FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service.	**Case No. 07-829-GA-AIR**
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of an Alternative Rate Plan for its Gas Distribution Service	**Case No. 07-830-GA-ALT**
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval to Change Accounting Methods	**Case No. 07-831-GA-AAM**
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment	**Case No. 08-169-GA-UNC**
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with Automated Meter Reading Deployment Through an Automatic Adjustment Clause, and for Certain Accounting Treatment	**Case No. 06-1453-GA-UNC**

MEMORANDUM CONTRA APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "Company"), pursuant to Rule 4901-1-35, Ohio Administrative Code, files its Memorandum Contra the

Application for Rehearing by the Ohio Consumers' Counsel. For the reasons that follow, the Commission should deny OCC's Application for Rehearing ("Application").[1]

I. INTRODUCTION

OCC has presented no grounds for modifying the Commission's Entry of April 9, 2008. Procedurally, OCC has not explained how the Commission's Entry of April 9, 2008, has prejudiced its ability to investigate or present its views on the PIR Application. Instead, it offers conclusory assertions regarding its discovery burden and repeated exaggerations of what the PIR Application involves. Substantively, OCC has not shown that the Commission erred in determining that R.C. 4929.11 was the appropriate statute under which to file the PIR Application.

II. ARGUMENT

A. Because OCC Has Not Demonstrated that It Has Lost or Will Lose the Opportunity to Investigate, Evaluate and Present Its Views Regarding the PIR Application, Its Request to Delay Issuance of the Staff Report Is Groundless.

The primary thrust of OCC's Application is that the Commission should delay the issuance of the Staff Report. OCC, however, has provided no good reason to do so.

1. OCC vastly overstates what the PIR Application involves.

The backbone of OCC's position is the notion that the sheer size of the PIR Application requires an unprecedented level of analysis and review. Consider, for example, OCC's repeated characterization of the PIR Application as the "$2.5 billion Pipeline Replacement Plan." (OCC Reh'g at 3.) OCC's insinuations, however, are demonstrably false.

As the caption in this case makes clear, DEO merely seeks approval of a *mechanism* for *potential* recovery of costs associated with a program that will involve replacement of bare steel

[1] DEO's underlying application filed in Case No. 08-169-GA-UNC will be referred to as the "PIR Application."

mains, as well as service lines and other infrastructure improvements. DEO does not seek to recover *any* costs in this proceeding. Indeed, not one penny of costs will be paid by customers immediately as a result of the PIR Application. The PIR Application plainly contemplates further proceedings to determine the extent of any cost recovery.

In essence, OCC is making a mountain out of a mechanism. OCC's repeated complaint—that there is much to do and too little time in which to do it—has no basis in reality. For example, OCC compares the time that the parties have had to review DEO's rate case application (eight months) with the time that they have had to study the PIR Application. (OCC Reh'g at 8.) Yet, the rate case application does require detailed review and approval of many substantive proposals (*e.g.*, test year expenses, the value of rate base, the appropriate rate of return). In contrast, the PIR Application merely proposes a mechanism and procedures to govern the *future* recovery of costs. The PIR case is about a process; it is not about cost recovery.

OCC's comparison of the alleged dollar values involved ($72.5 million versus $2.5 billion) is similarly misguided because the PIR Application is not seeking approval of a $2.5 billion pass through. Any dollars to be passed through any mechanism that might be approved in this case will be subject to additional review and proceedings. The dollar amounts mentioned in the PIR Application represent background information given in the interest of transparency regarding the long-term scope of the project. But in terms of the issues presented in this case, the cost figures are irrelevant. Even if DEO expected to spend only $25,000, the issues presented for review by the PIR Application would be identical.

OCC attempts to base the delaying of this case on the alleged lack of detail in the PIR Application. (*See, e.g.*, OCC Reh'g at 3 & n.8.) But the PIR Application accomplishes all that it should. It explains the kinds of costs being proposed for recovery and describes the mechanism

designed to account for and recover those costs in a level of detail comparable to other applications seeking approval of similar mechanisms. *See, e.g., In re the Application of Columbia Gas-Ohio for Approval of Tariffs to Recover Through an Automatic Adjustment Clause Costs Associated with the Establishment of an Infrastructure Replacement Program*, Case No. 07-478-GA-UNC. The hearing will explore the substantive issues thus raised and stated in the Application, such as whether the proposed costs deserve rider recovery or whether the rider is appropriately structured. What will not be explored at this time in this docket (and hence was not explained in the PIR Application) is whether *particular* expenditures were reasonable and should be recovered.

2. Because the PIR Application does not require lengthy and burdensome cost reviews, OCC has not shown any prejudice.

Without some showing of resultant prejudice if the case moves forward, OCC's request for any delay (much less one of 90 days) should not be granted. In three attempts (its original motion, its reply brief, and now its rehearing application), OCC still has yet to explain in concrete terms how the consolidation of these cases will hinder OCC's ability to present its case on the PIR Application.

(a) OCC's complaints regarding an as yet unknown procedural schedule are premature.

OCC's allegations of prejudice are premature. The Staff Report has not been issued; nor has a procedural schedule been set. Indeed, the Commission's statements on the matter of scheduling should only encourage OCC: "[T]he commission will ensure that due process is afforded to parties in these cases and that sufficient time is allotted for the Commission's consideration of the issues posed by these applications prior to any rates going into effect." (Entry of Apr. 8, 2008, at 8.)

OCC's complaints are based on unfounded concerns about anticipated burdens presented by something that has not even come into being. Given the Commission's assurance that it will ensure "due process" and provide "every opportunity to engage in discovery and participate in the hearings" (*id.*), it is unclear why OCC complains.

(b) In any event, OCC has had and will have ample to time to review the PIR Application because some delay has already occurred.

Given that the PIR Application merely proposes a process, there are no costs proposed for present recovery, no audits required, and no schedules to be reviewed. These facts belie OCC's assertions that 12 more weeks are required to review the 16-page PIR Application, on top of the 10 weeks that have already passed.

In fact, OCC has already benefited from a significant delay of the Staff Report. DEO's review of a number of recent rate case dockets shows that the Staff Report is typically issued about five months or so after the filing of the application.[2] DEO filed its rate case application on August 30, 2007—eight months ago. The apparent two-and-a-half month delay was likely caused by DEO's motion to consolidate the rate case with the PIR Application, which was filed nearly two-and-a-half months ago. DEO acknowledges the need for Staff to have sufficient time to review the PIR Application and does not object to the delay experienced thus far. The salient point here is that OCC has already received most of the three-month delay it is requesting.

OCC has had and will have every opportunity to investigate the PIR Application. Written discovery is already well underway. OCC submitted and received all non-confidential responses to its first set of PIR-related discovery, and additional interrogatories and document

[2] *See, e.g.*, Case Nos. 07-689-GA-AIR (Suburban Natural Gas); 07-589-GA-AIR (Duke Energy Ohio); 05-824-GA-AIR (Pike Natural Gas); 04-1779-GA-AIR (Eastern Natural Gas); 04-571-GA-AIR (Vectren Energy Delivery of Ohio); 01-1228-GA-AIR (Cincinnati Gas & Electric).

requests concerning the PIR Application have been served and are being responded to. Besides the discovery OCC has undertaken in this case, DEO and its system have also been scrutinized in the rate case, by Staff, by auditors, and by OCC. No veil enshrouds DEO, its system, or the costs or accounting it has proposed for the PIR rider.

OCC also maintains that it "will not be able to exercise it[s] right to hire 'technically qualified persons.'" (OCC Reh'g at 9.) But over 60 days have elapsed since the PIR Application was filed. What has stopped OCC from making the requisite arrangements in these last nine weeks? The unexplained assertion that "the contracting process will be irreparably impaired under the remaining time frame" (*id.*) sheds no light on OCC's apparent failure even to initiate the contracting process before now.

Notably, the Staff has had the same amount of time to review the PIR Application that OCC has had. Assuming that the issuance of the Staff Report represents the completion of Staff's investigation, the Commission should ask: if the Staff could conclude its investigation, why could not OCC do the same?

(c) OCC is already familiar with the issues presented in this case.

OCC's claims of unpreparedness ring hollow for other reasons. This is not the first time OCC has studied pipeline replacement cost pass-through mechanisms. DEO's proposal presents similar issues and questions as were presented in at least three other proceedings that evaluated riders recovering the costs of varying levels of infrastructure replacement and in which OCC participated. *See In re the Application of Columbia Gas-Ohio for Approval of Tariffs to Recover Through an Automatic Adjustment Clause Costs Associated with the Establishment of an Infrastructure Replacement Program*, Case No. 07-478-GA-UNC; *In re the Application of Duke Energy Ohio for Approval of an Alternate Rate Plan*, Case No. 07-590-GA-ALT; *In re the Application of CG&E for Approval of an Alternative Rate Plan for Its Gas Distribution Service*,

Case No. 01-1478-GA-ALT. If any party to this case should be ready to present its position on a pipeline-infrastructure-replacement rider, it is OCC.

3. DEO does not consent to any delay in issuing the Staff Report, but is open to discussing the procedural schedule to be established in this case.

DEO does not consent to any delay in the issuance of the Staff Report. While DEO understands that consolidation of the PIR Application required additional investigation, the 275-day period after which DEO may institute its proposed rates without Commission approval is running out and indeed will pass well before the likely hearing in this case. DEO's rate case application was accepted for filing as of August 30, 2007, meaning that the 275-day period ends on or around May 31, 2008. If OCC's 90-day request is granted, at least 320 days will have elapsed *before the Staff Report is even issued. See* R.C. 4909.42.[3]

Nevertheless, DEO is willing to discuss any tangible scheduling or procedural concerns on the part of OCC or any other party in this case. DEO would be amenable to a prehearing conference designed solely to establish the procedural schedule following issuance of the Staff Report, and would consider agreeing to extensions of certain discovery deadlines in order to facilitate any needed review of the PIR Application. DEO is confident that an appropriate solution to any procedural issues can be reached.

B. DEO Appropriately Filed Its PIR Application under R.C. 4929.11.

OCC rehashes many of the substantive arguments raised in its Motion to Dismiss, but they still lack merit. DEO appropriately filed the PIR Application under R.C. 4929.11.

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[3] In its Entry, the Commission stated "we do not believe that it is necessary to toll the [R.C. 4909.42] time frame." (Entry of Apr. 9, 2008, at 8.) DEO respectfully disagrees with the implication that the Commission has the authority to do so, for the reasons stated in its Memorandum Contra OCC's Motion to Dismiss. Even if the Commission had the authority to do so, it has already issued an entry stating DEO's rate case application complied with the standard filing requirements, and OCC alleges no fault with Case No. 07-829-GA-AIR or the related cases. Commission-approved consolidation of the rate case with a different case provides no basis for tolling the rate case.

1. The Commission did not err in finding that the PIR Application proposes "an automatic adjustment mechanism" under R.C. 4929.11.

OCC argues that "automatic adjustments may be permitted only where the costs being tracked fluctuate on the same automatic basis." (OCC Reh'g at 16.) The statute contains no such requirement. Section 4929.11 provides as follows:

> Nothing in the Revised Code prohibits, and the public utilities commission may allow, any automatic adjustment mechanism or device in a natural gas company's rate schedules that allows a natural gas company's rates or charges for a regulated service or goods to fluctuate automatically in accordance with changes in a specified cost or costs.

Contrary to OCC's assertion, the word "automatic" does not qualify the phrase "changes in a . . . costs or costs." The only qualification attached to that phrase is "specified." The only thing that must "fluctuate automatically" is the company's "rates or charges."

OCC's concerns regarding any "slippery slope" or "loophole" are misguided. It appears that OCC's problem is with the language of the statute, not with the Commission's application of the statute. Section 4929.11 does not contain any substantive limitation as to the kind of costs to be recovered through an automatic adjustment mechanism. The statute, however, does contain procedural limitations. The costs must be "specified" and "allow[ed]" by the Commission. Here, no one questions the Commission's continuing authority to review expenditures throughout the life of the rider. Indeed, DEO expressly submits to that authority in the PIR Application.

Section 4929.11 is an enabling statute ("the public utilities commission may allow"). "The necessity of . . . delegat[ing] . . . administrative functions to boards and commissions in order that the very evident purpose of enabling statutes may be made effective has been long recognized and sanctioned." *Akron & B.B.R. Co. v. Pub. Util. Comm.* (1947), 148 Ohio St. 282, 287. As the Court stated, "It is no violation of the constitutional inhibition against the delegation

of legislative power for the General Assembly to establish a policy and fix standards for the guidance of administrative agencies of government while leaving to such agencies . . . the determination of facts to which the legislative policy applies." *Id.* Here, section 4929.11 is an enabling statute that delegates discretion to the Commission to determine what kinds of costs are appropriate for rider recovery. Section 4929.02(A) explains "the policy of this state"; subsection (B) instructs that the Commission "shall follow the policy specified in this section in carrying out," *inter alia*, R.C. 4929.11. This combination of policy-explanation and agency-enabling is appropriate legislative activity and presents no grounds for rehearing.

OCC's reliance on *Pike Natural Gas v. Public Utilities Commission* (1984), 68 Ohio St.2d 181, does not further OCC's cause. (*See* OCC Reh'g at 17.) That case involved the purchased-gas adjustment statute and was decided before the enactment of Chapter 4929 and the general authorization for automatic adjustment mechanisms. That case reviewed the scope of R.C. 4905.302. Unlike R.C. 4905.302 (which only allows recovery of "the cost to the company of obtaining the gas that it sells"), however, R.C. 4929.11 contains no substantive limitation on what kind of costs may be recovered. *Pike Natural Gas* is not even remotely on point.

2. The PIR Application need not be filed as an alternative rate plan under R.C. 4929.05.

OCC repeats its argument that the PIR Application should have been filed as an alternative rate plan under R.C. 4929.05. OCC covers no new ground here and still has not responded to the fatal flaw in its argument, *i.e.*, that OCC's reading of the statute renders R.C. 4929.11 superfluous.

Section 4929.01(A) provides that "[a]lternative rate plans . . . may include . . . automatic adjustments." Section 4929.11 expressly authorizes "automatic adjustment mechanism[s] or device[s] in a natural gas company's rate schedules." Thus, Chapter 4929 authorizes both

"automatic adjustments" as a component of an alternative rate plan, *see* R.C. 4929.05 & 4929.01(A), or a stand-alone "automatic adjustment mechanism," *see* R.C. 4929.11. This analysis fully accounts for both R.C. 4929.01(A) and R.C. 4929.11. As OCC reads the statute, both R.C. 4929.11 and 4929.01(A) accomplish the same purpose and are hence redundant—each one does nothing more than allow alternative rate plans to include automatic adjustments. OCC would read R.C. 4929.11 out of the Revised Code.

3. The PIR Application is not for an increase in rates.

No matter how many times OCC tries to say so, the PIR Application is *not* for an increase in rates. Rates will not increase upon approval of the PIR Application, so no rate-increase filing is required under R.C. 4909.18 and 4909.19, and the prefiling notice requirements of R.C. 4909.43 do not apply.[4]

OCC cites *Ohio Consumers' Counsel v. Public Utilities Commission*, 111 Ohio St.3d 384, 2006-Ohio-5853, for the proposition that "the Commission must follow the ratemaking requirements" of the Revised Code. (OCC Reh'g at 22.) This case stands for no such thing. As pertinent here, the Court merely held that "orders allowing accounting-procedure changes" are final orders and thus subject to appeal. *Id.* ¶ 25. DEO does not dispute that. The eventual order approving or denying the PIR Application likely will also be final and subject to appeal. Of course, the right to appeal is one thing; success on the merits is another. And the cited case—an electricity case, involving accounting orders, and having nothing to do with automatic adjustment mechanisms—has no bearing on the merits here.

[4] As pointed out in DEO's Memorandum Contra OCC's Motion to Dismiss, DEO *did* provide notice to OCC and affected communities.

C. The Commission's Entry Was Procedurally Sound.

OCC finally asserts that the Commission's Entry was not supported by findings of fact. (OCC Reh'g at 22–23.) Section 4903.09, however, does not support OCC. That statute does not require "findings of fact" until the filing of "the records of [contested] cases." OCC, however, is complaining about a *prehearing* entry. No hearing has been held in this case, and no evidence has been taken, so it is not clear how the Commission would have made the requested findings of fact before the development of the record. Accordingly, R.C. 4903.09 neither applies in this instance nor supports OCC's request for rehearing.

In addition to lacking statutory support, OCC's argument poses significant practical problems. The Commission was ruling on OCC's own, prehearing Motion to Dismiss. To rule on OCC's Motion, the Commission had to assume certain facts to be true, such as DEO's assertion that certain costs will fluctuate. OCC made a *legal* assertion that the wrong statute was being used. OCC's Motion, then, called for a legal—not factual—determination. In order to make this legal determination (*i.e.*, whether the correct statute was used), the Commission necessarily assumed that DEO's factual assertions were true. How else could the Commission proceed? OCC apparently would have the Commission hold a hearing and take evidence *before* ruling on its Motion to Dismiss.[5] Such a process would be as impracticable as it would be inappropriate.

III. CONCLUSION

For the above reasons, DEO respectfully requests that the Commission deny OCC's Application for Rehearing.

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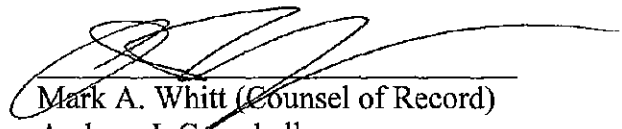
[5] OCC, of course, will have an opportunity to prove at hearing that DEO's infrastructure-replacement costs will not change or fluctuate.

Respectfully submitted,



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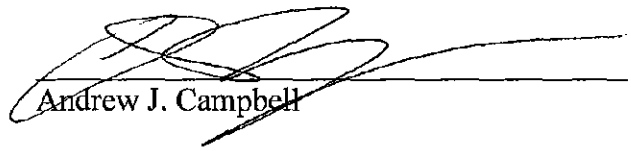
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Application for Rehearing by the Office of the Ohio Consumers' Counsel was sent by ordinary U.S. mail to the following parties on this 29th day of April, 2008.



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