

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

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

**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**

XOOM Energy Kentucky, LLC (“XOOM”), Interstate Gas Supply, Inc. (“IGS”) and Constellation New Energy, Gas Division, LLC (“CNEG”), by counsel, pursuant to 807 KAR 5:001 Section 5(2), hereby file this response to Columbia Gas of Kentucky, Inc.’s (“Columbia”) Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program (the “Motion”). For the reasons further outlined below, Columbia’s request to withdraw its tariff filing and ultimately terminate the CHOICE program violates the due process rights of XOOM, IGS, and CNEG. Furthermore, although Columbia is permitted to withdraw from the Stipulation, this withdrawal does not allow Columbia to attempt to relitigate this proceeding from a proposal other than the position previously advocated for in this matter. XOOM, IGS, and CNEG request that the Commission deny Columbia’s request to withdraw its tariff filing, deny Columbia’s request that the Motion serve as notice of its intention to terminate the CHOICE program, and determine if the intervenors’ recommendations on the CHOICE program, including the permanency of the program, should be implemented based on the evidence in the record. Accordingly, in support of this Response, XOOM, IGS, and CNEG state as follows:

I. PROCEDURAL HISTORY

1. In Case No. 2017-00115, the Commission extended the term of Columbia’s pilot CHOICE program through March 31, 2022, and directed Columbia to file no later than September 30, 2021 an application to continue, modify, or terminate its CHOICE program (the “2017 Order”).¹

2. On September 30, 2021, in compliance with the 2017 Order, Columbia submitted a tariff filing to continue its CHOICE program under the program’s current terms and conditions through March 31, 2025.²

3. On October 18, 2021, the Commission found that “an investigation is necessary to determine the reasonableness of the proposed tariffs to extend the CHOICE program” and established this proceeding.³

4. On December 7, 2021, the Commission entered a revised procedural schedule. In the revised schedule, the Commission afforded the parties until May 6, 2022 to request a public hearing or request that this case be decided based upon the written record.⁴

5. On March 17, 2022, the Commission entered an Order extending the CHOICE program under its current terms and conditions until a final order was entered in this proceeding.⁵

6. On May 6, 2022, Columbia filed a request for the case to be decided on the record, and in its request noted that “Columbia believes that the record sufficiently and accurately evidences that Columbia and its customers desire the continuation of the CHOICE program, as

¹ See Case No. 2017-00115, *In the Matter of Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Final Order at p. 4 – 5 (Ky. PSC Jun. 19, 2017).

² Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Order at p. 1 (Ky. PSC Oct. 18, 2021).

³ *Id.* at p. 1 – 2.

⁴ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Order at Appendix (Ky. PSC Dec. 7, 2021).

⁵ *Id.* Order at p. 4 (Ky. PSC Mar. 17, 2022).

presented in Columbia’s October 7, 2021 tariff filing.”⁶ However, XOOM, IGS, and CNEG requested a public hearing for this matter.⁷

7. On September 22, 2022, Columbia, XOOM, IGS, and CNEG (collectively, the “Parties”) filed a Joint Stipulation and Settlement Agreement (“Stipulation”) which resolved all the issues in this proceeding.⁸ A formal hearing for this matter was held on September 29, 2022. Following the hearing, on November 8, 2022, the Parties filed an Addendum to the Stipulation (“Addendum”) to clarify the intent of the Stipulation and provide additional information regarding the Gas Choice Working Group (“GCWG”).⁹

8. On March 28, 2023, the Commission entered a Final Order in this case which accepted the Stipulation and the Addendum with certain modifications which were set forth in the order, beginning on page 13 under the heading “Settlement Modifications.”¹⁰

9. On April 7, 2023, Columbia provided notice of its election to void and withdraw from the Stipulation (the “Notice”).¹¹ Additionally, Columbia filed the Motion at issue in this response.¹² In the Motion, Columbia asserts that the Commission’s modifications to the Stipulation “represent the imposition of additional conditions or requirements, as contemplated by Section 7 of the Stipulation.”¹³ Accordingly, Columbia has moved for leave to withdraw its September 30, 2021 filing in which it sought to continue the CHOICE program through March 31, 2025, and has

⁶ *Id.* Motion of Columbia Gas of Kentucky, Inc. for a Decision on the Record at p. 2 (May 6, 2022).

⁷ *Id.* XOOM Energy Kentucky, LLC’s Request for a Hearing (May 6, 2022)

⁸ *Id.* Joint Stipulation and Settlement Agreement (Sept. 22, 2022).

⁹ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Addendum to Joint Stipulation and Settlement Agreement (Nov. 8, 2022).

¹⁰ *Id.* Order at p. 15 ¶ 4 (Ky. PSC Mar. 28, 2023).

¹¹ *Id.* Columbia Gas of Kentucky, Inc.’s Notice of Withdrawal from Stipulation (Apr. 7, 2023).

¹² *Id.* Columbia Gas of Kentucky, Inc.’s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program (Apr. 7, 2023).

¹³ *Id.* at ¶ 5.

indicated its intention to terminate the CHOICE program.¹⁴ The Commission should deny Columbia’s request for leave to withdraw its filing and deny Columbia’s request for termination of the CHOICE program.

II. ARGUMENT

A. Columbia’s request to withdraw its filing violates the due process rights of XOOM, IGS, and CNEG.

10. There is an implied covenant of good faith and fair dealing in every contract, and contracting parties have a duty “to do everything necessary” to carry out the contract.¹⁵ At no point in the Notice or the Motion did Columbia explain which of the Commission’s modifications caused it to withdraw from the Stipulation. However, upon information and belief, it is XOOM, IGS, and CNEG’s understanding that Columbia has withdrawn from the Stipulation due to the Commission’s finding that Columbia “shall develop a method to track its costs to administer the CHOICE program and to provide an accounting of those costs and all collections from marketers in its annual CHOICE program reports.”¹⁶

11. First, while Section 7 of the Stipulation provides a mechanism for a party to withdraw from the Stipulation, and thereby cause the Stipulation to be voided, the relevant portion of Section 7 states that “[s]hould the Stipulation be voided or vacated for any reason after the Commission has approved the Stipulation and thereafter any implementation of the terms of 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 the Stipulation.*”¹⁷ The status quo “immediately prior to the

¹⁴ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Columbia Gas of Kentucky, Inc.’s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program at ¶ 7 (Apr. 7, 2023).

¹⁵ See *Farmers Bank and Trust Company of Georgetown, Kentucky v. Willmott Hardwoods, Inc., et. al.*, 171 S.W.3d 4, 11 (Ky. 2005) (quoting *Ranier v. Mount Sterling National Bank*, 812 S.W.2d 154, 156 (Ky. 1991)).

¹⁶ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Order at p. 12 (Ky. PSC Mar. 28, 2023).

¹⁷ *Id.* Joint Stipulation and Settlement Agreement at ¶ 7 (Sept. 22, 2022) (emphasis added).

execution of the Stipulation” was a tariff filing requesting continuation of the CHOICE program with a fully submitted record ready to be decided on the merits. Data requests had been answered, and direct and rebuttal testimony had been filed. Columbia in its May 6, 2022 filing argued that the Commission should decide the case on the written record and continue the CHOICE program.¹⁸ Intervenors sought a hearing so that “the public interest [would be] best served” and that the Commissioners could ask questions about the issues raised in the testimony of all parties.¹⁹ A hearing occurred, with Commissioners asking a series of wide-ranging questions about the parties’ positions, albeit in the context of a settlement. In any case, a return to the “status quo” is not what Columbia now proposes, which is a 180-degree change to the position it previously advocated for in this case.

12. Columbia’s proffered concept, which is to close its market to competition by winding down the CHOICE program – contrary to its customers’ desires – is something that no party, Columbia included, advocated for, either at or after the deadline that the Commission imposed on Columbia to file the application that initiated this proceeding. Columbia did not take this position until now, one and a half years after the date which the Commission set as the deadline for Columbia to first make a proposal. The intervenor parties in this proceeding have now spent substantial resources and many hours litigating this matter; thus, it is fundamentally unfair to entertain what Columbia suggests. Reverting to the *status quo*, with a record fully submitted, ripe for the Commission’s decision on all contested matters, reflects a more fair, balanced, and legally correct path forward relative to initiating a *de novo* proceeding on the same subject matter, with a radically altered and contradictory posture on the part of the applicant, Columbia. Indeed, Columbia appears to have only undertaken that new position because it has been apprised of the

¹⁸ *Id.* Motion of Columbia Gas of Kentucky, Inc. for a Decision on the Record at p. 2 (May 6, 2022).

¹⁹ *Id.* XOOM Energy Kentucky, LLC’s Request for a Hearing at p. 2 (May 6, 2022).

decisionmaker’s feelings on one part of the matter to which it now objects, and in doing so would prefer to throw out the baby and bathwater together.

13. The Kentucky Supreme Court has held that “[t]he fundamental requirement of procedural due process is simply that all affected parties be given the opportunity to be heard at a meaningful time and in a meaningful manner.”²⁰ Furthermore, the Kentucky Supreme Court has found that:

Procedural due process in the administrative or legislative setting has widely been understood to encompass a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party’s constitutional rights are involved, a judicial review of the administrative action.²¹

14. Pursuant to the Commission’s December 7, 2021 Order, Columbia was required to serve a copy of its tariff filing – where it recommended continuation of the program – on all approved CHOICE program marketers.²² This tariff filing reflected a continuation of the CHOICE program until March 31, 2025. At no point until hours before the Motion that was filed on April 8, 2023 – after testimony had been submitted, the Stipulation had been filed, and a hearing was convened on this matter – did Columbia give any indication in this proceeding that it intended to terminate the CHOICE program. In fact, Columbia witness Judy Cooper testified that “Columbia’s program should not be extended indefinitely but remain an option created under the rules of the Commission’s Order in Administrative Case No. 367.”²³ By not providing any indication in this proceeding that it may elect to wind down and eventually terminate the CHOICE program, and in

²⁰ *Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005) (internal citations and quotations omitted).

²¹ *Id.* (internal citations and quotations omitted).

²² Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Order at p. 2 ¶ 2 (Ky. PSC Dec. 7, 2021).

²³ Rebuttal Testimony of Judy Cooper at 4:18-20.

fact taking the opposite position, Columbia violated the due process rights of XOOM, IGS, and CNEG, as these suppliers were made to engage in a full and expensive proceeding around an entirely different proposal.

B. Columbia’s notice of withdrawal from the Stipulation does not permit it to now relitigate this proceeding from a different proposal.

15. Second, the Commission’s requirement that Columbia track and provide an accounting of the costs to administer the CHOICE program was not a settlement modification made by the Commission. The settlement modifications begin on page 13 of the Commission’s Final Order under the heading “Settlement Modifications” and primarily make modifications to the GCWG meetings. However, even if this requirement was a settlement modification, it is not a significant modification to the settlement. Furthermore, the Commission raises a valid concern that Columbia’s costs to administer the CHOICE Program are unknown and therefore the impact of the program on customers should be determined.²⁴

16. Notwithstanding the above, Columbia unilaterally perceives there to be a modification to the Stipulation due to the Commission’s requirement that it tracks the costs of the CHOICE program, and accordingly has filed a notice of withdrawal with the Commission.²⁵ It is important to note that it is not abnormal for utilities to be required to track the costs of administering programs it offers, and it comes as a surprise to XOOM, IGS, and CNEG that Columbia does not already track these costs. Moreover, the Commission can require Columbia to track these costs at any time, regardless of whether there is a settlement.²⁶ Columbia should not be permitted to utilize the Commission’s requirements that Columbia track and provide an accounting

²⁴ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Order at p. 12 (Ky. PSC Mar. 28, 2023).

²⁵ *Id.* Columbia Gas of Kentucky’s Notice of Withdrawal from Stipulation (Apr. 7 2023).

²⁶ See KRS 278.230(3); see also 807 KAR 5:006.

of costs to simultaneously withdraw from the Stipulation, request to withdraw its current filing, and take an opposition position of the one it took in its initial filing to continue the CHOICE program.

17. While the Stipulation permitted Columbia to withdraw from the agreement, it did not permit Columbia to entirely withdraw its filing, and it certainly does not permit Columbia to withdraw its filing to turn around and file an entirely new case, especially one that now takes an opposition position of the case filed almost two years ago. To do so is a collateral attack against the Commission's October 18, 2021 Order, which determined that an investigation was "necessary to determine the reasonableness of the proposed tariffs to extend the CHOICE program."²⁷ Additionally, Columbia made its current filing in order to comply with the Commission's 2017 Order as discussed above. Attempting to refile a new case is an ill-disguised second bite at the apple and effectively a violation of the 2017 Order which permitted one filing with the option to either continue, modify, or terminate the program. The 2017 Order did not permit Columbia to submit one filing, litigate the position in that filing all the way to the Commission issuing a final order, determine it does not like the final determination, and then turn around and seek to submit a second filing with a different position.

18. Furthermore, under Ky. R. Civ. P. 59.05, "[a] motion to alter, amend, or vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." With its Motion, Columbia is seeking new relief from the Commission akin to a CR 59.05 motion by essentially stating it is dissatisfied with the Commission's final determination and effectively requesting that the Commission vacate its final order so it may be permitted to withdraw its filing.

²⁷ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Order at p. 1(Ky. PSC Oct. 18, 2021).

19. In construing CR 59.05, the Kentucky Supreme Court has held the “[r]ule governing motion to alter, amend or vacate a judgment is considered to be the same as (sic) federal rule (FRCP 59(e)) governing amendment of judgments.”²⁸ Likewise, in deciding whether to amend a final judgment, the Kentucky Supreme Court referenced “[r]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.”²⁹ In construing this extraordinary remedy (amendment of judgments), the four basic permissible grounds to grant a FRCP 59(e) motion to alter, amend or vacate are: (i) the need to correct manifest errors of law or fact in the judgment; (ii) the need to present newly discovered or previously unavailable evidence; (iii) the need to prevent manifest injustice; and (iv) the need to do so from an intervening change in the law.³⁰ Given that KRS 278.230(3) already allows the Commission to require Columbia to file cost tracking information involving Choice, Columbia’s Motion fails to provide any reasonable basis in fact or law to support their request and would also not merit CR 59 relief. In other words, the Commission’s cost tracking requirement falls within the reasonable purview of the Commission and is certainly an outcome that any regulated utility, which are routinely subject to cost-tracking and accounting requirements by their regulators, could have anticipated as within the range of possible outcomes of the proceeding that the Commission required Columbia to commence. The case that resulted from that filing now has been fully submitted, and even Columbia’s Motion recognizes that it needs leave from the Commission to withdraw its filing.³¹ The Commission should proceed to rule on the merits, rather than tolerating additional delay.

²⁸ *Guillion v. Guillion*, 163 S.W.3d at 892 (Ky. 2005) (citing *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995)).

²⁹ *Id.* at 893 (Ky. 2005) (citing Federal Practice and Procedure § 2810.1).

³⁰ *Id.*

³¹ Case No. 2021-00386, *In the Matter of Electronic Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Columbia Gas of Kentucky’s Motion to Reopen Case, Withdraw the Tariff Filing, and Temporarily Extend Program at p. 1, 5, 7 (Apr. 7 2023).

20. Finally, to be clear, intervenors accept that Columbia has a right to withdraw from the Stipulation, and that it apparently has exercised that right, albeit without any consultation with other parties and over an issue that would be an utter triviality in the context of the normal course of utility regulation generally. While intervenors view the data-reporting requirement not to have been described in the Commission's Order as a modification to the settlement, intervenors nevertheless are not protesting Columbia's largely pretextual use of this requirement to withdraw from the utility's commitment. The Commission can and should impose this requirement regardless, at a time of its choosing, even outside of the instant docket where it enjoys plenary powers over the utility's books and records. Obviously, however, this behavior on the part of the utility should not be rewarded. By the plain terms of the Stipulation, the instant proceeding now reverts to its *status quo* that existed before the Stipulation was filed. Columbia previously waived a hearing, and intervenors are now satisfied that the case has been appropriately vetted. Intervenors object to the concept, which Columbia appears to suggest, that the Stipulation allows Columbia to re-commence this proceeding through an entirely different proposal, after parties have expended substantial resources litigating what Columbia first filed, and the Commission has issued its final order. That is wrong, because the Commission had instructed Columbia to file this proceeding, and Columbia could have decided with its filing to propose to terminate the tariff containing the CHOICE program. Accordingly, the Commission should deny Columbia's request to withdraw its filing in this matter.

21. Columbia, of course, is a utility that enjoys the right to file a tariff proposal before this Commission. It generally may file whatever it cares to, albeit not in this matter where subject to a prior Commission order it made an application that it faithfully represented as its position and which – after discovery, intervenor testimony, further discovery, and Columbia's rebuttal

testimony – is now ripe for the Commission’s decision. Exercising its lawful filing rights, Columbia may instead elect to do exactly what it proposes, outside of the instant proceeding, and file an application to terminate the CHOICE program, but to be clear, it should not be permitted to withdraw its current filing. If it were to make a new filing in the future, it may have to overcome the fact that its advocacy is a collateral attack on whatever the Commission may in this matter decide, but, again, that is not the Commission’s fault nor the intervenors’, but Columbia’s.

III. CONCLUSION

22. As discussed above, the Commission directed Columbia to file no later than September 30, 2021 an application to continue, modify, or terminate its CHOICE program.³² Columbia complied with this Order, but it now seeks a complete reversal of its position, and correspondingly withdraw of its Commission mandated filing, supposedly based on what it has learned about the Commission’s concerns, which are limited to imposing a cost-reporting requirement, outside the settlement the parties reached. In doing so, Columbia is effectively violating the Commission’s 2017 Order and giving itself a two-year extension by requesting authority to make a new proposal that it could have made at the beginning of this matter. Simply put, Columbia is not acting in good faith. It should not now get the opportunity to change its mind, withdraw its filing, and file a new application to terminate the program in this docket. It should only be allowed to return to the *status quo*, where Columbia had argued that this case was fully submitted, did not require a hearing at all, and was ready to be decided on the merits. The Commission should now do so.

23. XOOM made several recommendations regarding the CHOICE program, including: (1) making the CHOICE program a permanent program; (2) implementing proposals to

³² See Case No. 2017-00115, *In the Matter of Tariff Filing of Columbia Gas of Kentucky, Inc. to Extend its Small Volume Gas Transportation Service*, Final Order at p. 4 – 5 (Ky. PSC Jun. 19, 2017).

increase customer awareness of the CHOICE program; (3) implementing additional consumer protections; (4) requiring Columbia to implement day one switching, seamless moves, accelerated switching, and shop with your wallet to make it easier for customers to participate in the CHOICE program; and (5) requesting that the Commission open a multi-utility docket to consider the adoption of parallel programs in other service territories.³³ As discussed above, this matter is now ready to be decided on the merits, and the Commission should make a determination on these issues.

WHEREFORE, for the foregoing reasons, the Commission should deny Columbia's request to withdraw its tariff filing, deny Columbia's request that the Motion serve as notice of its intention to terminate the CHOICE program, and determine whether the CHOICE program should be continued or made permanent and if the intervenors' recommendations to improve the CHOICE program should be implemented based on the merits of the evidence currently in the record.

Respectfully submitted,

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³³ See Direct Testimony of Travis Kavulla at 21:1-23 through 22:1-9.

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Dated: April 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that the foregoing April 14, 2023 electronic filing is a true and accurate copy of the foregoing; that the electronic filing has been transmitted to the Commission on April 14, 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 April 14, 2023 electronic mail notification of the electronic filing is provided to all parties of record.

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