Robert Dove
65 East State Street, Suite 1800
Columbus, Ohio 43215
rdove@keglerbrown.com

February 27, 2023

Docketing Division
Public Utilities Commission of Ohio
180 E Broad St., 11th Flr,
Columbus, OH 43215

Re: Case No. 21-637-GA-AIR et al.

Dear Ms. Troupe:

Ohio Partners for Affordable Energy ("OPAE") filed an Application for Rehearing today in the above captioned matter. However, through inadvertent error, an earlier draft of the of the Application which did not include the necessary information pursuant to Ohio Admin. Code 4901-1-35 was filed instead of the final document which included the necessary information. OPAE respectfully requests that the prior document be removed from the docket and this Corrected Application for Rehearing be filed in its place. I apologize for any inconvenience.

Sincerely,

/s/ Robert Dove
Robert Dove (0092019)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
rdove@keglerbrown.com

Counsel for Ohio Partners for Affordable Energy

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

CORRECTED APPLICATION FOR REHEARING BY OHIO PARTNERS FOR AFFORDABLE ENERGY

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, Ohio Partners for Affordable Energy ("OPAE") files this Application for Rehearing of the January 26, 2023, Opinion and Order ("Order") in these proceedings. The Order approved and modified a joint stipulation and recommendation ("Stipulation") proposed by Columbia as of Ohio, Inc. ("Columbia"), Commission Staff ("Staff"), Office of the Ohio Consumers' Counsel ("OCC"), Ohio Manufacturers' Associate Energy Group ("OMAEG"), Kroger Co. ("Kroger"), Retail Energy Supply Associate ("RESA"), Northeast Ohio Public Energy Council ("NOPEC:"), Ohio School Council ("OSC"), Ohio Energy Group ("OEG"), Interstate Gas Supply, Inc. ("IGS"), and Industrial Energy Users of Ohio ("IEU Ohio") (collectively, the "Signatory

Parties"). The Order modified the Stipulation in at least two ways, including eliminating a provision shifting funds from low-income weatherization to bill payment assistance and eliminating a prohibition on Columbia's ability to lobby at the legislature in support of energy efficiency. OPAE appreciates these modifications and thanks the Commission for recognizing OPAE's position on these matters. However, the Commission failed to modify the Stipulation in several ways which make the Commission's Order unlawful and unreasonable. As explained in the attached Memorandum in Support, the Commission's failure to eliminate an unlawful and unreasonable limitation within the Stipulation discriminates against renters. Additionally, the Commission's basis for failing to modify the stipulation to allow non-low-income energy efficiency programs to continue is unlawful and unreasonable as the Commission failed to consider the overall impact on the elimination of these programs on customers and provided a conclusion without record support.

Specifically, pursuant to Ohio Admin. Code 4901-1-35, OPAE seeks rehearing from the Commission January 26, 2023 Order on the following grounds:

A. The Commission acted unreasonably and unlawfully by approving the Stipulation without modifying the discriminatory renters provision and without explaining the reasons behind such approval pursuant to R.C. 4903.09.

B. The Commission's failure to modify the Stipulation to include non-low-income demand side management programs was unsupported by the record in violation of R.C. 4903.09 and therefore the Commission's decision is unlawful and unreasonable.

/s/Robert Dove
Robert Dove (0092019)
Nicholas S. Bobb (0090537)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
Fax: (614) 464-2634
rdove@keglerbrown.com

(Willing to accept service by email)
Attorneys for OPAE

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

MEMORANDUM IN SUPPORT APPLICATION FOR REHEARING BY OHIO PARTNERS FOR AFFORDABLE ENERGY

I. Introduction

In its January 26, 2023 Order, the Commission approved and modified the Stipulation proposed by the Signatory Parties. While OPAE appreciates the Commission adopting some of OPAE's recommendations, the Commission's failure to adopt others results in a modified Stipulation that contains discriminatory provisions, is unsupported by the evidence in the record, and was not fully reasoned, for these reasons the Commission's Order is unreasonable and unlawful.

II. Law and Argument

A. The Commission acted unreasonably and unlawfully by approving the Stipulation without modifying the discriminatory renters provision and without explaining the reasons behind such approval pursuant to R.C. 4903.09.

Ohio Revised Code 4903.09 states,

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The Ohio Supreme Court has held that this statute requires the Commission to explain its decisions and identify in sufficient detail the record evidence upon which its orders are based. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 311-312, 513 N.E.2d 337 (1987). The Commission abuses its discretion if it decides an issue without adequate record support. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 30.

The Stipulation states, "notwithstanding the foregoing, property owners are limited to receiving weatherization assistance for one rental premise per calendar year during the five-year term of the DSM program."[1] As noted by OPAE, the renters limitation is both a vague and onerous requirement that will harm income eligible renters in Columbia's service territory. OPAE Witness Peoples explained that the services provided to renters under WarmChoice benefit the renter because the renter is paying the utility bill that is reduced by the weatherization services.[2] Weatherization of gas heated homes can typically save the renter 40% on their utility bills.[3]

[1] Joint Exhibit 1 p.13.
[2] OPAE Exhibit 2 p. 9:15-22; p10:1-2.
[3] Id.

However, under the Stipulation, renters may not be able to obtain service if another renter at a different address but with the same landlord received service under WarmChoice that calendar year. This is an inefficient and discriminatory provision that only serves to harm low-income renters based on the fact that they share a landlord. If they owned their home, they would be able to receive service but because they rent, if another renter who shares their landlord has already received service they will be unnecessarily and discriminatorily denied. The Order acknowledged these arguments, and then noted OCC's counter that once a premise is weatherized the benefits of that weatherization should continue for subsequent renters as well.[4]

After this two-paragraph recitation, the Commission undertook no further analysis, failed to address renters living at different locations but who share a landlord, and made no other specific findings as to the renters limitation in the Stipulation. Instead, the Commission simply found that the Stipulation, as a package, benefits ratepayers and the public interest.[5] The Commission's approval of a provision that serves only to discriminate against low-income renters in favor of low-income homeowners is discriminatory in violation of R.C. 4905.35(B)(1) and therefore is unlawful and unreasonable. Further, the Commission's failure to explain its reasoning for approving the discriminatory limitation is a violation of R.C. 4903.09 and contrary to Ohio Supreme Court precedent and is therefore unlawful and unreasonable.

OPAE respectfully requests that the Commission modify the Stipulation to eliminate the discriminatory renters limitation in the WarmChoice program.

[4] Order ¶¶166-167.
[5] Id. ¶169.

B. The Commission's failure to modify the Stipulation to include non-low-income demand side management programs was unsupported by the record in violation of R.C. 4903.09 and therefore the Commission's decision is unlawful and unreasonable.

In the Order, the Commission finds that it is the policy of the state to:

> [P]romote the availability of *unbundled* and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs; promote diversity of natural gas supplies and suppliers, by giving consumers *effective choices over the selection of those supplies and suppliers*; and encourage innovation and *market access* for cost-effective supply- and *demand-side natural gas services* and goods.[6]

The Commission continues stating that the elimination of the non-low-income programs will save customers over $120 million between 2023 and 2027 and that Columbia will receive no shared savings as a result of the Stipulation.[7] Those two claims are repeated numerous times (no fewer than three by the Commission itself) in the Order to support the termination of the programs.[8] Finally, the Commission stated:

> [T]he General Assembly codified gas choice over twenty years ago with the enactment of House Bill 9 by the 124th General Assembly. It is time to look to competitive markets to play a more significant role in the provision of energy efficiency services in this state.[9]

First and foremost, it must be noted that the elimination of a proposal by the Company to received shared savings is not and cannot be considered a benefit. A proposal is not assured, and if the elimination is a benefit – as repeatedly cited by the Commission – then the Commission would have been well within its rights to reject the proposal outright regardless of the Stipulation and still achieved the same benefit. To call its elimination a benefit of a Stipulation when Staff could easily reject the request absent a Stipulation is hollow.

[6] Order ¶56 (Emphasis in original.)
[7] Id.
[8] Id. ¶56; ¶134; ¶155; ¶171; ¶204.
[9] Id. ¶56.

Further, the Commission cites to the $120 million saved from the elimination of the non-low-income programs with zero discussion of the benefits that accompany that $120 million that will be lost under the Commission's approval of the Stipulation. Appendix A in Columbia's Exhibit 1 demonstrated that the proposed programs passed three separate cost effectiveness tests even when the low-income program was included.[10] Further, the estimated savings from the programs – before being diminished by the Stipulation and subsequent Order - was over 1 million Mcf a year for a total of 5,464,086 Mcf over the proposed five-year program.[11] None of these benefits – lost as a result of the stipulation – were discussed by the Commission in its Order. Instead, the Commission focused on the costs avoided. The Commission has made this mistake before – focusing solely on the costs avoided with no regard for the lost benefits those costs would have achieved. *See* Pub. Util. Comm. Case No. 16-0743-EL-POR Opinion and Order (Nov. 21, 2017). Reversed and Remanded by *In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196 (Oct. 15, 2019.) Any consideration of the benefits of the Stipulation that does not even discuss the benefits lost as a result of the Stipulation is incomplete.

Finally, the Commission's statement in support of eliminating the non-low-income DSM programs that "[i]t is time to look to competitive markets to play a more significant role in the provision of energy efficiency services in this state"[12] has zero support in the record. No party offered any evidence that the competitive market can or will fill the hole left by the elimination of the non-low-income programs. The Commission cannot point to anything in the record to support this statement. This lack of support is particularly egregious given the Commission took the exact opposite position less than two years before this Order was issued.

[10] Columbia Exhibit 1 Appendix A p. 22.
[11] Id.
[12] Id. ¶56.

In a Vectren case from 2021 the Commission rejected OCC's arguments pointing to the same provisions the Commission pointed to in this Order regarding market access[13] in the order in the Vectren case stating:

> There can be no doubt that, in recent history, Ohio regulatory policy has embraced natural gas DSM programs. *See* [*In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 18-298-GA-AIR], Opinion and Order (Aug. 28, 2019) at ¶ 102; [*In re Columbia Gas of Ohio, Inc.*, Case No. 19-1940-GAR-DR], Opinion and Order (Dec. 2, 2020) at ¶ 54; *In re Columbia Gas of Ohio, Inc.*, Case No. 16-1309-GA-UNC (DSM Extension Case), Opinion and Order (Dec. 21, 2016) at ¶ 126; *In re The East Ohio Gas Company dba Dominion East Ohio*, Case No. 07-829-GAAIR, et al., Opinion and Order (Oct. 15, 2008), *aff'd Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261. And, while that precedent may not remain unchanged forever, the Commission finds no compelling reason to abandon such programs at this time. Here, while we acknowledge our continued issuance of orders authorizing EE activity by and through natural gas utilities, we also signal our intent to continue to monitor program development and the sustained evolution of the competitive marketplace in order to determine to what extent the competitive marketplace may provide a more efficacious delivery mechanism for a particular EE product or service. To that end, we plan to have future discussions and welcome stakeholder input during our upcoming EE workshops.
> *In the Matter of the Application Vectren Energy Delivery of Ohio*, Pub. Util. Comm. Case No. 19-2084-GA-UNC, Opinion and Order ¶73 (February 24, 2021). ("*2021 Vectren Order*")

In that same case, the Commission rejected arguments that utility offered non-low-income energy efficiency programs were unnecessary because similar services were available in the competitive market. *2021 Vectren Order* ¶61. The Commission noted that it considered similar arguments just 18 months prior to that Order and rejected them, finding energy efficiency in the public interest and producing demonstrable benefits. *Id.*

The Commission went on to state that it found the argument "that the market for EE products and services has transformed such that utility involvement is no longer needed" "unavailing." *Id.* ¶62. The Commission approved the proposed programs in that case less than

[13] Id.

two years ago. *Id.* It is unclear what has changed between January 2021 and February 2023 that makes the Commission confident enough to reject the benefits that came from the proposed programs in the application in this proceeding in favor of competitive markets. That lack of clarity results from a lack of record support for that change in position and makes the Commission's decision unlawful and unreasonable.

The Ohio Supreme Court has held that "[w]hen the commission has a made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified." *Office of Consumers' Counsel v. Public Utilities Com.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984). The Ohio Supreme Court "will not allow the commission to arbitrarily change" a prior order without explanation. *Officer of Consumers' Counsel v. Public Utilities Com.*, 16 Ohio St.3d 21, 22-23, 475 N.E.2d 786 (1985). "Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law" *Cleveland Elec. Illuminating Co.* v. *Pub. Util. Comm.*, 42 Ohio St. 2d 403, 431 (1975). "And if the commission does see fit to depart from a prior order, the commission 'must explain why,' and 'the new course also must be substantively reasonable and lawful.'" *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 17, quoting *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52.

Based on the foregoing, it is error to not follow a prior order without explaining the need to deviate from it. *Officer of Consumers' Counsel*, 16 Ohio St.3d at 23 ("because the commission has not justified its overruling of its 1981 order … we reverse the order of the commission");

Office of Consumers' Counsel, 10 Ohio St.3d at 50-51 (holding the Commission erred by failing "to justify its apparent decision" to change a prior order).

In this proceeding, the Commission is taking a position that it has repeatedly rejected the last five years, including as recently as January 2021, without adequately explaining why. Nothing in the Commission's Order describes why it "is time to look to competitive markets to play a more significant role in the provision of energy efficiency services in this state." Further, the Order fails to identify any evidence in the record to support the proposition that the competitive markets can play a significant role in the provision of energy efficiency services in this state. There remains the very real chance that the competitive market cannot play a significant role in the provision of energy efficiency services in this state. Without testimony on that subject, the only thing the Commission can do is speculate.

For these reasons, the Commission's stark departure from its prior precedent, without record support—without adequate explanation beyond a conclusory sentence—is in violation of Ohio Supreme Court precedent and R.C. 4903.09's requirement to provide "facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." Therefore, the Commission's Order is unlawful and unreasonable.

III. Conclusion

The Commission's Order fails to adequately explain its reasoning and in certain cases fails to provide any record support for those decisions described above. The Commission's substantial shift in policy for natural gas demand side management and energy efficiency programs requires careful consideration and detailed analysis to justify the shift from past Commission precedent. However, the Order failed to provide such evaluation and therefore is

unreasonable and unlawful. Further the Order includes discriminatory terms in violation of R.C. 4905.35(B)(1) and therefore is unreasonable and unlawful.

Respectfully submitted,

/s/Robert Dove
Robert Dove (0092019)
Nicholas S. Bobb (0090537)
Kegler Brown Hill + Ritter Co., L.P.A.
65 E State St., Ste. 1800
Columbus, OH 43215-4295
Office: (614) 462-5443
Fax: (614) 464-2634
rdove@keglerbrown.com

(Willing to accept service by email)
Attorneys for OPAE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all parties of record via the DIS system on February 27, 2023.

/s/ Robert Dove
Robert Dove (0092019)

Summary: Text Corrected Application for Rehearing with Cover Letter electronically filed by Mr. Robert Dove on behalf of Ohio Partners for Affordable Energy