

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

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

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**JOINT MOTION TO STRIKE DOMINION EAST OHIO'S MEMORANDUM  
CONTRA JOINT MOTION TO REOPEN THE RECORD AND FOR WAIVER  
OF CERTAIN REQUIREMENTS OF OHIO ADM. CODE 4901-1-34(B)  
AND FOR A PROCEDURAL SCHEDULE**

**AND**

**JOINT REPLY TO DOMINION EAST OHIO'S MEMORANDUM CONTRA  
JOINT MOTION TO REOPEN THE RECORD AND FOR WAIVER OF  
CERTAIN REQUIREMENTS OF OHIO ADM. CODE 4901-1-34(B)  
AND FOR A PROCEDURAL SCHEDULE**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
THE CITY OF CLEVELAND,**

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**OHIO PARTNERS FOR AFFORDABLE ENERGY,  
THE NEIGHBORHOOD ENVIRONMENTAL COALITION, THE  
EMPOWERMENT CENTER OF GREATER CLEVELAND,  
CLEVELAND HOUSING NETWORK, AND THE CONSUMERS  
FOR FAIR UTILITY RATES**

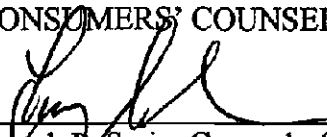
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The Office of the Ohio Consumers' Counsel ("OCC"), the City of Cleveland, Ohio Partners for Affordable Energy ("OPAE"), and a Citizens Coalition comprised of the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumers for Fair Utility Rates ("Citizens Coalition") (collectively "Joint Advocates"), pursuant to Ohio Adm. Code 4901-1-12 on behalf of the 1.1 million residential consumers in the East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "the Company") service territory, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to strike the Memorandum Contra ("Memo Contra") that DEO filed in opposition to the Joint Advocates' Motions to reopen the record, for a waiver of certain administrative requirements, and for a procedural schedule as filed on February 13, 2009. The Memo Contra was not timely filed and should not be considered. In the alternative, the Joint Advocates also file this Reply to DEO's Memo Contra.

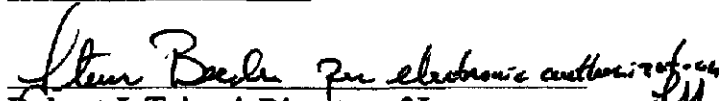
The Joints Advocates request that the Commission strike the Memo Contra and grant the Joint Motion to Reopen the Record, for Waiver of Certain Requirements of Ohio Adm. Code 4901-1-34(b), and for a Procedural Schedule. The reasons for granting this Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

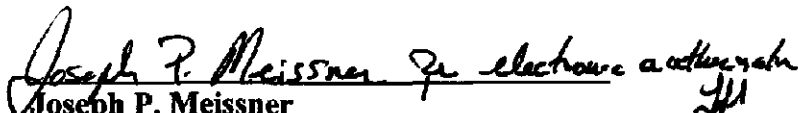
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## Table of Contents

	Page
I. INTRODUCTION .....	2
II. ARGUMENT .....	2
A. DEO's Memo Contra Was Submitted Out of Time .....	2
B. The Commission Should Disregard DEO's Arguments and Grant the Joint Motions.....	3
1. The Filing of an Application for Rehearing does not control the Joint Motion to Reopen the Record .....	3
2. The Filing Joint Advocates have shown good cause for reopening the proceedings.....	5
3. The OCC did not have the ability to present the updated COSS independently .....	9
III. CONCLUSION.....	11

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**MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DOMINION EAST  
OHIO'S MEMORANDUM CONTRA  
AND  
REPLY TO DOMINION EAST OHIO'S MEMORANDUM CONTRA  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
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THE NEIGHBORHOOD ENVIRONMENTAL COALITION, THE  
EMPOWERMENT CENTER OF GREATER CLEVELAND,  
CLEVELAND HOUSING NETWORK, AND THE CONSUMERS  
FOR FAIR UTILITY RATES**

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## **I. INTRODUCTION AND STATEMENT OF FACTS**

On January 13, 2009, DEO filed its updated cost-of-service study as required by the Commission's October 15, 2008 Opinion and Order ("Opinion and Order").<sup>1</sup> On January 29, 2009, in reaction to DEO's filing, Joint Advocates filed a Joint Motion to Reopen the Record, Joint Motion for Waiver of Certain Requirements of Ohio Adm. Code 4901-1-34(b), and Joint Motion for a Procedural Schedule ("Joint Motions"). On February 13, 2009, DEO filed its untimely Memo Contra to Joint Advocates' Joint Motions.

## **II. ARGUMENT**

### **A. DEO's Memo Contra Was Submitted Out of Time.**

The requirements regarding both the timing of pleadings and the associated electronic service requirements, in the above-captioned cases, were set in an Entry dated March 3, 2008. The Attorney Examiners established the following timetable for pleadings: seven calendar days for memoranda contra and four calendar days for replies.<sup>2</sup> DEO's Memo Contra was filed and served on February 13, 2009, fourteen days after the Joint Advocates filing and electronic service of their Joint Motions, and seven days out of time. The Memo Contra was electronically served on the OCC at 5:32 p.m. on Friday of the Presidents Day holiday weekend that limited Joint Advocates to just one business day response time under the PUCO's shortened response times. Nonetheless, the Joint Advocates comply with the PUCO's timeline for a reply. DEO's Memo Contra should be stricken because it was filed seven days out of time. DEO's failure to provide a timely

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<sup>1</sup> Opinion and Order at 25-26 (October 15, 2008).

<sup>2</sup> Entry at 3-4 (March 3, 2008).

Memorandum Contra to the Joint Advocates' Motions should not be excused. The Memo Contra should be stricken and ignored as the result of the Company's failure to abide by the expedited pleading requirements set out in these cases.

In the event that the Commission accepts the Company's Memorandum Contra out of time, then the Joint advocates present the following arguments in Reply.

**B. The Commission Should Disregard DEO's Arguments and Grant the Joint Motions.**

**1. The Filing of an Application for Rehearing does not control the Joint Motion to Reopen the Record.**

DEO admitted that the Commission possesses continuing authority to review the reasonableness of the rates charged by utilities.<sup>3</sup> But DEO claims that the fact that year 2 rates were *established* in this proceeding does not mean that year 2 rates must be *reviewed* in this proceeding.<sup>4</sup> The Joint Motion to Reopen these proceedings is merely a request for the Commission to do something that the Company admits the PUCO has authority to do at any time.

The Commission has the authority and has explicitly stated its intention to exercise that continuing authority. The Commission's Order stated:

Therefore, the Commission is approving the first two years of this transition, however, prior to approval of rates for the third year and beyond the Commission believes that a review of the cost allocation methodologies for the GSS/ECTS classes is appropriate. Therefore, DEO is directed to complete the cost allocation study required in the stipulation within 90 days of this order. Upon completion, DEO should submit a report and recommendation regarding whether the GSS/ECTS classes are appropriately comprised of both residential and non-residential customers or whether the classes should be split. DEO shall also provide, if the recommendation is to split the classes, a recommended cost

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<sup>3</sup> Memo Contra at 6.

<sup>4</sup> Memo Contra at 6 (Original emphasis).



allocation per class. Upon review of the cost allocation study, the Commission will be establishing a process that will be followed to determine the appropriate rates in year three and beyond, as soon as practicable.<sup>5</sup>

Inasmuch as the Commission did not state any intention to change its review process, the Joint Advocates presumption is that any process established by the Commission to review the updated cost of service study (“COSS”) will mirror the rate case process pursuant to R.C. 4909.18 and R.C. 4909.19 such that the utility bears the burden of proof, interested parties are given notice, ample discovery rights, and an opportunity to be heard. The Joint Advocates are requesting an acceleration of the Commission’s intended review of the rates established in these cases now that the results are available from the updated COSS, and the harm to residential customers has been quantified.

The Commission in its Opinion and Order anticipated a review of DEO’s rates in year three and beyond. However, as evidenced by the updated COSS the harm to residential customers begins in year-two. As DEO stated in its Memo Contra: “there would be no substantive difference between a review of year-two rates in this proceeding and a review of year-two rates in any other proceeding.”<sup>6</sup> To accommodate that review, through the process established by the Commission, the Joint Advocates asked the Commission to establish a procedural schedule that would determine the appropriate docket for such a review. Such a procedural schedule could be ordered within this proceeding pursuant to Ohio Adm. Code 4901-1-34(B), or by initiating the review in another proceeding. The Joint Advocates are not focused on the particular docket, but

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<sup>5</sup> Opinion and Order at 25-26 (October 15, 2008).

<sup>6</sup> Memo Contra at 6.

that the review of year-two rates takes place, in a timely manner --prior to the implementation of year-two rates when the harm to residential customers will take place. Therefore, the Commission should grant the Joint Motions and order a review of the year-two GSS rates, through the process established by the Commission, in order to remedy the unreasonable inter-class subsidy that exists within the general sales service ("GSS") rate design that will prejudice residential consumers.

**2. The Joint Advocates have shown good cause for reopening the proceedings.**

The standard for reopening a proceeding, under Ohio Adm. Code 4901-1-34(A), includes a showing of good cause. The Company incorrectly argues that the Joint Advocates have failed to show good cause for reopening the proceeding, but DEO does not discuss the substance of Joint Advocates' arguments. The Company states:

Fundamentally, the Joint Advocates have failed to explain why the issues raised in the Motion could not just as effectively be addressed in a separate proceeding. They seek review only of "the applicable year two rates (to be effective October 16, 2009)."<sup>7</sup>

The Joint Advocates have moved to reopen these proceedings because this was the docket in which DEO filed the updated COSS. The Joint Advocates would have no issue if, as part of the process established by the Commission,<sup>8</sup> it ordered the updated COSS to be filed in a different docket and established a procedural schedule that would permit the timely review of year two GSS rates before their scheduled implementation.

As DEO so aptly put it in its Memo Contra, this calls only for a "modestly accelerated procedural schedule."<sup>9</sup> The Commission ordered this study, and the Joint

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<sup>7</sup> Memo Contra at 6.

<sup>8</sup> Opinion and Order at 25-26 (October 15, 2008).

<sup>9</sup> Memo Contra at 6.

Advocates believe the results of the updated COSS should be considered and implemented, by the Commission, in a timely manner in order to mitigate the known and measurable harm to residential customers from the SFV rate design. As the Joint Advocates argued, and DEO does not counter, based on the results of the updated COSS, the revenue shift is dramatic for residential consumers.

The GSS residential distribution base rate increase in year one is \$28 Million whereas the GSS non-residential base rate revenues actually decrease in year one by \$5 million, a total revenue shift of \$33 million that requires that much more be paid by residential consumers under the PUCO's new rate design.<sup>10</sup> In year two the GSS residential base revenues increase another \$9 million while the GSS non-residential base rate revenues decrease by that same \$9 million, for a total revenue shift of \$42 million to be paid by residential consumers. This is a significant shift in revenue responsibility to the GSS residential customers, and contrary to DEO's argument,<sup>11</sup> is a basis for reopening the proceeding or reviewing year-two rates in another proceeding, as part of the process established by the Commission.

Furthermore, as argued in the Joint Motion, if the third year was implemented as the Company proposes in its updated cost-of-service study, the residential GSS customers' base rate revenues would increase by yet another \$11 million and the non-residential GSS customers' base rate revenues would decrease by that same amount, resulting in a total revenue shift of \$53 Million to be paid by residential consumers.<sup>12</sup> In total the residential base rates from the test year to the third year will have increased \$48

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<sup>10</sup> Joint Motion at 8.

<sup>11</sup> Memo Contra at 6.

<sup>12</sup> Joint Motion at 8.

million as a result of prior COSS used in the rate case, which is troubling because DEO's entire distribution rate increase approved by the Commission in these cases was only \$40.5 Million.<sup>13</sup> This serves as further evidence that a legitimate basis exists for the Commission to address the SFV rate design in a timely manner. DEO has offered no arguments to counter the extent to which the GSS residential customers will be harmed as a result of the establishment of uniform rates for the residential and non-residential customers in the GSS class.

DEO has attempted to minimize the Joint Advocates argument in these cases by comparing the subsidy caused by the SFV rate design to an alleged subsidy under the Percentage of Income Payment Plan ("PIPP"). The Supreme Court of Ohio upon a challenge of the PIPP program found the following in a 1986 decision:

Pursuant to its emergency powers under R.C. 4909.16, the PUCO created the PIP plan as a response to growing concern "about the number of residential gas \* \* \* [and] electric customers unable to obtain service as a result of disconnection for nonpayment of bills because of the economic recession, increases in the cost of gas and electric service, and a decrease in the level of governmental assistance \* \* \*." PUCO No. 83-303-GE-COI, *supra*, at 1. The PUCO's exercise of this emergency authority was appealed to this court in a number of cases. [ ] These appeals were summarily dismissed upon motion of the PUCO which asserted that the quasi-legislative nature of its decisions was not properly subject to judicial review. In addition, it is the opinion of this court that it is clearly within the PUCO's emergency powers under R.C. 4909.16 to fashion such relief as that provided by the PIP plan and we find the plan of the commission to be manifestly fair and reasonable as a solution to the crisis.<sup>14</sup>

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<sup>13</sup> Opinion and Order at 6, 12 (October 15, 2008).

<sup>14</sup> *Montgomery County Board of Commissioners v. Pub. Util. Comm.* (1986) 28 Ohio St. 3d 171.

The exercise of emergency powers to address the crisis through the PIPP program is more applicable than a subsidy derived from the implementation of a novel new rate design without the benefit of all information regarding the impacts of that new rate design.

Furthermore, there has been an unsuccessful challenge by non-residential consumers to the PIPP program that DEO did not mention in its Memo Contra. In a 1993 Finding and Order, the Commission stated:

IEC [Industrial Energy Consumers] challenges the arrearage crediting component of the stipulation as unreasonable and unlawful. IEC characterizes the program as an illegal debt forgiveness program. IEC is clearly mistaken. The arrearage crediting program is nothing more than a rate incentive program similar to other such programs implemented by the Commission. The purpose of the program is to provide PIPP customers with an incentive to get off and stay off of PIPP. *Such a result clearly benefits all rate payers \* \* \*.*<sup>15</sup>

The Commission also went on to justify its approval of the PIPP program recovery mechanism because the existence of similarly designed programs that benefited the non-residential customers. The Commission stated:

The Commission currently operates similar programs for industrial and commercial customers pursuant to Section 4905.31, Revised Code. To encourage the expansion of business in a particular service area, the Commission allows the use of economic development rates (EDR). *\* \* \* EDR rates allow the customer to pay a lower rate and the utility to recover half of the lost revenues from all other ratepayers through base rates.* The arrearage crediting program accomplishes the same purpose by allowing the former PIPP customer to pay a reduced rate while the utility recovers half of the arrearage through the PIPP Rider. The arrearage crediting program is an EDR for residential ratepayers or EDR is PIPP for the industrial and or commercial ratepayers.<sup>16</sup>

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<sup>15</sup> *In the Matter of the review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case Nos. 88-1115-GE-PIP, et al. Finding and Order at 18 (December 2, 1993) (Emphasis added).

<sup>16</sup> *Id.* at 18-19 (Emphasis added).

Therefore, the Commission should disregard DEO's argument that the subsidy arising under the SFV rate design should be mitigated by an alleged subsidy under the PIPP program that until now had not been raised by DEO in the rate case or in the updated COSS.

The Commission should, therefore, reopen these proceedings or in the alternative open a new proceeding, to review the GSS rate design before the implementation of year-two rates.

**3. The OCC did not have the ability to present the updated COSS independently.**

DEO argues that OCC was in possession of all data necessary to update DEO's cost-of-service study on February 20, 2008.<sup>17</sup> That argument is false. There are several reasons why OCC could not have accomplished the update as DEO suggests. The updated COSS as filed by DEO on January 13, 2009 states:

DEO has updated its class cost of service study as follows. First, the figures have been adjusted to match those in the Staff Report, *as revised by Staff following the issuance of the December 19, 2008 Entry on Rehearing in this case.*

\* \* \* Updating the study's allocation factors provided insight into the cost to serve both the residential and non-residential segments of the GSS/ECTS class of customers.<sup>18</sup>

The fact that DEO relied on data that was available with the issuance of the Entry on Rehearing and updated the study's allocation factors demonstrates that the OCC was not in a position to replicate this study at the time OCC witness, Frank Radigan, filed his testimony, on June 23, 2008.

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<sup>17</sup> Memo Contra at 8-9.

<sup>18</sup> Updated COSS at 3-4 (January 13, 2009) (Emphasis added).

Furthermore, DEO admitted that updating the COSS was dependent upon the rate design that the Commission approved. DEO stated: "the final cost allocation will be a function of the rate design authorized by the Commission."<sup>19</sup> In support of its updated COSS study, the Company filed twenty pages of workpapers summarizing and supporting the update including the one with the newly developed GSS Residential/GSS Non-Residential allocation factors. None of this material was available at the time Mr. Radigan prepared his testimony. Nor could it have been as Mr. Radigan did not have the benefit of the final rate design authorized by the Commission at the time he prepared his testimony.

What Mr. Radigan did have was a concern for the potential harm that GSS customers could experience if the Commission authorized uniform rates for the GSS class. Mr. Radigan expressed his opinion as to what could occur under an SFV rate design scenario for the GSS class, but that rate design was not authorized when his testimony was filed, and an updated COSS, as DEO stated, is dependent on the authorized rate design. That opinion at a high level expressed the potential harm that GSS residential customers might face, but did not have the precision of the updated COSS because many of the inputs and data were simply not available.

The Commission should recognize that OCC, with reasonable diligence, could not have provided the Commission with a cost of service study that was similar to the updated COSS filed by DEO on January 13, at the time Mr. Radigan's testimony was filed. Indeed, the fact that the PUCO ordered DEO to file the COSS, after the PUCO's

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<sup>19</sup> Updated COSS at 4 (January 13, 2009).

Order, reflects that DEO was the only entity in the position to prepare the study.

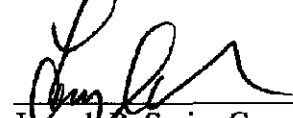
Therefore, the Joint Motions should be granted.

### **III. CONCLUSION**

For all the reasons stated above, the Joint Advocates' Motion to Strike DEO's Memo Contra should be granted and the Commission should admit the Company's updated COSS study into the record as requested by the Joint Advocates. In addition, the Commission should establish a procedural schedule to hear evidence and issue a ruling so as to mitigate the harm, totaling potentially \$51 million resulting from a revenue shift, and GSS residential customers subsidization of the non-residential GSS customers under the SFV rate design.

Respectfully submitted,

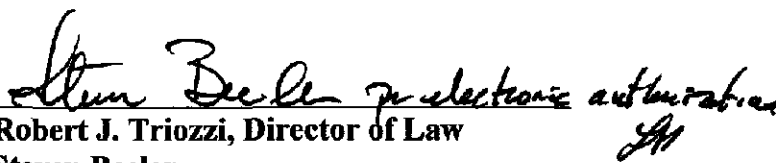
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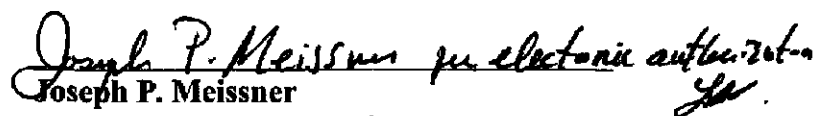
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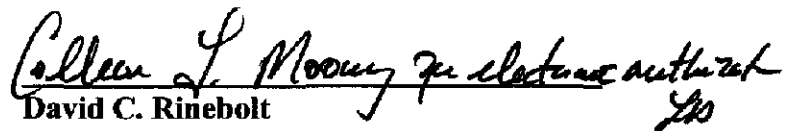
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Motion and Joint Reply* has been served upon the below-named counsel via Electronic Mail this 17th day of February 2009.

  
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