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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 Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services.	)))))	Case No. 07-1224-GA-EXM

REPLY TO DOMINION'S MEMORANDA CONTRA OCC'S MOTION TO ORDER A SPECIAL MANAGEMENT PERFORMANCE AUDIT AND OCC'S MOTION TO ORDER DOMINION TO PREPARE A LONG-TERM FORECAST REPORT PURSUANT TO THE REQUIREMENTS OF R.C. 4935.04 AND OCC'S MEMORANDUM CONTRA TO DOMINION'S MOTION TO STAY DISCOVERY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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AND
OCC'S MEMORANDUM CONTRA TO DOMINION'S MOTION TO STAY DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Reply and this Memorandum Contra toward protecting Ohio consumers with regard to the East Ohio Gas Company d/b/a Dominion East Ohio's ("Dominion" or "Company") proposal to release some of its on-system natural gas storage to its affiliate, Dominion Transmission, Inc. ("DTI"). The Parties to the Lease Agreement have filed for approval at the Federal Energy Regulatory Commission ("FERC"). Dominion proposes leasing 3-5 Bcf of its on-system storage to DTI for a term of 15 to 20 years.

The Lease Agreement raises many more questions than Dominion has provided answers in terms of on going operation and reliability on Dominion's distribution system in the event this capacity deemed excess today later becomes necessary to serve Dominion's Ohio retail customers. To be certain that all questions surrounding this transaction are answered before the Lease Agreement is approved by FERC, the PUCO should order a Special Management Performance ("M/P") Audit and a Long-Term Forecast Report ("LTFR").

II. PROCEDURAL HISTORY

On April 8, 2005, Dominion filed an application ("Phase I Application") requesting an exemption pursuant to R.C. 4929.04 seeking approval of Phase I of its plan to exit the merchant function.[1] On May 26, 2006, the Commission approved Dominion's Phase I Application to implement its proposed alternative market-based pricing of natural gas commodity sales.

On December 28, 2007, Dominion filed an application ("Phase II Application") for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services from Chapters 4905, 4909, and 4935 except Sections 4905.10, 4935.01, and 4935.03, and from specified sections of Chapter 4933 of the Revised Code. Dominion proposed to fundamentally change the way it purchases the natural gas it sells to Ohio residential customers.

On April 10, 2008, the Company, PUCO Staff, OCC, Integrys Energy Services, Inc. ("Integrys"), Dominion Retail, Inc. ("Dominion Retail"), Ohio Gas Marketers Group ("OGMG"), Northeast Ohio Public Energy Council ("NOPEC") filed a Stipulation and Recommendation ("Stipulation") in that case. On June 18, 2008, the Commission issued an Opinion and Order that approved the Phase II Application as modified by the Stipulation.

[1] *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA, Application (April 8, 2005).

The Company's Phase I and Phase II Applications have brought an end to the gas cost recovery ("GCR") proceedings[2] and the bi-annual M/P Audits.[3] However, as noted below, the Commission retained authority to order Special M/P Audits as it deems necessary.

On March 26, 2010, Dominion and DTI, its Interstate Pipeline affiliate, filed a Joint Application ("Joint Application") seeking a Certificate of Public Convenience and Necessity for Authorization of a Lease Agreement at the Federal Energy Regulatory Commission ("FERC").[4] The Joint Application states that Dominion would lease approximately 3-5 Bcf of its on-system storage to its affiliate DTI ("Leased Capacity"). In turn, DTI plans to use the leased on-system storage capacity to serve customers in the interstate market.[5] The lease would begin with 3 Bcf (Phase 1) at the outset of the lease and grow to 5 Bcf (Phase 2) by 2014.[6] Dominion claims that the Leased Capacity is excess capacity that has only now suddenly become excess in the most recent years due to the economic downturn in the Cleveland, Ohio area and the surrounding industrial sector.[7]

On May 3, 2010, OCC filed a Motion to Intervene and Protest at FERC to challenge the approval of the Joint Application. The Joint Application provides only superficial information, and thus the Joint Application raises many more questions than it

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[2] R.C. 4905.302.

[3] Ohio Adm. Code 4901:1-14-07.

[4] The filing is pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 212 and 214 (2007).

[5] Joint Application at 2.

[6] Joint Application at 2.

[7] Joint Application at 5-6.

answers and also raises significant legal and policy issues for Ohio's residential consumers. Therefore, a Special M/P Audit, performed by an independent third party auditor selected by the PUCO and paid for by Dominion, would help answer these important questions.

On May 18, 2010, OCC filed Motions to Order a Special Management Performance Audit and Order Dominion to Prepare a Long-Term Forecast Report ("Motions"). OCC also served Dominion with Discovery.

On June 2, 2010, Dominion filed its Memorandum Contra ("Memo Contra") to OCC's Motion to Order a Special Management Performance Audit and Motion to Order Dominion to Prepare a Long-Term Forecast Report. In addition, Dominion filed a Motion to Stay Discovery.

OCC herein files a Reply to Dominion's Memorandum Contra[8] and files a Memorandum Contra to Dominion's Motion to Stay Discovery.

III. ARGUMENT

A. Reply To Dominion's Memorandum Contra To OCC Motions

1. The PUCO Has A Vital Role To Play Regarding FERC's Decision On The Lease Agreement.

In its Memorandum Contra, Dominion asserted that it is up to FERC to decide if DEO and DTI have adequately supported the Joint Application.. But Dominion has conceded that issues remain open for PUCO consideration. Dominion stated that "Most of the allegations raised in OCC's motion were also raised in OCC's Notice of Protest at

[8] Pursuant to Ohio Adm. Code 4901-1-12(B)(2), the OCC has seven (7) days to Reply to Dominion's Memo Contra. Because the OCC was served Dominion's Memo Contra by mail, pursuant to Ohio Adm. Code 4901-1-07(B) an additional three days shall be added to the prescribed period of time.

FERC."[9] Dominion further argues that it has addressed **most** of OCC's concerns in the pending FERC proceeding.[10] As one might conclude "most" does not mean all, and there were issues raised in OCC's protest at FERC that Dominion suggested would be resolved at the PUCO.

There are specific examples in Dominion's pleading at FERC in which an issue was left for PUCO resolution. Dominion stated:

> The Ohio OCC's primary concern seems to be the fear that the Lease Agreement will adversely affect [Dominion's] existing intrastate customers. This concern is a matter for the [PUCO], which has comprehensive jurisdiction over [Dominion's] local distribution function, not for [FERC].[11]

Recognition that the PUCO retains jurisdiction over Dominion's local distribution function and protection of the intrastate jurisdictional customers of Dominion should not be taken lightly. The PUCO should not accept Dominion's assurances that the lease agreement will not harm its residential customers without an independent review and assessment of the circumstances created by the 15 to 20 year term of the lease.

In addition, OCC raised concerns regarding cost allocations. Dominion conceded that allocation of Dominion's costs belong before the PUCO. Dominion stated: allocations of costs to Ohio consumers of course, are within the jurisdiction of the PUCO, and well outside the scope of the Joint Application.[12] Dominion also unreasonably

[9] Memo Contra at 5.

[10] Memo Contra at 5. (Emphasis added).

[11] Memo Contra at Exhibit D (Motion for Leave to Answer and Answer of Dominion East Ohio and Dominion Transmission Inc.,) at 7.

[12] Memo Contra at Exhibit D (Motion for Leave to Answer and Answer of Dominion East Ohio and Dominion Transmission Inc.,) at 14.

argues that the opportunity to look at such cost allocation issues will present itself during Dominion's next base rate case. Dominion stated:

> In its next Ohio rate case, [Dominion] will have to submit a comprehensive cost of service study the [PUCO] will determine the proper costs allocation and revenue attribution when establishing just and reasonable rates for each jurisdictional rate class. That future proceeding, before that State agency, is the proper place for the Ohio OCC to raise its concerns about cost allocation of [Dominion's] storage costs.[13]

Therefore, the PUCO should take the opportunity to examine the Lease Agreement to assure that Dominion's Ohio consumers are not unreasonably harmed by costs that were never reviewed as a result of the Joint Application filed with FERC.

Ohio consumers deserve a review of the costs and benefits of the Lease Agreement to interested parties outside of the Lease Agreement prior to the FERC approval. The PUCO should not delay reviewing the cost implications of the Lease Agreement to the next Dominion base rate proceeding, and further should not rely on the self-serving statements made by the Company in support of the arrangement that will be of an obvious benefit only to the parties proposing the lease. A Special M/P Audit[14] and Long-Term Forecast Report will assist the PUCO make an independent assessment of the impacts of the Lease Agreement on Ohio jurisdictional customers in a timely manner.

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[13] Memo Contra at Exhibit D (Motion for Leave to Answer and Answer of Dominion East Ohio and Dominion Transmission Inc.,) at 15.

[14] Dominion argues in footnote 2 of its Memorandum Contra that any special M/P audit should be limited because some issues could not be properly examined in an M/P audit case. OCC disagrees and would note that in the context of an M/P Audit, the PUCO has gone as far as to review the makeup of the Board of Directors of a Local Distribution Company and its affiliate Interstate Pipeline. To the extent that the PUCO was concerned about the lack of arms length relationship in that case, there is ample precedent for the PUCO to review whether non-affiliates were given any opportunity to lease the same on-system storage capacity package as the one offered to DTI. See *In the Matter of the Investigation Into the Gas Purchasing Practices and Policies of Columbia Gas Of Ohio, Inc.* Case No. 83-135-GA-COI *and In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Columbia Gas of Ohio, Inc. and Related Matters*, Case no. 84-6-GA-GCR, Opinion and Order (October 8, 1985) at 15-16.

Finally, Dominion has argued that the Lease Agreement will not harm customers. Dominion stated:

> The [PUCO], not [FERC], has jurisdiction over [Dominion's] contracting for services from interstate pipelines. * * * Most importantly, [Dominion's] usage of on-system and contract storage for operational balancing is a matter to be decided by the [PUCO], not by [FERC] in this proceeding.[15]

The PUCO should accept the responsibility for these issues, as Dominion has recognized and make certain that the Lease Agreement does not adversely impact Dominion's contracting for services from interstate pipelines or its usage of on-system storage for operational balancing. A Special M/P Audit will assure the system reliability and integrity will be maintained as Dominion suggests given the proposed Lease Agreement.

Dominion is playing a shell game, and the PUCO should not lose sight of the pea. Dominion argues to FERC, as demonstrated above, that there are issues exclusive to the PUCO's jurisdiction. At the PUCO, Dominion has argued that "it is up to FERC to decide if [Dominion] and DTI have adequately supported the Joint Application. And [the PUCO] certainly has the ability to monitor the FERC proceeding, or intervene in that proceeding if deemed necessary."[16] The PUCO should not relegate itself to a monitor's role, but rather take the affirmative step of ordering a Special Management Performance Audit and a Long-Term Forecast Report be prepared in order to be advised of the anticipated impacts of the Lease Agreement **before** FERC approval, rather than deal with the consequences for the next 15 to 20 years **after** the Lease Agreement is approved.

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[15] Memo Contra at Exhibit D (Motion for Leave to Answer and Answer of Dominion East Ohio and Dominion Transmission Inc.,) at 17.

[16] Memo Contra at 7.

2. A Special Management Performance Audit And Long-Term Forecast Report Are Warranted.

Dominion has unreasonably argued that OCC's requests for a Special M/P Audit or LTFR are not warranted.[17] Dominion's arguments are deficient because they are based on a backward look over time or the circumstances as they exist today rather than imputing the effects of the Lease Agreement over the next 15 to 20. Inasmuch as customers will be impacted by the Proposed Lease for 15-20 years, the review should look forward and not back.

The need for the LTFR is further demonstrated by the fact that Dominion has claimed loss of load as a justification for the availability of the 3-5 Bcf of on-system storage. As previously noted by the OCC, this claim contradicts the data contained in the most recent LTFR filed by Dominion.[18] In addition, Dominion's claim is contradicted by the addition of significant potential new load as a result of the completion of a 20 inch high pressure line that would connect the Freemont Energy Center -- a power generation facility -- to Dominion's system by tapping into Dominion's 30 inch TPL-12 pipeline.[19] The Freemont Center is a nominal 540 MW natural gas fired combined cycle generating plant that is capable of operating for up to 8760 hours per year.[20]

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[17] Memo Contra at 7-16.

[18] *In re DEO and DTI Joint Application at FERC,* Docket No,CP10-107-000, OCC Answer (June 1, 2010 at 6.

[19] Construction Notice for the Freemont Energy Center, Ohio Power Siting Board, Case No. 08-605-GA-BNR(May 20, 2008); Construction Notice for the Freemont Energy Center, Ohio Power Siting Board, Case No. 01-1369-GA-BNR(June 12, 2001).

[20] *In the Matter of the Application of Freemont Energy Center, LLC, for a Certificate of Environmental Compatibility and Public Need for a Merchant Combined Cycle, 704 Megawatt Power Plant in Sandusky County, Ohio,* Case No. 00-1527-EL-BGN, Staff Report (March 13, 2001) at 27.

The record in the Freemont Center Power Siting Board case, indicates that Dominion would operate and own the 20 inch high pressure pipeline tap, pipeline lateral, and Meter and Regulation equipment at an estimated cost of $4,906,000.[21] Obviously, an investment of this magnitude by Dominion would be expected to produce a significant increase in volumetric throughput. Dominion has not addressed how the loss of the 3-5 Bcf of on-system storage capacity would impact current service in light of this new customer load.

Finally the very nature of a power generation facility is that it does not generally operate on a consistent basis but is used to meet peak needs. As a result the load factor of such a facility can place additional strain on a Local Distribution Company peak supply capacity, as well as placing additional strain on hourly load balancing capabilities provided by Dominion's on-system storage, which is impacted by the Proposed Lease.

a. A Management Performance Audit Will Assist The Commission Determine If The Lease Agreement Will Affect The Quantity Of Storage Available To Ohio Retail Customers.

Initially, Dominion argues that the Lease Agreement will not reduce the quantity of storage service offered to Ohio retail customers. Dominion states:

> The reduced base load and winter season demand within [Dominion's] Ohio retail market inhibits its ability to withdraw storage inventory, effectively idling capacity that could otherwise be used. However, if those trends are reversed and on-system demand expands, [Dominion's] ability to provide more storage to its Ohio retail market expands as well even with the Lease in place. The Lease has no effect on [Dominion's] ability to offer more

[21] Construction Notice for the Freemont Energy Center, Ohio Power Siting Board, Case No. 08-605-GA-BNR(May 20, 2008) at 2; Construction Notice for the Freemont Energy Center, Ohio Power Siting Board, Case No. 01-1369-GA-BNR(June 12, 2001) at 1.

> storage to on-system markets if significant base load and winter season demand returns.[22]

It is without explanation how this will work. There is a finite level of on-system storage capacity. Yet it is unclear how if the Ohio retail demand increases, and Dominion should need the 3-5 Bcf of capacity it has leased to DTI, then Dominion can still provide the same capacity to both DTI and its Ohio retail customers.

Dominion argues that it either allocates or sells its on-system storage to existing customers.[23] Dominion attempts unsuccessfully to comfort the PUCO by suggesting that it has not changed its allocation method for nearly a decade,[24] and that its allocation of on-system storage was reviewed by a long line of GCR M/P Auditors in numerous cases.[25] However, this argument only looks backwards, and does not address how the system of allocation will work if the 3 to 5 Bcf of on-system capacity leased to DTI should be needed by a Marketer or end user. Furthermore, if reliance on previous M/P Audits lends credibility to what has previously transpired with Dominion's on-system storage allocation, then another more timely and forward looking audit should be used to address Dominion's proposed allocation of on-system storage to an affiliate.

Dominion suggests that its method of allocating storage capacity has contributed to a competitive market.[26] Dominion states that many Marketers have told Dominion that its system has one of the most competitive commodity markets in the country.[27]

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[22] Memo Contra at 8.

[23] Memo Contra at 8.

[24] Memo Contra at 8.

[25] Memo Contra at 8.

[26] Memo Contra at 15-16.

[27] Memo Contra at 15.

Dominion retold its experience with the SSO and SCO auctions, and made the claim that "if the storage allocated to suppliers were inadequate, suppliers would have been unable to offer such low prices. However, Dominion's claim is backward looking only, and fails to substantiate how the Proposed Lease of 3 to 5 Bcf of on-system storage capacity will impact Marketers and end users going forward.

In regards to the sale of its storage capacity, Dominion's argument is no more persuasive. Dominion argues that:

> [Dominion] also sells storage service to end users and marketers under its Firm Storage Service rate schedule. Each February, [Dominion] conducts an open season in which parties submit their requests for storage service.[28]

However, Dominion has failed to address the key aspect of OCC's concerns with regards to the Lease Agreement. What appears to be the case is that during the open season when the Lease Agreement was negotiated with DTI, Dominion failed to offer any of the Marketers or end users (e.g. non-affiliates) **the same package that was offered to DTI.** Therefore, the PUCO should not be convinced by Dominion that a Special M/P Audit is unwarranted in this proceeding.

Dominion relies on the silence of other Marketers as proof that there is no support for OCC's position in this case. Dominion stated:

> Despite concerns about an alleged transfer of storage capacity raised by OCC in the meeting, only one of the marketers present, Interstate Gas Supply, filed a "plain vanilla" motion to intervene in the FERC proceeding and did not protest the proposed lease arrangement. In criticizing the Lease, it is clear that OCC speaks only for itself, and not for marketers or end users.[29]

[28] Memo Contra at 10.

[29] Memo Contra at 10.

First, the OCC does not purport to speak for any party other than Dominion's residential customers who may ultimately be harmed by the long term impact from the Proposed Lease. Second, it is folly for Dominion to take any party's silence as acquiescence to a position. Dominion suggests that silence by Marketers indicates that they have no opposition or issue with the Proposed Lease.[30] OCC would proffer an equally plausible explanation for the Marketers silence -- that is that Dominion has persuaded Marketers to remain silent. Both of these explanations are plausible and yet both are nothing more than speculation which should not serve as the basis for any decision made by the PUCO.

b. A Management Performance Audit Will Assist The Commission Determine If The Lease Agreement Will Diminish The Reliability Of Storage Service Offered To Ohio Retail Customers.

Dominion makes arguments that fail to explain the continuation of service reliability in light of the Lease Agreement. Dominion argues that Phase I of the Lease Agreement is structured with provisions that provides protection to existing customers during peak months.[31] However, that same lucidness is lost as Dominion explains Phase II of the Lease Agreement. Dominion states:

> Provisions addressing the Phase II capacity are no less straightforward. Section 3.4(a) of the Lease states: "Once Phase I Storage is made available to DTI, East Ohio will undertake additional facility additions, refurbishments and other changes to its storage properties that will allow [Dominion] to provide DTI the Phase II storage capabilities set forth on Exhibit B." **There is no mystery here.**[32]

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[30] Dominion has omitted the fact that Stand Energy filed a letter in support of the OCC Motion in this docket and minimized the importance of the Interstate Gas Supply intervention filed in the Federal proceeding.

[31] Memo Contra at11.

[32] Memo Contra at 11 (emphasis added).

Well there may not be a mystery, but there are plenty of questions. For example, what are the additional facilities, refurbishments and other changes to its storage properties that are necessary to allow Dominion to DTI the Phase II storage capabilities? Dominion neglects to provide an explanation to those questions.

The status of Dominion's on-system storage capacity is unclear. Dominion claimed:

> [Dominion] has made substantial storage investments (exceeding some $30 million) since the March 31, 2007 date certain in its last rate case. In addition to the 20-inch pipeline project that was the subject of an application filed in Case No. 08-289-GA-BTX, [Dominion] has made a series of additional investments in its storage infrastructure since the 2007 test year of its last rate case, and it is continuing to make additional investments to ensure adequate storage capacity. [Dominion] has drilled five new storage wells, all of which will be tied into the storage system in 2010 after being hydraulically fractured. This year, [Dominion] also will complete the installation of a new compressor unit at its Chippewa Station, increasing maximum storage injection rates. [Dominion] also has completed well bore cleanouts and acid cleaning on nine existing, underperforming storage wells, returning the wells close to their original deliverability.[33]

The description of the work that Dominion claims it has performed on its system would lead to a conclusion that on-system storage capacity has been increased. However, Dominion curiously never states that or quantifies such an increase. A Special M/P Audit would be critical to establishing the level of on-system storage that Dominion actually has at its disposal.

[33] Memo Contra at 12-13.

c. A Management Performance Audit Will Assist The Commission Determine If The Lease Agreement May Negatively Impact The Cost Of Storage Service, Or Otherwise Harm Customers.

Dominion's Memo Contra makes a statement regarding the cost of storage service that should not provide the PUCO with any comfort. Dominion stated: "DEO did not file an application to change any rates or charges as a result of the lease arrangement."[34] That statement holds for today, but says nothing about the cost of storage service going forward. Dominion has made no statement about the cost of storage service going forward, and the potential negative impact of the Proposed Lease on current customers.

In consideration of the revenues that the Lease Agreement will generate, Dominion anticipates retaining them entirely until the next distribution rate case. In its Memo Contra, Dominion stated:

> To the extent that the Lease provides additional revenues, [Dominion] will be better positioned to avoid a rate case and thus leave its existing rates and charges in effect longer than would otherwise be the case. The Lease therefore promotes stability and predictability in base rates.[35]

The revenues generated by the Lease Agreement should be flowed back to consumers rather than retained by Dominion and its shareholders.

There is a sharing mechanism in place that determines the allocation of off-system sales revenues between Dominion and its customers.[36] Dominion admitted in its Memo Contra the following:

> [Dominion's] ability to make capacity available for the Lease does not exist without the off-system market created by the Lease. Without an off-system market creating more demand,

[34] Memo Contra at 14.

[35] Memo Contra at 14.

[36] Memo Contra at 20-21.

> [Dominion's] ability to utilize storage remains limited by its on-system market.[37]

It is unclear how the Lease Agreement is structured differently than other off-system sales transactions in which the resulting revenues are shared between the Company and its customers. Therefore, the PUCO should require Dominion to share the revenues with its customers.

The revenues to be generated by the Lease Agreement are significant, and should not be retained by Dominion and its shareholders. During Phase I of the Lease Agreement, the revenues generated are approximately $12 million.[38] During Phase II of the Lease Agreement, the revenues will yield between $59.1. million and 84.8 million depending if the lease goes 15 or 20 years.[39] The PUCO should carefully review the structure of the lease Agreement, and determine the appropriate ratemaking treatment for these revenues.

d. Dominion Is Not Exempt From The Statutes OCC Seeks To Have The Commission Enforce.

In its Motions, OCC argued that in the Phase I Application Case, the PUCO issued an Opinion and Order in which the Commission discussed its oversight responsibilities in the post-GCR environment. The PUCO stated:

> While the proposal calls for an end to management performance audits, **the Commission also has the authority to order a special**

[37] Memo Contra at 8.

[38] Memo Contra at Exhibit B at Exhibit N page 2 of 2 (Line 22 $286,234.23 monthly lease charge x 12 months x 3.5 years = $12,021,837.66).

[39] Memo Contra at Exhibit B at Exhibit N page 2 of 2 (Line 22 $428,282.41 monthly lease charge x 12 months x116.5 years = $59,102,972.58 or Line 22 $428,282.41 monthly lease charge x 12 months x 16.5 years = $84,799,917.84).

> **management performance audit at any time for any issues it deems necessary.**[40]

While the Commission has not exerted this authority up to this point in time, the issues that are raised by the Joint Application at FERC warrant the PUCO to exercise its authority in this case.[41]

Dominion argues that in order to enforce statutes that the Commission has previously exempted, the Commission can only do so pursuant to R.C. 4929.08. Dominion stated:

> R.C. 4929.08 provides that the Commission, after notice and a hearing, may abrogate or modify an exemption order if "the commission determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest." R.C. 4929.08(A)(1). The Commission may also modify an exemption order if it finds that the natural gas company "is not in substantial compliance with state policy," "is not in compliance with its alternative rate plan," or "alternative regulation is affecting detrimentally the integrity or safety of the natural gas company's distribution system or the quality of any of the company's regulated services." R.C. 4929.08(B).[42]

It should not be a surprise to Dominion, but requirements of R.C. 4929.08 fit with OCC's arguments. OCC has raised concerns that the Lease Agreement, if approved, could affect detrimentally the integrity of Dominion's natural gas distribution system or the quality of some of the Company's regulated services. Therefore, the Commission should order a Special Management Performance Audit and Long-Term Forecast Report to enable the Commission to independently evaluate the implications of the Lease Agreement on Dominion's on-system storage operations.

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[40] *In re Dominion Phase I Application Case*, Case No. 05-474-GA-ATA, Opinion and Order at 8 (May 26, 2006). (Emphasis added).

[41] Motions at 4.

[42] Memo Contra at 18.

Dominion has wrongly articulated OCC's position in this case. Dominion stated in its Memo Contra:

> There are no allegations that [Dominion] is not in compliance with state policy. And there are no allegations that the exemption granted to [Dominion] is detrimentally affecting the integrity or safety of [Dominion's] distribution system.[43]

Again Dominion has focused its arguments on the present. OCC is concerned with what will be as a result of the Lease Agreement. Going forward OCC has raised concerns with regard to the operation and system reliability of Dominion's on-system storage capacity during the 15 to 20 year term of the Lease Agreement. That arrangement can have an adverse impact on the integrity of Dominion's distribution system, and provides the PUCO with the rationale for ordering a Special M/P Audit and LTFR pursuant to R.C. 4929.08.

OCC has also raised the concern that the Lease Agreement represents an abandonment of service.[44] Dominion has argued that the PUCO has exempted the Company from R.C. 4905.20 and R.C. 4905.21. However, as is the case with Dominion's argument regarding exemption from M/P Audits and LTFRs, the PUCO can enforce the provisions under R.C. 4905.20 and R.C. 4905.21 pursuant to R.C. 4929.08. Therefore, the PUCO should take a closer look at the structure of the Lease Agreement and decide if the 15 to 20 year term constitutes an abandonment of service. If the PUCO decides the Lease Agreement constitutes an abandonment, then the PUCO should require strict compliance with the statutes to assure the abandonment is reasonable.

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[43] Memorandum Contra at 18 (Emphasis added).

[44] Motions at 14-15.

B. Memorandum Contra to Dominion Motion to Stay Discovery

Pursuant to Ohio Adm. Code 4901-1-12(B), the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential natural gas customers, submits this Memorandum Contra Dominion Motion to Stay Discovery, filed on June 2, 2010 ("Dominion Motion"). While OCC has styled its response as a Memorandum Contra, Dominion has failed to properly style its pleading as a Motion.[45]

Dominion has unreasonably asked the PUCO to stay discovery because the Commission has not granted the relief that OCC requests, and Dominion argues it should not be required to respond to OCC's discovery requests. OCC's right to discovery is assured by law, rule and Supreme Court precedent. OCC is entitled to timely and complete responses to its discovery inquiries. R.C. 4903.082 provides that "[a]ll parties and intervenors shall be granted ample rights of discovery."

Dominion incorrectly relies on Commission precedent to escape its obligations to respond to OCC's discovery requests.[46] The Company stated:

> Merely asking the Commission to initiate a special proceeding does not give the requesting party the right to demand responses to discovery associated with the requested proceeding. Absent an order granting OCC's request, OCC simply has no right to demand that DEO respond to discovery in this proceeding.[47]

The CSP case involved a complaint filed against CSP for its failure to become part of a regional transmission organization ("RTO") by the date required by the CSP electric

[45] Ohio Adm. Code 4901:1-12 "All motions, * * * shall be accompanied by a memorandum in support * * *." Dominion's Motion does not include a memorandum in support.

[46] *Columbus Southern Power Co.* et al.. ("CSP Case"), Case No. 02-3310-EL-ETP (Entry, Feb. 20, 2003), pp.7-8.

[47] Memo Contra at 21.

security plan ("ESP") stipulation -- December 15, 2001. The Commission in that case recognized there to be many unresolved issues regarding the formation, approval and operation of RTOs[48] not the least of which was the fact that as of December 15, 2001 there was not a single fully operational FERC-approved RTO up and running,[49]

In the CSP case, there were many issues that involved exclusive FERC jurisdiction that warranted the Commission to stay activity at the state level pending federal clarification of the unresolved issues. In this case however, the jurisdiction does not rest solely in the FERC arena. Dominion has argued at FERC, as OCC previously stated herein, that there are issues within the PUCO's jurisdiction. Thus it would be unreasonable for the PUCO to stay discovery in this case. Furthermore, should the PUCO sit on the sidelines waiting for FERC to resolve the Lease Agreement it may lose jurisdiction -- and all ability to affect the lease impacts thereafter. Therefore, Dominion's Motion should be denied, and the Commission should order the Company to respond in a timely manner.

Discovery is important in this case where Dominion and DTI have entered into a Lease Agreement that ties up 3-5 Bcf of on-system storage for the next 15 to 20 years. As the statutory representative of Dominion's 1.1 million residential consumers, OCC has a vital interest in obtaining responses to the discovery requests served upon Dominion.

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[48] *Columbus Southern Power Co.* et al.. ("CSP Case"), Case No. 02-3310-EL-ETP (Entry, Feb. 20, 2003), pp.4.

[49] Id. at 3.

The Commission should not allow Dominion to imped OCC's investigation in this proceeding. The Commission should enforce its discovery rule similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Because Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding the Commission should do so in this proceeding.[50] The Company argues to stay OCC's discovery rights stating: "that [u]nless and until it does [grant OCC's Motions] (and it should not), DEO should not be required to respond to OCC's discovery requests." Dominion merely seeks to complicate a process that should be uncomplicated. In another case that dealt, in part, with the PUCO denying OCC the right to discovery, including the denial of an OCC Motion to Compel, the Supreme Court of Ohio found that the Commission erred in its decision.[51] The Court based its decision in part on its reliance on R.C. 4903.082 which states: [a]ll parties and intervenors shall be granted ample rights of discovery, as well as, recognition of the role Commission's rules play in discovery matters by stating: "[t]he present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable."[52] Therefore the Commission should liberally construe its discovery rule and order Dominion to respond.

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[50] *Ohio Consumers' Counsel v. Public Util. Comm.*, (2006) 111 Ohio St.3d 300, 2006-Ohio-5789, ¶82.

[51] *Ohio Consumers' Counsel v. Public Util. Comm.*, (2006) 111 Ohio St.3d 300, 2006-Ohio-5789, ¶83. "The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding").

[52] Id. at ¶82.

The OCC is entitled to discovery within the scope provided by the Commission's rules: "[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.[53]" Dominion has challenged OCC's right to seek discovery, and has refused to provide information responsive to OCC's discovery inquiries.[54] Dominion has not moved for a protective order pursuant to Ohio Adm. Code 4901-1-24, and its refusal to respond to OCC's requests is inappropriate. Rather than Stay discovery, the Commission should order Dominion to provide an immediate response to OCC's discovery requests and the requests for production of documents.

IV. CONCLUSION

For all the reasons argued above, OCC's Motion to Order a Special Management Performance Audit and Motion to Order Dominion to Prepare a Long Term Forecast Report should be granted. In addition, the Commission should consider the need to establish a procedural schedule to hear evidence and issue a ruling so as to mitigate the harm the lease arrangement could cause Dominion's residential customers that could result from the Joint Application at FERC. Finally, the Commission should deny Dominion's Motion to Stay discovery, and instead order the Company to provide responses to OCC's discovery forthwith.

[53] Ohio Adm. Code 4901-1-16.

[54] Memo Contra at 21.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply* has been served upon the below-named counsel by First Class Mail this 14th day of June 2010.

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