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

RESPONSE OF XOOM ENERGY KENTUCKY, LLC INTERSTATE GAS SUPPLY, INC. D/B/A/ IGS ENERGY AND CONSTELLATION NEW ENERGY GAS DIVISION, LLC TO COLUMBIA GAS OF KENTUCKY, INC.'S MOTION FOR REHEARING

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RESPONSE

I. INTRODUCTION

XOOM Energy Kentucky, LLC ("XOOM"), Interstate Gas Supply, Inc. d/b/a IGS Energy ("IGS"), and Constellation New Energy Gas Division, LLC ("Constellation") (collectively the "Intervenors"), respectfully request that the Kentucky Public Service Commission ("Commission") deny Columbia Gas of Kentucky, Inc.'s ("Columbia's") Motion for Rehearing.[1] KRS 278.400 establishes the standard of review for motions for rehearing, limiting rehearing to "new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful."[2] Findings are unreasonable "when the evidence presented leaves no room for difference of opinion among reasonable minds."[3] Within these limited parameters, the Commission has been clear that, "[r]ehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original."[4]

Here, Columbia presents no new evidence, alleges no material errors, and can point to no unreasonable or unlawful findings to justify a rehearing. Put differently, Columbia seeks a second bite at the apple, hoping for a different result even though the law and facts have not changed. KRS 278.400 simply does not allow that illogical result. Accordingly, the Intervenors request that the Commission deny Columbia's Motion for Rehearing.

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[1] Columbia Gas of Kentucky, Inc.'s Motion for Rehearing at 1.
[2] *In the Matter of: Eichelberger v. Duke Energy Kentucky, Inc*, Case No. 2022-00289, Order at 1 (May 28, 2024).
[3] Energy Regulatory Comm'n v. Kentucky Power Co., 605 S.W. 2d 46 (Ky. App. 1980).
[4] *In the Matter of: Eichelberger v. Duke Energy Kentucky, Inc*, Case No. 2022-00289, Order at 2 (May 28, 2024).

II. BACKGROUND AND FACTS

Beginning in 2000, Columbia has offered the Choice Program to its customers as a way for customers to purchase their natural gas from a third-party supplier.[5] Intervenors are third-party suppliers participating in the Choice Program.[6] This case originated with a tariff filing from Columbia in 2021, proposing to extend the Choice Program for three years, through March 31, 2025.[7] The Commission established a formal proceeding to determine whether Columbia's proposed tariff was just and reasonable.[8] Intervenors entered the proceeding and negotiated a Joint Stipulation with Columbia extending the term of the program and creating a working group, among other provisions.[9]

The Commission approved the Joint Stipulation with minor modifications.[10] In response, Columbia withdrew from the Stipulation and requested to terminate the Choice Program.[11] The Commission held a second hearing on July 26, 2023, and thereafter received post-hearing briefs from Columbia and the Intervenors.[12] On June 28, 2024, the Commission entered an order (the "Order") extending the Choice Program until March 31, 2028, requiring Columbia to track the expenses and revenue of the Choice Program, and creating a working group overseen by Commission Staff.[13] On July 18, 2024, Columbia Gas of Kentucky, Inc. ("Columbia") filed a motion for rehearing.

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[5] Post-Hearing Brief of XOOM Energy Kentucky, LLC, Interstate Gas Supply, Inc. d/b/a IGS Energy and Constellation New Energy Gas Division, LLC at 2.
[6] *Id.* at 2-3.
[7] October 18, 2021, Order at 1.
[8] Oct. 18, 2021, Order at 2
[9] Motion for Rehearing at 6.
[10] March 28, 2023, Order.
[11] Columbia Gas of Kentucky, Inc.'s Notice of Withdrawal from Stipulation; Columbia Gas of Kentucky, Inc.'s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program.
[12] July 10, 2023, Order; Columbia Gas of Kentucky, Inc.'s Post-Hearing Brief; Post-Hearing Brief of XOOM Energy Kentucky, LLC, Interstate Gas Supply, Inc. d/b/a IGS Energy and Constellation New Energy Gas Division, LLC.
[13] June 28, 2024, Order at 13-14.

III. ARGUMENT

a. Commission's Jurisdiction

Columbia argues incorrectly that the Commission lacks jurisdiction to compel Columbia to continue the Choice Program. Columbia specifically points to the Commission's extension of the term of the program until March 31, 2028, when Columbia's original tariff filing only proposed continuation of the program through March 31, 2025.[14] Columbia argues that implementation of the Choice Program is voluntary and is "not mandated by any act of the General Assembly, nor Commission regulation" and that by extending the term of the program the Commission is acting in excess of its statutory authority.[15] Columbia cites to Case No. 2010-00416 where the Commission found that it lacked statutory authority to compel utilities to enact Choice Programs.[16] Not only has Columbia already raised, and lost, these arguments, but they continue to be incorrect on the merits.

Columbia has already made and exhausted this argument.[17] In its Motion for Rehearing, Columbia cites no new authorities other than those cited previously in its Post-Hearing Brief, and makes no novel arguments about the Commission's alleged lack of jurisdiction.[18] Indeed, the Commission addresses these arguments quite succinctly in the Order stating that, " Columbia Kentucky created this program, not the Commission, and as such, Columbia Kentucky should actually operate the program in the way it was intended."[19] The Commission also points to its own mandate to regulate utilities as found in KRS 278.030 and KRS 278.040.[20] The

[14] Motion for Rehearing at 5, 8.
[15] Motion for Rehearing at 6-7.
[16] Motion for Rehearing at 7.
[17] Columbia's Post-Hearing Brief at 2-3.
[18] Columbia's Post -Hearing Brief at 2-5.
[19] June 28, 2024, Order at 9.
[20] June 28, 2024, Order at 9.

Commission's regulation of a program that Columbia created to provide utility services to consumers is well within the Commission's regulatory authority.

Columbia also argues that the Commission lacks the requisite authority to institute a working group and to require that Columbia track expenses and revenues related to the Choice Program.[21] These actions fall squarely within the Commission's regulatory authority. The Commission cannot ensure that the rates that Columbia charges for the Choice Program are "fair, just, and reasonable" unless Columbia tracks the revenues and expenses related to the program and provides that information to the Commission, which the Commission has the authority to require.[22] Likewise, it is well within the Commission's authority to order the creation of working groups to address the concerns of interested parties, and to lay out the process by which they will be implemented. These additional requirements set forth in the Order are well within the Commission's power to regulate utilities using "all reasonable rules, regulations and orders of the commission," as stated in KRS 278-040.[23]

b. Incorrect Information and Inconsistencies

Columbia asserts that there are "errors or inconsistencies" in the Commission's Order.[24] However, KRS 278.400 requires that only "material errors or omissions" justify a motion for rehearing. Nowhere in the Motion for Rehearing does Columbia assert that the Commission's alleged errors were material. Columbia's discussion of inconsistencies is irrelevant under KRS 278.400.

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[21] Columbia's Post-Hearing Briet at 15, 17.
[22] KRS 278.030(1). Moreover, from a best practices perspective, a business – especially an investor-owned utility – should track the costs and revenues associated with a particular program.
[23] *Kentucky Public Serv. Com'n v. Com. Ex rel. Conway*, 324 S.W.3d 373, 377(Ky. 2010) (holding that the PSC has broad role in "regulating, and investigating utilities to ensure that utilities comply with state law").
[24] Motion for Rehearing at 8.

First, Columbia attacks the example that the Commission used in stating that it does not compel gas utilities to adopt programs. The Commission used the example that Atmos Energy Corporation ("Atmos") does not use a PBR mechanism and that the Commission does not compel them to.[25] Columbia alleges that Atmos does use a PBR mechanism.[26] Even if the Commission was mistaken in the example that it used, it does not alter the legal basis underlying the example, that the Commission does not compel utilities to institute specific programs.[27] This is easily illustrated by the fact that Columbia is the only gas utility that has chosen to institute a Choice Program and the Commission has not compelled any other utility to institute a similar program.[28] Since the underlying reasoning behind the Commission's example is sound, this is not a material error that would justify granting rehearing.

Second, Columbia points to alleged "inconsistencies" in the Order. For example, Columbia takes issue with the Commission citing Columbia's own survey in finding that Columbia "ha[d] not met the burden of proof regarding termination of the Choice Program."[29] Columbia cites a prior Commission finding where the Commission stated that it, "considers survey results speculative in predicting customer participation."[30] As a threshold issue, the irony is not lost that Columbia initially relied on the survey to extend the Choice Program and then reversed course, relying on the survey to end the program.[31] Columbia's about-face is the very

[25] June 28, 2024, Order at 9-10.
[26] Motion for Rehearing at 9.
[27] June 28, 2024, Order at 9-10 ("there are other programs in existence that not every gas utility has adopted . . . However, the Commission has the authority to investigate the mechanism and determine whether or not it results in fair, just and reasonable rates").
[28] June 28, 2024, Order at 9.
[29] June 28, 2024, Order at 10-11.
[30] Case No. 2022-00049, October 30, 2023, Order at 7 (Ky. PSC October 30, 2023).
[31] Prepared Direct Testimony of Judy M. Cooper at 5 ("[t]he survey results indicated that customers participating in the program have the desire for a choice in supplier of the natural gas commodity consumed); Columbia's Post-Hearing Brief at 4 ("[a]fter review of the settlement modifications, the responses from the survey, the potential costs Columbia might have to cover, and reviewing the lack of

definition of "inconsistent" and violates the well-settled doctrine of quasi estoppel, which prohibits a party from approbating and reprobating.[32] Regardless, even assuming Columbia's point is valid – which it is not – the survey is but one small fact in a larger case. Understandably, the Commission did not think that one small survey was significant enough to accurately use as a starting point for creating rates that are fair, just, and reasonable.[33]

Rather, the Commission's citation of Columbia's survey is only a part of the Commission's consideration in finding that Columbia had not met the burden of proof regarding termination.[34] The Commission states that Columbia has not "provided sufficient evidence for the Commission to decide about whether the Choice Program is or could be successful, and whether termination would be fair, just and reasonable to consumers."[35] The Commission cites the survey as evidence that there is customer demand for the program, alongside Columbia's own statements that customers have a desire to choose their natural gas supplier.[36] Further, the Commission cites support of the program from market participants.[37]

The standard for granting a rehearing is finding material errors or omissions in the Order, and Columbia has failed to meet this standard. Even if it is inconsistent for the Commission to cite the survey as evidence of consumer interest in the program, this is not a material error as required by KRS 278.400. Nor do the alleged errors of using the Atmos example or concluding

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savings for the participating customers as a whole, Columbia reached the conclusion that it was time to end the Choice Program").

[32] In *Pettit's Adm'r v. Goetz*, 261 Ky. 107, 87 S.W2d 99, 102 (1935), the Court, quoting *Bigelow on Estoppel*, held that: "A party cannot either in the course of litigation or in dealings *in pais* occupy inconsistent positions. Upon that rule election is founded; a man shall not be allowed, in the language of the Scotch law, to approbate and reprobate. And where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts." (Internal quotes omitted).

[33] Case No. 2022-00049, October 30, 2023, Order at 10 (Ky. PSC October 30, 2023).

[34] June 28, 2024, Order at 10-11.

[35] June 28, 2024, Order at 10.

[36] June 28, 2024, Order at 11; Prepared Direct Testimony of Judy M. Cooper at 5.

[37] June 28, 2024, Order at 11.

that Columbia's administration of the Choice Program was faulty demonstrate a material error in the reasoning the Commission applied. None of the examples provided by Columbia amount to a material error or omission and therefore do not justify a rehearing on this matter.

c. Columbia's argument that the Commission's Order is "punitive" lacks merit.

Finally, Columbia asserts that the Commission's Order is punitive in response to Columbia's withdrawal from the Settlement Agreement.[38] Columbia states that "[b]y requiring Columbia to invest more in a failing program, the Commission's actions are unreasonable, unlawful, and could be considered punitive"[39] The only support offered for this argument is Columbia's citation of *Conway* and its discussion of *Bell.*[40] In *Bell*, the Supreme Court of Kentucky held that the Utility Regulatory Commission had committed an illegal action by explicitly penalizing a utility for its poor service by reducing the reasonable rate of return the utility could achieve.[41] *Conway* in evaluating *Bell*, states that the Public Service Commission cannot use its plenary ratemaking authority for purposes other than ensuring that rates are fair, just, and reasonable.[42]

The Commission here is not seeking to punish Columbia for withdrawing from the Joint Agreement; rather, the Commission is exercising its authority to ensure just and reasonable rates, and to ensure customers may continue to choose their natural gas supplier if that is their desire. The Commission states that having Commission Staff run the working group meetings is for "consistency and administrative transparency."[43] Likewise, the Commission states that requiring

[38] Motion for Rehearing at 17.
[39] Motion for Rehearing at 19.
[40] Motion for Rehearing at 19.
[41] *South Central Bell Telephone Co. v. Utility Regulatory Comm'n*, 637 S.W.2d 649, 651 (Ky. 1982).
[42] Motion for Rehearing at 19; *Kentucky Pub. Serv. Comm'n v. Com. ex rel. Conway*, 324 S.W.3d 373, 382 n. 16 (Ky. 2010) (citing *South Central Bell Telephone Co. v. Utility Regulatory Comm'n*, 637 S.W.2d 649, 651 (Ky. 1982)).
[43] June 28, 2024, Order at 12.

Columbia to report the expenses and revenues of the Choice Program is essential for the Commission to "evaluate the CHOICE program appropriately.[44] At the conclusion of the Order, the Commission states that it will "evaluate the program fully once all the necessary information has been provided."[45] This is a clear exercise of the Commission's investigative authority under KRS 278.030 and KRS 278.040, which grant the Commission authority to "regulate and investigate utilities and ensure that rates charged are fair, just and reasonable."[46] It is in no way a punitive measure against Columbia.

CONCLUSION

Granting a Motion for Rehearing is only justified when necessary to consider "new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful."[47] Rehearings are not an "opportunity to relitigate a matter fully addressed in the original."[48] Put another way, a motion for rehearing is not an opportunity for a "re-do" of arguments previously advanced, or an opportunity to advance new arguments that could have been made initially. Columbia, in its Motion for Rehearing, raises issues that the Commission already fully considered and rejected, and Columbia has failed to allege any material errors or omissions, or accurately identify any unreasonable or unlawful conduct.

For the foregoing reasons, the Intervenors respectfully request that the Commission deny Columbia's motion for rehearing.

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[44] June 28, 2024, Order at 13.
[45] June 28, 2024, Order at 13.
[46] *Kentucky Public Serv. Com'n v. Com. Ex rel. Conway*, 324 S.W.3d 373, 383 (Ky. 2010).
[47] *In the Matter of: Eichelberger v. Duke Energy Kentucky, Inc*, Case No. 2022-00289, Order at 1 (May 28, 2024).
[48] *In the Matter of: Eichelberger v. Duke Energy Kentucky, Inc*, Case No. 2022-00289, Order at 2 (May 28, 2024).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing electronic filing is a true and accurate copy of the foregoing; that the electric filing has been transmitted to the Commission on July 25, 2024; that pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, an original and one copy of the filing are being mailed to the Commission; that there are currently no parties excused from participation by electronic service; and that, on July 25, 2024, electronic mail notification of the electronic filing is provided to all parties of record.

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