COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

POST-HEARING BRIEF

Comes now Columbia Gas of Kentucky, Inc., ("Columbia") by and through counsel, pursuant to the Kentucky Public Service Commission's ("Commission") July 28, 2023 Order in this proceeding setting forth the post-hearing procedural schedule and the deadline for submitting a reply brief in support of its post-hearing position in this matter, and respectfully states as follows:

I. INTRODUCTION

Columbia filed its post-hearing memorandum brief on September 29, 2023. Interstate Gas Supply, Inc. ("IGS"), Constellation New Energy – Gas Division, LLC ("CNE") and XOOM Energy Kentucky, LLC ("XOOM") (collectively, "the Intervenors") filed a joint response brief on October 18, 2023.

II. ARGUMENT

A. Columbia's Choice Program Has Always Been a Voluntary Program and the Commission has Recognized it Does Not Have the Authority to Mandate a Permanent Choice Program or Any Particular Length of Choice Program.

Columbia's Choice Program has always been filed as a voluntary tariff. As the Commission stated in Case No. 1999-00165, it is Columbia's decision to continue the program or to abandon it since it is a voluntary tariff.[1] As Columbia pointed out in its initial brief, Columbia's Choice Program is, and always has been, undertaken voluntarily.[2] It is not mandated by act of the General Assembly, nor Commission regulation. Contrary to the Intervenors' argument in their response brief that Columbia only relied on the 2010 Report completed by the Commission in Case No. 2010-00146, Columbia cited to the 1999 case as well as the Commission's 1998 decision in Administrative Case No. 367. The Commission's 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

[1] *See, 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,* Case No. 99-165, p. 5, (March 6, 2000). ("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."); *See also,* HVR 16:30:35 – 16:33:17.

[2] *See, id.*

address.[3] The Kentucky General Assembly passed House Joint Resolution 141 during its 2010 Regular Session directing the Commission to investigate natural gas retail competition 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 General Assembly should grant the Commission additional regulatory jurisdiction."[4] No additional regulatory jurisdiction was granted by the General Assembly and the General Assembly did not mandate expanded transportation services or choice programs at that time, or in the over a decade since the Commission's 2010 Report was completed. In short, the General Assembly has never given the Commission the authority to require Columbia to keep the Choice program longer than Columbia requests or agrees to continue.

Requiring Columbia to offer a program that all other LDCs in the state are not required to offer would be a discriminatory act by the Commission against Columbia.

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[3] *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, Order (Ky. P.S.C., July 1, 1998) ("Admin Case 367").

[4] *See,* Case No. 2010-00146, An Investigation of Natural Gas Retail Competition Programs, p. 19.

The program is and always has been a voluntary program which the Commission has acknowledged on multiple occasions. The guidelines established by the Commission in Administrative Case 365 were set up for a utility "**who chooses**" to offer such a program. In Columbia's original case voluntarily establishing the Choice Program, Case No. 1999-165, the Commission acknowledged that the Choice Program was voluntary and that it was "within Columbia's discretion to go forward with the program as approved or to abandon it."[5] This was solidified by the Commission in its 2010 Report.

The Intervenors point to *Kentucky Pub. Serv. Comm'n. v. Com. ex rel. Conway*, 324 S.W.3d 373, 383 (Ky. 2010) as authority for the Commission to mandate the Choice Program. The Intervenors even state "[t]here the Supreme Court of Kentucky held that the Commission had the plenary authority to ***allow*** a utility to adjust its rates by imposing a rider or surcharge to recover costs associated with improvements to gas distribution mains." (emphasis added). The Kentucky Supreme Court stated "The Court, relying on the plain language in KRS 278.030 and 278.040, held that, "so long as the rates established by the utility were fair, just, and reasonable, the [Commission] has broad ratemaking power to ***allow*** recovery of such costs outside the parameters of a general rate case and even in the absence of a statute specifically authorizing recovery of such

[5] *See,* Case No. 99-165, Order p. 5 (March 6, 2000).

costs."[6] The key word is "allow." The *Conway* case does not give the Commission the authority to mandate such programs, but to allow a utility to offer one and recover the costs of such a program if they choose to implement one, without having to file a general rate case to do so. As is the case here, if Columbia **chooses to offer** the Choice Program, the Commission has the authority to **allow** Columbia to do so.

Columbia is choosing to extend the Choice Program and the Commission should issue an Order extending the Choice Program without modification until March 31, 2025.

B. Columbia's Current Position is the Same as its Original Position in this Proceeding.

Columbia's original proposal in its tariff filing application in this proceeding was to continue the Choice Program for three years with no changes through March 31, 2025.[7] That is also Columbia's current position in this proceeding. The Intervenors argue that Columbia cannot change its position in the proceeding and cites a 1935 case[8] stating a party cannot take inconsistent positions. However, what the Intervenors fail to address is that Columbia's position is the same as was filed originally in this proceeding. Columbia is proposing to extend the Choice Program until March 31, 2025 under the current conditions of the program. In both the original filing and the current position,

[6] *See, Kentucky Pub. Serv. Comm'n. v. Com. ex rel. Conway*, 324 S.W.3d 373, 374, 380-81 (Ky. 2010) (emphasis added).

[7] *See,* Columbia's CHOICE tariff filing (September 30, 2021).

[8] *See, Pettit's Adm'r v. Goetz*, 87 S.W.2d 99, 102 (Ky. 1935).

Columbia would have to make a filing at the Commission prior to March 31, 2025 to either extend or terminate the program. The only thing that has changed is that Columbia has communicated its thoughts on what its next filing might be. Columbia has signaled its current intention to terminate the program sometime in the future; however, that question is not pending before the Commission at this time. Termination of the program has always been a possibility for Columbia and the potential for raising that position has not changed.

Columbia finds it curious that the Intervenors would make an argument regarding Columbia's ability to change its position in this proceeding when the Intervenors do this very thing in its brief. The Intervenors state "[w]hile intervenor witness Mr. Crist testified that if the Commission is not inclined to make the program permanent, a five-year extension would be acceptable, that is no longer the case."[9] The Intervenors are changing their original position in this proceeding, where Columbia is not.

Furthermore, if the Intervenors' position is correct that Columbia could not change its position throughout the proceeding, then agreeing to a settlement would never be an option. Both the Intervenors and Columbia agreed to items in the settlement that they did not originally propose in their initial filings. The Intervenors also agreed to the provision in the Settlement Agreement that allowed for either party to back out of the

[9] *See*, Intervenors' Post-Hearing Brief, p. 13.

Settlement Agreement if *any* changes were made to the Settlement Agreement by the Commission. The Commission modified the settlement,[10] acknowledged that all parties were returned to the position they occupied prior to the submission of the Settlement,[11] and Columbia is using its right agreed to by the parties to terminate the Settlement Agreement and pursue its original position in the case.[12]

Finally, Intervenors dedicate a significant portion of their brief lamenting the ongoing litigation over the Choice Program and the length of time that Columbia is willing to extend the Choice Program, saying these circumstances inhibit investment in the Choice Program.[13] However, Intervenors conveniently ignore the over 20 years they have had to invest into the Choice Program and increase the number of customers who are shopping to make the program robust enough to merit continuing the Choice Program. Moreover, the Intervenors in the past have not protested the ordinary 3-year extensions that Columbia has more recently received Commission approval. The Commission should not be persuaded by the Intervenors' hollow advocacy.

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[10] *See,* Order, pp. 13-15 (Settlement Modifications heading and Ordering Paragraph 4).

[11] *See,* Scheduling Order, p. 7 (April 27, 2023).

[12] The Intervenors' advocacy using the Stipulation and Supplemental Testimony of Ms. Cooper is also disappointing as they agreed in the Stipulation that "and, (c) in the event of such termination and withdrawal of the Stipulation, neither the terms of this Stipulation nor any matters raised during the settlement negotiations shall be binding on any of the signatory Parties to this Stipulation or be construed against any of the signatory Parties." Stipulation, p. 5 (September 22, 2023).

[13] *See*, Intervenors' Brief, pp. 8-13.

For the reasons indicated above, the Commission should issue an Order extending the Choice Program without modification until March 31, 2025.

C. The Commission should ensure that non-participating customers or Columbia do not pay for or subsidize any of the educational efforts or enhancement programs proposed by Intervenors. The Intervenors alone should bear all cost recovery responsibility for any education or program enhancements the Commission orders. Cost recovery from anyone other than the marketers or non-participating customers would be even more unfair in light of the negative savings that customers have experienced since the inception of the Choice Program.

Intervenors propose several brand-new educational efforts and enhancement programs for implementation – Columbia will discuss those below. The elephant in the room is who will pay for the additional education and program enhancements. Unsurprisingly, the Intervenors fail to offer to pay for the education and enhancement programs they support that will benefit them.

As it relates to cost recovery, the Intervenors point to the revenues that Columbia receives from marketers as a source of funds, but also concede that a cost analysis for each educational effort and market enhancement is necessary.[14] The marketers further propose Columbia defer any incremental costs not offset by revenues already collected from marketers to implement whatever the Commission might order in this case, suggesting that such fees could be recovered in Columbia's next base rate case.[15]

[14] *See,* Intervenors' Brief, p. 25.

[15] *See,* Intervenors' Brief, p. 25.

Columbia opposes all of the educational efforts and enhancement programs for the reasons laid out below in this brief. However, as a threshold matter, the Commission should ensure its current policy continues – no costs should be paid for by non-participating customers.[16] If the marketers want these customer education and enhanced programs, which will benefit their own bottom line, then they should pay for all of these items. This would be consistent with the important regulatory concept that costs should be recovered by cost causers as well as the Commission's long-standing policy delineated in the 99-165 case.

Further, Columbia opposes the deferral of any particular costs for these initiatives. Columbia would shoulder the added financial burden (cash flow, interest expense, etc.) and it would be unlawful and unreasonable to require Columbia to take on any financial burden without concurrent cost recovery for all activities and costs that might flow from an order in this case.

Finally, other than the first year of the program, Columbia's customers have in the aggregate paid $74,321,995 more than they would have had they not participated in the Choice Program.[17] When questioned by the Chairman in the hearing in this matter, Columbia's witness, Judy Cooper, testified that when the Choice program initially began, the participating marketers offered guaranteed savings over Columbia's rates. Once

[16] *See,* Case No. 99-165, Orders, (January 27, 2000 and March 6, 2000).

[17] *See,* Columbia Response to 1st Set of Post Hearing Data Requests, No. 7 (August 18, 2023).

those offers ran out, the marketers no longer offered guaranteed savings. And since then customers have paid $74,321,995 more than they otherwise would have on Columbia's gas cost adjustment mechanism. Ordering that anyone other than the marketers and participating customers pay for anything requested by the Intervenors would be particularly unreasonable given the financial track record of shopping customers in the Choice Program.

D. The Educational Efforts Requested by the Intervenors should be Rejected.

The Intervenors seek multiple changes to the Choice Program to educate customers. As a general matter, the Intervenors' recommendations should be denied for lack of information, specifically that their proposals lack sufficient information to determine how those proposals would benefit customers, fail to provide enough information about how they would work in practice, and contain no details about the costs of implementing those proposals or who will pay for their unsupported proposals.

In the Intervenors' response brief, they suggest detailed marketing materials should be developed to describe the Choice Program, that Columbia and the Commission prominently display the Choice Program on its website, and that the Commission develop a shopping website for customers. Intervenors go on to state that these shopping websites are useful in other states. The Intervenors also suggest the Commission order Columbia to put marketers' logos on customer bills. Finally, the Intervenors also want Columbia's customer service representatives to have scripts that would direct a customer,

who calls for any non-emergency reason, to be given information regarding the Choice program and directions to Columbia's website where information on the Choice program can be found.

The Intervenors' education enhancements should be rejected. As an initial matter, consider the proposal about a shopping website. The Intervenors could have developed a shopping website at their own cost and effort but have failed to do so. If they believe these websites are so useful, why haven't they taken the steps, in the past twenty plus years of the Choice Program, to develop a shopping website? Intervenors want Columbia and the Commission to bear the costs of these items with no clear indication of how customers would benefit.[18] The number of customers that have demonstrated an interest in the Choice Program is small, and the number of actual participants is decreasing, so the number of customers to whom this educational material may benefit would be correspondingly small.[19] The cost associated with these types of changes are unknown and should not be borne by any of the non-participating customers.

The same issues exist for placing logos on customer bills. The Intervenors provide no cost-benefit analysis related to putting logos on customer bills. Nor do the Intervenors provide any evidence that marketers will actually use that service from Columbia. And

[18] *See,* Xoom's Responss to Commission Staff's First Request for Information, Item 1 (April, 18, 2023).

[19] *See,* Staff Hearing Exhibit 1, p. 8.

finally the Intervenors do not offer to pay for any programming or other costs related to implementing a change that promotes their own businesses.

Columbia also opposes Intervenors' proposed call center modifications. Adopting the Intervenors' undefined proposals would increase the call time for customers, which in turn would increase the hold time for other customers who are calling Columbia. This would also require script changes and increased training for Columbia's customer service representatives, which would be a cost to Columbia that is not currently recovered by Columbia. Currently, Columbia's customer service representatives attempt to address the concerns of the customers calling them as quickly as possible to maximize customer satisfaction and reduce hold times. Finally, by ordering Columbia to make this change, the Commission would be requiring Columbia to promote a program that has historically not saved customers money compared to the GCA mechanism.

For these reasons, the Intervenors' proposals related to customer education should be rejected.

D. The Proposed Enhancement Programs are not Reasonable and Will Not Benefit Customers.

The Intervenors next request that the Commission order Columbia to implement a Customer Referral Program ("CRP"). The Intervenors state that the CRP would offer participants a guaranteed savings over Columbia's price to beat and will educate customers. However, the Intervenors are only proposing to offer this guaranteed savings

for a period of three-months.[20] The Intervenors propose that Columbia run this proposed program through its call center and cite to a similar program in Pennsylvania to support its proposal. The Intervenors propose the Commission prioritize the CRP over other enhancements and suggest the program go live within one year.

The Commission should reject the proposed CRP. The Pennsylvania program is for electric utilities and the guaranteed savings must be offered for a period of twelve months rather than the three recommended by the Intervenors.[21] The Intervenors cite to no other *natural ga*s program like this in any other state with a competitive market for gas supply and can only cite to a single electric program across the country. It would be unreasonable to require Columbia and its customers to be a guinea pig for an experiment that the Intervenors have only gotten approval for in one other state, and for electricity and not natural gas.

Moreover, the Intervenors are attempting to get the Commission to implement a program that will require Columbia to train its customer service agents to discuss the program with customers who call the call center with any non-emergency issue. As discussed above, distracting call center agents with this unproven program will only extend the wait times for other customers who are calling to resolve more pressing issues.

[20] *See,* Intervenors' post-hearing brief p. 20.

[21] See, i*d*. FN 51.

Should the Commission consider the CRP, the Commission should not set a hard date for implementation of the proposed CRP. Columbia has no estimate of IT programming or any other costs to implement the proposed CRP, nor is a single year enough time to figure out, let alone implement, all the moving pieces that would involve standing up such a program that is totally foreign to Columbia and that Columbia adamantly opposes.

Next, the Intervenors urge the Commission to direct Columbia to implement "other enhancements" including "Enroll With Your Wallet", "Seamless Moves", "Day One Switching", and "Accelerated Switching." Like the CRP, ordering implementation would be unreasonable. Columbia does not know, nor is there a sufficient record to demonstrate, the requisite IT, processes, personnel, or customer changes or costs that would be necessary to implement any of these programs. The Commission should similarly reject these proposals as insufficiently supported by the Intervenors. The Commission should further outright reject these proposals as none of these programs, untested in Kentucky, merit approval.

For the reasons cited above, the Commission should deny the proposed educational and enhancement programs.

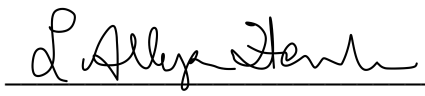
III. CONCLUSION

Columbia's Choice Program has been in effect as a voluntary pilot program for more than twenty years during which participation by customers and marketers has

increased and decreased throughout the period. No other energy provider in the Commonwealth of Kentucky has sought a similar type of competitive marketplace for any of its customers. Nor has the Commission, Attorney General, or the General Assembly, after investigating the question, suggested such a competitive marketplace should be offered by all energy providers in the Commonwealth. In 2021, Columbia requested to continue its program for three years beyond its then authorized period of March 31, 2022.

Columbia's current position is the same as it was when the original tariff filing was made in this proceeding – to continue the Choice Program, without modification, until March 31, 2025. Wherefore, Columbia requests the Commission reject the Intervenors' unsupported and unwise proposals and issue an order in this proceeding continuing the Choice Program without modification until March 31, 2025.

Respectfully submitted,



L. Allyson Honaker
HONAKER LAW OFFICE PLLC
1795 Alysheba Way, Suite 6202
Lexington, KY 40509
(859) 368-8803 - office
(859) 396-3172 - mobile
allyson@hloky.com

and

Joseph M. Clark
Assistant General Counsel
John R. Ryan
Senior Counsel
290 W. Nationwide Blvd.
Columbus, Ohio 43215
(614) 813-8685
(614) 285-2220
(959) 288-0258 (fax)
josephclark@nisource.com
johnryan@nisource.com

Counsel for Columbia Gas of Kentucky, Inc.

CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing was filed electronically with the Commission on November 3, 2023 and that there are currently no parties that the Commission has excused from electronic participation in this matter. Pursuant to prior Commission orders, no paper copies of this filing will be made.

Counsel for Columbia Gas of Kentucky, Inc.