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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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.)	

**JOINT REPLY TO DOMINION EAST OHIO'S MEMORANDUM CONTRA
JOINT MOTION TO STAY**

**BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
THE CITY OF CLEVELAND,
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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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
A. The Commission Should Disregard DEO's Arguments and Grant the Joint Motion to Stay.....	1
1. DEO cannot equate its experience at the Commission to the likelihood of success at the Court.	1
2. DEO unreasonably argues that neither Consumer Advocates, nor their clients, will suffer irreparable harm.....	3
a. Lost opportunities for conservation constitute irreparable harm.	3
b. Implementation of the Stage 2 rates will cause irreparable harm in the event the SFV rate design is over-turned on appeal.	6
c. Irreparable harm will result should the SFV rate design force low-use customers to migrate off the system.	8
d. DEO's failure to provide customers the required notice of the SFV rate design constitutes irreparable harm.	9
3. DEO and many of its customers will not be harmed by the granting of the Stay.	10
4. A Stay is in the public interest.	12
III. CONCLUSION.....	13

I. INTRODUCTION

On March 31, 2009, The Office of the Ohio Consumers' Counsel ("OCC"), the City of Cleveland, Ohio Partners for Affordable Energy, 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 "Consumer Advocates") filed a Joint Motion to Stay the implementation of Stage 2 of DEO's SFV rate design ("Joint Motion"). On April 15, 2009, The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "Company") filed its Memo Contra to Consumer Advocates' Joint Motion ("Memo Contra"). The Consumer Advocates herein reply to DEO's Memo Contra.

II. ARGUMENT

A. The Commission Should Disregard DEO's Arguments and Grant the Joint Motion to Stay.

1. DEO cannot equate its experience at the Commission to the likelihood of success at the Court.

DEO unreasonably states: "Because [Consumer Advocates] merely repeat previously rejected arguments, [Consumer Advocates'] *appeal* is not likely to succeed on the merits, much less make a strong showing of the likelihood."¹ DEO spends numerous pages of the pleading recounting the Company's success at the Public Utilities Commission of Ohio ("Commission" or "PUCO").² Consumer Advocates do not dispute DEO's characterization of the status of the SFV rate design -- the brainchild of the PUCO Staff and brought to life by the PUCO in recent rate cases involving the four largest

¹ Memo Contra at 3. (Emphasis added).

² Memo Contra at 3-6.

natural gas utilities in Ohio.³ However, the results at the Commission do not necessarily translate into success before the Ohio Supreme Court where an appeal currently is pending.

It is inappropriate for DEO to gauge the likelihood of its success on what has transpired at the Commission in these cases. The Ohio Supreme Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case. *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, 563. Based upon such a review, if the Court were to reverse, vacate or modify the PUCO's decision and remand this case to the PUCO with instructions to correct both the procedural and substantive violations of law, a Stay of the Stage 2 SFV rate design would alleviate the irreparable harm that will occur with the implementation of the Stage 2 rates in October, 2009.

DEO has been surprisingly successful in this case where the primary object of its success -- the SFV rate design -- was not even included in the public notice of DEO's application. The SFV rate design was not requested as part of DEO's Application,⁴ and the Staff has been a strong ally for the Company throughout these proceedings promoting

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 07-589-GA-AIR, et al., Pre-Filing Notice (June 18, 2007); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 07-829-GA-AIR, et al., Pre-Filing Notice (July 20, 2007); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 07-1080-GA-AIR, et al., Pre-Filing Notice (September 28, 2007); and *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-72-GA-AIR, et al., Pre-Filing Notice (February 1, 2008).

⁴ Memo Contra at 5.

the SFV rate design.⁵ It would be unreasonable for DEO to assume such circumstances will continue at the Court on the basis that Consumer Advocates' arguments have not prevailed at the Commission.

2. DEO unreasonably argues that neither Consumer Advocates, nor their clients, will suffer irreparable harm.⁶

The irreparable harm to DEO's residential customers under the SFV rate design cannot be ignored. As the Consumer Advocates argued, this harm takes the following forms: a) lost opportunities for conservation; b) nonrefundable over-payment and subsidies by low-usage residential consumers to Commercial and Industrial customers; c) SFV rate design may force low-use customers off the system, and d) lack of required due process.

a. Lost opportunities for conservation constitute irreparable harm.

DEO unreasonably argues that the SFV rate design does not discourage customers from conserving.⁷ In making this argument, the Company relies upon the commodity portion of the bill which comprises up to 75% to 80% of a customer's natural gas bill, as incentive for consumer conservation efforts.⁸ But the rate design of the other 20% to 25% of the natural gas bill can also impact a consumer's conservation decisions. The Commission, its Staff, and/or DEO cannot point to any evidence in the record to refute Consumer Advocates' position, because such evidence does not exist.

⁵ See Motion to Terminate Expedited Response Times for Motions Set in the Entry of March 19, 2008 (April 3, 2009). (Motion filed by Staff for the benefit of any party filing a Memo Contra to Joint Consumer Advocates Motion for Stay; although Staff filed the Motion, the Staff did not file a Memo Contra only DEO filed such Memo Contra.)

⁶ Memo Contra at 6-12.

⁷ Memo Contra at 6.

⁸ Memo Contra at 7.

The Commission ordered the demand side management (“DSM”) collaborative to perform a review of DEO’s energy efficiency programs. The Commission stated;

Furthermore, we encourage the collaborative to address additional opportunities to achieve energy efficiency improvements and to consider programs which are not limited to low-income residential consumers. As part of its review, the collaborative should develop energy efficiency program design alternatives and should consider those alternatives in a manner that strikes a balance between cost savings and any negative ratepayer impacts. The energy efficiency programs should also consider how best to achieve net total resource cost and societal benefits; how to minimize unnecessary and undue ratepayer impacts; how process and impact evaluation will be conducted to ensure that programs are implemented efficiently; how to capture what otherwise become lost opportunities to achieve efficiency improvements in new buildings; how to minimize “free ridership” and the perceived inequity resulting from the payment of incentives to those who might adopt efficiency measures without such incentives; and how to integrate gas DSM programs with other initiatives. Noting that the stipulation establishes a collaborative and a threshold related to reasonable and prudent DSM spending above the current \$4,000,000 commitment, the Commission directs that the collaborative shall file a report within nine months of this order, identifying the economic and achievable potential for energy efficiency improvements and program designs to implement further reasonable and prudent improvements in energy efficiency.⁹

While the Commission’s ordering a study was appropriate and needed, the Commission’s directives for the study were incomplete and failed to also include as part of such study a review of the SFV rate design and the impact that it has on conservation and energy efficiency efforts (e.g. extending the payback period). At the time the Commission’s Order was rendered, there was no existing study, and no studies were performed before the implementation of the SFV rates. Therefore, it is impossible to know with any degree of certainty that the SFV rate design will not cause consumers to forego conservation

⁹ Order at 23 (October 15, 2008).

efforts and energy efficiency investments thus leading to the irreparable harm described by the Consumer Advocates -- lost opportunities for customers to conserve.¹⁰

The Commission in its Order approving the SFV rate design over-focused on the Company's incentive to encourage conservation, and DEO improperly seizes on the Commission Order on this point.¹¹ DEO states:

As the Commission recognized, so long as DEO had to rely heavily on volumetric charges to meet its fixed costs, DEO would have no incentive to encourage conservation; in fact, DEO's financial incentives ran in exactly the opposite direction.¹²

The Commission's Order was intended to encourage a desired outcome -- the less DEO relies upon volumetric charges to meet its fixed costs the more incentive DEO has to encourage and foster conservation¹³ -- however, imposition of the SFV rate design was unnecessary to achieve that desired outcome. What is missing in DEO's analysis is that under the Stipulation, DEO agreed to the same level of demand- side management and low income weatherization dollars (\$9.5 million) as the Commission ultimately approved in its Order. DEO's agreement was made with the understanding that the Commission would approve one of two rate designs -- either the traditional rate design (e.g. the low fixed monthly customer charge, and proposed to recover its rate increase predominantly through the volumetric rate with a decoupling mechanism) or a transition to the SFV rate design.¹⁴ But in bending over backwards for the Company, the Commission

¹⁰ Joint Motion to Stay at 9-10.

¹¹ Memo Contra at 7-8 (Citing the Commission Order at 22 and 25).

¹² Memo Contra at 7.

¹³ Order at 25 (October 15, 2008).

¹⁴ Memo Contra at 14.

implemented a rate design that discourages consumers' from undertaking conservation efforts.

DEO's argument that staying the implementation of Stage 2 SFV rates will halt progress in its tracks is unfounded.¹⁵ The Stage 2 SFV rate design will further increase the fixed portion of the monthly charge and further diminish the volumetric charge. The implementation of Stage 2 rates will adversely impact customers contemplating energy efficiency investments who may ultimately decide not to proceed given the ever-lengthening pay-back period for such investments that result from the SFV rate design; however, the Company's commitment to conservation (\$9.5 million) will not change regardless of the status of the SFV rate design. Therefore, the Stage 2 SFV rate design should not be implemented, and the Consumer Advocates' Motion should be granted.

b. Implementation of the Stage 2 rates will cause irreparable harm in the event the SFV rate design is over-turned on appeal.

Consumer Advocates have argued that in the event the Ohio Supreme Court reverses the Commission's Order in this case on appeal, and Stage 2 rates have been implemented, there will be irreparable harm to customers who have over-paid their natural gas bill under the SFV rate design.¹⁶ DEO does not address within the Memo Contra Consumer Advocates' argument that a refund of an over-payment would be problematic in light of the case law that the Consumer Advocates cited in this area.¹⁷

The argument from DEO's perspective comes against the example of the harm described by the Consumer Advocates -- overpayment of rates by low-income low-usage

¹⁵ Memo Contra at 8.

¹⁶ Joint Motion to Stay at 7-9 (March 31, 2009).

¹⁷ *Keco Industries, Inc. v. Cincinnati and Suburban Bell Te. Co.* (1957), 166 Ohio St. 254.

customers. The Company continues its relentless recitation of the Commission's determination that low-income customers are better off under a pure SFV design.¹⁸ The record in these cases is not clear-cut and does not answer the question of how the SFV rate design impacts the low-use low-income customer. The Commission was content recapping this situation by stating: "there will be some customers who are better off and some customers who will be worse off."¹⁹ The Commission approved the SFV rate design without a full and complete understanding of the harm that it may cause.

The Consumer Advocates have argued that the SFV rate design approved by the Commission is bad public policy for DEO's low-usage and low-income residential customers who will now be forced to subsidize DEO's high-use Commercial and Industrial customers and high-use residential customers.²⁰ The SFV rate design has the effect of making the distribution cost per Mcf that a customer faces higher at lower consumption levels than at higher consumption levels.²¹ Such a rate design is inherently unfair to low-usage customers who also may happen to be low-income customers, and who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than homeowners with larger homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America's working poor, amidst a nationwide

¹⁸ Memo Contra at 8.

¹⁹ Order at 26 (October 15, 2008).

²⁰ Joint Application for Rehearing at 14 (November 14, 2008).

²¹ Staff Ex. No. 3B Puican Second Supplemental Testimony at Exhibit SEP-1A (August 25, 2008) (By way of example as usage increases the cost per Mcf decreases: 12 month usage of 5 Mcf Proposed Bill \$167.25 Cost per Mcf = \$33.45; 12 month usage of 100 Mcf Proposed Bill \$362.72 Cost per Mcf = \$3.6272; and 12 month usage of 5000 Mcf Proposed Bill \$12,405.60 Cost per Mcf = \$2.4811).

mortgage foreclosure crisis and with the country facing a deepening recession, a fact initially raised by Company witness Murphy, and uncontested in the record.²²

In its Memo Contra DEO brings in extra-record evidence which should be disregarded by the Commission. The Company has allegedly performed an analysis of the recent colder-than-normal winter under the SFV rate design. Any alleged trend from prior years' analysis has not been presented as part of the record in this case. DEO has not done so, and as such the information should be ignored. The Commission should take the necessary steps to prevent the irreparable harm that may occur in the event the appeal of the Commission's Order in these cases is successful by granting the Consumer Advocates' Motion to Stay the implementation of the SFV Stage 2 rates.

c. Irreparable harm will result should the SFV rate design force low-use customers to migrate off the system.

The Consumer Advocates argued that the SFV rate design harms DEO's low-use residential customers. DEO's residential customers who use 100 Mcf per year or less, which constitutes 58.64 percent of the total General Sales Service ("GSS") customer class will see between a 1.35 and 135.94 percent increase.²³ While GSS customers who used more than 100 Mcf per year will see between 1.32 and 28.48 percent decrease from DEO's proposed bill per its Application. Customers who use the lowest volumes -- who do not use natural gas as a heat source -- could potentially find alternative sources of energy for their current natural gas consumption (e.g. cooking, clothes drying, decorative lighting, etc.). It is the potential for the loss of the low-use customers, who choose to

²² DEO Ex. No.1.1 (Murphy Direct Testimony) at 21-22 (September 13, 2007).

²³ Second Supplemental Direct Testimony of Stephen E. Puican at Exhibit SEP-2B (August 25, 2008).

migrate from DEO's system, that could put an additional burden on remaining DEO GSS customers.²⁴ DEO failed to address this irreparable harm argument in the Memo Contra.

d. DEO's failure to provide customers the required notice of the SFV rate design constitutes irreparable harm.

The notice that DEO sent to its customers regarding the substance of its Application was deficient because the rate design in DEO's Application was significantly different from the rate design approved by the PUCO.²⁵ The notice requirements for a public utility's application to begin a traditional rate case and for an alternative rate case are found under R.C. 4909.18, 4909.19 and 4909.43. In this case, the Commission failed to enforce the notice requirements, thus denying consumers adequate notice with sufficient detail of the residential rate design ultimately approved by the Commission, which differed significantly from Duke's Application.

DEO further argued that R.C. 4909.19 requires copies of the Staff Report to be served upon municipalities affected by the rate application as well as "such other persons" as the Commission deems interested.²⁶ While the service list for the Staff Report may be substantially identical to the distribution of DEO's Pre-filing Notice regarding its Application for the rate increase, it is unreasonable to believe that a lawful substitute for a notice of the "substance of the Application" could be the 179 page Staff Report filed on May 23, 2008. Moreover, the Staff Report which was filed eight months after the filing of DEO's Application was the source of post-Application changes that resulted in the proposed SFV rate design.

²⁴ Joint Motion to Stay at 10.

²⁵ Memo Contra at 10. (DEO stated "its Application did not include an SFV proposal. Rather, the May 23, 2008 Staff Report, issued some eight months after DEO filed its Application, marked the first appearance of a specific SFV rate design in this case.").

²⁶ Memo Contra at 11.

The Company cannot be permitted to hide behind post-Application changes, approved by the Commission, as lawful justification for providing consumers a deficient notice. Furthermore, the Commission's authority to design and establish customer rates should not supersede consumers' right to be noticed of the rate increase that they ultimately will be asked to pay of the rate increase they will be required to pay.

3. DEO and many of its customers will not be harmed by the granting of the Stay.

The Consumer Advocates argued that DEO would not suffer substantial harm if the Commission were to grant the Motion to Stay Stage 2 of the SFV rate design.²⁷ DEO responded to the Consumer Advocates' argument by stating that this argument was improperly narrowed. DEO stated: "that the four factor test requires the Commission to consider whether or not, if a stay is issued, substantial harm to **other parties** would result."²⁸ DEO then states that the Consumer Advocates argument has ignored the potential for harm to DEO's other customers that would result from a delay in Year Two rates.²⁹ DEO unreasonably argues that under Stage 2 rates, residential customers continue to receive subsidies; however, those subsidies are smaller than under Stage 1.³⁰ The SFV rate design presents an inter-class subsidy that arises within the GSS customer class under which residential, commercial, and industrial customers are served.

During the proceedings, the Consumer Advocates argued that DEO's cost-of-service study did not support charging GSS class customers (residential and non-

²⁷ Joint Motion to Stay at 15-16.

²⁸ Memo Contra at 12.

²⁹ Memo Contra at 13.

³⁰ Memo Contra at 13.

residential) uniform rates under the SFV rate design.³¹ Consumer Advocates explained that the GSS class is comprised of non-homogenous residential and non-residential (Commercial and Industrial) consumers with widely varying usage. OCC pointed out that the average residential customer uses 99.1 Mcf per year, the average non-residential customer uses 390 Mcf per year, and the largest consumption in the GSS class is in excess of 3,000 Mcf per year.³² It was also argued that under the SFV rate design, no user should pay more than their appropriately allocated share of fixed costs; however, the record does not establish that all customers in the GSS class place the same burden on the system. Consumer Advocates maintained that, without more detail in the cost-of-service study, it was undetermined who was actually responsible for the fixed costs that are recovered through the SFV rate design. Now that the updated COSS study exists there is unrefuted proof provided by the Company that supports Consumer Advocates' above arguments. By granting the stay, the Commission will limit the harm that has occurred under the SFV rate design to no more than the harm of the Stage 1 rate implementation.

The Company also improperly argued that it will suffer harm if the stay is granted. DEO stated: "the fact that the natural gas market is now characterized by volatile and sustained price increases, causing consumers to increase their conservation efforts to conserve gas. As a result, the Commission found DEO's reliance on a volumetric charge to recover its fixed costs is increasingly risky * * *."³³ However, no substantial harm will inure to the Company as a result of the Stay being granted. DEO is

³¹ OCC Initial Brief at 7-8 (September 10, 2008), OCC Reply Brief at 4-5 (September 16, 2008), Joint Application for Rehearing at 9-12 (November 14, 2008).

³² OCC Initial Brief at 6-7; Tr. Vol. IV at 18 (Murphy) (August 25, 2008).

³³ Memo Contra at 14.

currently collecting the revenue requirements approved by the Commission in its Order under the Stage 1 Residential Tariffs. Granting the Motion to Stay would mean that the current Stage 1 rates will remain. The current Stage 1 rates reflect an increased monthly customer charge (that itself is inappropriate) and a larger volumetric rate, relative to the Stage 2 rate design. The implementation of Stage 2 rates means that the current tariff will continue to be collected, and the level of authorized revenue collected by the Company remains unaffected. This ensures the Company will not sustain substantial harm as a result of granting the Consumer Advocates' Motion to Stay.

Interestingly, the trend leading into the Company's request for increases in rates was that the average use per customer was decreasing, and the Company urged the Commission to do something to address the alleged revenue erosion. Notably, the SFV rate design that the Company now so staunchly defends and covets was not even proposed as part of its Application. Not implementing something that the Company did not even ask for is a cause for skepticism about its claims of harm. DEO's opportunity to collect authorized revenues is unchanged under the Stage 1 or Stage 2 rate design, because both tariffs are designed to collect the same level of revenues authorized by the PUCO.

Therefore, the Commission should determine that neither DEO nor any of its customers will suffer substantial harm in the event the stay is granted.

4. A Stay is in the public interest.

Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is "above all ***, where lies the interest of the public" and that "the public interest [] is the ultimate important consideration for this Court in these types

of cases.”³⁴ There is a disparate interpretation of the public interest in these cases between DEO and the Consumer Advocates. DEO unreasonably criticizes the Consumer Advocates for “[not] accounting for the broad and diverse stakeholders affected by the Commission’s Order, and rests its arguments on a single slice of DEO’s broad customer base.”³⁵ The SFV rate design was the only issue remaining from the Company’s rate increase Application that was litigated.³⁶ However, DEO’s broad customer base is not confronted with the SFV rate design. The SFV rate design is limited to customers served under DEO’s GSS tariff (e.g. residential, commercial and small industrial customers using 3,000 Mcf per year or less). It is the impact the SFV rate design has on that “slice of DEO’s customer base” that must be considered to be in the public interest. Therefore, to further the public the Commission should grant the Stay of the implementation of the Stage 2 SFV rate design to prevent further harm to the low-usage residential customers who are harmed by the Stage 1 SFV rate design.

III. CONCLUSION

For all the reasons stated above, the Consumer Advocates’ Motion to Stay should be granted.

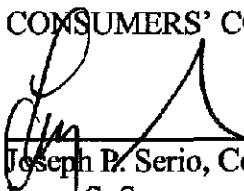
³⁴ *MCI Telecommunications Corp. v. Pub. Util. Com.* (1987), 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (Douglas, J., dissenting).

³⁵ Memo Contra at 15

³⁶ Stipulation and Recommendation at 4 (August 22, 2008).

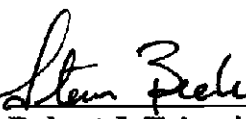
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Reply* has been served upon the below-named counsel via Electronic Mail this 22nd day of April 2009.



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