Columbia Gas of Kentucky
A NiSource Company
200 Civic Center Drive
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September 25, 2013

Mr. Jeff Derouen, Executive Director
Public Service Commission
Commonwealth of Kentucky
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

RE: In the matter of adjustment of rates of Columbia Gas of Kentucky, Inc., KY PSC Case No. 2013-00167

Dear Mr. Derouen,

Enclosed for docketing with the Commission are an original and ten (10) copies of Columbia Gas of Kentucky, Inc.'s *Motion to Strike Portions of the Direct Testimony of AG Witness Frank Radigan*. Should you have any questions about this filing, please contact me at 614-460-5558.

Very truly yours,

Brooke E. Leslie (gmc)

Brooke E. Leslie
Senior Counsel

Enclosures

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of adjustment of rates of Columbia Gas of Kentucky, Inc.	))	Case No. 2013-00167

MOTION OF COLUMBIA GAS OF KENTUCKY, INC. TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF ATTORNEY GENERAL WITNESS FRANK W. RADIGAN

Columbia Gas of Kentucky, Inc. ("Columbia"), pursuant to 87 KAR 5:0001, Sec. 5(1), respectfully requests issuance of an order striking the following portions of the direct testimony of Frank W. Radigan, submitted by the Attorney General ("AG") on September 11, 2013:

> (1) Exhibit FWR-2 (Direct Testimony of Dr. J. Randall Woolridge filed in Case No. 2012-000520); and
>
> (2) Page 33, line 14, beginning with the second sentence, through page 34, line 12.

The subject testimony pertains to Mr. Radigan's opinions concerning return on equity ("ROE"). The issue with the testimony is not whether it should be stricken, but for how many different reasons. Mr. Radigan is not qualified to render an opinion about Columbia's investor-required ROE. This is evident from the "methodology" he relied on as the basis for his recommendation in this case;

that methodology being, stapling the ROE testimony from a different witness, in a different case, for a different company, in a different industry, to his testimony in this proceeding and claiming that what that witness said *there* can also be said *here*. Mr. Radigan says all of this *after* testifying that the AG is *not* offering an ROE recommendation in this proceeding. The problem, of course, is that Columbia has no opportunity to take discovery from, or cross-examine, the witness whose testimony Mr. Radigan is adopting. The Commission cannot allow this testimony and also respect Columbia's right to due process. Mr. Radigan's ROE testimony should be stricken.

I. INTRODUCTION

Mr. Radigan's attempt to offer an opinion regarding ROE suggests a belief that this proceeding is not a formal legal proceeding subject to legal and constitutional requirements. The ROE portion of Mr. Radigan's testimony (pp. 33-34) is as unusual as it is improper. Attached to Mr. Radigan's testimony is the direct testimony of Dr. J. Randall Woolridge filed in the pending Kentucky American Water rate case, Case No. 2012-000520. Mr. Radigan declares, with no analysis, reasoning or support, that because the ROE range Dr. Woolridge testified to in the Kentucky-American case is "so much lower than that requested by Columbia" in this proceeding, "it is proper to give an illustrative return on equity in the low 7.3% to 9.7% range." (*Id.* at 34.) Mr. Radigan then proceeds to

recalculate Columbia's revenue requirement with an assumed ROE of 8.5%. The net result is a revenue reduction exceeding $4.8 million.

The AG is plainly grasping at straws to try to get something – *anything* – in the record that will enable it to argue on brief that there is "record evidence" to support an 8.5% ROE. But the mere act of printing words on paper does not make a document record evidence; the proposed testimony must be sponsored by a competent, knowledgeable witness. And, Mr. Radigan is not a competent knowledgeable witness on ROE. Mr. Radigan's resume reveals no training, education or experience that qualifies him as an ROE expert. The AG thus seeks to channel its ROE witness from a *different* case with Mr. Radigan as the medium. But Mr. Radigan's testimony about what Dr. Woolridge testified to in a different case is hearsay, pure and simple.

Additionally, whatever Dr. Woolridge had to say about a recommended ROE for Kentucky American is patently irrelevant to Columbia's ROE. Indeed, given the AG's decision not to "formally" propose an ROE in this proceeding, *nothing* Mr. Radigan has to say about this topic is relevant.

Striking Dr. Woolridge's testimony from the record of this proceeding is not enough to remedy the prejudice caused by AG's introduction of this testimony. Mr. Radigan's testimony about, and references to, Dr. Woolridge's testimony must also be stricken. Indeed, the fact that Mr. Radigan says he is *not*

being sponsored as a witness to propose an ROE in this case warrants striking his testimony on this topic.

II. ARGUMENT

Although the Commission is "not bound by the technical rules of legal evidence," KRS 278.310, the Commission considers the evidence rules as "advisory in nature to the proceedings of the Commission." *Windstream Kentucky East, LLC*, Case No. 2009-00246, 2009 Ky. PUC LEXIS 1211, Order at *7 (Nov. 24, 2009). Thus, while KRS 278.310 does not mandate that the Commission apply the Rules of Evidence, the Commission plainly has the discretion to apply the principles underlying these rules as it determines necessary. *See, e.g., Petition of Southeast Telephone, Inc.*, Case No. 2006-00316, 2001 Ky. PUC LEXIS 1432, Order at *1–2 (Aug. 30, 2006) ("Although the Commission is not, pursuant to KRS 278.310, bound by the technical rules of legal evidence, the parties hereto are hereby put on notice that cumulative, repetitive, and irrelevant evidence will not be heard in the formal hearing in this matter.").

Two elements of Mr. Radigan's testimony must be stricken: first, the attachment consisting of Dr. Woolridge's testimony from a different case, and second, Mr. Radigan's own testimony concerning ROE.

1. Exhibit FWR-2 should be stricken.

a. The attachment consisting of Dr. Woolridge's testimony is plainly hearsay.

"Hearsay" is "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." KRE 801(c) "Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky." KRE 802. Rule 803 lists twenty-three exceptions to the hearsay rule, but whether any exception applies here (none does) is not even a close question.

Dr. Woolridge's testimony is a "statement" (*see* KRE 801(a)(1)) and it is being offered for its truth; *i.e.*, that the range of ROEs recommended in his testimony are appropriate. And the statements are offered in this proceeding by Mr. Radigan, who is "other than" the declarant, Dr. Woolridge. Mr. Radigan's testimony in this case about what Dr. Woolridge testified to in the Kentucky American proceeding is textbook hearsay.

b. Allowing Mr. Radigan to testify about Dr. Woolridge's opinions would unfairly prejudice Columbia.

The hearsay attachment is not only technically problematic, but it poses serious problems of fairness. Because Dr. Woolridge is neither a party nor witness, he has no obligation to furnish the data and workpapers underlying his testimony. In fact, he has no obligation to participate in the discovery process or the hearing at all. Although Columbia could attempt to subpoena Dr. Woolridge to appear at the evidentiary hearing, enforcing a subpoena on an out-of-state witness is a time-consuming, costly and burdensome process. (And given that

his testimony does not even address the company at issue in this case, all that cost would be pointless.) For all practical purposes, Columbia can neither take discovery of Dr. Woolridge nor compel him to appear at hearing for cross-examination.

Commission decisions must be based on reliable evidence, and must also provide due process. *Kentucky Power Co. v, Energy Regulatory Comm'n,* 623 S.W.2d 904, 908 (Ky. 1981) ("Even a public utility has some rights, one of which is the right to a final determination . . . in accordance with due process."); *Utility Regulatory Comm'n v. Kentucky Water Service Co.,* 642 S.W.2d 591, 593 (Ky. Ct. App. 1982) ("the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.") But such qualities cannot be assured when parties are deprived of the opportunity to discover the bases and cross-examine the source of the statements offered into evidence against them. Mr. Radigan is offering testimony about Dr. Woolridge's opinions. Columbia has no practical means of determining what data Dr. Woolridge relied on, what methods he used and whether he properly used them, what assumptions he made in arriving at his opinions, or any of the other basic information needed to properly cross examine an expert.

The Commission has recently recognized that it is improper for parties to refer to testimony in other, unrelated cases in parties' post hearing briefs. In

Jessamine-South Elkhorn Water District, Case No. 2012-00470, 2013 Ky. PUC LEXIS 377 (April 30, 2013), the Commission granted a motion to strike portions of a post hearing brief that quoted testimony from an unrelated Commission proceeding, reasoning that the unrelated entity's testimony "injects the issues of an unrelated proceeding into the current proceeding," and compromises due process. *Id.* at 7. Although the Commission focused on the fact that the unrelated testimony was never made part of the record, its presence in the record would cure neither the relevance problem (the testimony pertains to a different company in a different proceeding) nor the basic fairness and due process problem (the lack of opportunity to depose and cross-examine Dr. Woolridge).

Striking Dr. Woolridge's testimony from the record would not unfairly prejudice the AG. The AG made a decision not to propose an ROE in this case. Having made this decision, AG cannot complain that it would be unfairly prejudicial to strike from *this* proceeding ROE testimony it filed in a *different* proceeding.

2. Mr. Radigan's ROE testimony must also be stricken.

The AG will presumably stipulate that Mr. Radigan is being proffered as an expert witness. (Arguing that Mr. Radigan is a lay witness would not help the AG's cause, as KRE 701 bars lay witness opinion testimony.) Expert opinion is subject to KRE 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case.

Mr. Radigan's testimony meets none of the KRE 702 requirements.

a. Mr. Radigan is not qualified to render opinions concerning ROE.

Opinion testimony is admissible under KRE 702 only if the witness is "qualified as an expert by knowledge, skill, experience, training, or education." Nothing in Mr. Radigan's background suggests he is qualified to render opinions concerning ROE. According to his resume (Exhibit FWR-1), Mr. Radigan's bachelor's degree is in chemical engineering. He has no degree in accounting, finance or related disciplines. His work history does not describe any position where he had responsibility for determining ROEs. The "fields of specialization" section of his resume does not list ROE. The "project highlights" section of his resume does not list any project where he consulted with a client or provided testimony concerning ROE recommendations. The "expert witness testimony" section of his resume lists many different cases in which he testified; none are described as pertaining to ROE. Nor has Mr. Radigan given presentations about ROE, according to the "presentations" section of his resume.

Having testified as an expert "on more than 100 occasions" (testimony, p. 2, line 9) is not sufficient to qualify Mr. Radigan to render opinions concerning ROE. General qualifications are not a substitute for expertise. *See McIntire v. Commonwealth,* 192 S.W.3d 690, 697 (Ky. 2006) (witness with "impressive qualifications and . . . extensive experience in the field of forensic pediatrics" deemed unqualified to render opinions outside his area of expertise). Mr. Radigan may be an expert in *something,* but certainly not in estimating utility ROEs.

b. Mr. Radigan's opinions are not supported by sufficient facts or data

Mr. Radigan's ROE testimony also fails to connect the dots between his conclusions and the underlying data upon which he relies. He characterizes the purpose of his testimony as "serv[ing] to provide prospectus [sic] on what the overall revenue requirement may be for this Company given returns on equity that have been recently awarded throughout the country." (p.33) The remainder of his testimony, however, does not discuss ROEs "awarded throughout the country." Mr. Radigan mentions only a single authorized return (for an electric distribution company, no less) from a single, different, and distant jurisdiction (Connecticut). There is no explanation of how a return authorized for a Connecticut electric company is in any way relevant to the Commission's determination of ROE for a Kentucky gas company.

The Commission has recognized that it is "inappropriate" to use water and gas companies as proxies for each other because "the nature of the risks that each industry faces is sufficiently different . . . ." *Kentucky American Water Co.*, Case No. 2010-00036, Order at 70. Just as water companies are inappropriate as proxies for Columbia, so are electric companies.

Mr. Radigan references a report from Regulatory Research Associates ("RRA"), which he says shows that during the third quarter of 2013, ROEs averaged 9.73%. But since the report he references is not included with his testimony, the Commission is left to take his word for it. There is reason, however, to be skeptical of Mr. Radigan's claim that the RRA report shows returns for the third quarter of 2013. The Connecticut decision that allegedly cited this report was issued in August 2013 – well *before* the end of the 3d quarter.

In any case, the RRA data that Mr. Radigan cites does not support his conclusions. According to Mr. Radigan, RRA data shows that third quarter ROEs have ranged from 9.30 to 10.20 percent (whether these ROEs are for gas, electric, water, or some combination is left unsaid). Mr. Radigan's adjustment reflects an ROE of just 8.50 percent – 80 basis points below the bottom end of the purported RRA range.

Mr. Radigan cites Dr. Woolridge's testimony to claim that "Kentucky has not been immune from the trend in lower recommended rates of return." The

mere fact that Dr. Woolridge testified to a recommended ROE of 7.3 to 8.6 percent for Kentucky-American Water does not establish that an 8.5 percent ROE is appropriate for Columbia, much less that Columbia is caught in some larger trend. The Commission has not adopted this recommendation, and as already established, Dr. Woolridge's recommendation flies in the face of the RRA data that Mr. Radigan cites.

c. Mr. Radigan's testimony is not the product of reliable principles and methods that have been applied reliably to the facts of this case.

The core problem with Mr. Radigan's testimony is not so much a matter of the flawed application of principles and methods; the problem is that recognized principles and methods are completely absent.

In establishing a utility's rate case ROE, the Commission typically considers factors such as the composition of the proxy group, analysts' projections of growth rates, regulatory risk, frequency of rate filings, current and anticipated economic conditions, and similar factors. *See, e.g., Kentucky-American Water Co.*, Case No. 2010-00036, Order at 71. Mr. Radigan clearly made no attempt to apply these principles and methods; indeed, he does not even address them. He concedes that he was not asked to do so because AG is "not sponsoring a witness to propose a return on equity in this case." (p. 33.) It should go without saying that attaching someone else's testimony from a different case, for a

different company, serving a different industry, is not a reliable principle or method for determining Columbia's ROE.

d. Mr. Radigan's testimony is not relevant.

Finally, Mr. Radigan's testimony must be struck because it is irrelevant. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. "Implicit in the definition for rule 401 are two distinct requirements: (1) the evidence must tend to prove the matter sought to be proved; and (2) the matter sought to be proved must be one that is of consequence to the determination of the action." *Taylor v. Commonwealth,* 2006 Ky. Unpub. LEXIS 110, at *15 (Ky. 2006) *quoting United States v. Waldrip,* 981 F.2d 799, 806 (5th Cir. 1993).

Mr. Radigan's ROE testimony does not meet the threshold requirement of relevance, *i.e.,* that "the evidence must tend to prove the matter sought to be proved." In response to the question, "Could you please discuss the AG's position on return on equity," Mr. Radigan responds, "Yes, the AG is not sponsoring a witness to propose a return on equity in this case." (p. 33) None of the testimony that follows has any relevance to "the matter sought to be proved"—that AG is not proposing an ROE. The subsequent discussion of

alleged third quarter 2013 ROEs and Dr. Woolridge's recommendation in a different case amount to idle commentary, at best.

III. CONCLUSION

For the foregoing reasons, Columbia's motion to strike should be granted. The attachment consisting of Dr. Woolridge's testimony is blatant hearsay. And Mr. Radigan himself is not qualified to render expert opinions about ROE. This is confirmed not only by his lack of discussion of relevant ROE training, education and experience, but by the slipshod manner in which he applied a contrived 8.5% ROE. Mr. Radigan's opinions are not based on reliable facts or data, and his conclusions are simply irrelevant. The Commission should grant this motion and strike the portions of testimony identified herein.

Dated at Columbus, Ohio, this 25th day of September 2013.

Respectfully submitted,
COLUMBIA GAS OF KENTUCKY, INC.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Columbia Gas of Kentucky, Inc.'s Motion to Strike Portions of the Direct Testimony of AG Witness Frank Radigan* by ordinary U.S. Mail, postage prepaid, to the parties on this 25th day of September, 2013.

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