FILE

44

RECEIVED-DOCKETING
2008 JUL 21 PM 4:02
PUCO

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-ALT
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 and for Certain Accounting Treatment.	))))))	Case No. 06-1453-GA-UNC

MOTION TO DISMISS DOMINION EAST OHIO'S APPLICATION FOR AUTHORITY TO INCREASE RATES FOR ITS GAS DISTRIBUTION SERVICE OR IN THE ALTERNATIVE MOTION TO DISMISS DOMINION EAST OHIO'S PIPELINE INFRASTRUCTURE REPLACEMENT APPLICATION BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Joseph P. Serio, Counsel of Record
Larry S. Sauer
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
serio@occ.state.oh.us
sauer@occ.state.oh.us
poulos@occ.state.oh.us

July 21, 2008

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-ALT
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 and for Certain Accounting Treatment.	))))))))	Case No. 06-1453-GA-UNC

MOTION TO DISMISS DOMINION EAST OHIO'S APPLICATION FOR AUTHORITY TO INCREASE RATES FOR ITS GAS DISTRIBUTION SERVICE OR IN THE ALTERNATIVE
MOTION TO DISMISS DOMINION EAST OHIO'S PIPELINE INFRASTRUCTURE REPLACEMENT APPLICATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

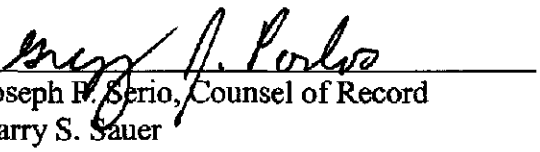
The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all the approximately 1.2 million residential utility consumers of the East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "the Company") moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to dismiss DEO's application for authority to increase rates for its gas distribution service ("Rate Case Application"). The Company failed to include the Pipeline Infrastructure Replacement Application ("PIR Application") as part of the required statutory procedural requirements of R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43. DEO has twice published public notices and sent notices to the mayors and legislative leaders addressing portions of the Rate Case Application yet, both times the Company failed to use a notice that incorporated all five of the core components of the Rate Case. Therefore, the Commission must dismiss DEO's Rate Case.

In the alternative, OCC moves to dismiss DEO's February 22, 2008 Pipeline Infrastructure Replacement Application to increase customers' rates and collect over $2.6 billion (in 2007 dollars) in pipeline infrastructure replacement costs from customers. The Commission lacks jurisdiction to consider the PIR Application based on the Company's failure to follow the statutory requirements of R.C. 4909.18, R.C. 4909.19, R.C. 4929.05 and R.C. 4909.43.

The reasons for granting OCC's Motion to Dismiss are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Joseph P. Serio, Counsel of Record
Larry S. Sauer
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
serio@occ.state.oh.us
sauer@occ.state.oh.us
poulos@occ.state.oh.us

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF THE CASE AND FACTS 2

III. ARGUMENT IN SUPPORT OF OCC'S MOTION TO DISMISS DEO'S RATE CASE APPLICATION 7

A. Because the Commission Determined that the Pipeline Infrastructure Replacement Application is an Alternate Rate Plan, DEO Must Comply with the Statutory Mandates of Chapter 4929.05 7

B. DEO's Rate Case Public Notice Failed to Disclose the Substance of the Rate Case Application Because It Did Not Include The Pipeline Infrastructure Replacement Application 8

1. Ohio Supreme Court Precedent Requires the Public Notices to Incorporate the Substance of An Application 10

2. By failing to include the Pipeline Infrastructure Replacement Application in the Rate Case Public Notice, DEO cannot demonstrate that its public notice fully discloses the essential nature or quality of the entire current application. 12

C. The Consolidation of the Pipeline Infrastructure Replacement Application Into the Rate Case At This Late Date Means DEO Also Failed to Comply With the Statutory Requirements of R.C. 4909.43 Regarding Pre-filing Notice to Municipalities. 16

IV. ARGUMENT IN SUPPORT OF OCC'S MOTION TO DISMISS DEO'S PIR APPLICATION 17

A. As an Alternate Rate Filing, DEO's PIR Application Has Not Met the Statutory Mandates of R.C. Chapter 4929 17

B. The Commission Lacks Jurisdiction to Approve the PIR Application Because It Was Not "Part of an Application Filed Pursuant to R.C. 4909.18," in Violation of R.C. 4929.05 19

C. DEO's Pipeline Infrastructure Replacement Application is An Application for a Rate Increase and thus Must Comply with the Applicable Statutory Notice Requirements including R.C. 4909.18, 4909.19, and 4909.43(B). 21

1. DEO's Pipeline Replacement Program Application is An Application for a Rate Increase and Must Comply with R.C. 4909.18(E), R.C. 4909.19 and R.C. 4909.43(B). 22

2. DEO's Attempt To Amend the Rate Case At This Late Date Means the Public Will Not Receive the Statutorily Required Public Notice For this Significant Rate Increase. 24

V. CONCLUSION.....29

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-ALT
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 and for Certain Accounting Treatment.	)))))))	Case No. 06-1453-GA-UNC

MEMORANDUM IN SUPPORT OF OCC'S MOTIONS TO DISMISS

I. INTRODUCTION

In the current proceeding, the DEO Rate Case Application has been transformed from a straight-forward traditional request for a rate increase to a more complex

proceeding that now contemplates potential future rate increases for a $2.6 billion Pipeline Infrastructure Replacement program. In the rush to making this transformation, the Company and the Commission have not provided DEO customers with the notice specifically required by R.C. 4909.18(E) and R.C. 4909.19.

Although the Company has submitted two notices that have been approved by the Commission, the consolidation of the PIR Application into the Rate Case Application has resulted in a situation where customers have not yet received the formal legal notice required regarding the resulting current Rate Case Application. Because customers have not received notice, the requirements of R.C. 4909.18(E) and R.C. 4909.19 have not been fulfilled. The Commission should dismiss the current consolidated Rater Case Application, or in the alternative, dismiss the PIR Application from the Rate Case.

II. STATEMENT OF THE CASE AND FACTS

On August 30, 2007, DEO filed a Rate Case Application to increase rates for all of its customers, including approximately 1.2 million residential customers in Ohio.[1] On September 30, 2008, within a month of filing its Rate Case Application, DEO moved to consolidate a previously existing, nine-month-old application to recover the costs associated with DEO's deployment of automated meter reading ("AMR") devices[2] ("AMR Application"), with the Rate Case Application. The AMR Application was originally filed in December 2006, purportedly under R.C. 4929.11, and was docketed as

[1] *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, Application (August 30, 2007) ("Rate Case").

[2] *Rate Case*, Motion to Consolidate (September 20, 2007).

Case No. 06-1452-GA-UNC.[3]

On August 30, 2007, DEO filed a proposed public notice ("August 30 Notice")[4] along with the Rate Case Application to comply with R.C. 4909.18(E) and R.C. 4909.19.[5] The August 30 Notice incorporated four substantive components of the Company's Rate Case Application:

1. DEO's request for authority to increase the rates and charges for natural gas distribution services to its customers;
2. The Company's request for approval for an alternative rate plan under R.C. 4929.05 to institute a sales reconciliation rider;
3. The Company's proposed AMR cost recovery charge; and
4. The Company's proposed Gross Receipts Tax Rider.[6]

The Commission approved the August 30 Notice as "Comply[ing] with section 4909.18(E), Revised Code, and should be approved * * *."[7]

In the Rate Case Application, DEO requested a base rate revenue increase of approximately $75.5 million.[8] The AMR Application, sought recovery for the funds to be used by the Company to pay for the AMR program through a cost recovery charge to

[3] *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 and for Certain Accounting Treatment*, Case No. 06-1453-GA-UNC, Application (December 13, 2006) ("AMR Application").

[4] See Attachment 1. It is noteworthy that the Company took the effort to make sure that proposed DSM costs of up to $5.5 million per year were spelled out in the notice, but did not take the same effort to make sure that customers were informed about the $110-$110 million AMR cost estimate.

[5] *Rate Case*, Application, Volume 1, Part 2 of 2, S-3 (August 30, 2007) at 120-122.

[6] *Id.* (The AMR application was incorporated into the public notice by DEO even though the Commission had not yet ruled upon DEO's Motion to Consolidate the AMR Application, Case No. 06-1452 into the rate case.)

[7] *Rate Case*, Entry (October 24, 2007) ("October 24 entry") at 3. (The Commission approved the public notice with a slight modification that is irrelevant to this discussion.)

[8] *Rate Case*, Application Volume 1, at 7.

customers.[9] The AMR Application projected AMR program costs of approximately $100-110 million.[10] However, in less than one year the AMR cost estimate has risen by over 10 percent, without any explanation, to $126.3 million.[11] In contrast with the Pipeline Infrastructure Replacement Application components, the base rate increase and AMR were at least mentioned in the August 30 Notice.

Six months into the rate case review process, on February 22, 2008, DEO filed a second Motion to Consolidate.[12] This Motion to Consolidate sought to add yet another revenue requirement to the Rate Case Application -- this time a $2.6 billion (in 2007 dollars)[13] Pipeline Infrastructure Replacement Application.[14] The PIR Application was initially filed as a "UNC" filing, or an unclassified filing, and assigned Case No. 08-169-GA-UNC.

The potential magnitude of the Pipeline Infrastructure Replacement Application eclipsed the already significant base rate increase requested in the August 30, 2007 Rate Case Application. The $2.6 billion in Pipeline Infrastructure Replacement costs is equivalent to hundreds of millions of dollars in revenue requirements over the next 25 years.

---

[9] *AMR Application* at 6.

[10] *Id.*

[11] *Rate Case*, Second Supplemental Testimony of Jeffrey Murphy (June 23, 2008) at 19.

[12] *In the Mater 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, Motion to Consolidate, (February 22, 2008). ("PIR Case").

[13] Based on the fact that the Company only calculates the PIR Application costs in terms of "2007 dollars" and the fact that the AMR Application costs have already increased by 10% in less than a year from $110-$110 million to $126.3 million, leads to inevitable conclusion that the PIR Application costs will far and away exceed the $2.6 billion price tag that the Company has identified in this case.

[14] *PIR Case*, Application (February 22, 2008) at 11.

The Company made this massive request despite a claim that its pipeline system presently provides safe and reliable service.* * *."[15] Moreover, the Company is currently repairing and replacing pipeline as needed under the traditional regulatory ratemaking methodology as set forth in R.C. 4909.18 and R.C. 4909.19.[16] Nonetheless, the Company is requesting cost recovery to accelerate the process and replace 4,122 miles of pipeline over the next 25 years.[17]

On March 14, 2008, OCC filed a Motion to Dismiss DEO's Pipeline Infrastructure Replacement Application and a Memorandum Contra DEO's Motion to Consolidate the PIR Application with the Rate Case Application. Also on March 14, 2008, Ohio Partners for Affordable Energy ("OPAE") filed a Memorandum Contra DEO's Motion and Application, presenting arguments that were similar to those made in OCC's Memorandum Contra.

In its April 9, 2008 Entry the Commission denied OCC's Motion to Dismiss and accepted DEO's Pipeline Infrastructure Replacement Application as an automatic adjustment mechanism under R.C. 4929.11.[18] In addition, the Commission determined that DEO's PIR Application did not need to be filed as part of a rate case proceeding or as an alternative regulation plan because the proposal only requested approval of the proposed methodology to recover costs of the PIR Application.[19] On April 18, 2008, OCC filed an Application for Rehearing of the Commission's April Entry.[20]

---

[15] *Id.*

[16] *PIR Case*, Direct Testimony of Tim C. McNutt (May 30, 2008) at 9.

[17] *PIR Case*, Application (February 22, 2008) at 2.

[18] *PIR Case*, Entry (April 9, 2008) ("April 9 Entry") at 5.

[19] *Id.* at 5-6.

[20] *Rate Case*, Application for Rehearing by the Office of the Ohio Consumers' Counsel (April 18, 2008).

On May 28, 2008, the Commission granted OCC and OPAE's Applications for Rehearing in part and denied them in part, regarding the Entry of April 9. The Commission denied OCC and OPAE's positions that the Commission erred when it found on April 9 that DEO's Pipeline Infrastructure Replacement Application constituted an automatic adjustment mechanism under R.C. 4929.11.[21] The Commission stated that a determination of whether DEO's PIR Application constituted an automatic adjustment mechanism has not yet been made and would be addressed at a hearing on the matter.[22] Nonetheless, the Commission permitted DEO to go forward with its PIR Application as part of this rate case.[23]

In its Entry on Rehearing, the Commission agreed with OCC and OPAE's position that DEO's Pipeline Infrastructure Replacement Application was an alternative method to establishing rates for distribution service and must comply with R.C. 4929.05. Pursuant to the Commission's May 28, 2008 Entry on Rehearing DEO filed a proposed legal notice and "the pre-filed Supplemental Testimony of Jeffrey A. Murphy and Direct Testimony of Tim C. McNutt in support of the PIR Application in Case No. 08-169-GA-ALT."[24] On June 6, 2008, OCC filed a Memorandum Contra DEO's proposed legal notice.

On June 18, 2008, the Commission granted DEO's motion for approval of the proposed legal notice.[25] In its June 18 Entry the Commission also stated that it has

---

[21] *Rate Case*, Entry on Rehearing (May 28, 2008) ("May 28 Entry on Rehearing") at 6.

[22] *Id.*

[23] *Id.*

[24] *Rate Case*, Motion for Approval of Legal Notice ("May 30 Notice").

[25] *Rate Case*, Entry (June 18, 2008) ("June 18 Entry") at 4.

determined that the Pipeline Infrastructure Replacement Application is an alternative rate plan case that will be considered under R.C. 4929.05.[26]

III. ARGUMENT IN SUPPORT OF OCC'S MOTION TO DISMISS DEO'S RATE CASE APPLICATION

A. Because the Commission Determined that the Pipeline Infrastructure Replacement Application is an Alternate Rate Plan, DEO Must Comply with the Statutory Mandates of Chapter 4929.05.

The applicable standards for granting a Motion to Dismiss are well established. A Motion to Dismiss for failure to state a claim is procedural in nature and tests the sufficiency of the pleading.[27] All factual statements made in the pleading must be accepted as true.[28]

The facts as they relate to the Pipeline Infrastructure Replacement Application are not disputed. DEO filed the PIR Application pursuant to R.C. 4929.11[29] and six months later requested that the PIR Application be consolidated with the Rate Case Application.

DEO's February 22, 2008 Pipeline Infrastructure Replacement Application did not meet any of the procedural requirements for an application filed under R.C. 4909.18 or R.C. 4929.05. Despite this flaw, DEO moved for the consolidation of the PIR Application into its Rate Case Application and the PUCO granted this motion which, by design or effect, avoided the mandatory notice and informational requirements of R.C. 4909.15, R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43.

On May 28, 2008, the Commission determined that DEO's PIR Application was

---

[26] *Id.* at 4.

[27] *State ex. rel. Hanson v. Guernsey County Bd. of Comm.* (1992), 65 Ohio St. 3d 542, 549.

[28] *Lucas County Comm'rs v. PUC*, (1997) 80 Ohio St. 3d 344, 347.

[29] *PIR Case*, Application at 1.

an alternative rate plan:

> Upon review of DEO's application in the PIR case, we find that the company does propose an alternative method to establishing rates for a distribution service that is alternate to the method found in section 4909.15, Revised Code.[30]

As a result of the consolidation of the PIR Application into the Rate Case, the PIR Application is now **a part of the** Rate Case Application and at this late date had the consequence of rendering all of DEO's earlier Rate Case notices as incomplete. As previously noted, the August 30 Notice did not include any mention of the PIR program. Thus the August 30 Notice could not, in any way, provide the type of substantive notice to the public as required by R.C. 4909.18(E) and R.C. 4909.19.

The consolidation of the PIR Application into the Rate Case Application is further demonstrated in the June 27, 2008 Entry scheduling Local Public hearings.[31] The June 27 Entry scheduled Local Public Hearings and the evidentiary hearing for both the Rate Case Application and the PIR Application without any specific mention that the hearings would cover both applications. Instead the PIR Application has simply been incorporated into the Rate Case Application.

B. DEO's Rate Case Public Notice Failed to Disclose the Substance of the Rate Case Application Because It Did Not Include The Pipeline Infrastructure Replacement Application.

The August 30 Notice had to meet the requirements of R.C. 4909.18(E) and R.C. 4909.19. Specifically, R.C. 4909.18(E) set forth requirements relating to "fully disclosing the substance of the application." R.C. 4909.19 states that the "public utility

---

[30] *May 28 Entry on Rehearing* at 9.

[31] *Rate Case*, Entry (June 27, 2008) ("June 27 Entry").

shall forthwith publish the substance and prayer of such application a form approved by the public utilities commission." Obviously, the statutory requirement for "disclosing the substance of the application" is intended to provide customers with sufficient information about the utility's filing that customers can actually understand and use.

It must go without saying that customers could use -- and would, in fact, expect -- information regarding a future $2.6 billion program that will result in hundreds of millions of dollars in revenue requirements in future cases to customers as part of the substance of the application. This statutory imperative could not have possibly been accomplished by the August 30 Notice because the Pipeline Infrastructure Replacement Application was not a part of those public notices.

Under R.C. 4909.18(E):

> If the commission determines that said application **is for an increase in any rate**, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:
>
> * * *
>
> (E) A proposed notice for newspaper publication **fully disclosing the substance of the application**. The notice shall prominently state that any person, firm corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The *notice shall* further include the average percentage increase in rate that a representative industrial, commercial, and residential customer *will bear* should the increase be granted in full. (Emphasis added.)

1. Ohio Supreme Court Precedent Requires the Public Notices to Incorporate the Substance of An Application.

The Ohio Supreme Court discussed the proper content of a public notice required by R.C. 4909.18(E) and R.C. 4909.19 in *Committee Against MRT*,[32] stating:

> While generally the published notice required under R.C. 4909.19 need not contain every specific detail affecting rates contained in the application (indeed, such a requirement would be highly impractical and unnecessarily expensive), the **court notes that the statute does require that the "substance" of the application be disclosed; i.e., that the essential nature or quality of the proposal be disclosed to those affected by the rate increases.** Although there is no specific test or formula this court can apply in reviewing challenges made by subscribers with respect to the sufficiency of the notice provided by a utility, **it is clear, given the purposes of the publication required by R.C. 4909.19, that a highly innovative and material change in the method of charging customers should be included in the notice.**[33]

In *Committee Against MRT*, the Court concluded that the notice must set forth the fact that the utility was seeking approval of a measured rate service proposal. In reaching its conclusion, the Court noted:

> In the instant cause Cincinnati Bell provided in its notice to subscribers that it had applied to the commission for authority to increase its rates and charges and revise its tariffs, all of which would be applicable throughout the company's territory in Ohio. The utility stated further in its notice that more information could be obtained from exhibits on file with the commission. Although the utility fully explained measured rate service in Exhibit D of its application, there was no mention of this important proposal in its notice furnished subscribers.
>
> **From reading the notice published in their local newspapers, subscribers opposed to usage rates would not have known of the innovative plan being introduced by the utility, would not have had any reason to view the exhibits on file with the commission, nor would they have had any interest in**

[32] *Committee Against MRT et al. v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 371 N.E.2d 547.

[33] *Id.* at HN2. (Emphasis added).

> **participating in the hearings held before the commission.** Thus, because of the insufficient notice, appellants were not only denied an opportunity to present evidence at the hearings before the commission opposing the selection of the experimental area for measured rate service, but also were denied the opportunity to challenge the new rate service itself. (emphasis added)

In *Ohio Association of Realtors v. Pub. Util. Comm.*,[34] a case regarding a similarly deficient notice of a change to a measured rate service proposed by Ohio Bell, the Ohio Supreme Court again found that the utility's notice "did not disclose the essential nature or quality of the proposal to those affected by the rate increase."[35] Ohio Bell argued that any insufficiency in the published notice was cured by its mailing of brochures containing information regarding the proposed measured rate service increase, sent to customers along with their regular bill. The Court determined that the information in the brochures, while it appeared to explain the measured rate service, "cannot stand in the stead of the requirement of a reasonable statement of such rate amendment proposal to be placed in the legal notice."[36]

The Court further stated:

> The notice requirement of the statute as discussed by this court in *MRT, supra,* is not an unreasonable one. It requires only that the notice state the reasonable substance of the proposal so that consumers can determine whether to inquire further as to the proposal or intervene in the rate case.[37]

The Ohio Supreme Court established two components that a company must meet to establish that the newspaper notice complies with R.C. 49094.18(E) and R.C. 4909.19. First, the company must demonstrate that the notice "fully discloses the essential nature

---

[34] *Ohio Association of Realtors v. Pub. Util. Comm. et al.* (1979), 60 Ohio St.2d 172, 398 N.E.2d 784.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 176.

or quality" of the application.[38] Second, the notice must be understandable and the proposal must be in a format "that consumers can determine whether to inquire further as the proposal or intervene in the rate case."[39] Meeting both prongs is essential to providing an opportunity for every person to understand the full context of the proposal and be able to file an objection.

As discussed in detail below, the PIR Application was not included as part of the Rate Case Application and thus, there was not a full disclosure of the essential nature of the Rate Case Application in the Notice submitted by DEO and approved by the PUCO.[40]

2. By failing to include the Pipeline Infrastructure Replacement Application in the Rate Case Public Notice, DEO cannot demonstrate that its public notice fully discloses the essential nature or quality of the entire current application.

DEO's decision to consolidate the $2.6 billion PIR Application into the Rate Case Application, six months later, nullified the August 30 Notice. As currently proposed, DEO's Rate Case Application now has five core components:

1. DEO's request for authority to increase the rates and charges for natural gas distribution service;

2. The Company's request under R.C. 4929.05 to institute a sales reconciliation rider;

3. The Company's proposed AMR cost recovery charge;

4. The Company's proposed Gross Receipts Tax Rider;[41] and

---

[38] *Ohio Assoc. of Realtors v. Pub. Util. Comm.* (1979) 60 Ohio St. 2d 172, 176, 175.

[39] *Id.* at 176.

[40] *Rate Case, Application,* Volume 1, Part 2 of 2, S-3 (August 30, 2007) at 120-122. See also *Rate Case,* October 24 entry at 3. (The Commission approved the public notice with a slight modification that is irrelevant to this discussion.)

[41] *Rate Case,* Application (August 30, 2007). (The AMR application was incorporated into the public notice by DEO even the Commission had not yet ruled upon DEO's Motion to Consolidate the AMR Application, Case No. 06-1452 into the rate case.)

5. The Company's request under R.C. 4929.05 for a $2.6 billion Pipeline Infrastructure Replacement program.[42]

The August 30 Notice **did not** include the fifth component -- the PIR Application which is also the largest, in terms of dollars. There is no action that DEO or the Commission can take now -- after the fact -- to retroactively cure this deficiency.

The PIR Application had to be included in the Rate Case Application public notice in order to meet the statutory requirements. On May 28, 2008, the Commission attempted to cure this deficiency by requiring DEO to file a public notice, addressing only the PIR Application.

The Commission and Company attempts to cure these deficiencies through the May 30, 2008 Public Notice ("May 30 Notice")[43] were equally inadequate. The May 30 notice **did not** mention the $2.6 billion PIR price tag;[44] the May 30 Notice **did not** mention how long the PIR program is proposed to be;[45] and the May 30 Notice **did not** mention that the proposed PIR charge may grow to be as much as $22.72 per customer per month,[46] in addition to the proposed fixed customer charge of at least $17.50 per customer per month,[47] plus the actual cost of gas.

---

[42] *April 9 Entry* at 8.

[43] See Attachment 2.

[44] *Id.*

[45] *Id.*

[46] $1.12 per month from year 1 plus $.90 per month for years 2-25 (24 x $.90) = $22.72 total. Murphy Supplemental Direct Testimony at 11. Even though the Company claims that his is not intended to represent projected levels of the PIR Cost Recovery Charge, these estimates do represent an estimate of the potential magnitude (in 2007 dollars) of these costs and thus customers should have gotten notice.

[47] In addition to other notice deficiencies customers have not received notice of the PUCO Staff proposed $17.50 fixed charge customer charge (Rate Case Staff Report at 34-35) that the Company has adopted (Murphy Supplemental Direct Testimony at 15-16).

The PIR Application public notice mentions the Rate Case Application only once -- and only in general terms -- stating:

> This Application has been assigned Case No. 08-169-GA-ALT by the Commission, and the case has been consolidated for review with DEO's rate case proceedings in Case Nos. 07-829-GA-AIR, 07-830-GA-ALT, 07-831-GA-AAM, and 06-1453-GA-UNC.[48]

By consolidating the PIR Application into the Rate Case Application without publishing a timely comprehensive public notice that contains the entire substance of the Rate Case Application, DEO has once again failed to comply with the statutory requirements of R.C. 4909.18(E) and R.C. 4909.19.

DEO's piecemeal attempts to address the public notice requirements of R.C. 4909.18 and R.C. 4909.19 contradicts the precedent set by the Ohio Supreme Court in the *Ohio Association of Realtors* and *Committee Against MRT*. Notice for an application for an increase in rates must be sufficient to give customers the opportunity to present evidence at the hearings, before the Commission, opposing the rates or any other aspect of the Application.[49] DEO's failure to include the Pipeline Infrastructure Replacement Application as part of a comprehensive Rate Case Application public notice precluded customers from having the statutorily required opportunity to participate provided under R.C. 4909.18(E) and R.C. 4909.19.

[48] *Rate Case*, Motion for Approval of Legal Notice (May 30, 2008).

[49] *Committee against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St. 2d 231, 234.

The Court in *Committee Against MRT* further noted that the "highly innovative and material change in the method of charging customers should be included in the notice."[50] When this standard is applied to the instant case, it becomes even more apparent that the August 30 Notice was not, and could not, be sufficient. The underlying PIR Application is a significant material change in how DEO would recover the costs associated with repair and replacement of pipelines in the future. The PIR Application proposed a new recovery mechanism for a program of unprecedented magnitude (hundreds of millions of dollars).

In addition to these changes, the sheer magnitude of the PIR Application ($2.6 billion) would warrant more extensive and detailed notice deemed appropriate by the Court. Neither the August 30 Notice, nor the May 30 Notice, has provided customers with the sum and substance of the Rate Case Application as it is now constituted and does not provide customers the information that is needed to determine whether to inquire further as the proposal or intervene in the rate case. Customers could not reasonably understand the magnitude and importance of the changes proposed in the Rate Case Application, as presently constituted, from reading those notices.

Finally, the May 30 Notice is misleading and therefore is not understandable by a residential customer because the only dollar figure included in the Notice is the statement "The maximum monthly PIR Cost Recovery Charge for any DTS customer shall be $1,000.00 per account."[51] By including this dollar figure and failing to include dollar figures relevant to all aspects of the PIR Application and the Rate Case Application,

[50] *Id.* at 233.

[51] *May 30 Notice* at 1.

DEO's May 30 Notice fails to disclose the substance of the Rate Case Application or the PIR Application in a manner that is understandable by the Company's customers.

To summarize, DEO has now published two public notices addressing the Rate Case Application yet, DEO has failed to provide any public notice that incorporates all five of the core components of the Rate Case. The Company has also failed, in its notices, to fully disclose, in a manner that is understandable, the essential nature or quality of the entire current application, therefore, the Commission must dismiss DEO's Rate Case Application.

C. The Consolidation of the Pipeline Infrastructure Replacement Application Into the Rate Case At This Late Date Means DEO Also Failed to Comply With the Statutory Requirements of R.C. 4909.43 Regarding Pre-filing Notice to Municipalities.

In addition to failing to comply with the public notice requirements of R.C. 4909.18 and R.C. 4909.19, addressed above, DEO's decision to consolidate the PIR Application into the Rate Case Application also resulted in DEO's failure to comply with the associated notice provisions of R.C. 4909.43 for a Rate Case Application. R.C. 4909.43(B) states in pertinent part:

> **Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a** public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.[52]

On July 27, 2007, thirty days before filing the Company's Rate Case, DEO notified municipalities about the Rate Case in accordance with the statutory requirement of R.C. 4909.43(B). The Company only included the same four core components that

[52] R.C. 4909.43(B) (Emphasis added.)

can be found in the Company's August 30 Notice: (1) DEO's request for authority to increase the rates and charges for natural gas distribution services to its customers; (2) the Company's request for approval for an alternative rate plan under R.C. 4929.05 to institute a sales reconciliation rider; (3) the Company's proposed AMR cost recovery charge; and (4) the Company's proposed Gross Receipts Tax Rider. However, DEO failed to include the largest piece of the Rate Case Application in the statutorily required pre-filing notice -- the $2.6 billion Pipeline Infrastructure Replacement Application. In fact, the municipalities would not get notice of this component for another six months.

R.C. 4909.43(B) required that notice be given to mayors and legislative leaders **prior** to the filing of an application and not subsequent to the filing. R.C. 4909.43(B) is not an enabling statute nor is it discretionary in its application. DEO had to submit this notice to the mayors and legislative leaders thirty days prior to filing the Rate Case. In this case the May 30 Notice occurred almost one year **after** the original Rate Case Application (August 30, 2007), and after the consolidation of the PIR Application into the Rate Case Application (May 28, 2008). As a result, the May 30 Notice is defective and the Company has failed to fulfill its statutory obligations. The Commission cannot consider slipping a 25-year, $2.6 billion component into the Rate Case at such a late date, without adhering to the statutorily required prior notice to the municipalities and compliance with the pre-filing notice of R.C. 4909.43(B).

IV. ARGUMENT IN SUPPORT OF OCC'S MOTION TO DISMISS DEO'S PIR APPLICATION

A. As an Alternate Rate Filing, DEO's PIR Application Has Not Met the Statutory Mandates of R.C. Chapter 4929.

The Commission has ruled that DEO's February 22, 2008 Pipeline Infrastructure

Replacement Application is an application for an alternate plan.[53] R. C. Chapter 4929 permits alternate rate plans; however, they must comply with the seminal provision of the chapter, R.C. 4929.05. At this time DEO has not filed an appropriate application in order to take advantage of the alternate rate plan provisions of R.C. Chapter 4929. DEO's PIR Application fails in several respects to comply with the terms and conditions of R.C. 4929.05.

Revised Code 4929.05 states, in pertinent part:

> (A) **as part of an application filed pursuant to section 4909.18 of the Revised Code, a natural gas company may request approval of an alternative rate plan. After notice, investigation, and hearing**, and after determining just and reasonable rates and charges for the natural gas company pursuant to section 4909.15 of the Revised Code, the public utilities commission shall authorize the applicant to implement an alternative rate plan if the natural gas company has made a showing and the commission finds that both of the following conditions are met * * *.[54]

Accordingly, to comply with R.C. 4929.05, DEO was required to file its PIR Application, as an alternate rate plan, "as a part of an application filed pursuant to section 4909.18 of the Revised Code." The statute does not permit the alternative rate plan to be filed after the R.C. 4909.18 and R.C. 4909.19 traditional rate case filing. In addition, DEO's proposed $2.6 billion Pipeline Infrastructure Replacement Application had to comply with the notice requirements of R.C. 4929.05. It did not.

The legislative intent of the statute is clear. DEO failed to meet the statutes requirement and must be dismissed. The law is clear, "When the language [of a statute] * * * clearly expresses the legislative intent, the court need look no further[,]" because "at

[53] *May 28, 2008 Entry on Rehearing* at 9.

[54] R.C. 4929.05 (Emphasis added).

that point the interpretative effort is at an end, and the statute must be applied accordingly."[55] In addition, under R.C. 1.42 "words and phrases shall be read in context and construed according to the rules of grammar and common usage." Finally, under R.C. 4929.05, the Commission is permitted to use alternative rate-making only as "part of an application filed pursuant to 4909.18* * *." Any other interpretation defies the express language and clear intent of the General Assembly.

B. The Commission Lacks Jurisdiction to Approve the PIR Application Because It Was Not "Part of an Application Filed Pursuant to R.C. 4909.18," in Violation of R.C. 4929.05.

A significant part of DEO's consolidated Rate Case Application is the $2.6 billion dollar PIR Application. The potential magnitude of the PIR Application ($2.6 billion) eclipses by far the already significant revenue increase requested by DEO in the Rate Case Application ($75.5 million).

DEO did not initially request approval of the Pipeline Infrastructure Replacement Application as part of the Rate Case Application -- that was filed pursuant to R.C. 4909.18. Rather DEO's PIR Application was filed six months after the Rate Case Application, on February 22, 2008, under R.C. 4929.11, a separate provision in the gas alternative regulation chapter of the Revised Code. It was six months later that the Commission declared DEO's filing to be an alternative regulation plan filing under R.C. 4929.05.[56] Once the Commission made this ruling, the Company was required to take a number of steps to comply with the alternative regulation rules. However, any after-the-fact revisions about earlier events are not a substitute for the Company's failure to timely

[55] *Time Warner v. Pub. Util. Comm.* (1996), 75 Ohio St. 3d 229, 237 citing *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101.

[56] *DEO Rate Case*, Entry on Rehearing (May 28, 2008) at 9.

comply with R.C. 4909.18 and R.C. 4929.05.

DEO did not file its PIR Application under R.C. 4909.18 -- either for "an increase in rates" or "not for a rate increase." In fact, the Commission in the June 18, 2008 Entry noted that no determination about the status of the PIR Application under R.C. 4909.18 had been made, stating:

> **The examiner is aware that nowhere in the entry on rehearing does the Commission state that the PIR case is an application for an increase in rates.** Rather, the Commission determined that DEO's PIR case would be treated as an alternative rate plan and considered under the provisions of section 4929.05, Revised Code. In fact the Commission specifically stated in the entry on rehearing that, "In light of our conclusion that the PIR case has been consolidated with the rate case proceedings, the **Commission finds it unnecessary for us to consider whether the PIR application is or is not for an increase in rates."**[57]

DEO's notice filing was made under R.C. 4929.11, and not under R.C. 4929.05 "as part of an application filed pursuant to section 4909.18."

This fact pattern is similar to the facts in *Time Warner*. The telephone utility company in *Time Warner* did not file an application under R.C. 4909.18 -- it merely filed an application under the alternative rate statute.[58] The Court found that the alternative rate statute could not be applied since the company had not filed the application under R.C. 4909.18.[59] Here too, there was no filing under R.C. 4909.18 either for an increase in rates or not for an increase in rates. *Time Warner* and the plain meaning of the controlling statutes cannot be ignored. The Commission is precluded from crafting an after-the-fact solution to the fatal flaws in DEO's notice filings.

---

[57] *Id.* at 4.

[58] *Time Warner* at 237.

[59] *Time Warner* at 236.

The Commission erred by approving the Pipeline Infrastructure Replacement Application as an alternative rate plan when DEO failed to request approval "as part of an application filed pursuant to section 4909.18." The PUCO had no jurisdiction to do so. The Commission, as a "creature" of statute, may exercise only that jurisdiction conferred by statute."[60]

The jurisdiction of the Commission is limited by the plain language contained within the confines of R.C. Chapter 4929. That unambiguous language sets forth distinct mandatory requirements of an alternative regulation plan. The mandatory requirement that an alternative regulation plan may only be considered "as part of an application filed pursuant to section 4909.18" regardless of whether it is or is not for an increase in rates, was not met. Furthermore, the Pipeline Infrastructure Replacement Application is a request by the Company to increase rates and must comply with the notice requirements as stated in R.C. 4909.18(E) and R.C. 4909.19.

C. DEO's Pipeline Infrastructure Replacement Application is An Application for a Rate Increase and thus Must Comply with the Applicable Statutory Notice Requirements including R.C. 4909.18, 4909.19, and 4909.43(B).

DEO's Pipeline Infrastructure Replacement Application was filed without meeting any of the procedural notice requirements for an application filed under R.C. 4909.18. DEO cannot now go back and retroactively comply with the mandatory notice and informational requirements of R.C. 4909.18, 4909.19, and 4909.43(B), after the fact.

The Commission's May 28 Entry on Rehearing ruled that the PIR Application

[60] *Columbus Southern Power Co v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 537.

falls under R.C. 4909.18,[61]

> We note that the alternative rate plan statute itself requires that such applications be filed as part of an application under Section 4909.18, Revised Code. That application under Section 4909.18, Revised Code, could, we find, either be for an increase in rates or not for an increase in rates.

As an application under R.C. 4909.18, DEO's rates may only be increased: (1) after pre-filing notice in accordance with R.C. 4909.43(B), (2) upon written application and notice to the public under R.C. 4909.18, (3) after a hearing under R.C 4909.19, and (4) upon an order of the Commission under R.C. 4909.18 fixing and establishing the rates as just and reasonable rates (and after compliance with certain other statutes and rules). In this regard, DEO failed to file an appropriate pre-filing notice, failed to file a timely application, and failed to issue appropriate notices to the public, as required by the Revised Code.

In R.C. Chapter 4909 the General Assembly established specific proceedings and processes for setting utility rates. Whenever a utility desires to increase its rates and collect more money from customers, it must comply with the procedures set forth in R.C. 4909.18 and R.C. 4929.05. DEO did not comply with those requirements and the PIR Application should be dismissed.

1. DEO's Pipeline Replacement Program Application is An Application for a Rate Increase and Must Comply with R.C. 4909.18(E), R.C. 4909.19 and R.C. 4909.43(B).

The Company has stated that the PIR Application is not an increase in rates[62] and the Commission has stated that it has not made a determination on whether the PIR

[61] May 28 Entry on Rehearing at 8.

[62] *PIR Case*, Memorandum Contra Application for Rehearing by the Office of the Consumers' Counsel (May 9, 2008) at 2.

program is an increase in rates.[63] However, it cannot be disputed that $2.6 billion in pipeline infrastructure costs will result in hundreds of millions of dollars in future revenue requirement and thus the Pipeline Infrastructure Replacement Application clearly is a rate increase.

It is also noteworthy that although the supplemental testimony filed by DEO witness Murphy and McNutt discussed a brief process that would be used to review annual Pipeline Infrastructure Replacement filings, there was no mention of annual notice to customers, no mention of any discovery process and no mention of an evidentiary hearing.[64] The Company and PUCO cannot argue that notice is not needed at this point in time because there is no actual rate increase, and then not include any notice, discovery or hearing provisions in the future PIR process.[65]

In this case DEO is requesting to amend the rates the Company receives for infrastructure repair and replacement. As acknowledged by Staff, the Company's current rates include funds for replacement costs for aging infrastructure. "Under its current base rates, DEO has replaced approximately 40 miles of bare steel and cast iron pipeline, on average, over the last six years."[66] Therefore, the PIR Cost Recovery Charge is a modification -- albeit an exponentially large one -- to the Company's current charge for infrastructure replacement costs.

In fact, under the PIR Application submitted by the Company and approved by Staff, the PIR Cost Recovery Charge will result "in an incremental cost per residential

---

[63] May 28 Entry on Rehearing at 12.

[64] *PIR Case*, Direct Testimony of Tim C. McNutt, Second Supplemental Testimony of Jeff Murphy.

[65] Supplemental Testimony of Jeff Murphy at 8. Even this mention of "pre-filing notice" only seems to contemplate notice to the PUCO staff in order to facilitate the filing and not notice to the public.

[66] *PIR Case*, Staff Report at 7.

customer of $1.12 per month for the first year of the [Pipeline Infrastructure Replacement] Cost Recovery Charge * * *."[67] In the PIR Staff Report, Staff acquiesced to DEO's rate increase argument stating "Staff agrees with this revenue allocation in principle but the final allocation must conform to whatever allocation is ultimately approved by the Commission in this base rate proceeding."[68] Staff did limit its approval of the PIR Application to only the first eight years "[Staff] recommend[s] the Commission grant approval for an initial eight years or the filing of a subsequent base rate case whichever come first."[69] Thus, authorizing DEO to collect the deferrals, commencing in August 2009 -- annual deferrals representing millions of dollars -- constitutes an increase in rates for customers for a service that the Company is already providing.

The PIR Application will result in significant automatic rate increases to residential customers for at least the next 8[70] and possibly as long as the next 25 years.[71] This is more than a mere accounting approval. The effect of "approving" the accounting is that rates in this case will be **increased** significantly on the basis of the deferrals being permitted.

2. DEO's Attempt To Amend the Rate Case At This Late Date Means the Public Will Not Receive the Statutorily Required Public Notice For this Significant Rate Increase.

As part of the Commission's Entry on Rehearing, the Commission stated that DEO's PIR Application would be treated as an alternative rate plan and considered under

---

[67] *PIR Case*, Application at 4.

[68] *Rate Case*, Staff Report at 4.

[69] *Rate Case*, Staff Report at 5.

[70] *PIR Case*, Staff Report at 5.

[71] *PIR Case*, Application at 1.

the provisions of R.C. 4929.05.[72] The notice requirements for the PIR program are the same as those for an application for an increase in rates under R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43(B). It is axiomatic that the "notice" required under R.C. 4929.05 is the same notice required when a utility applies for a rate increase under R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43(B). This is because R.C. 4929.05 is based upon a filing under R.C. 4909.18 -- "as part of an application filed pursuant to section 4909.18 of the Revised Code."

The notice requirements for an application for a traditional rate case (and an alternative rate case) can be found under R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43. In this case, DEO has failed to meet any of these notice requirements.

The May 30 Notice is misleading and therefore is not understandable by a residential customer because the only dollar figure included in the notice is the statement "The maximum monthly PIR Cost Recovery Charge for any DTS customer shall be $1,000.00 per account."[73] By including this dollar figure and failing to include any other dollar figure DEO is representing that "the maximum monthly PIR Cost Recovery Charge for any DTS customer" is a primary component of this Application. This is misleading.

For example, DEO's mischaracterization includes DEO's failure to disclose its estimates for the pipeline replacement portion of its PIR Application or the associated main-to-curb replacement costs included in the Application:

[72] May 28 Entry on Rehearing at 10.

[73] *May 30 Notice* at 1.

> DEO estimates that the pipeline replacement portion would cost approximately $1,656,000,000, with the associated main-to-curb replacement expected to cost approximately $490,000,000.[74]

DEO mischaracterization of the material components of this Application also include the Company's failure to disclose in its May 30 Notice its estimates for the replacement costs of service lines associated with the bare-steel and cast- and wrought-iron pipeline infrastructure portion of its PIR Application.

> DEO estimates that the replacement cost of service lines directly associated with the bare-steel and cast- and wrought-iron pipeline infrastructure will be $516,000,000 in 2007 dollars.[75]

DEO's mischaracterization of the material components of this Application also include the Company's failure to disclose in its May 30 Notice the magnitude of the Pipeline Replacement Plan proposal.

> The net mileage estimated for this portion of the PIR program is approximately 3,567 miles. The program will also entail replacement of approximately 515,000 main-to-curb connections to which curb-to-meter service lines are connected.[76]

As one final example, DEO's mischaracterization of the material components of the PIR Application also include the Company's failure to disclose its estimates of what its residential consumers could expect to pay in the event the Commission approved its PIR Application.

> DEO estimates that the program will result in an incremental cost per residential customer of $1.12 per month for the first year of the PIR Cost Recovery Charge, with subsequent increases of less than $0.90 per year in 2007 dollars.[77]

[74] DEO Pipeline Replacement Case, Application at 5 (February 22, 2008).

[75] Id. at 6.

[76] Id. at 5.

[77] Id. at 4.

These omissions from the Notice, along with others, that DEO is proposing in its PIR Application are significant and result in DEO's failure to fully disclose the substance of the application in a manner that is understandable and in a format that consumers can determine whether to inquire further as the proposal or intervene in the rate case. Without notice of the specific nature and dramatic increases to the monthly customer charges incorporated in DEO's PIR Application, the public does not have the statutory opportunity to participate in the proceedings.

DEO also failed to comply with the associated notice provisions of R.C. 4909.43(B). R.C. 4909.43(B) is not discretionary in its application and had to be completed thirty days prior to DEO filing the PIR Application. R.C. 4909.43(B) states:

> **Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code**, a public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein. (Emphasis added)

DEO failed to comply with the requirements of this law. DEO included the municipalities on the service list for the PIR Application, which means the Company provided notice to the municipalities at least thirty days **after** the statutorily required period. Because DEO failed to submit the proper pre-filing notice thirty days **before** filing the PIR Application, DEO cannot meet the statutory requirements related to filing an application for a rate increase, and the Commission has no jurisdiction to accept DEO's PIR filing.

In addition, R.C. 4909.18(E) sets forth the requirements relating to the substance of the application and R.C. 4909.19 establishes the method of publication. Under R.C.

4909.18(E),

> If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:
>
> * * *
>
> (E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The **notice shall** further include the average percentage increase in rate that a representative industrial, commercial, and residential customer **will bear** should the increase be granted in full. (Emphasis added.)

R.C. 4909.19 requires that the "substance and prayer" of the application must be approved by the PUCO and published once a week for three consecutive weeks in "newspapers published and in general circulation throughout the territory in which such utility operates." DEO has not complied with, nor can DEO's proposal comply with these requirements at this late date. The Ohio Supreme Court has stated the purpose of R.C. 4909.18(E) is "to provide **any person**, firm, corporation, or association, **an opportunity to file an objection to the increase under R.C. 4909.19.**"[78]

The Commission, as a "creature" of statute, may exercise only that jurisdiction conferred upon it by statute.[79] The Commission's jurisdiction is limited by the plain language contained within the confines of R.C. 4909.18, R.C. 4909.19, and R.C. 4943(B). Under R.C. 1.42 "words and phrases shall be read in context and construed according to the rules of grammar and common usage." The language of R.C. 4909.18, R.C. 4909.19, and R.C. 4943(B) set forth distinct mandatory requirements for an

[78] *Committee Against MRT et al. v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 234. (Emphasis added.)

[79] *Columbus Southern Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 537.

application for an increase in rates. These requirements were not met for DEO's PIR Application, and thus the Commission cannot accept the filing.

V. CONCLUSION

Ohio's ratemaking statutes require that the public receive proper notice as part of any utility request to increase rates. Statutory requirements and Ohio Supreme Court precedent specifically require that highly controversial and material changes should be included in any notice to customers for a proposed rate increase. DEO customers have never received notice of the of the current consolidated rate case which includes controversial and material changes in the form of the $2.6 billion Pipeline Infrastructure Replacement Application. Therefore, the Commission should dismiss the current consolidated Rate Case Application because it has failed to adhere to the statutory requirements.

In the alternative, customers have not received proper notice of the alternative regulation Pipeline Infrastructure Replacement Application as required by R.C. 4929.05 and other statutes, and thus the Pipeline Infrastructure Replacement Application should be dismissed.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Joseph P. Serio, Counsel of Record
Larry S. Sauer
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
serio@occ.state.oh.us
sauer@occ.state.oh.us
poulos@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing *Motion to Dismiss Dominion East Ohio's Application for Authority to Increase Rates for its Gas Distribution Service or Motion to Dismiss Dominion East Ohio's Pipeline Infrastructure Replacement Application by the Office of the Ohio Consumers' Counsel* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 21st day of July, 2008.

Gregory J. Poulos
Assistant Consumers' Counsel

Stephen Reilly
Anne Hammerstein
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Mark A. Whitt
Andrew J. Campbell
Jones Day
P.O Box 165017
Columbus, Ohio 43216-5017

Joseph P. Meissner
Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3900

Joseph M. Clark
McNees, Wallace & Nurick
Fifth Third Center
21 East State Street, Suite 1700
Columbus, Ohio 43215

David A. Kutik
Jones Day
North Point, 901 Lakeside Ave.
Cleveland, Ohio 44114-1190

David Rinebolt
Ohio Partners for Affordable Energy
231 West Lime Street
P.O. Box 1793
Findlay, Ohio 45839-1793

John M. Dosker
General Counsel
Stand Energy Corporation
1077 Celestial Street, Suite 110
Cincinnati, Ohio 45202-1629

Todd M. Smith
Schwarzwald & McNAir LLP
616 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114

W. Jonathan Airey
Gregory D. Russell
Ohio Oil & Gas Association
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

Stephen M. Howard
Ohio Gas Marketers Group
Vorys, Sater, Seymour &Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

David F. Boehm
Michael L. Kurtz
Ohio Energy Group
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

Schedule S-3

THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO
CASE NO. 07-0829-GA-AIR
PROPOSED NOTICE FOR NEWSPAPER PUBLICATION

NOTICE OF APPLICATION FOR AUTHORITY
TO INCREASE RATES FOR ITS GAS DISTRIBUTION SERVICE AND FOR
APPROVAL OF AN ALTERNATIVE RATE PLAN AND CHANGE IN
ACCOUNTING METHODS
THE EAST OHIO GAS COMPANY DBA DOMINION EAST OHIO
PUCO CASE NOS. 07-0829-GA-AIR, 07-0830-GA-ALT, 07-0831-GA-AAM

Pursuant to Section 4909.19, Revised Code, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby gives notice that on August 30, 2007, it filed an application with the Public Utilities Commission of Ohio ("Commission") requesting authority to increase the rates and charges for natural gas distribution services to its customers. DEO has also applied, under Section 4929.05, Revised Code, for approval of an alternative rate plan to institute a sales reconciliation rider.

This notice describes the substance of the Application. However any interested party desiring complete, detailed information with respect to any affected rates, charges regulations, and practices may inspect a copy of the Application and supporting schedules at the offices of the Commission at 180 East Broad Street, Columbus, Ohio 43215-3793, or at the business office of DEO at 1201 East 55th Street, Cleveland Ohio 44103, during normal business hours. A notice of intent to file this rate increase application and a copy of the proposed rates were mailed to the mayors and legislative authorities of the communities located within the areas served by DEO and filed with the Commission on July 20, 2007.

The Application, which contains proposed revisions to DEO's Tariff for Gas Service, affects rates and charges and certain terms and conditions for natural gas service to all customers of DEO served within all or portions of the counties of Allen, Ashland, Ashtabula, Auglaize, Belmont, Columbiana, Cuyahoga, Fulton, Geauga, Guernsey, Holmes, Lake, Mahoning, Medina, Mercer, Monroe, Paulding, Portage, Putnam, Shelby, Stark, Summit, Trumbull, Tuscarawas, VanWert, Washington, and Wayne, Ohio. The application states that the current rates and charges do not provide a just and reasonable rate of return on DEO's used and useful property as of March 31, 2007, the date certain

in this case. The application states that DEO requires the proposed revenue increase to provide an opportunity to earn a fair return on its assets and to recover its costs of operation.

Any person, firm, corporation, or association may file, pursuant to Section 4909.19 of the Revised Code, an objection to such proposed increased rates by alleging that such proposals are unjust and discriminatory or unreasonable. Recommendations that differ from the application may be made by the Staff of the Commission or by intervening parties and may be adopted by the Commission.

The existing tariffs of DEO include separate base rates, gross receipt tax percentages, and monthly service charges for the areas under the former West Ohio Gas Company. These areas are the counties of Allen, Auglaize, Mercer, Paulding, Putnam, Shelby and Van Wert. The West Ohio Division rates were determined in a rate case filed by the former West Ohio Gas Company in February 1983 and became effective October 23, 1983. The existing base rate for other DEO communities were determined in a rate filing that became effective November 8, 1994. As a result of the current rate filing, all of the counties included in DEO's East and West Ohio service territories will be under one set of rates.

In its application DEO is proposing to install automated meter reading (AMR) equipment for all its customers over a five year period, which will provide actual meter readings each month.

DEO is also proposing to spend up to an additional $5.5 million per year on customer conservation programs. The company would initially increase dollars spent on conservation programs from the current level of $3.5 million per year to $6 million. If the program exceeds approved targets, the company would then expand it by an additional $1 million in each of the next three years.

Sales Reconciliation Rider (SRR)

A Sales Reconciliation Rider has been proposed to recover the difference between actual base rate revenues and approved test year revenues adjusted to reflect changes in the number of customers. The rider rate will be zero when the tariff is approved by the PUCO. Effective November 1 of each year, the rider rate will be revised after further approval by the PUCO. This proposed rider would apply to the General Sales Service (GSS), Large Volume General Sales Service (LVGSS), Energy Choice Transportation Service (ECTS) and Large Volume Energy Choice Transportation Service (LVECTS) rate schedules.

AMR Cost Recovery Charge

A flat monthly charge will be added to the otherwise applicable customer service charge for all customers under the following rate schedules: GSS, LVGSS, ECTS, LVECTS, General Transportation Service (GTS), and Transportation Service for Schools

(TSS). This additional charge is proposed to recover the depreciation, incremental property taxes and post in-service carrying costs associated with the installation of AMR equipment throughout DEO's system.

Gross Receipts Tax (GRT) Rider

The current GRT Rider is applied only to gas cost charges billed under the GSS and LVGSS rate schedules. The proposed GRT Rider will apply to all of the charges billed by DEO on all rate schedules, excluding charges billed on behalf of Energy Choice suppliers that may be subject to applicable sales tax rates.

A description of the proposed changes to the to the base transportation rates and monthly customer charges are listed on the schedules filed with the application. The schedules also list the proposed changes to Volume Banking Service fees, the Transportation Surcredit Rider, and Gross Receipts Tax Rider.

The increase in the operating revenue requested by DEO for its GSS and LVGSS sales rate schedules, inclusive of gas cost revenue, is 4.3% and 1.7%, respectively. The requested increase in operating revenue for its ECTS and LVECTS Energy Choice rate schedules, exclusive of gas cost, is 17.8% and 8.0%, respectively. The requested decrease in operating revenue for DEO's GTS/TSS and Daily Transportation Service (DTS) transportation classes, exclusive of gas cost, is 6.7% and 3.4%, respectively. The requested increase in operating revenue for DEO's Firm Storage Service (FSS) rate schedule, excusive of gas cost, is 9.0%.

2

FILE

LEGAL NOTICE

NOTICE OF APPLICATION TO THE PUBLIC UTILITIES COMMISSION OF OHIO FOR APPROVAL OF A PIPELINE INFRASTRUCTURE REPLACEMENT COST RECOVERY CHARGE FOR THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby gives notice that on February 22, 2008, it filed with The Public Utilities Commission of Ohio ("Commission") an Application 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. This Application has been assigned Case No. 08-169-GA-ALT by the Commission, and the case has been consolidated for review with DEO's rate case proceedings in Case Nos. 07-829-GA-AIR, 07-830-GA-ALT, 07-831-GA-AAM, and 06-1453-GA-UNC. The substance of the application follows:

The Application, which proposes a mechanism called the Pipeline Infrastructure Replacement ("PIR") Cost Recovery Charge, is applicable to all customers of DEO receiving service under DEO's sales and transportation rate schedules within all or portions of the counties of Allen, Ashland, Ashtabula, Auglaize, Belmont, Columbiana, Cuyahoga, Fulton, Geauga, Guernsey, Holmes, Lake, Mahoning, Medina, Mercer, Monroe, Paulding, Portage, Putnam, Shelby, Stark, Summit, Trumbull, Tuscarawas, Van Wert, Washington, and Wayne, Ohio. In addition to any otherwise applicable monthly service charge, the proposed mechanism provides that all customers receiving service under the following rate schedules shall be assessed a monthly charge, regardless of gas consumed, to recover the revenue requirement net of Gross Receipts Tax associated with DEO's pipeline infrastructure replacement program:

- General Sales Service ("GSS")
- Energy Choice Transportation Service ("ECTS")
- Large Volume General Sales Service ("LVGSS")
- Large Volumes Energy Choice Transportation Service ("LVECTS")
- General Transportation Service ("GTS")
- Transportation Service for Schools ("TSS")

Customers receiving service under the Daily Transportation Service ("DTS") rate schedule shall be assessed a volumetric charge in addition to their volumetric delivery

charge for that purpose. The maximum monthly PIR Cost Recovery Charge for any DTS customer shall be $1,000.00 per account.

The PIR Cost Recovery Charge will provide for the recovery of costs incurred in (1) the replacement of certain bare-steel and cast- or wrought-iron pipelines over a period of twenty-five years; (2) the assumption of responsibility for curb-to-meter service lines; and (3) ongoing infrastructure replacements and relocations and system improvements.

The PIR Cost Recovery Charge shall be updated annually to reflect the variation in DEO's revenue requirements associated with pipeline infrastructure replacement expenditures as offset by corresponding operations and maintenance expense reductions during the most recent twelve months ended June 30. DEO shall file a notice no later than May 31 of each year based on nine months of actual data and three months of estimated data for the fiscal year. The filing shall be updated by no later than August 31 of the same year to reflect the use of actual fiscal year data. Such adjustments to the PIR Cost Recovery Charge shall become effective with bills rendered on and after November 1 of each year.

Any person, firm, corporation or association may file a motion to intervene. Any interested party seeking detailed information with respect to the Application may inspect a copy of the Application at the offices of the Commission at 180 East Broad Street, 13th floor, Columbus, Ohio, 43215-3793; by visiting the Commission's web site at http://www.puco.ohio.gov, selecting DIS, inputting 08-169 in the case-lookup box, and selecting the date the Application was filed; or by telephoning the Commission at 1-800-686-7826. In addition, a copy of the Application and supporting documents may be viewed at the business office of DEO at 1201 East 55th Street, Cleveland, Ohio 44103, during normal business hours.