**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission : R-2020-3018835

Office of Consumer Advocate : C-2020-3019702

Office of Small Business Advocate : C-2020-3019714

Columbia Industrial Intervenors : C-2020-3020105

Dr. Richard Collins : C-2020-3020207

Ionut R. Ilie : C-2020-3020498

Pennsylvania State University : C-2020-3020666

:

 v. :

:

Columbia Gas of Pennsylvania, Inc. :

**THIRD INTERIM ORDER**

Denying Objections

of Columbia Gas of Pennsylvania, Inc.

to Portions of Public Input Testimony

of Richard C. Culbertson

On April 24, 2020, Columbia Gas of Pennsylvania, Inc. (Columbia) filed Supplement No. 307 to Tariff Gas Pa. P.U.C. No. 9 at Docket No. R-2020-3018835, with an effective date of January 23, 2021. Columbia proposed to increase overall rates by approximately $100.4 million per year, or 17.54% over present revenues. Columbia’s proposal, if granted, would increase the average residential customer bill from $87.57 to $103.19, or by approximately 17.84%. Columbia also proposed to increase the residential fixed monthly charge from $16.75 to $23.00.

On Wednesday, June 3, 2020, the presiding officer conducted a call-in telephonic prehearing conference with the parties in which various procedural matters were discussed and a litigation schedule was established. Present during the call-in telephonic prehearing conference were counsel representing the following: Columbia Gas; OCA; OSBA; BIE; CII; CAAP; and CAUSE-PA. The parties addressed various procedural matters including the litigation schedule but could not agree on a litigation schedule. The parties requested time after the prehearing conference in which to discuss together the litigation schedule and then to inform the presiding officer the proposed dates the parties would request for this proceeding.

On Friday, June 5, 2020, the parties provided suggested dates for the litigation schedule. Thereafter, the presiding officer requested, and received, clarifying information about the technology and procedure to be used by witnesses and non-testifying participants at the telephonic public input hearings. Accordingly, on Friday, June 12, 2020, the presiding officer issued the Prehearing Order which memorialized the matters discussed by the parties during the prehearing conference on June 3, 2020 and which established the litigation schedule.

Also, on June 12, 2020, the Office of Administrative Law Judge issued the Telephonic Evidentiary Hearing Notice which scheduled the telephonic evidentiary hearings for Tuesday, September 22, 2020 through Thursday, September 24, 2020.

On July 8, 2020, the presiding officer conducted a telephonic public input hearing. One of the two witnesses who testified at that public input hearing was Richard C. Culbertson. Prior to being sworn in as a witness, Columbia Gas objected to the testimony of Mr. Culbertson. Columbia Gas contended Mr. Culbertson did not qualify as a witness and should not be permitted to testify because he was neither a party nor a current ratepayer.

On July 15, 2020, Columbia Gas filed its Objections of Columbia Gas of Pennsylvania, Inc. to the Written Statement and Exhibits of Richard C. Culbertson (Objections to Culbertson Testimony) submitted into the hearing record when Mr. Culbertson testified at the public input hearing on July 8, 2020. Columbia Gas requested the presiding officer exclude certain portions of the written statement and exhibits submitted by Mr. Culbertson. Columbia Gas specified it objected to Public Input Exhibits 1, 5 and 6, and it specified its particular objections in Paragraphs 16 to 26 of its Objections to Culbertson Testimony. Columbia Gas averred the written statement and exhibits contained irrelevant statements that were unrelated to the rates and service provided by Columbia Gas, and that the inadmissible hearsay statements within were not subject to any hearsay exception.

 Columbia Gas contended unsupported assertions contained within Mr. Culbertson’s testimony concern actions and events which involved NiSource, Columbia Gas’ parent company, and Columbia Gas of Massachusetts, a “sister corporation.” Columbia Gas argued allowing the disputed statements - about events occurring in another state and involving Columbia Gas’ unrelated “sister corporation” and/or NiSource - through Mr. Culbertson’s testimony in the Section 1307(f) proceeding is unfair to Columbia Gas and a violation of the rules of evidence. Columbia Gas referenced the Walker Rule

On July 27, 2020, the Office of Administrative Law Judge issued the Initial Call-In Prehearing Conference Notice which scheduled a telephonic evidentiary prehearing conference for 9:00 a.m. on Friday, July 31, 2020.

On July 31, 2020, the presiding officer conducted the evidentiary prehearing conference. At the evidentiary prehearing conference, oral arguments against the objections were received from OCA and CAAP. OCA contended the Walker Rule is not controlling and does not apply in this proceeding. OCA referred to evidentiary decisions in the *TrailCo* case and *Zapatka v. Columbia Gas of Pennsylvania* case as precedence for admitting exhibits at a public input hearing even when the exhibits contain hearsay to which there are objections. OCA noted hearsay exhibits can be admitted over objection but standing alone cannot form the basis of fact needed to establish substantial evidence. OCA argued Columbia Gas has a right to rebut the testimony and exhibits and the utility continues to have an opportunity to respond to the evidence as needed.

In addition, OCA pointed out there were only two witnesses at the public input hearing in a $100 million base rate request and Columbia Gas’ hearsay arguments are too far-reaching for a public input hearing and may create a chilling effect for participation by ratepayers in future proceedings. OCA specifically discussed each objection raised by Columbia Gas and pointed out the reasons why the disputed information should remain in the record. Specifically, OCA noted the places where Columbia Gas objected to information which Mr. Culbertson placed in a table or chart format using information from either Columbia Gas or the parent company, NiSource, specifically Public Input Exhibits 3 and 4, which are news releases from or about NiSource and/or Columbia Gas of Massachusetts and to which Columbia Gas did not raise an objection in its filing.

CAAP also objected to Columbia Gas’ objections. CAAP contended that hopefully more than two ratepayers would have testified at the public input hearing but averred the Commission should give deference to ratepayers who appear to testify publicly. CAAP pointed out Columbia Gas made a larger than normal number of objections during the public input hearing and further noted Columbia Gas’ objections will have a chilling effect on participation by ratepayers at future public input hearings.

DISCUSSION

**Exhibits at Issue[[1]](#footnote-1)**

Public Input Exhibit 1

Written Statement of Richard C. Culbertson. Includes personal information of witness including education, work experience, testimony before the Commission and various personal opinions concerning Columbia Gas’ current base rate request as well as reference to various state and federal statutes, regulations and guidelines. Attachments include front page of Pennsylvania’s Management Directive No. 325.12 Amended (Standards for Internal Controls in Commonwealth Agencies, dated May 15, 2018); front page of Pennsylvania’s Management Directive No. 325.3 Amended (Performance of Audit Responsibilities, dated January 10, 2011); and a sundry listing of various newspaper articles, trade association statements and/or guidelines, and charts concerning Columbia Gas and/or NiSource.

Public Input Exhibit 5

Deferred Prosecution Agreement between the United States Attorney for the District of Massachusetts and NiSource, Inc.as Defendant, concerning criminal liability for actions of subsidiary, Columbia Gas of Massachusetts, from over-pressurization event on September 13, 2018 in Merrimack Valley, Massachusetts.[[2]](#footnote-2) Does not include a copy of the February 24, 2020 Plea Agreement between the Government and NiSource which is referenced by the exhibit itself. In Paragraph 11, NiSource agreed its subsidiaries in other states (including Pennsylvania) would implement and adhere to each of the recommendations from the NTSB related to the Merrimack Valley over-pressurization event.

Public Input Exhibit 6

Pipeline Accident Report, related to NTSB Accident ID PLD 18MR003, adopted September 24, 2019 by National Transportation Safety Board, subtitled *Overpressurization of Natural Gas Distribution System, Explosions, and Fires in Merrimack Valley, Massachusetts September 13, 2018*. Finding No. 8 concluded NiSource’s engineering risk management processes were deficient. The NTSB report issued new recommendations which include advising multiple states (including Pennsylvania) to remove any exemption so that all future natural gas infrastructure projects would require a licensed professional engineer’s approval and stamping. The NTSB report noted prior recommendations including recommending NiSource revise its engineering plan and constructability review process across all of NiSource’s subsidiaries.

**Relevance and Hearsay**

 Relevant evidence is that evidence which tends to establish some fact material to the case, or which tends to make a fact, which is at issue, more or less probable.[[3]](#footnote-3) Generally speaking, evidence which is irrelevant or immaterial will not be admissible before the Commission.[[4]](#footnote-4) In addition, evidence which is relevant should still be excluded if its probative value is outweighed by the danger there will be unfair prejudice, a confusion of the issues, misleading of the fact finder, creating undue delay, wasting time or needlessly presenting cumulative evidence.[[5]](#footnote-5)

Pursuant to Pennsylvania Rule of Evidence § 401, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and if the fact is of consequence in disposing of the action, as determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case. The evidence can be relevant even if the relevance of the proposed evidence may be dependent on evidence not yet of record.[[6]](#footnote-6)

 The hearsay is generally defined as a statement made by an out-of-court declarant (i.e., the declarant is not testifying at the current trial or hearing) and a party attempts to offer the out-of-court statement into evidence in order to prove the truth of the matter asserted in the out-of-court statement.[[7]](#footnote-7) Pursuant to Pa.R.E. § 802, that hearsay statement generally is not admissible. There are, however, currently in Pennsylvania over two dozen exceptions to the hearsay rule.[[8]](#footnote-8)

By statute, administrative agencies, which are part of the executive branch of the government, are not bound by the hearsay rule. *See* 2 Pa.C.S.A. §§ 505, 554. However, the Commission follows the *Walker[[9]](#footnote-9)* rule, which provides that hearsay evidence, properly objected to, is not competent evidence to support a finding of the agency. Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the agency if it is corroborated by any competent evidence in the record, but no finding of fact can stand if based solely on hearsay.

 There are ample Commission cases discussing this issue: *Zapatka v. Columbia Gas of Pennsylvania, Inc*, 82 PA PUC 138, 143-144 (1994); *Re Duquesne Light Company*, 57 PA PUC 313, 317-318 (1983), *Nesbit v. Vandervort* 128 Pa Super Ct 58 (1937); *Bickling v. Unemployment Compensation Board of Review* 17 Pa Cmwlth 619 (1975); *Collins v. Peoples Natural Gas Company d/b/a Dominion Peoples*, Docket No. C‑20042465, entered, June 1, 2005; *Palumbo v. Equitable Gas Company*, Docket No. F‑01030117, entered July 15, 2003: and *Peckman v. Pennsylvania Electric Company* , Docket No. C-20078456 (Final Order entered January 15, 2009) at 8-9.

The important point is that the hearsay rule is not a technical rule. The courts consider the hearsay rule to be a fundamental principle of law which must be followed by an agency at those points in a hearing where facts crucial to the issue are sought to be placed on the record. *Com., State Board of Medical Education & Licensure v. Contakos*, 21 Pa. Commw. Ct. 422, 346 A.2d 850, 852 (1975); *Bledevens v. Com., State Civil Service Commission*, 11 Pa. Commw. Ct. 1, 312 A.2d 109, 111 (1973).

**Conclusion**

Columbia Gas acknowledged in its Objections (in Paragraph 22) that the proper scope of any testimony offered in this base rate case includes an investigation into Columbia Gas’ rates and services. But Columbia Gas insisted Mr. Culbertson’s evidence did not relate to the rates and services of Columbia Gas - even though three exhibits (Public Input Exhibits 2, 3 and 4) relate to news releases concerning assurances made by Columbia Gas’ parent company (NiSource) in a Massachusetts proceeding about services it would provide through Columbia Gas of Pennsylvania, Inc. Those press releases refer to service but also refer to the costs those promised services may have on the rates charged to the ratepayers of Columbia Gas of Pennsylvania, Inc.

Furthermore, the other three exhibits at issue were received with statements from an interested party testifying at a public input hearing and questioning how the assurances and promises made by the parent company to expend monies through Columbia Gas, *inter alia*, will impact the current $100 million base rate increase.

Mr. Culbertson presented material which he intended would show that a natural gas explosion occurred in Merrimack Valley, Massachusetts involving a “sister company” in 2018. Columbia Gas is correct when it asserted it played no part in the explosion or in resolving the aftermath. However, Columbia Gas’ parent company made many promises. While it is true some material contained statements of opinion offered by other people, those same materials contained Mr. Culbertson’s statements of opinion. While hearsay offered from a declarant who is not present and subject to cross-examination is not relevant typically, Mr. Culbertson’s opinions are admissible and relevant as the statements of an interest member of the public at a public input hearing involving a base rate request from a public utility. It should be noted that Columbia Gas had a full opportunity to cross-examine Mr. Culbertson about his testimony and exhibits.

Lastly, it must be noted that OCA’s and CAAP’s stated concerns are valid as those concern related to Columbia Gas’ stance at the public input hearing. Columbia Gas took a strong position with a witness at a public input hearing before the presiding officer even started the opening statement or mentioned swearing in Mr. Culbertson as a witness. A member of public, whether familiar or unfamiliar with testifying publicly, might have been cowed or considered the exchange to be confrontational and combative.

Furthermore, the witness had distributed his material via email two days prior to the public input hearing to, among others, Columbia Gas. Columbia Gas waited until the public input hearing to voice concerns about Mr. Culbertson’s testimony and exhibits. Once the public input hearing began, Columbia Gas objected strenuously and repeatedly to the testimony of a public input witness in front of all participants at the public input hearing.

OCA and CAAP correctly noted Columbia Gas’ behavior at the public input hearing and in the filing of a long list of specific objections to testimony provided by a member of the public will create, whether by design or unintentionally, and has created, a chilling effect on participation by other witnesses at future public input hearings.

The primary purpose of all public input hearings is to secure the testimony of what ratepayers and interested parties, i.e., the public, think. At the start of most public input hearings, the presiding officer will advise those present that the Commission wants to hear from the public what the public thinks about the utility’s request. That sentiment is repeated typically multiple times by a presiding officer and is often echoed in the opening statements of the parties present at the start of the public input hearing. To grant Columbia Gas’ request – to limit the opportunity for an interested member of the public to tell the Commission what the witness thinks about a $100 million base rate increase – would be to expose members of the public to intense cross examination and potentially public ridicule by a public utility. The end result would be the opposite of the Commission’s stated intention for why public input hearings are conducted.

Mr. Culbertson interspersed his testimony and exhibits with material that is relevant to the base rate proceeding as well as some material that appears irrelevant but it is not. While some evidence is repetitive on the circumstances surrounding the natural gas explosion in Massachusetts in 2018 involving Columbia Gas of Massachusetts, Inc., those same exhibits contain statements from Columbia Gas’ parent company, NiSource, about costs NiSource expected to spend or promised to spend on infrastructure and safety equipment/practices through its subsidiary, Columbia Gas of Pennsylvania, Inc.

**All** costs which a public utility uses to compute its base rate, including improvements to infrastructure and to safety, are relevant in a base rate proceeding. In addition, safety specifically is **always** a relevant issue in a base rate proceeding. While NiSource is not a certificated public utility in Pennsylvania, Columbia Gas of Pennsylvania is. Therefore, evidence - which tends to show that Columbia Gas may be obligated through its parent company to expend sums for improvements to infrastructure and safety – is relevant and may well be pertinent to the discussion at hand.

Accordingly, the Objections of Columbia Gas will be denied in the Ordering Paragraphs below. The evidence provided through Mr. Culbertson at the public input hearing will remain within the hearing record. The presiding officer will determine the weight, if any, which the evidence will carry.

THEREFORE,

IT IS ORDERED:

 1. That, pursuant to 52 Pa.Code § 5.103, § 5.412(f) and § 5.402, the Objections of Columbia Gas of Pennsylvania, Inc. to the Written Statement and Exhibits of Richard C. Culbertson are denied.

 2. That the Written Statement and Exhibits of Richard C. Culbertson, having been previously admitted into the hearing record, will remain within the hearing record in this proceeding, subject to a determination by the presiding officer about the weight to be applied to the evidence.

 3. That Columbia Gas of Pennsylvania, Inc. may supply evidence in rebuttal to the written statement and exhibits in written form and/or during the evidentiary hearings in this proceeding, as Columbia Gas of Pennsylvania, Inc. may deem necessary.

August 13, 2020 \_\_\_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Katrina L. Dunderdale

 Administrative Law Judge

**R-2020-3018835 et al - PA PUBLIC UTILITY COMMISSION v. COLUMBIA GAS OF PENNSYLVANIA INC**

*Revised 7/7/20*

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1. Columbia Gas did not object to three exhibits: Public Input Exhibit 2 (April 24, 2020 Press Release by Columbia Gas of Pennsylvania, Inc. concerning current base rate request for investment in safety); Public Input Exhibit 3 (June 26, 2020 Press Release from NiSource concerning company and subsidiary information for NiSource); and Public Input Exhibit 4 (2018 publication of the American Petroleum Institute, entitled *Pipeline Safety Management Systems*). [↑](#footnote-ref-1)
2. The witness highlighted some portions of the document. [↑](#footnote-ref-2)
3. *Com. v. Scott*, 389 A.2d 79 (1978). [↑](#footnote-ref-3)
4. 66 Pa.C.S.A. § 332(b). [↑](#footnote-ref-4)
5. Pa. R.E. § 403; Parr v. Ford Motor Co., 109 A.3d 682 (Pa.Super. 2014). [↑](#footnote-ref-5)
6. Pa.R.E. § 401. [↑](#footnote-ref-6)
7. Pa.R.E. § 801. [↑](#footnote-ref-7)
8. Pa.R.E. § 803. [↑](#footnote-ref-8)
9. *Walker v. Unemployment Compensation Board of Review,* 367 A.2d 366, 370 (Pa. Cmwlth. 1976). [↑](#footnote-ref-9)