

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF COLUMBIA)	
GAS OF KENTUCKY, INC. TO EXTEND ITS)	CASE NO.
SMALL VOLUME GAS TRANSPORTATION)	2021-00386
SERVICE)	

COLUMBIA GAS OF KENTUCKY, INC.'S
MOTION FOR REHEARING

Comes now Columbia Gas of Kentucky, Inc. ("Columbia"), by counsel, pursuant to KRS 278.400 and other applicable law, and does hereby request the Commission to grant rehearing to correct the Commission's June 28, 2024 Order in the above-styled case ("the Order"), specifically arguing that the Commission's decision to extend Columbia's Small Volume Gas Transportation Service Tariff ("Choice Program") until March 31, 2028, to require informal conferences to be held for the working group with agenda's established by Commission Staff and to require Columbia to track revenues and expenses and file reports regarding same, is unlawful and unreasonable. Columbia respectfully states as follows:

I. BACKGROUND

On September 30, 2021, Columbia filed a tariff filing to extend its Choice Program through March 31, 2025. On October 18, 2021, the Commission issued an Order

establishing this proceeding to investigate the reasonableness of Columbia’s proposed tariff.¹ Intervention was granted to Interstate Gas Supply, Inc, Constellation New Energy – Gas Division, LLC, and Xoom Energy Kentucky, LLC.² Columbia responded to multiple rounds of discovery³ and a Joint Stipulation and Settlement Agreement (“Settlement Agreement”) was entered into the record on September 22, 2022⁴, and testimony supporting the Settlement Agreement was entered into the record.⁵ A hearing was held on September 29, 2022, and post-hearing data requests were responded to by the parties on October 21, 2022.⁶ An Addendum to the Settlement Agreement was filed on November 8, 2022.⁷ The Commission issued an Order accepting the Settlement Agreement and the Addendum to the Settlement Agreement with modifications.⁸ On

¹ Case No. 2021-00386, October 18, 2021 Order (Ky. PSC October 18, 2021).

² Case No. 2021-00386, January 13, 2022 Order (Ky. PSC January 13, 2021) and January 25, 2022 Order (Ky. PSC January 25, 2021).

³ Columbia’s Response to Commission Staff’s First Set of Request for Information (filed November 11, 2021), Columbia’s Responses to Commission Staff’s Second Request for Information (filed February 18, 2022), Response’s to Xoom First Request for Information (filed February 19, 2022), Columbia Gas of Kentucky’s Response to Xoom’s Second Set of Requests for Information (filed March 18, 2022).

⁴ Joint Stipulation and Settlement Agreement (filed September 22, 2022).

⁵ Supplemental Testimony in Support of Stipulation (filed September 27, 2022), Testimony in Support of Settlement (filed September 28, 2022), Letter Addressing Testimony in Support of Stipulation (filed September 28, 2022).

⁶ Response to Commission Staff Post hearing Request for Information (filed October 21, 2022), Responses to Staff Post-Hearing Data Request (filed October 21, 2022), and Columbia Response to Commission Staff’s Post-Hearing Request for Information (filed October 21, 2022).

⁷ Addendum to Joint Stipulation and Settlement Agreement (filed November 8, 2022).

⁸ Case No. 2021-00386, March 28, 2023 Order (Ky. PSC March 28, 2023).

April 7, 2023, Columbia filed its notice to withdraw from the Settlement Agreement and a motion to reopen the proceeding and to withdraw its tariff filing to extend the Choice Program.⁹ The Commission issued an Order on April 27, 2023, reopening the proceeding but denied Columbia's motion to withdraw its tariff filing.¹⁰ Columbia responded to an additional round of discovery from Commission Staff¹¹ and a second hearing was held on July 26, 2023. Responses to post-hearing data requests were filed by the parties on August 18, 2023¹². Following the post-hearing requests for information, the intervenors filed post-hearing briefs¹³ and on November 3, 2023, Columbia filed a reply brief.¹⁴ The Commission entered the Order which is the subject of this Motion for Rehearing on June 28, 2024.

⁹ Response to Final Order and Motions (filed April 7, 2023).

¹⁰ Case No. 2021-00386, April 27, 2023 Order (Ky. PSC April 27, 2023).

¹¹ Columbia Gas of Kentucky's Response to Commission Staff's Third Request for Information (filed July 19, 2023).

¹² Responses to Staff's Post-Hearing Data Requests (filed August 18, 2023), Response of Interstate Gas Supply Inc, and Constellation New Energy, Gas Division LLC to the Commission Staff's Post-Hearing Request for Information Dated July 28, 2023 (filed August 18, 2023), Responses to Post-Hearing Data Requests (filed August 18, 2023).

¹³ Post Hearing Brief of Xoom Energy Kentucky, LLC, Interstate Gas Supply, Inc d/b/a IGS Energy and Constellation New Energy Gas Division, LLC (filed October 18, 2023).

¹⁴ Reply Brief (filed November 3, 2024).

II. APPLICABLE LAW AND STANDARD OF REVIEW

KRS 278.400 governs motions for rehearing, which provides the Commission with the ability to correct findings based on material errors or omissions, or to correct findings that that are unreasonable or unlawful.¹⁵ The statute states, in its entirety:

After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty (20) days after the service of the order, apply for a hearing with respect to any of the matters determined. Service of a commission order is complete three (3) days after the date the order is mailed. The application shall specify the matters on which a rehearing is sought. The commission shall either grant or deny the application for rehearing within twenty (20) days after it is filed, and failure of the commission to act upon the application within that period shall be deemed a denial of the application. Notice of the hearing shall be given in the same manner as notice of an original hearing. Upon the rehearing any party may offer additional evidence that could not with reasonable diligence have been offered on the former hearing. Upon the rehearing, the commission may change, modify, vacate or affirm its former orders, and make and enter such order as it deems necessary.

A Commission Order is unreasonable when “the evidence presented leaves no room for difference of opinion among reasonable minds.”¹⁶ An Order of the Commission is unlawful when it is deemed to be in violation of a state or federal statute, or a

¹⁵ *Electronic Application of Kenergy Corp. for a Certificate of Public Convenience and Necessity for the Construction of a High-Speed Fiber Network and for Approval of the Leasing of the Network’s Excess Capacity to an Affiliate to be Engaged in the Provision of Broadband Service to unserved and Underserved Households and Businesses of the Commonwealth*, Case No. 2021-00365, Order (Ky. PSC May 19, 2022) at 1–2.

¹⁶ *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky. App. 1980).

constitutional provision.¹⁷

III. ARGUMENT

A. Columbia's Choice Program is a Voluntary Tariff and the Commission's Decision to Continue the Program Over Columbia's Objection is Outside the Commission's Jurisdiction

The Commission's decision to extend Columbia's Choice Program until March 31, 2028, establish post-hearing informal conferences to be administered by Commission Staff, and require Columbia to track and file reports on the expenses and revenues of the Choice Program is unlawful and unreasonable. Columbia's Choice Program has always been a voluntary tariff. In fact, there is no other utility regulated by the Commission that has a program close to the Choice Program. The Commission previously found it is Columbia's decision to continue the program or to abandon it since it is a voluntary tariff:¹⁸

Finally, Columbia requests that the Commission permit it to withdraw its application of April 22, 1999 if the requested relief is not granted. Because the Customer Choice program was filed voluntarily, the Commission finds that it is within Columbia's discretion to go forward with the program as approved or to abandon it.

¹⁷ *Public Service Comm'n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm'n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

¹⁸ See, Case No. 1999-00165, *In the Matter of: The Tariff Filing of Columbia Gas of Kentucky, Inc. to Implement a Small Volume Gas Transportation Service, to Continue its Gas Cost Incentive Mechanisms, and to Continue its Customer Assistance Program*, March 6, 2020 Order at 5 (Ky. PSC March 6, 2020). See also, HVR 16:30:35 – 16:33:17.

Therefore, the decision in this case directly contradicts the prior Commission finding that it is Columbia's decision to extend or discontinue the Choice Program. Columbia's Choice Program is, and always has been, undertaken voluntarily.¹⁹ It is not mandated by act of the General Assembly, nor Commission regulation. The Commission's 1998 decision in Administrative Case No. 367 made clear that local distribution companies in Kentucky could offer customer choice programs to small-volume customers and outlined the framework for any "utility proposing a customer choice program" including issues that any proposed program must address.²⁰ The Kentucky General Assembly passed House Joint Resolution 141 during its 2010 Regular Session directing the Commission to investigate natural gas retail competitions programs and submit a report to the Legislative Research Commission. The Commission established Case No. 2010-00146 to carry out that directive and submitted its report into the record closing that proceeding. The Commission's report found that, "regardless of whether the General Assembly mandates expanded transportation services or choice programs or simply allows the LDCs to continue to propose expanding transportation when they deem it appropriate for their individual companies and customers, the

¹⁹ See, Case No. 99-165, March 6, 2020 Order at 5 See also, HVR 16:30:35 – 16:33:17.

²⁰ See, Administrative Case No. 367, The Establishment of a Collaborative Forum to Discuss The Issues related to Natural Gas Unbundling and the Introduction of Competition to the Residential Natural Gas Market, July 1, 1998 Order (Ky. PSC July 1, 1998) ("Admin Case 367").

General Assembly should grant the Commission additional regulatory jurisdiction.”²¹ Further, the Commission found in its report, that it would not be reasonable or consistent with its statutory responsibility to mandate that its regulated utilities offer choice programs or expanded transportation services without additional statutory authority and significant consumer protections.²² The decision to require the Choice Program to continue is also in direct contradiction to the findings in Case No. 2010-00416 that the Commission lacked the statutory authority to require this type of tariff. In the more than two decades since its inception, no statute or regulation has been promulgated to promote or order the Commonwealth's utilities to adopt such programs. No other utilities have voluntarily done so.

Columbia’s original proposal in its tariff filing application in this proceeding was to continue the Choice Program with no changes through March 31, 2025.²³ When Columbia withdrew from the Settlement Agreement, the Commission’s Order ²⁴ stated that the parties are placed into the position prior to the Settlement Agreement and that an evidentiary hearing was needed to “hear testimony concerning extending the CHOICE program for a defined term as proposed by Columbia Kentucky, and extending

²¹See, Case No. 2010-00146, An Investigation of Natural Gas Retail Competition Programs at 19.

²² See, Case No. 2010-00146 at 22. .

²³ See, Columbia’s CHOICE tariff filing (September 30, 2021).

²⁴ Case No. 2021-00386, April 27, 2023 Order

the CHOICE program permanently, as proposed by the Intervenors.”²⁵ The defined term proposed by Columbia was to extend the Choice Program until March 31, 2025. There is no statutory or regulatory basis by which Columbia can be ordered to indefinitely extend the Choice Program, or even to require Columbia to extend the Choice Program further than it proposed. It is a voluntary program, and from its inception the Commission has properly left the continuance or abandonment of the Choice Program to Columbia’s discretion.²⁶ Therefore, the Commission’s decision to require Columbia to extend the Choice Program beyond the period proposed by Columbia, and without Columbia’s consent, is not only unlawful and unreasonable, but also, it is outside the jurisdiction of the Commission.

B. The Commission’s Order Contains Incorrect Information and Inconsistencies With Prior Commission Orders

i. Incorrect Information

There are several errors or inconsistencies with prior Orders in the Commission’s June 28, 2024 Order in this proceeding. First, in response to Columbia’s argument that the Commission’s decision to deny Columbia’s withdrawal of the Choice program as discriminatory, the Commission used an example of the PBR sharing mechanism. The Commission stated, “Given Columbia Kentucky’s allegations of discrimination, the

²⁵ See, Case No. 2021-00386, April 27, 2023 Order at 7. .

²⁶ See, Case No. 1999-00165, March 6, 2020 at 5.

Commission finds its worth noting that there are several programs in existence that not every gas utility has adopted. Specifically, Columbia Kentucky has a PBR sharing mechanism, but **Atmos Energy Corporation (Atmos) does not.**" (Emphasis added). This statement is blatantly false. Atmos Energy Corporation does have a PBR sharing mechanism and in fact had established a new case number²⁷ for its PBR renewal filing.

In addition, the Commission's findings in that section support Columbia's position in this case. The Commission stated, "In fact, the Commission did not force the creation of Columbia Kentucky's PBR mechanism nor will force Atmos to develop such a mechanism. However, the Commission has the authority to investigate the mechanism and determine whether or not it results in fair, just and reasonable rates regardless of the utility."²⁸ This statement supports Columbia's argument that the Commission cannot force Columbia to continue a voluntary tariff, but only has the authority to investigate it to determine whether or not it results in fair, just and reasonable rates. Notwithstanding, the Commission's June 28, 2024, decision in effect forces Columbia to continue a program that is voluntary, that no other utility in the state has, and costs ratepayers more money than if they did not participate in the program. This is a discriminatory action by the Commission, outside the jurisdiction of the Commission, and should be reconsidered.

²⁷ See Case No. 2024-00205, *Electronic Application of Atmos Energy Corporation for Performance Based Ratemaking Mechanism*, Motion for Deviation in which Atmos Energy Corporation states it is not proposing any changes to its Performance Based Ratemaking mechanism.

²⁸ Case No. 2021-00386, June 28, 2024 Order at 10. ,

Second, the Commission's Order has incorrect statements regarding Columbia's administration of the Choice program. The Commission stated:

Based on the entirety of the record, the Commission finds that since its inception, the CHOICE program has not been administered in a manner to ensure its success.... Also the evidence does not support the conclusion that Columbia Kentucky has invested in the CHOICE program in the manner envisioned. Because of Columbia's lack of commitment, the market participants have not invested.²⁹

Columbia has administered the program according to its design. The program was designed in accordance with the parameters set forth in Administrative Case No. 367 and has been modified within the bounds of those parameters with the agreement of Columbia and authorization of the Commission in the more than twenty years since. The statements contained in the June 28, 2024 Order are in stark contrast to the Commission's stated objective in Administrative Case No. 367, "that the public's interests are met and not just those of other parties who would seek to serve the public."³⁰

ii. Inconsistencies With Prior Commission Orders

In addition to the incorrect information contained in the Commission's Order, the Commission's June 28, 2024 Order is inconsistent with prior Commission Orders. For example, the Commission states, "Indeed, the evidence supports that there is a demand for customer choice, first from the customer side as evidenced by Columbia Kentucky's

²⁹ See, June 28, 2024 Order at 10.

³⁰ Admin Case 367, September 26, 1997 Order at 3.

Survey Report, with 23.5 percent of residential customers stating that the ability to choose who you buy your gas supply whether you save money or not as very important, while 35.2 percent of customers stated that these reasons were somewhat important.”³¹ However, reliance on the survey results is inconsistent with prior Commission Orders in voluntary tariff filings of Columbia. For example, in Columbia’s Green Path Rider proceeding,³² the Commission stated in its December 6, 2023 Order on rehearing, “The Commission discussed the concerns with the survey results and specifically noted that, to the extent to which they were used to calculate the Green Path Rider’s proposed starting rates and associated volumetric usage, it did not have confidence rates could be considered fair, just and reasonable due to the lack of statistical significance of the survey results.”³³ Citing to its October 30, 2023 Order in the Green Path Rider case, the Commission stated:

Columbia Kentucky has a responsibility to its customers to provide adequate, efficient and reasonable gas service at the lowest reasonable cost possible. Expanding service to financial products to satisfy a speculative interest for less than one percent of customers does not effectuate increased adequate, efficient, and reasonable service. Columbia Kentucky currently offers and participates in the Choice program. The Choice program includes marketers that offer customers environmentally friendly programs. Customers

³¹ Case No. 2021-00386, June 28, 2024 Order at 11.

³² Case No. 2022-00049, *In the Matter of: Electronic Application of Columbia Gas of Kentucky, Inc. for Approval of the Green Path Rider Pilot Program*, (filed, Dec. 29, 2022). (“Green Path”)

³³ Case No. 2022-00049, December 6, 2023 Order at 3 (Ky. PSC December 6, 2023).

have the option to choose from those offerings. Based on the above discussion, the Commission finds that Columbia Kentucky has not demonstrated that the Green Path Rider is needed or is a reasonable or efficient condition under which to provide natural gas service. Columbia Kentucky has not established the reasonableness of the proposed rates, and has not identified sufficient benefit to any customer that might choose to participate.³⁴

In denying the Green Path Rider, the Commission voiced concerns over survey results but has no concerns relying on surveys in requiring Columbia to extend the Choice Program. The Commission voiced concern in the Green Path Rider Order that the Green Path Rider was being offered for less than 1% of Columbia's customers and it did not "effectuate increased adequate, efficient, and reasonable service."³⁵ In that same Order, the Commission set out the obligation of Columbia to its customers by stating, "The service Columbia Kentucky is obliged to provide is natural gas service, not carbon offsets or environmental attributes."³⁶ The Commission went on to say Columbia's responsibility to its customers is to "provide adequate, efficient, and reasonable gas service at the lowest reasonable cost possible."³⁷ In the October 30, 2023 Order regarding the Green Path Rider, the Commission discussed the results of the survey stating:

³⁴ Case No. 2022-00049, December 6, 2023 Order at 4.

³⁵ Case No. 2022-00049, December 6, 2023 Order at 4.

³⁶ Case No. 2022-00049, December 6, 2023 Order at 4.

³⁷ Case No. 2022-00049, December 6, 2023 Order at 9.

“...despite Columbia Kentucky’s contention that statistical significance is unnecessary, the Commission does not agree that the results reported indicate interest sufficient to launch a program... Columbia Kentucky is required to provide adequate, efficient, and reasonable service, and *may establish reasonable rules related to how it conducts business and the conditions under which it provides service...* However, the likelihood of customer participation in a program for which customers would pay on average \$10.02 or \$20.03 more than their monthly bill is low, in the Commission’s estimation, especially considering that the program-related charges would be even higher in cold weather months due to increased usage for heating. The Commission considers survey results speculative in predicting customer participation and *is not willing to rely on these results in approving a tariff, even on a pilot basis, when it appears likely to cause customers to pay more for a program* that could be doomed to failure due to insufficient interest relative to its cost.”³⁸ (*emphasis added*)

However, in the present Order, the Commission has completely contradicted its earlier reasoning that survey results are speculative to find that the survey results support the Commission’s decision to extend the program at issue.³⁹ At the same time that the Commission relies on the survey results in the record, the Commission finds there is “a lack of tangible evidence of the program’s success or failure” and that Columbia has not met its burden to provide information to terminate the program.⁴⁰ The Commission has

³⁸ Case No. 2022-00049 October 30, 2023 Order at 7. (Ky. PSC October 30, 2023).

³⁹ Case No. 2022-00049 October 30, 2023 Order at 10.

⁴⁰ Case No. 2021-00386, June 28, 2024 Order . at 10. “The Commission has concerns that customers do not have adequate information on the options and process of securing gas service from marketers. Also, the evidence does not support the conclusion that Columbia Kentucky has invested in the CHOICE program in the manner envisioned. Because of Columbia Kentucky’s lack of commitment, the market participants have not invested. It’s an endless loop of blame resulting in a lack of tangible evidence of the program’s success or failure.”

placed great reliance on survey results in this proceeding. The Commission has extended a voluntary program, longer than requested by Columbia, that serves a small percentage of customers who have participated over more than two decades, and which has resulted in customers who participate paying a premium for natural gas service⁴¹ similar to that which was proposed in the Green Path Rider case, which was denied by the Commission.

In addition, the Commission is forcing Columbia to go against the very obligation to its customers the Commission recognized in the Green Path Rider proceeding: “provide adequate, efficient, and reasonable gas service at the lowest reasonable cost possible.”⁴² It is forcing Columbia to continue a voluntary program that has been proven to cost Columbia’s customers millions of dollars more than they would have paid without the Choice Program. The Commission is also forcing Columbia to do something more than to provide a service. Not only have the customers historically paid more under the Choice program, but the new requirements established by the Commission in this proceeding will increase costs, further burden Columbia’s existing workforce and require additional resources that are not currently available. For instance, in the June 28, 2024 Order the Commission created a requirement that Columbia follow a Settlement provision of a working group with interested marketers.⁴³ The Commission stated it

⁴¹ Response’s to Xoom First Request for Information, Item 7 (filed February 19, 2022).

⁴² Case No. 2022-00049 October 30, 2023.

⁴³ Case No. 2021-000386 June 28, 2024 Order at 11-12.

created procedural changes for the working group in the March 28, 2023 Order and then Columbia simply withdrew.⁴⁴ In the June 28, 2024 Order the Commission created the further “condition” on the working group of requiring that the working group be run by Commission Staff.⁴⁵ Commission Staff will schedule, set the agenda, and facilitate the meetings that will be open to all marketers providing service, or interested in providing gas service.⁴⁶

This requirement of the working group is outside of the Commission’s authority⁴⁷ and denies Columbia the fundamental statutory right, created by the General Assembly in KRS 278.030, to establish reasonable rules related to how it conducts business and the conditions under which it provides service. By requiring the working group to participate in informal conferences that are scheduled, planned, and administered by Commission Staff, the Commission has put Commission Staff in a position that oversteps the authority of the Commission and also substitutes Commission Staff for Columbia to

⁴⁴ Case No. 2021-00386, June 28, 2024 Order at 12.

⁴⁵ Case No. 2021-00386, June 28, 2024 Order at 12.

⁴⁶ Case No. 2021-00386, June 28, 2024 Order at 12.

⁴⁷ See *Croke v. Pub. Serv. Comm’n of Kentucky*, 573 S.W.2d 927 (Ky. App. 1978); “Although KRS Chapter 278 grants the Commission sweeping authority to regulate public utilities, the Commission is a creature of statute and its powers are purely statutory, having only such powers as conferred expressly, by necessity, or by fair implication..” See also, *City of Pikeville v. Pub. Serv. Comm’n of Kentucky*, No. 2023-CA-0338-MR, 2024 WL 1686864, at *2 (Ky. Ct. App. Apr. 19, 2024); citing *Cincinnati Bell Tel. Co. v. Kentucky Pub. Serv. Comm’n*, 223 S.W.3d 829, 836 (Ky. App. 2007) (citing *Commonwealth, Transp. Cab. v. Weinberg*, 150 S.W.3d 75 (Ky. App. 2004)).

make business decisions for administering Columbia’s voluntary tariff. This is arbitrary and unlawful and beyond the Commission’s jurisdiction. Citing “an endless loop of blame” that caused a failure on Columbia’s part to educate its customers and collect the specific information the Commission seeks,⁴⁸ the Commission structures an artificial format to create and collect information that does not exist in the record. Commission Staff only has statutory duties to carry out the provisions of Chapter 278 or to perform the duties conferred by law upon the Commission.⁴⁹ The grant of authority to Commission Staff to establish the rules and conditions of service that will govern the Choice Program through the working group is clearly outside the statutory duties established by the General Assembly.⁵⁰ This grant of power is so far beyond the duties of Commission Staff, it could open the Commission and Staff to liability for damages to Columbia’s customers as a result of the Choice Program.

The Commission’s Order in this proceeding is inconsistent with prior Commission Orders establishing that Columbia’s responsibility to its customers is to “provide adequate, efficient, and reasonable gas service at the lowest reasonable cost possible.”⁵¹

⁴⁸ Case No. 2021-00386, June 28, 2024 Order at 10.

⁴⁹ See KRS 278.110.

⁵⁰ See *S. Cent. Bell Tel. Co. v. Util. Regul. Comm’n*, 637 S.W.2d 649 (Ky. 1982), The Utility Regulatory Commission must give effect to all factors which are prescribed by the legislative body in fixing rates, but it may not act on a matter which the legislature has not established. KRS 278.030, 278.040(2), 278.260, 278.270, 278.280, 278.390.

⁵¹ *Id.*, at 9.

The Commission stated multiple times in the June 28, 2024 Order that Columbia is to track expenses and revenues related to the Choice Program.⁵² Columbia has reiterated its position multiple times that its current software cannot provide the type of expense and revenue information the Commission has stated it would like to evaluate. The software necessary to track this information would require significant investment in unplanned upgrades to Columbia's information technology ("IT") system. This updated software, which is not included in the forecasted test period in Columbia's pending rate case, would be a cost born by all Columbia customers to track expenses for a completely voluntary program that Columbia requested to discontinue. This would not result in Columbia providing reasonable gas service at the lowest cost possible.

C. Columbia's Withdrawal From the Settlement Agreement Was Proper and the Commission's Order is Punitive

The Commission's June 28, 2024 Order stated, "However, the Commission has serious concerns that the working group as laid out in the Settlement Agreement and Addendum would not function as intended. This is highlighted by the fact that Columbia Kentucky withdrew from the Settlement Agreement after the Commission's laid out procedural changes to the working group."⁵³ What the Commission fails to state in its Order is the Settlement Agreement contained a provision that allowed any party to the

⁵² June 28, 2024 Order at 12-13.

⁵³ Case No. 2021-00386, June 28, 2024 at 12.

Settlement Agreement to withdraw from it if any modifications were made to the Settlement Agreement. Specifically, Paragraph 7 of the Settlement Agreement states, “If the Commission does not accept and approve this Stipulation in its entirety or imposes any additional conditions or requirements upon the signatory Parties, then: (a) any Party may elect, in writing docketed in this proceeding,... that this Stipulation shall be void and withdrawn by the Parties hereto from further consideration by the Commission and neither Party shall be bound by any of the provisions herein...”⁵⁴ The Commission acknowledges that it modified the Settlement Agreement and imposed additional requirements both on the working group as well as Columbia. These modifications triggered Paragraph 7 of the Settlement Agreement and any party, not just Columbia, could have withdrawn from the Settlement Agreement. It was their contractual right. The Commission’s June 28, 2024 Order appears to be penalizing Columbia for exercising its contractual right to terminate the Settlement Agreement for the modifications and additional conditions that were imposed by the Commission.

In addition, the Commission’s order penalizes Columbia for not carrying out the over-two-decade-old Choice program in a manner that this Commission now believes it should have. The Commission is requiring Columbia to invest more time, money, and effort into a declining voluntary program, in order to gather enough evidence to evaluate a voluntary program that Columbia has requested to terminate. The Commission’s

⁵⁴ See, Joint Stipulation and Settlement Agreement (filed, September 22, 2022).

objective is flawed if it is requiring a utility to continue a voluntary program and expend resources in order to collect information in order to discontinue that same voluntary program. Columbia has provided substantial evidence in multiple proceedings since the Choice program was established to show the participation level by both customers and marketers. This information has shown that the Choice program has resulted in overall gas cost to customers in excess of what gas costs would have been without the Choice program and that participation levels from both customers and marketers has steadily diminished. By requiring Columbia to invest more into a failing program, the Commission's actions are unreasonable, unlawful and could be considered punitive.⁵⁵ There is well settled caselaw that states that rates must be "non-confiscatory, just and reasonable" and are such so long as they enable the utility to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for risks assumed even though such rates might produce only a meager return on the so-called

⁵⁵ See *Kentucky Pub. Serv. Comm'n v. Com. ex rel. Conway*, 324 S.W.3d 373, 381 (Ky. 2010) The Kentucky Supreme Court discussing, *South Central Bell Telephone Co. v. Util.Reg.Comm'n*, 637 S.W.2d 649 (Ky.1982), "While we recognize that the PSC has discretion in fulfilling its statutory duty of insuring that rates are fair, just, and reasonable, we do not hold that the PSC has unlimited power to do whatever it wants in regards to ratemaking. For example, in *South Central Bell Telephone Co. v. Util. Reg. Comm'n*, 637 S.W.2d 649 (Ky.1982), we recognized that the PSC (or its predecessor) could not use its plenary ratemaking authority for purposes other than insuring that rates were fair, just, and reasonable; specifically we held that the Commission could not order a rate that was too low to be "fair, just, and reasonable" to penalize a utility for poor service because statutes required separate procedures for dealing with ratemaking issues and dealing with service issues. *Id.* at 651-54. Although *South Central Bell* does indicate that the PSC's ratemaking power "will be strictly construed[,] see *id.* at 653, we do not read it as inconsistent with our opinion here, given that the ratemaking challenged in *South Central Bell* stemmed from an improper purpose inconsistent with the statutory duty to ensure that rates are "fair, just, and reasonable" to utilities as well as customers.

“fair value” rate base.⁵⁶ The Commission’s actions are outside its statutory authority and constitute a confiscatory and punitive overreach of its plenary ratemaking authority because the actions do not insure that rates are fair, just and reasonable.

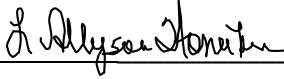
III. CONCLUSION

Columbia respectfully requests that the Commission grant this Motion and reconsider its decision to continue the Choice Program beyond the date proposed by Columbia, establishing post-hearing informal conferences to be administered by Commission Staff and requiring Columbia to track revenues and expenses for the Choice program and to file reports regarding same. Columbia respectfully requests the Commission to approve Columbia’s original request in this proceeding to continue the Choice program, without modification from the current program, through March 31, 2025. At which time, Columbia will file a plan to terminate the Choice program in an organized manner that will be the least disruptive for Columbia’s customers.

This 18th day of July 2024.

⁵⁶ *Com. ex rel. Stephens v. S. Cent. Bell Tel. Co.*, 545 S.W.2d 927 (Ky. 1976).

Respectfully submitted,



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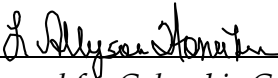
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CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing was transmitted to the Commission on July 18, 2024; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, no paper copies of the filing will be made.



Counsel for Columbia Gas of Kentucky, Inc.