet point.
[16] OCC Motion to Strike p. 3.

First, OPAE does not necessarily cite to documents. Rather, OPAE cites to prior testimony and arguments raised by party opponents. This is not a situation where the documents are themselves evidence. Rather, they are offered to show the parties' shifting positions which then begs the question whether the Stipulation at issue in this case truly benefits the public. For example, OCC fought against similar levels of return on equity, rate increases to residential customers, allocation, and rate of return, arguing that they did not benefit the public. Columbia was previously an ardent supporter of its DSM programs, some of which are being eliminated, by this Stipulation. The fact that OCC (and Columbia) have now rejected those arguments is instructive on whether the Stipulation meets the three-prong test.

The Commission has previously rejected the argument that OCC makes. It has denied OCC's motion to strike the use of information from a prior proceeding where OCC was a party to both proceedings on the basis that participation in the prior proceeding gave OCC the opportunity to contest the offered statements.[17] That same reasoning applies here. OCC might not like what it or Columbia previously said. But that is not grounds to have those statements stricken from the record.

C. The Cases OCC's Cites for Support are Inapplicable to the Language OCC Seeks to Strike.

OCC cites numerous cases in attempt to support its position that the specified language in OPAE's Reply Brief should be stricken. However, a review of those cases reveals they are not applicable to the type of information used by OPAE, primarily, statements of party opponents not used for the truth of the matter asserted. For example, OCC's footnote 8 cites to *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO. In that case, the Commission disallowed AEP's use of information related to other utilities

[17] Pub. Util. Comm. Case No. 16-1309-GA-UNC, Opinion and Order ¶¶31-32 (Nov. 21, 2016).

POLR charges, that was not introduced in the hearing, in its brief to prove the reasonableness of its proposed POLR charges.[18] None of the information OPAE used in its Reply Brief which OCC is seeking to strike was offered for the truth of the matter asserted. Rather, it supported other points made by OPAE as previously shown, and/or were statements made by party opponents.

Additionally, footnote 8 relied on the Commission's decision in its 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-ELSSO (October 12, 2016). In that decision, the Commission struck multiple parties' use of previously stricken testimony in their rehearing briefs. This is clearly inapplicable as nothing OPAE used in its Reply Brief was previously stricken testimony. (In fact, OCC does not even allege that it challenged the testimony in prior hearings. How could it? Much of what OPAE offered was OCC's own testimony and statements.)

In footnote 9, OCC claims those cases stand for the principle that "parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed." However, the cases OCC cites either do not apply or, in fact, contain holdings which contradict OCC's characterization.

First OCC cites to *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 stating the decision stands for the principle that a party cannot cite to documents filed in other PUCO proceedings. In that instance the offending party cited to multiple pending applications made by non-parties to

[18] In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan, Case No. 08-917-EL-SSO, Order on Remand at 9-10, (Oct. 3, 2011).

demonstrate how the applicant may act in the future.[19] This is wholly inapplicable to the language offered by OPAE which were statements made by party opponents in prior proceedings. Once again, those statement are not hearsay and therefore that citation is inapplicable.

Next, OCC relies on *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, claiming it stands for the principle that you cannot cite a motion filed in the same case because the motion was not admitted into the record. In that case, the Commission did strike Columbia's reliance on language in a Motion for an Extension that was not moved in the record because "[t]he Commission believes that to rule otherwise would have a chilling effect on a party's willingness to agree to a request for additional time to engage in settlement discussions".[20] That decision was made to encourage parties to allow the settlement process to take as much time as it needed. There is no similar concern in this matter. Further, the motion cited to and later stricken was a joint motion whereas the statements OPAE included in its Reply Brief were statements directly made by either Columbia or OCC. There can be no confusion of whether the party made or adopted the allegedly offending statement. And there can be no confusion of whether the statements are hearsay. They are not.

In that same case, contrary to what OCC claims however, the Commission denied OCC's motion to strike OPAE's use of language from a Stipulation in a prior case that was not admitted into the record.[21] The Commission stated, "The Commission is vested with the authority to grant administrative notice, subject to two limitations: where the opposing party had prior knowledge

[19] Id. Public Reply Brief of Constellation New Energy and Exelon Generation pp. 39-41 (Feb. 26, 2016.)
[20] Pub. Util. Comm. Case No. 16-1309-GA-UNC, Opinion and Order ¶35 (Nov. 21, 2016).
[21] Pub. Util. Comm. Case No. 16-1309-GA-UNC, Opinion and Order ¶¶31-32 (Nov. 21, 2016).

of the facts and had an adequate opportunity to explain and rebut the facts administratively noticed." *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1,8, 647 N.E.2d 136 (1995).[22] The Commission then held, "it cannot be argued that OCC did not have prior knowledge of the stipulation or the chance to rebut OPAE's interpretation of the stipulation" because OCC was a party to the prior case in which the Stipulation was filed.[23] The same reasoning applies here to every statement OCC asks this Court to strike.

Finally, OCC attempts to paint its Motion to Strike as necessary to defend the fairness of the process via the Commission's decision in *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*. In that case, the Commission struck references to a post-hearing affidavit attached to a brief. An affidavit clearly falls squarely within the definition of hearsay. It is also quite clear that an affidavit offered after the close of the hearing is in no way analogous to OPAE's use of prior statements made by Columbia and OCC – before the close of the hearing. The Commission should reject this strained comparison.

D. The OCC Misrepresents the Legal Conventions of What Can Be Included in a Post-Hearing Brief.

The OCC claims that OPAE flouts legal conventions by citing to information outside of the record. As has been exhaustively shown, OCC's fails to understand that the statements OPAE included are, by the express language of the rule, not hearsay and therefore properly before the Commission. Further, OCC's statement that the Commission can only rely on information that has been admitted as evidence cannot be squared with any fair reading of the relevant precedent.

The Supreme Court of Ohio has repeatedly held, that "[t]here is neither an absolute right for nor an absolute prohibition against the commission taking administrative notice of facts

[22] Id. ¶31.
[23] Id. ¶32.

outside the record of a case."[24] "Rather," the Court held, "each case must be resolved on its facts * * * ."[25] When considering whether to take administrative notice of a particular fact, the Court has considered factors including "whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed."[26] OCC should have been aware of this precedent, because it cited a Commission opinion which explicitly acknowledged the Commission's "authority to take administrative notice *** of facts outside the record of a case" under such circumstances.[27]

In its Motion, OCC seeks to strike language used by Columbia in a prior case in which OCC was a party and contested Columbia's position. OCC cannot claim it is prejudiced by the use of these statements of a party opponent as the Commission recognized in Pub. Util. Comm. Case No. 16-1309-GA-UNC, Opinion and Order ¶¶31-32 (Nov. 21, 2016). Further, the remainder of the information the OCC wishes to shield the Commission from is information of which the Commission is already aware and are the OCC's own statements made through prior pleadings and witness testimony. The OCC clearly had prior knowledge of its own statements so unless the OCC wishes to rebut its own statements there is no reason the Commission cannot take administrative notice of each of the pleadings referenced in OPAE's Reply Brief now, under Ohio Supreme Court precedent, thereby rendering OCC's Motion moot to the extent it is not already as the statements are not inadmissible hearsay.

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[24] *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.Sd 1218, 129, citing *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 71 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995*). See also Allen V. Pub. Util. Com.*, 40 Ohio St.3d 184, 185, 532 N.E.2d 1307 (1988) ("This court has previously recognized neither an absolute right to nor prohibition against the commission's authority to take administrative notice.").

[25] *In re Ohio Edison Co.*, 2016-Ohio-3021, at ^29.

[26] *Allen*, 40 Ohio St.3d at 186.

[27] *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*, Case No. 14-1297-EL-SSO ("2024 FirstEnergy ESP Case"), Fifth Entry on Rehearing, ¶377, at 172 (Oct. 12, 2016). OCC cited to this Entry in its Motion to Strike Fn. 8.

III. Conclusion

For the foregoing reasons, OPAE requests that the Commission deny OCC's Motion to Strike portions of OPAE's Reply Brief.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on January 23, 2023. A courtesy copy has also been sent to the individuals listed below.

/s/ *Robert Dove*

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Summary: Memorandum Contra to Office of the Ohio Consumers' Counsel's Motion to Strike Reply Brief of Ohio Partners for Affordable Energy electronically filed by Mr. Robert Dove on behalf of Ohio Partners for Affordable Energy