

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF THE COMMONWEALTH OF KENTUCKY**

IN THE MATTER OF

ELECTRONIC TARIFF FILING OF
COLUMBIA GAS OF KENTUCKY, INC.
TO EXTEND ITS SMALL VOLUME GAS
TRANSPORTATION SERVICE

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CASE NO. 2021-00386

**POST-HEARING BRIEF OF
XOOM ENERGY KENTUCKY, LLC
INTERSTATE GAS SUPPLY, INC. D/B/A IGS ENERGY
AND
CONSTELLATION NEW ENERGY GAS DIVISION, LLC**

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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”) permanently extend Columbia Gas of Kentucky, Inc.’s (“Columbia’s”) CHOICE program for customers. The CHOICE program provides customers with numerous benefits by giving them the freedom to choose their supplier for their natural gas. Even Columbia has recognized that giving customers the freedom to choose is the “American way.” Rather than extend the program once again after 23 years as a pilot program – this time through March 31, 2025, a mere 17 months from now – Intervenors recommend that the Commission not only make the program permanent but also direct Columbia to implement additional customer education efforts and enhancement programs to move the CHOICE program forward. As a starting point, Intervenors recommend that the Commission direct Columbia to implement a Customer Referral Program, as discussed below, as a low-risk way to educate customers about choice and provide additional savings.

In essence, over the past 23 years, the Commission and stakeholders have laid the foundation for a robust competitive market. Making the program permanent, followed by customer education and enhancement programs as recommended, will lead to increased supplier

participation, including from existing suppliers, and additional benefits to customers by way of more choices and potentially favorable pricing and offers.

II. BACKGROUND AND FACTS

Since 2000, Columbia has offered the CHOICE program to its customers on a pilot basis.¹ In the last decade, the Commission extended the program in 2013 (for three years),² and 2017 (for five years).³ Under the CHOICE program, customers are given “the option to purchase the natural gas [they] use from a supplier other than Columbia Gas.”⁴ As of December 2021, 11 percent of Columbia’s residential customers participate in the CHOICE program, contracting with an approved marketer for their natural gas service.⁵ Columbia’s 2023 Annual Report on Customer CHOICE indicates that seven marketers serve the 12,181 residential and 1,972 commercial customers participating in the program.⁶ Marketers supply 17% of the total eligible throughput.⁷

The Intervenors are retail suppliers, also known as marketers, participating in the Columbia CHOICE program:

- XOOM is a Kentucky limited liability company and a part of NRG Energy, Inc.’s corporate family. The NRG corporate family includes other natural gas and electricity retail

¹ Case No. 1999-00165, *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*, Order at 27 (Jan. 27, 2000).

² Case No. 2013-00167.

³ Case No. 2017-00115.

⁴ *Columbia Gas of Kentucky*, Customer Choice, found at: <https://www.columbiagasky.com/bills-and-payments/billing-programs/choice> (last accessed Aug. 30, 2023).

⁵ Case No. 2021-00386, *In the Matter of the Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Columbia Kentucky’s Response to XOOM’s First Request, Item 4, Attachment A.

⁶ Staff Exhibit 1 at July 26, 2023 hearing.

⁷ *Id.*

suppliers that collectively serve over six million electricity and natural gas customers across 24 states, the District of Columbia, and eight provinces in Canada.⁸

- IGS is a privately held, family-owned Ohio Corporation and serves thousands of customers in the CHOICE program. IGS exclusively offers a fixed-rate carbon-neutral natural gas product to new Kentucky customers.⁹

- Constellation is a Kentucky limited liability company and serves thousands of customers in the CHOICE program. Constellation serves customers in many states nationwide and is the largest provider of clean energy and sustainable solutions to homes, business, and public sector customers across the United States.¹⁰

Columbia has travelled a rocky path to this point in the proceedings. Initially, Columbia submitted a tariff filing on September 30, 2021 proposing to extend the CHOICE program by three years through March 31, 2025. On October 18, 2021, the Commission entered an order establishing this formal proceeding upon finding that an investigation was necessary to determine the reasonableness and justness of Columbia's proposed tariff. On January 18, 2022, Columbia filed the Direct Testimony of Judy M. Cooper in this case in which Columbia expressed its support for continuing the CHOICE program through March 31, 2025 and referencing its June 1, 2021 customer survey which indicated, among other things, that "customers participating in the program have a desire for a choice in supplier of natural gas commodity consumed."¹¹

On March 25, 2022, XOOM submitted the Direct Testimony of Travis Kavulla, and the Intervenor submitted the direct Testimony of James L. Crist. Mr. Kavulla recommended that the Commission make the CHOICE program permanent, explaining that doing so would benefit

⁸ Direct Testimony of James L. Crist at 5.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

¹¹ Direct Testimony of Judy M. Cooper at 5.

customers by allowing them the opportunity to continue to enter into long-term contracts – i.e., “insurance” products – that XOOM and other suppliers offer. Mr. Kavulla continued that permanency would encourage suppliers such as XOOM to make the significant investments needed to participate in the program that the program’s current transitory nature discourages.¹²

Mr. Kavulla also recommended specific program enhancements and educational efforts to bolster the transparency and visibility of the program.¹³ The enhancements include, but are not limited to: (1) a Customer Referral Program where customers can be referred to a participating suppliers for a discounted price; (2) implementing “Enroll With Your Wallet” so that customers do not have to have their utility account number with them to switch to a supplier and can, instead, rely on other information such as their address, phone number, or last four digits of their social security number; (3) implementing “Seamless Moves,” where customers can move residences within Columbia’s service territory without having to break their contract with their supplier; (4) implementing “Day One Switching” where customers can contract directly with a supplier when establishing service as opposed to having to take one month of Columbia supply service and then switch; and (5) implementing Accelerated Switching to reduce the timing for a switch to occur and allow customers to more quickly take advantage of offers they want;

Mr. Kavulla also proposed specific educational efforts such as a dynamic shopping website and the inclusion of the supplier’s logo on the Columbia consolidated bill. Finally, Mr. Kavulla proposed specific consumer protections such as additional notices to customers and requiring suppliers to post a \$250,000 security bond to perform door-to-door or telephone marketing.

¹² Revised Direct Testimony of Travis Kavulla at 21.

¹³ IGS and Constellation adopt and support the program enhancements, educational efforts, and consumer protections proposed by XOOM and further explained herein.

Intervenor witness Mr. Crist explained that the program, if not made permanent, should be extended through March 31, 2027.¹⁴ In rebuttal, Columbia witness Ms. Cooper stated that Columbia could agree to the March 31, 2027 extension.

Both Mr. Kavulla and Mr. Crist explained the benefits of a fixed-price contract with a supplier versus the utility's quarterly rates. A long-term contract may act as an insurance policy against more volatile utility rates. Mr. Crist pointed out that 56.3% of customers surveyed by Columbia responded that "getting a fixed rate that is the same each month" is the "greatest benefit [they] receive from participating in the Customer Choice Program."¹⁵ Further, Mr. Kavulla explained that XOOM has offered long-term, fixed-rate contracts that, over time, have been cheaper than the utility's rates.¹⁶ He elaborated on XOOM's products at the July 26, 2023 hearing, presenting XOOM Exhibits 2 and 3 which shows the savings available at that time versus Columbia's "price to beat." A XOOM residential customer would have saved 13% on the 12-month fixed price "insurance" contract, and a small commercial customer would have saved 12%. XOOM Exhibit 2 also shows the incentives that XOOM provides such as airline miles and charitable contributions.

The parties then entered into a Joint Stipulation in which Columbia agreed, among other things, to extend the program through March 31, 2030. In support of the Stipulation, Columbia testified that a seven-year extension through March 2030 extension is fair, just, and reasonable:

The Stipulation's 7-year extension of this program allows Columbia's participating customers to enter into longer term contracts than would otherwise not be possible under the previous review cadence. It allows the opportunity for a greater variety of product offerings to customers and innovation in offerings, such as "green gas" or renewable natural gas

¹⁴ Direct Testimony of James L. Crist at 23.

¹⁵ *Id.* at 13 (citation omitted).

¹⁶ Revised Direct Testimony of Travis Kavulla at 7-11; *see also* XOOM Response to Staff Post-Hearing Data Request, Question 1 (Oct. 21, 2022); *see also* XOOM Exhibit 3 at the July 26, 2023 hearing (explained at 17:00 on the video transcript).

products. Permitting this option for customers is a fair, just and reasonable compromise between Columbia and the intervenors positions.¹⁷

Also as part of the Stipulation – which was revised after the initial hearing to address concerns expressed by the Commission – the parties agreed to establish a working group to “discuss measures to increase customer participation, enhance the customer experience, address consumer protection issues, and improve operational efficiency of the program.”¹⁸ In other words, Columbia agreed as part of the Stipulation to a forum in which the parties, and others, would discuss the very issues such as enhancement programs that Mr. Kavulla proposed.

On March 28, 2023, after a hearing, the Commission entered an Order approving the Stipulation with slight modifications to the proposed working group process. The Commission also required Columbia, separate from the Stipulation, to track its costs related to the CHOICE program. In response, Columbia surprisingly withdrew from the Stipulation. Columbia also requested permission to withdraw its September 30, 2021 tariff filing and to terminate the CHOICE program in 2024.

The Commission followed with an Order holding that Columbia “has acted in a manner that has wasted time and resources” and had “completely changed its position after the Commission devoted time and resources to considering the Settlement.”¹⁹ The Commission reopened the proceeding for the purpose of holding a formal hearing “where the Commission will hear testimony concerning extending the CHOICE program for a defined term as proposed by Columbia Kentucky, and extending the CHOICE program permanently, as proposed by the Intervenors.”²⁰

¹⁷ Supplemental Testimony of Judy M. Cooper at 5.

¹⁸ Addendum to Joint Stipulation and Settlement Agreement at 1 (Nov. 7, 2022).

¹⁹ Case No. 2021-00386, Order at 5 (April 27, 2023).

²⁰ *Id.* at 7.

Now, in its post-hearing brief filed September 29, 2023, Columbia advocates continuing the program through March 31, 2025, but with none of the modifications proposed by XOOM. It appears likely that Columbia's next filing – which Columbia says will be filed in March 2024 – will be to terminate the program effective March 31, 2025.

This brief responds to two of Columbia's arguments. First, the Commission can, and should, extend the CHOICE program permanently. Second, the enhancement programs and educational efforts proposed by XOOM are reasonable and should be adopted.

III. ARGUMENT

A. The Commission can, and should, extend the CHOICE program permanently.

As explained below, requiring Columbia to make its CHOICE program permanent would be a just and reasonable decision, consistent with Kentucky law. First, Columbia's arguments at this point in the proceeding that the CHOICE program is now somehow unreasonable must be rejected as violating well-settled approbate/reprobate principles. Second, the program is reasonable, as customers want the ability to choose and, furthermore, making the program permanent will reduce suppliers' regulatory and economic risk of participation, opening the door for additional suppliers to invest in Kentucky. Third, case law from the Supreme Court of Kentucky underscores that the Commission has the authority to make the program permanent. These positions are explained below.

1. Kentucky law prohibits Columbia from shifting its arguments mid-case to suddenly denigrate the CHOICE program.

Columbia makes references in its initial brief that could be construed as the current CHOICE program being unreasonable. However, the Commission should reject any argument advanced by Columbia that is inconsistent with Columbia's initial argument that the continuation

of the program is fair, just, and reasonable. Kentucky has long ascribed to approbate-reprobate principles, also referred to as the doctrine of quasi-estoppel, that prohibit a litigant from taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory.²¹ Columbia's initial position in this was that the CHOICE program is reasonable and that the survey results demonstrate that the program should be continued. Columbia later supported a five-year extension in rebuttal testimony, and then supported a seven-year extension in the Stipulation. Suddenly, in its April 27, 2023 filing – about 1.5 years after its initial tariff filing – Columbia shifted its position. Columbia's sudden “this program must end” argument is a 180-degree departure from its litigation and settlement positions throughout this case. Kentucky law prohibits such a dramatic reversal.

2. It would be unjust and unreasonable for the Commission to approve Columbia's tariff filing that authorizes Columbia to end its CHOICE program in 2025.

Columbia's latest position appears to be that the CHOICE program is just and reasonable until March 31, 2025, but would be unjust and unreasonable thereafter. The evidence – much of which was offered by Columbia – undercuts that argument.

First, Columbia, before it changed course, agreed to extend the program to March 2027 and then agreed to extend it even further to March 2030. It makes no sense for Columbia, without pointing to any change in circumstances, to now argue that a longer extension is unreasonable and

²¹ See, e.g., *Pettit's Adm'r v. Goetz*, 87 S.W.2d 99, 102 (Ky. 1935) (quoting *Bigelow on Estoppel* at 732) (“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.”).

that an extension through 2025, with a filing to terminate the program in March 2024, is the only reasonable outcome.

Second, the evidence demonstrates that Columbia’s customers want the ability to choose. Columbia witness Ms. Cooper referred to it as “the American way.”²² Specifically, the following exchange occurred at the September 29, 2022, hearing:

Staff Question: What is Columbia’s current view as to why customers want to have the option of buying their own gas?

Ms. Cooper’s Response: Not to be . . . um . . . flippant, but I think it’s the American way. I mean, people want to have a choice . . . and what I choose and what you might choose, you know, could be two different things . . . and I think we just like to have a choice. Whether we use it or not, and whether I think your choice is good or you think my choice is good or I think your choice is poor, and you might think my choice is poor . . . it’s just the value of having a choice . . . whether you use it or not . . . and, nothing, it’s not forced upon you.²³

Additionally, Columbia’s customer survey, as well as surveys conducted in other states such as West Virginia, Ohio, and Connecticut, demonstrate generic support for choice. Specifically with respect to energy, the surveys demonstrate that customers utilize choice to purchase fixed-price products, to achieve budget certainty, to save money, and to purchase renewable products.²⁴

In response to Columbia’s survey:

- 58.7% of all residential respondents indicated that the ability to choose their gas suppliers, whether they save money or not, is “very” or “somewhat” important;
- 56.3% of the current CHOICE participants indicated that a fixed rate is the greatest benefit they receive from the CHOICE program;
- 40.5% of the current CHOICE participants said they continue to participate in the CHOICE program because they like having a long-term fixed price contract even though they did not save money.

²² 11:49:30 a.m. (Sept. 29, 2022).

²³ 9:27:16 a.m.(Sept. 29, 2022).

²⁴ 11:50 a.m. (Sept. 29, 2022).

- Overall, 57.8% of the current CHOICE participants were “very” or “somewhat” satisfied with their participation in the program.

Thus, Columbia’s own witness and its own survey support the conclusion that customers value the ability to choose and it is, indeed, the American way.

Third, while customers want choice and certain suppliers may offer products today that customers desire, the current market design acts as a barrier to entry, discouraging suppliers from making the capital investment needed to compete in earnest in Columbia’s service territory. A truly competitive market will encourage all suppliers to invest in the program and to offer diverse and value-added products in addition to basic price competition.²⁵

Suppliers in the CHOICE program cannot be expected to create a robust retail presence when the market is “under review” every three or five years, and when the threat of terminating the program always permeates. The consistent threat of program termination, with few or no meaningful enhancements to the program since its inception, deters market growth and robust competition. In this regard, at the September 29, 2022, hearing, Mr. Kavulla explained that XOOM identifies Kentucky as a growth market. That said, XOOM and its parent company, NRG Energy, one of the largest retail energy companies in the country, are reluctant to focus on pilot programs like Kentucky “where only transitory opportunities exist” and prefer consistency in the markets in which they participate.²⁶

Constant regulatory reviews and “looming expiration” of the program increases the regulatory and economic risks that supplier face if they participate in the program, thereby discouraging participation. As an example, Mr. Kavulla explained wholesale hedging, the standard practice where a supplier procures wholesale natural gas equal to the load it is obligated to serve

²⁵ 11:49:30 a.m. (Sept. 29, 2022).

²⁶ Revised Direct Testimony of Travis Kavulla at 21; 17:32:30 (July 26, 2023).

under its retail contract. The supplier will typically enter into a hedge at the same time it enters into the retail contract. The threat that a change in law could terminate the retail contract, resulting in stranded wholesale hedging costs to the supplier, is an additional economic risk to suppliers.

These risks discourage suppliers from offering one, two, or five year contracts for fear of incurring stranded hedging costs.²⁷ Mr. Kavulla concluded that “it’s logical that you may see fewer marketer offers and possibly less attractive offers because of the risk or expectations that the program might be terminated . . . and that is because marketers are out there offering one year long, two year long, or five year long products for gas supply at a fixed cast.”²⁸ The additional hedging risk is “probably one of the primary reasons for any decline as well as fewer marketing offers that you may see.”²⁹

Mr. Kavulla elaborated in response to a question from the Chairman, stating that the program’s uncertainty could lead suppliers to include additional risk premiums in their offers: “it would be imprudent for a marketer to offer a product that had the regulatory risk of being a stranded asset, specifically related to a hedge, without reflecting the price they were charging to customers.”³⁰

Columbia’s current proposal in this case is to extend the CHOICE program through March 2025 – not very far away – while potentially filing in 2024 to terminate the program in 2025. That proposal exacerbates the market design problems. Constant hearings, and Columbia’s ever-changing positions and current proposal in this proceeding, increase suppliers’ regulatory risk.³¹ For example, XOOM currently sells 24-month fixed price products, and some suppliers sell longer

²⁷ 11:44 a.m. (Sept. 29, 2022).

²⁸ 11:45 a.m. (Sept. 29, 2022).

²⁹ 11:46 a.m. (Sept. 29, 2022).

³⁰ 11:56 a.m. (Sept. 29, 2022).

³¹ 16:54 (July 26, 2023).

fixed terms. The fact that Columbia states it may file in March 2024 to terminate the program effective March 2025 increases the uncertainty and economic risk regarding stranded costs to XOOM and other suppliers. Mr. Kavulla testified that this uncertainty:

is going to cause more marketers either to not offer such products which are the main source of value . . . or it will cause those retailers to increase the price of those longer-dated products in order to incorporate a risk premium associated with the regulatory risk that this program terminates because I can't reasonably tell my team that this program will be there for the final portion of the contract if one were signed today for a two-year term.³²

Even Columbia agreed that a shorter term for the CHOICE program reduces a supplier's ability to offer specific products such as longer-term products. As explained above, Columbia witness Ms. Cooper supported the Stipulation's seven-year extension by saying that "[t]he Stipulation's 7-year extension of this program allows Columbia's participating customers to enter into longer term contracts than would otherwise not be possible under the previous review cadence."³³ Thus, even Columbia agrees that shorter-term extensions, like the ones that have occurred since the program's inception in 2000, tie suppliers' hands and prohibit them from offering the long-term products that many customers want.

Fourth, as stated earlier, suppliers are offering products that customers want. For example, XOOM identified products that allowed for savings when compared to Columbia's rate – the "price to beat." Residential customers on a XOOM 12-month product (the "SureLock 12" product) would have saved 13%, or about \$95.53 for the average customer, for the 12 months ending June 2023. A commercial customer would have saved 12%, or about \$319.22, during the same 12-

³² 16:56-58 (July 26, 2023). Nor will a "regulatory out" clause address this risk. Such clauses are already included, by tariff, for retail contracts. However, a regulatory out clause in a retail contract does not address a supplier's liabilities or obligations under a wholesale contract. 16:59. At that point, the supplier may be able to sell the gas to someone else at a gain or a loss, but it nonetheless a significant regulatory and economic risk for the supplier at the onset of the retail contract. 16:57 (July 26, 2023).

³³ Supplemental Testimony of Judy M. Cooper at 5.

month period.³⁴ In July 2023, a customer could have signed a 12-month contract with XOOM at a price 7.8% below Columbia’s price to beat, or a 24-month product at 1.2% below the price to beat.³⁵ Those products, and products offered by other suppliers,³⁶ offer “insurance” against Columbia’s rates that change every three months, and customers value that certainty. The customers to whom XOOM referred at the hearing received both the value of the fixed price – i.e. the insurance against a volatile gas rate – and saved money, but XOOM does not warrant the latter. In this regard, there was general agreement that “value is subjective,”³⁷ and customers value price certainty. XOOM also offers other products that go beyond price competition and include value-added components such as airline miles and charitable donations.³⁸

Fifth, not only does the current market design and Columbia’s prior and current positions in this case increase suppliers’ risk, resulting in a potential decrease in longer-term product offers at prices higher, but terminating existing contracts raises constitutional takings issues that can be avoided by making the program permanent. While 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. The experience of this proceeding – leading to a constant churn of practically pancaked extension proceedings – highlights the need for program certainty that permanency will provide.

Consistent with Columbia’s analysis and data in this case, the Commission should find that Columbia’s CHOICE program is just and reasonable, and that a longer extension (i.e., permanent),

³⁴ XOOM Exhibit. 3 (July 26, 2023).

³⁵ XOOM Exhibit 2 (July 26, 2023)

³⁶ See Direct Testimony of James L. Crist at 20 (explaining that Volunteer Energy Services, Inc. and Kentucky United Energy offer guaranteed savings compared to Columbia’s rate). Also, IGS offers a carbon-neutral product with fixed price terms of 12-months, 24-months, and even 60 months. *Id.* at 11.

³⁷ 17:25:30 (July 26, 2023).

³⁸ XOOM Exhibit 2 (July 26, 2023).

provides more benefits to customers because it will allow for more customer involvement and incent suppliers to invest in the CHOICE program.³⁹

3. The Commission has the authority to permanently extend Columbia's CHOICE program and should do so.

Under KRS 278.040(2), the Commission has exclusive jurisdiction over the regulation of rates and service of Kentucky's utilities. KRS 278.030 provides that a utility may collect fair, just and reasonable rates and that the service it provides must be adequate, efficient and reasonable. Additionally, the utility may employ in the conduct of its business suitable and reasonable classifications of its services, patrons, and rates, taking into account the nature of the use, quality used, quantity used, time when used, purpose for which used, and any other reasonable consideration. Pursuant to these provisions, the Commission has the plenary authority to regulate and investigate utilities and to ensure that rates charged are fair, just, and reasonable.⁴⁰ Thus, a utility may file an application to amend its tariff and, after a hearing, the Commission has the authority to find that part of the proposed tariff is just and reasonable while another part is not. The Commission may then direct the utility to amend its tariff consistent with the Commission's order to make it just and reasonable.

Columbia initiated this proceeding, and prior proceedings regarding CHOICE program extensions, by seeking approval of two tariffs – the “Small Volume Aggregation Service (SVAS) Rate Schedule” and the “Small Volume Gas Transportation Service (SVGTS) Rate Schedule.” The former applies to marketers certified by Columbia, as defined in the tariff, to deliver gas on a firm

³⁹ If, however, the Commission is not inclined to make the program permanent, the better course would be a longer extension – even longer than the seven years agreed to in the Stipulation – and the implementation of certain enhancement programs and education efforts. That way, there will be data available in years to come to provide a fuller evaluation of the CHOICE program and the individual enhancements and education efforts, and stakeholders will not have to expend resources continually litigating these issues at the Commission.

⁴⁰ *Kentucky Pub. Serv. Comm'n. v. Com. ex rel. Conway*, 324 S.W.3d 373, 383 (Ky. 2010).

basis to the Company for redelivery to the marketer's customers. The latter applies to customers that are part of the SVAS marketer's aggregation pool. Columbia proposes a new termination date of March 31, 2025 for both tariffs, which is unreasonable as explained throughout this brief.

Columbia relies exclusively on the Commission's 2010 report in Case 2010-00146 ("2010 Report") as the sole basis for its conclusion that additional statutory authority is required to make the CHOICE program permanent. The Commission's primary concern in 2010 was protecting customers from deceptive marketing practices and loss of gas service.⁴¹ Those issues can be addressed without additional statutory authority in a tariff that does not include an end date. For example, Intervenor support consumer protections such as additional notices in certain instances, the posting of security, and prohibiting daily spot pricing for natural gas.⁴² Those proposals can be included in a Columbia tariff governing the rules of the CHOICE program. The same can be said about the loss of gas service. A customer's supply contract with a supplier, assuming a default, does not today result in a service termination, nor would it under a permanent program. These types of rules and best practices are common in other states and could be adopted in Kentucky without additional statutory authority.

Furthermore, Columbia does not have the unilateral ability to withdraw a tariff, and its proposal to end a tariff on a date certain is subject to the just and reasonable standard under Kentucky statutes. Nor is there any statutory provision for or against the promulgation of this tariff specifically. Put another way, since there is no statutory authority forbidding the Commission from permanently extending the CHOICE program, and the Commission's plenary powers derived from KRS 278.030 and 278.040 are sufficient for the Commission to do so. This situation is similar to the facts in *Kentucky Pub. Serv. Comm'n. v. Com. ex rel. Conway*, 324 S.W.3d 373, 383 (Ky.

⁴¹ 2010 Report at 23.

⁴² Revised Direct Testimony of Travis Kavulla at 19-20.

2010). There, 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. 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 costs.*”⁴³ KRS 278.030 and 278.040 40(2) expressly refer to the Commission’s exclusive jurisdiction over the regulation of a utility’s *rates and service*; therefore, the *Conway* Court’s reasoning applies not only to rates but also to services. The CHOICE program is a service that Columbia provides for which it charges certain fees to suppliers. The Commission may rely on *Conway* to approve the Intervenors’ request to make the program permanent.

The *Conway* Court agreed with the Commission and utilities that statutes concerning specific ratemaking issues limit the Commission’s regulatory powers rather than expand them. In *Conway*, the Commission and utilities pointed to the utilities’ fuel adjustment clauses as examples, for which there was no statute.⁴⁴ The Commission has relied on *Conway* on numerous occasions since 2010 to adopt or reject certain tariffs. For example, in 2021, the Commission rejected a utility’s argument regarding net energy metering rates, holding that, under *Conway*, “the Commission has plenary ratemaking authority that derives from KRS 278.030 and KRS 278.040, which gives the Commission exclusive jurisdiction to regulate utility rates and service, which

⁴³ *Kentucky Pub. Serv. Comm’n. v. Com. ex rel. Conway*, 324 S.W.3d 373, 374, 380-81 (Ky. 2010) (emphasis added). The *Conway* Court recognized that the Commission’s plenary power was not unlimited, cautioning that a ratemaking decision cannot stem from an “an improper purpose inconsistent with the [Commission’s] statutory duty to ensure that rates are ‘fair, just, and reasonable’ to utilities as well as customers.” *Id.* at 381 fn. 16. That is not the case here, where the CHOICE program provides benefits to customers and is not inconsistent with the Commission’s statutory duties.

⁴⁴ *Id.* at 381-82.

includes ensuring that a utility charges fair, just and reasonable rates *and establishes reasonable rules governing the conditions under which the utility is required to render service.*”⁴⁵

Here, the law does not prohibit a utility from offering a tariffed service in which the utility’s role is to implement a platform that enables third parties to provide the service. Allowing suppliers to provide supply service utilizing utility assets such as pipes and the billing system, while the utility continues as the default provider or “provider of last resort,” benefits customers and is just and reasonable. Moreover, as Columbia acknowledged, customers want the ability to choose their supplier.

B. The Commission should direct Columbia to implement XOOM’s proposed customer education efforts and enhancement programs to increase the benefits that the CHOICE program can provide to participating customers.

Columbia’s CHOICE program needs more than merely a short-term extension under the same terms and conditions. As explained, a permanent program means certainty, providing the confidence necessary for suppliers to invest in Kentucky. At the same time, XOOM recommends that the Commission take significant steps to further educate customers that they have the right to choose their supplier and how to find the available offers. XOOM also recommends that the Commission direct Columbia to implement enhancements to its current program to mitigate negative customer experiences with shopping.

⁴⁵ *In the Matter of: Elec. Application of Kentucky Power Co. for (1) A Gen. Adjustment of Its Rates for Electric Service; (2) Approval of Tariffs and Riders; (3) Approval of Acctg. Practices to Establish Reg. Assets and Liabilities; (4) Approval of A Certificate of Pub. Convenience and Necessity; and (5) All Other Required Approvals and Relief*, Case No. 2020-00174, 2021, Order at 17 (June 23, 2021) (emphasis added).

1. XOOM’s proposed customer education efforts are reasonable and will benefit customers.

The evidence demonstrated a need for additional customer education about the CHOICE program. Columbia’s customer survey revealed that 51.5% of residential customers surveyed are not aware of the CHOICE program. At the same time, too many customers do not know where to look to find information about choice. For example, 83.6.% did not know there was a choice calculator tool on Columbia’s website that allows customers to calculate potential savings, and 82.3% did not know that they could compare Columbia’s gas cost to a supplier’s gas cost on the Commission’s website.⁴⁶ When asked if they felt there was sufficient information available to make an informed decision regarding their choice of gas suppliers, 18.8% said “no,” and another 52.2% said “Don’t know/Not sure” which could mean they do not know about the program or, alternatively, they know about the program but do not know where to find information about it.

XOOM recommends specific customer education efforts coupled with ongoing stakeholder workshops to develop detailed marketing materials that describe the CHOICE program and the available products.⁴⁷ Information about choice should be prominently displayed on Columbia’s and the Commission’s websites. Yet another step is to develop a shopping website that includes information about shopping in general and also links to available supplier offers.⁴⁸ These “shopping websites” are useful in other states and offer a one-stop venue for customers to compare offers in a straightforward fashion. Furthermore, requiring Columbia to include the supplier’s logo on the consolidated bill not only enhances the visibility of the CHOICE program but also serves

⁴⁶ Customer Survey at 7, 13.

⁴⁷ Direct Testimony of James L. Crist at 21-23.

⁴⁸ Revised Direct Testimony of Travil Kavulla at 14-15.

as a customer protection measure, adding visibility to the fact that the customer is now receiving supply service from a supplier.⁴⁹

Additionally, a successful educational effort would include identifying the more efficient channels to communicate information to customers. Thus, it is not enough for Columbia and the Commission to include information about shopping on their websites in a prominent and conspicuous manner, or for the Commission to create a “shopping website” akin to what other states have created, although they certainly should. But they should also strive to actively drive customers to the sites with effective communications and provide other information. Columbia’s call center agents should be scripted to advise customers about the CHOICE program and direct them to the Columbia website anytime a customer calls Columbia for a non-emergency.⁵⁰

These education and awareness proposals are, by all accounts, low-hanging fruit that have been implemented in other jurisdictions and can be duplicated in Kentucky.

2. XOOM’s proposed enhancement programs are reasonable and will benefit customers.

XOOM recommends a series of programs that will not only enhance the shopping experience but also eliminate negative shopping experiences and live up to customer expectations.

a. The Customer Referral Program will directly benefit customers in terms of price and awareness of the CHOICE program.

The proposed program that deserves the most attention, and which the Intervenors recommend be implemented promptly, is the Customer Referral Program or “CRP.” This program serves two purposes: first it would actively save customers money versus the Columbia price to

⁴⁹ *Id.* at 16.

⁵⁰ *Id.* at 14. Columbia’s customer service agents are not required to offer information about the CHOICE program during all inbound customer calls. *Id.* at Exhibits TK-6 and TK-7.

beat; and second, it would educate customers – even those who choose not to participate in the CRP – about their right to choose suppliers.

As proposed, the Commission would direct Columbia to establish a CRP administered through Columbia’s call center. Pennsylvania has a similar program called the Standard Offer Program that has provided significant savings and benefits to electric customers, so the Commission would not be re-inventing the wheel. Columbia’s call service representatives would be trained to inform all customers who contact Columbia for non-emergency inquiries about the program. Suppliers electing to participate in the program agree to provide service at a price that is guaranteed to be a certain percentage below the utility’s supply rate at the time of enrollment for a certain number of months. Columbia’s call center representative would refer interested customers to a participating gas supplier on a random basis. XOOM’s proposal is that the customer receive a three-month price discounted off of Columbia’s prevailing supply rate, though in some states the discount period is longer.⁵¹ The enrollment process would follow normal protocols, and a customer may cancel at any time without penalty. This type of program is a low-risk way of increasing awareness about the CHOICE program and providing immediate savings for those who enroll.⁵² The Pennsylvania Public Utilities Commission has described its Standard Offer Program as a “win-win” for the customer and supplier: “The customer wins with potential savings on electric generation over the course of a year, with little or no risk, while the supplier gains a new customer now actively participating in the competitive retail market.”⁵³

⁵¹ Intervenors are not necessarily wedded to a three-month price. The Pennsylvania program, which is for electricity, is a 12-month price.

⁵² Revised Direct Testimony of Travis Kavulla at 14-15.

⁵³ See https://www.puc.pa.gov/General/pdf/PAPS-Standard_Offer_Program.pdf (last visited Oct. 16, 2023).

Intervenors propose that the Commission prioritize the implementation of the CRP over other enhancements. While the implementation details – such as Columbia’s call service scripts, electronic data exchanges between the supplier and utility, how a supplier gains entry into the CRP, and so forth – can be left to a working group, Intervenors recommend that the program go live within one year from the date of the final order in this case or sooner if the Commission so directs.

b. Other enhancements are needed for fairness and to live up to customer expectations and desires.

XOOM’s other proposed enhancements are designed to process the customer’s shopping decisions more quickly, and to eliminate or reduce the time period for the customer to remain on Columbia supply service when they do not want to be there. Customers’ expectations have evolved over time, and we now live in “Amazon time.” Customers think of energy purchases in the same way they think of their cell phones, cable or fiber optic service, online streaming services, banking apps with online payment capability, stock trading apps, online food ordering, and virtually every product – customers value simplicity, they want what they want, and they want it at the moment they make their shopping decision.

To align the CHOICE program with today’s world, the Intervenors recommend that the Commission direct Columbia to implement “Enroll With Your Wallet,” “Seamless Moves,” “Day One Switching,” and “Accelerate Switching,” all of which are consistent with a competitive market and customers’ expectations.

Enroll With Your Wallet, discussed at the July 26, 2023 hearing, would make it easier and convenient for customers to enroll with their chosen supplier. As Mr. Kavulla explained, most customers do not carry their utility bill with them, nor do they memorize their account number. Instead of requiring an account number to enroll, XOOM proposes that Columbia accept

information from the customer that the customer already knows, such as a phone number, date of birth, last four digits of your social security number, or a combination of these or their unique identifiers. This approach has the added benefit of reducing reliance on door-to-door and telephone marketing, which are utilized because customers have access to their utility account number if they are at home. The concept of Enroll With Your Wallet allows customers to avoid the hassle of having to locate their natural gas bill solely to find their Columbia account number so they can sign up for the product that they want. Imagine if you needed to provide a unique and lengthy number (that you would never commit to memory) anytime you wanted to buy a shirt or order a pizza.⁵⁴

Seamless Moves was also discussed at the July 2023 hearing. Columbia has since clarified that XOOM's understanding of what happens when a shopping customer moves residences within the Columbia service territory is correct: the customer must break his or her supply contract and return to utility service for at least one billing cycle.⁵⁵ That is a negative customer experience that should not be allowed to happen and, indeed, was not supposed to. Columbia's intent, when the program was designed, was for customers to keep their contract with their supplier if and when they moved within Columbia's service territory.⁵⁶ That, however, has not been happening in day-to-day operations.

It is very frustrating for a customer to move residences and have to go through the time and effort to re-enroll in a contract with a supplier that is cancelled simply because "that's how the

⁵⁴ See Revised Direct Testimony of Travis Kavulla at 18-19; see also 17:04-06 (July 26, 2023).

⁵⁵ See Columbia's Response to Staff Post-Hearing Data Request No. 1-4 (July 31, 2023) ("The existing CHOICE enrollment with a marketer ends when service is disconnected because the customer account number is no longer valid."); see also 17:01-03 (July 26, 2023) and Revised Direct Testimony of Travis Kavulla at Exhibit TK-17-18.

⁵⁶ 13:23:08 (July 26, 2013).

system works.” Yet, many times, customers view the supplier as the faulty party, creating a negative shopping experience that can easily be avoided with updated utility processes.

There are also substantive product and pricing implications involved for customers that chose the price certainty of a long-term, fixed price product and, because they moved residences, must cancel their contract and re-enroll. Because energy markets fluctuate over time, if a customer is in the middle of their contract, the customer may face the unfortunate situation of a higher price in the market when they move than they would have paid if able to continue their contract through the move. As another example, a customer may move, have their contract cancelled, and the supplier may no longer offer the same product or service. That could include the same contract duration, or a renewable percentage, or a specific value-added service. Implementing Seamless Moves would fix this flaw in the system, which Columbia acknowledged was never supposed to have occurred, and benefit customers who move within Columbia’s service territory.

Day One Switching was also discussed at the July 2023 hearing. As its name suggests, it would allow customers to shop from their first day of gas service. Currently, new customers must take supply service from Columbia for at least one billing cycle. XOOM proposes that the Columbia call representative inform the customer about their ability to choose a supplier. If the customer had already decided to switch, then the representative could process the request. Alternatively, the representative could inform the customer about choice and direct them to a website or other information for the customer to review.⁵⁷ *Day One Switching* is in line with customers’ expectations today about immediate access to products they find desirable.⁵⁸

⁵⁷ Revised Direct Testimony of Travis Kavulla at 16-17.

⁵⁸ It is also noteworthy that Columbia’s distribution affiliate in Ohio has implemented Seamless Moves and Day One Shopping.

Accelerated Switching would reduce the number of days before the end of the month when a supplier must submit the switch request to Columbia. Currently, the new enrollment must be submitted by the 15th day of the month to be processed by the first day of the next month. XOOM proposes that the window be extended to the 25th day of the month, which will allow more customers to take advantage of outstanding offers.⁵⁹ Accelerated Switching reduces a customer's potential waiting time to switch from up to 46 days to up to 36 days.⁶⁰ Accelerate Switching as proposed does not completely address a customer's "Amazon" expectation to enroll into the product immediately, at the click of a computer mouse, but it shortens the current time and is a step in the right direction.

3. The costs for the educational efforts and enhancement programs should not be prohibitive and case be paid for using the CHOICE program's current fee structure.

In its initial brief, Columbia argues that it should be allowed to perform a cost analysis, and that "the marketers and/or participating customers" should pay for any educational effort or enhancement program that may result from this proceeding, and that non-participating customers should be held harmless.⁶¹

The evidence at the hearing indicated that the CHOICE program likely produces a revenue windfall for all Columbia customers that is not offsetting any costs that would be avoided were the Commission to allow the program to be terminated.⁶² Columbia realizes revenues from participating CHOICE program suppliers in three ways: (1) suppliers pay \$0.05 per Mcf for CHOICE program volumes; (2) suppliers pay \$0.20 per customer bill; and (3) Columbia collects

⁵⁹ *Id.* at 18.

⁶⁰ For example, if a supplier currently submits a switch request to the utility on April 16, the switch will not become effective until June 1. If the window is changed as XOOM proposes, an April 16 switch request would become effective on May 1.

⁶¹ Columbia Initial Brief at 9.

⁶² 16:54:30 (July 26, 2023 hearing).

the supplier's revenues, keeps 2% and remits 98% to the supplier.⁶³ Columbia witness Ms. Cooper could not identify any non-incremental costs associated with Columbia's administration of the CHOICE program because Columbia does not track its program-related costs.⁶⁴ She did, however, testify that Columbia has recovered its incremental costs incurred to implement the program since 2000.⁶⁵ She stated that the 5-cents per Mcf fee was developed as "an agreement that marketers shall have some skin in the game"⁶⁶ and does not appear to be cost-based. While certainly a cost analysis for each educational effort and market enhancement is necessary, it is the Intervenors' expectation that the above revenues would offset the incremental costs.

Finally, the revenues received from suppliers offset Columbia's revenue requirement,⁶⁷ meaning that any change in the fee structure will impact base rates. To the extent incremental costs are not offset, then Columbia should defer the incremental costs and seek to revise the above fees in its next base rate case.⁶⁸

IV. CONCLUSION

For the reasons stated above, the Intervenors respectfully requests that the Commission issue an order holding that:

1. Continuation of the CHOICE program on a permanent basis is just and reasonable;
2. Columbia's proposed tariff language ending the CHOICE program on March 31, 2025 is not just and reasonable and should be revised to reflect that the program will be permanent;

⁶³ Case No. 2021-00386, Order at 7 (March 8, 2023).

⁶⁴ 13:17; 13:25 (July 26, 2023).

⁶⁵ 13:15-13:20 (July 26, 2023).

⁶⁶ 13:19:30 (July 26, 2023).

⁶⁷ 13:19:40 (July 26, 2023).

⁶⁸ Likewise, if the CHOICE program were terminated, Columbia's ratepayers could expect to see their base rates increase because there are no costs to avoid and the revenue stream from suppliers would end. 16:54:30 (July 26, 2023).

3. XOOM's proposed customer awareness and education proposals are just and reasonable;
4. XOOM's proposed CHOICE program enhancements are just and reasonable;
5. A working group of interested stakeholders, Staff, and anyone else that desires to participate shall develop a plan to implement the awareness and educational efforts, and the market enhancements programs, explained in Mr. Kavulla 's testimony. The plan shall be submitted to the Commission within six months of the final order in this proceeding and identify the timeline for implementation of each effort/program. The initial enhancement shall be the CRP, which shall be implemented within one year of the date of the final order in this proceeding; and
6. Such other and further relief as the Commission deems proper.

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 electronic filing has been transmitted to the Commission on October 18, 2023; that pursuant to the Commission's July 22, 2021 Order in Case No. 2020-00085, an original and one copy of the filing are excused from being mailed to the Commission; that there are currently no parties excused from participation by electronic service; and that, on October 18, 2023 electronic mail notification of the electronic filing is provided to all parties of record.

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