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File #: 182466

August 26, 2021

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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Harrisburg, PA 17105-3265

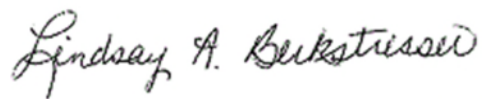
**Re: PA Public Utility Commission v. Columbia Gas of Pennsylvania, Inc.
Docket No. R-2021-3024296**

Dear Secretary Chiavetta:

Attached for filing is the Motion to Strike on behalf of Columbia Gas of Pennsylvania, Inc. ("Columbia") in the above-referenced proceeding. As indicated in the Motion to Strike, given the short timeframe for reply briefs, Columbia respectfully requests expedited treatment of this Motion. Specifically, Columbia requests that parties be directed to provide answers by August 30, 2021.

Copies will be provided per the Certificate of Service.

Respectfully submitted,



Lindsay A. Berkstresser

LAB/kl
Attachment

Rosemary Chiavetta, Secretary
August 26, 2021
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cc: Honorable Mark A. Hoyer
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	Docket No.	R-2021-3024296
Office of Consumer Advocate	:		C-2021-3025078
Office of Small Business Advocate	:		C-2021-3025257
Columbia Industrial Intervenors	:		C-2021-3025600
Pennsylvania State University	:		C-2021-3025775
Richard C. Culbertson	:		C-2021-3026054
Ronald Lamb	:		C-2021-3027217
	:		

v.

Columbia Gas of Pennsylvania, Inc.

**MOTION TO STRIKE
OF
COLUMBIA GAS OF PENNSYLVANIA**

TO DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE MARK A. HOYER:

Columbia Gas of Pennsylvania, Inc. (“Columbia”), by and through its attorneys, hereby files this Motion to Strike, pursuant to 52 Pa. Code §§ 5.103 and 5.231(d), and requests that pages 34-42 of Richard C. Culbertson’s Main Brief¹ be stricken because it restates verbatim a settlement discussion that was conducted via email between Mr. Culbertson and counsel for Columbia.

Given the short timeframe for reply briefs as established by the procedural schedule in this proceeding, Columbia respectfully requests expedited treatment of this Motion. Specifically, Columbia requests that parties be directed to provide answers to this Motion by August 30, 2021.

In support of its Motion to Strike, Columbia states as follows:

¹ Mr. Culbertson’s Main Brief contains no pagination. The references to pages 34-42 are based upon the pdf version of the Main Brief that was received from Mr. Culbertson.

1. On August 25, 2021 Mr. Culbertson and Columbia filed Main Briefs addressing the issues raised by Mr. Culbertson in this base rate proceeding. Columbia hereby incorporates the procedural history set forth in its Main Brief.

2. Beginning on page 34 of Mr. Culbertson's Main Brief and through page 42, Mr. Culbertson quotes emails that he exchanged with counsel for Columbia. On page 34 of his Main Brief, Mr. Culbertson states, "Settlement talks have not produced and [sic] any movement by Columbia. The correspondence to and from Columbia through their attorney best shows my intent and additional relief sought from Columbia gas of Pennsylvania – in part." Culbertson MB, p. 34. Mr. Culbertson then quotes a series of three emails that he exchanged during settlement negotiations with counsel for Columbia. The first email, dated August 11, 2021, is an email from Mr. Culbertson to counsel for Columbia in response to counsel for Columbia's request that Mr. Culbertson provide Columbia with any settlement terms that he would like the Company to consider. In the August 11, 2021 email, Mr. Culbertson lists several settlement demands. Culbertson MB, pp. 39-42. The next email, dated August 12, 2021, is from counsel for Columbia in reply to Mr. Culbertson's settlement demands. The August 12, 2021 email informs Mr. Culbertson that the Columbia does not accept Mr. Culbertson's proposed settlement terms. Culbertson MB, p. 38. The final email, dated August 16, 2021, is from Mr. Culbertson to counsel for Columbia requesting that Columbia reconsider Mr. Culbertson's settlement terms. Culbertson MB, pp. 34-38. The purpose of these emails was to determine if Mr. Culbertson and Columbia could resolve Mr. Culbertson's issues through settlement. It is evident from the fact that the subject line of the emails reads "Settlement" and from the content of the emails that the discussion was clearly in the nature of settlement negotiations. Mr. Culbertson impermissibly restated and relied upon these settlement communications in his Main Brief.

3. Pages 34-42 of Mr. Culbertson's Main Brief should be stricken because they violate the Commission's regulation prohibiting parties from relying upon unsuccessful settlement negotiations when a matter proceeds to litigation. *See* 52 Pa. Code 5.231(d). Section 5.231 of the Commission's regulations provides as follows:

§ 5.231. Offers of settlement.

- (a) It is the policy of the Commission to encourage settlements.
- (b) Nothing contained in this chapter or Chapter 1 or 3 (relating to rules of administrative practice and procedure; and special provisions) preclude a party in a proceeding from submitting, at any time, offers of settlement or proposals of adjustment, or from requesting conferences for that purpose.
- (c) Parties may request that the presiding officer participate in the settlement conferences or that an additional presiding officer or mediator be designated to participate in the settlement conferences.
- (d) Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.
- (e) Subsections (a)—(d) supersede 1 Pa. Code § 35.115 (relating to offers of settlement).

4. It is well-established Pennsylvania law that offers of settlement are not admissible in evidence. The Commission's regulation at 52 Pa. Code 5.231(d) is consistent with Rule 408(a) of the Pennsylvania Rules of Evidence, relating to Compromise Offers and Negotiations, which states the following:

Prohibited Uses. Evidence of the following is not admissible-on behalf of any party-either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: **(1)** furnishing, promising, or offering-or accepting, promising to accept, or offering to accept-a valuable consideration in compromising or attempting to compromise the claim; and **(2)** conduct or a statement made during compromise negotiations about the claim.

225 Pa. Code § 408(a).

5. The Commission has properly refused to consider statements made in the course of settlement negotiations when considering the merits of a case. *See Munro v. PECO Energy Co.*,

Docket No. C-2010-2214718, 2012 Pa. PUC LEXIS 945 (Order entered June 21, 2012) (holding that ALJ's decision not to address settlement discussion in initial decision was proper); *Jensen v. PECO Energy Company*, Docket No. F-2011-2270675, 2012 Pa. PUC LEXIS 905 (Order entered December 20, 2012) (refusing to consider portions of complaint that referred to offers of settlement).

6. The Commission's policy promotes settlements. *See* 52 Pa. Code 5.231. The Commission has recognized that maintaining the confidentiality of settlement discussions and unaccepted settlement proposals is critical to fostering meaningful settlement negotiations between parties. *See Pa. Pub. Util. Comm'n v. Pennsylvania Electric Co.*, Docket Nos. R-80051197 and C-80072106, 1980 Pa. PUC LEXIS 5 (Order entered December 4, 1980) (recognizing that the relevance of unaccepted settlement proposals is limited at best and public policy favors excluding such evidence to foster settlements). The Commission considers statements made during the course of settlement negotiations as privileged and inadmissible because to treat them otherwise would adversely affect parties' willingness to participate in meaningful settlement discussions. *Id.*

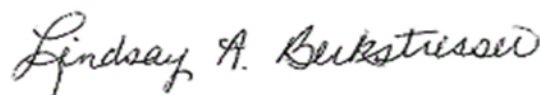
7. In addition, all of the material presented at pages 34-42 of Mr. Culbertson's Main Brief should be stricken and not relied upon for purposes of a decision in this proceeding because the material was not presented during the evidentiary phase of the proceedings. It is a fundamental principle of due process that information purporting to be of a factual nature must be submitted as evidence for the record, and may not be included for the first time in briefs. *See In re Shenandoah Suburban Bus Lines, Inc.*, 46 A.2d 26, 29 (Pa. Super. Ct. 1946) ("In hearings before the commission all parties must be apprised of the evidence submitted, and must be given opportunity to cross-examine witnesses; to inspect documents and to offer evidence in explanation or rebuttal.") "The allowance of new claims late in a case raises significant due process concerns.

Such concerns arise from the lack of adequate time to . . . respond adequately to adverse positions.” *Pa. PUC, et al. v. UGI Utilities*, Docket No. R-00932862, 1994 Pa. PUC LEXIS 138, *82-83 (May 23, 1994) (rejecting a claim that was introduced for the first time by a party in the rebuttal phase of the proceeding, rather than in the party's direct case); *see also Pa. PUC v. Duquesne Light Co.*, 59 Pa. PUC 67 (January 25, 1985) (disallowing the untimely introduction of exhibits); *Pa. PUC v. Pennsylvania-American Water Company*, 1989 Pa. PUC LEXIS 170, *167-169, 71 Pa. PUC 210 (October 27, 1989) (“late filed updates deny opposing parties an opportunity . . . to respond with countering evidence or testimony”).

8. For the reasons explained herein, Mr. Culbertson’s reference to and quotation of unfruitful settlement discussions between Mr. Culbertson and counsel for Columbia is inadmissible, impertinent, and immaterial and should not be relied upon to inform the ALJ’s or the Commission’s decision. Accordingly, Columbia respectfully requests that pages 34-42 of Mr. Culbertson’s Main Brief be stricken and given no weight by the ALJ and the Commission in reaching a decision in this proceeding.

WHEREFORE, Columbia Gas of Pennsylvania, Inc. respectfully requests that Deputy Chief Administrative Law Judge Mark A. Hoyer strike pages 34-42 of Richard C. Culbertson's Main Brief.

Respectfully submitted,



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Date: August 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Date: August 26, 2021

A handwritten signature in cursive script, reading "Lindsay A. Berkstresser". The signature is written in dark ink and is positioned above a horizontal line.

Lindsay A. Berkstresser