

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:)
)
 THE ELECTRONIC TARIFF FILING OF)
 COLUMBIA GAS OF KENTUCKY, INC. TO) Case No. 2021-00386
 EXTEND ITS SMALL VOLUME GAS)
 TRANSPORTATION SERVICE)
)

**COLUMBIA GAS OF KENTUCKY, INC.’S
 REPLY TO JOINT RESPONSE OF XOOM ENERGY KENTUCKY, LLC
 INTERSTATE GAS SUPPLY, INC., AND CONSTELLATION NEW ENERGY, GAS
 DIVISION, LLC.**

Comes now Columbia Gas of Kentucky, Inc. (“Columbia” or “Company”), by counsel, and respectfully offers, pursuant to 807 KAR 5:001, Section 5(3), its reply to the Joint Response to Columbia Gas of Kentucky, Inc’s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program (“Joint Response”) filed by XOOM Energy Kentucky, LLC (“XOOM”), Interstate Gas Supply, Inc. (“IGS”) and Constellation New Energy, Gas Division, LLC (“CNEG”) (collectively “Joint Intervenors”).

I. COLUMBIA’S PROCEDURAL MOTION EXERCISING ITS RIGHTS UNDER THE STIPULATION IN THIS CASE DOES NOT VIOLATE JOINT INTERVENORS’ DECLARED DUE PROCESS RIGHTS

1. In the Joint Response, two arguments are raised against Columbia’s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program

("Columbia's Motion"). In their first argument, Joint Intervenors imply that Columbia violated an "implied covenant of good faith and fair dealing"¹ by exercising Columbia's explicit right to withdraw and void the Joint Stipulation and Settlement Agreement ("Stipulation") filed in this case. Joint Intervenors' source of this "implied covenant" is an unrelated Supreme Court of Kentucky decision reviewing banking law.² Joint Intervenors' cited language fails to encompass the entire paragraph in that case, which goes on to state that "[a]n implied covenant of good faith and fair dealing does not prevent a party from exercising its contractual rights."³ Columbia's Motion did exactly this.

2. Section 7 of the Stipulation 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docketed in this proceeding, within ten (10) days of such Commission Order, that this Stipulation shall be void and withdrawn by the Parties hereto from further consideration by the Commission and neither Party shall be bound by any of the provisions herein...⁴

The Stipulation goes on to state:

Should the Stipulation be voided or vacated for any reason after the Commission has approved the Stipulation and thereafter any implementation of the terms of

¹ *In the Matter of the Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Case No. 2021-00386, XOOM Energy Kentucky, LLC, Interstate Gas Supply, Inc., and Constellation New Energy, Gas Division, LLC's Joint Response to Columbia Gas of Kentucky, Inc.'s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program ("Joint Response") (April 14, 2023) at 4.

² *Farmers Bank & Trust Co. v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4 (Ky. 2005)

³ *Id.* at 11 (quoting *Hunt Enterprises, Inc. v. John Deere Indus. Equipment, Co.*, 162 F.3d 1161 (6th Cir. 1998)).

⁴ *Supra* Note 1, Joint Stipulation and Settlement Agreement ("Stipulation") (September 22, 2022). at 5.

the Stipulation has been made, then the Parties shall be returned to the status quo existing at the time immediately prior to the execution of this Stipulation.⁵

3. On April 7, 2023, Columbia exercised its right, pursuant to the Joint Stipulation, to elect to withdraw and thereby void the Joint Stipulation. Columbia further exercised its right under Section 7 of the Stipulation by requesting that the Commission extend its Small Volume Gas Transportation Service tariff and Small Volume Aggregation Service tariff (“CHOICE Program”),⁶ thus reinstating the status quo existing at the time immediately prior to the execution of the Stipulation.

4. Joint Intervenors further allege that Columbia “violated the due process rights of XOOM, IGS, and CNEG” through Columbia’s Motion requesting that the Commission take notice of its intent to terminate the CHOICE Program. Ignoring the fact that Columbia is merely the applicant in this proceeding and is therefore incapable of the Joint Intervenors’ allegations, nothing in the procedure set forth in Columbia’s Motion infringes upon Joint Intervenors’ alleged procedural due process rights. Joint Intervenors were afforded the ability to file the Joint Response to Columbia’s Motion, and will be provided notice of, afforded the right to intervene in, and participate in Columbia’s forthcoming application to terminate the CHOICE Program.⁷ Columbia’s CHOICE

⁵ *Id.*

⁶ *Supra* Note 1, Columbia Gas of Kentucky, Inc.’s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program (“Columbia’s Motion”) (April 7, 2023) at 6.

⁷ Columbia’s Motion at 5.

Program is purely voluntary in nature. There is no statutory or regulatory requirement that it continue. Any procedural due process rights the Joint Intervenors may be entitled to are adequately protected by the processes proposed in Columbia's Motion.

II. JOINT INTERVENORS MISCHARACTERIZE COLUMBIA'S MOTION

5. Through the Joint Response, Joint Intervenors allege that Columbia withdrew from the Stipulation as a result of the Commission's requirement to track costs and develop an accounting of costs and collections from suppliers.⁸ However, what the Joint Intervenors failed to acknowledge in the Joint Response is that the Commission imposed other additional requirements on Columbia *and* ordered multiple modifications to the Stipulation in its March 28, 2023 Order.⁹ Columbia's Motion was based on the overall impact and modifications made to the Stipulation. Joint Intervenors' focus on one aspect of the Commission's Order, the requirement to develop a method of accounting of all of the costs of administering the CHOICE Program without a corresponding mechanism to adjust rates and charges to account for this added expense, does not give full accord to the plain language of the Stipulation, or to Columbia's Motion. The Stipulation provides that withdrawal is permitted upon the imposition of "*any* additional conditions or requirements upon the signatory Parties."¹⁰ There is no requirement that

⁸ See Joint Response at 4, 7, 9, and 10.

⁹ See *Supra* Note 1, Order (March 28, 2023) at 12-15.

¹⁰ Stipulation at 5 (*emphasis added*).

the additional conditions imposed be “significant” as implied by the Joint Intervenors.¹¹ As noted above, the Stipulation contemplated that any modification at all to the Stipulation would be cause for any signatory Party to withdraw from the Stipulation.

6. Joint Intervenors’ final argument attempts to recharacterize Columbia’s Motion as a motion to vacate a judgment pursuant to Ky. R. Civ. P. 59.05.¹² Columbia’s Motion cannot be construed in this manner. As previously stated, Columbia merely exercised its rights under the Stipulation agreed to by Columbia and the Joint Intervenors. The termination of the Stipulation and Columbia’s request to continue the CHOICE Program will return the parties to the status quo as it existed prior to the evidentiary hearing in this case. At that time, Columbia retained the right to withdraw its original electronic tariff filing.

WHEREFORE, on the basis of the foregoing, Columbia respectfully prays the Commission grant Columbia’s Motion filed on April 7, 2023.

This 19th day of April 2023.

¹¹ Joint Response at 7.

¹² Joint Response at 8.

Respectfully submitted,

/s/ John R. Ryan _____

John R. Ryan
Senior Counsel

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

L. Allyson Honaker

HONAKER LAW OFFICE, PLLC
1795 Alysheba Way, Suite 6202
Lexington, Kentucky 40509
(859) 368-8803
allyson@hloky.com

Counsel for Columbia Gas of Kentucky, Inc.

CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing is a true and accurate copy of the document; that the electronic filing was transmitted to the Commission on April 19, 2023; that on this same day the parties listed below have been electronically served a copy of this document; and that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding.

/s/ John R. Ryan

Counsel for Columbia Gas of Kentucky, Inc.

XOOM Energy Kentucky, LLC

gdupton@fbtlaw.com

BGreene@GreeneHurlocker.com

VHowell@GreeneHurlocker.com

**Interstate Gas Supply, Inc. and
Constellation New Energy, Gas
Division, LLC**

mmalone@hdmfirm.com

jdeckard@hdmfirm.com