

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Establish Competitive Response Rates |) | Case No. 10-2633-GA-AEC |
| In the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Amend its Tariffs to Establish Competitive Response Rates |) | Case No. 10-2634-GA-ATA |

**MEMORANDUM CONTRA MOTION TO INTERVENE AND PROTEST
BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND MOTION TO STAY DISCOVERY**

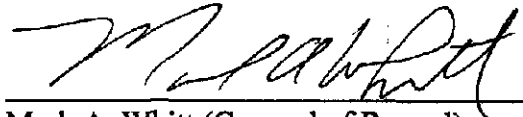
Pursuant to Rules 4901-1-12(A) and 4901-1-14, Ohio Administrative Code ("O.A.C."), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") respectfully requests an entry denying the request for intervention in this proceeding by the Office of the Ohio Consumers' Counsel ("OCC"). Because OCC cannot satisfy the statutory criteria for intervention, the Commission should also issue a stay of discovery served by OCC. This Motion should be granted for the reasons stated in the attached Memorandum in Support.

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Dated: January 3, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. A. Whitt', written over a horizontal line.

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**MEMORANDUM IN SUPPORT OF
MEMORANDUM CONTRA MOTION TO INTERVENE AND
PROTEST BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND MOTION TO STAY DISCOVERY**

Pursuant to Rule 4901-1-12(B)(1) and (2), Ohio Administrative Code ("O.A.C."), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") responds to the Motion to Intervene and "Motion to Protest" filed by the Office of Ohio Consumers' Counsel ("OCC"). Pursuant to Rules 4901-1-12(A) and 4901-1-14, O.A.C., DEO also requests an entry staying discovery in this proceeding. For the reasons set forth below, OCC's Motion to Intervene should be denied, and DEO's Motion to Stay Discovery granted.

I. INTRODUCTION

DEO filed the Application in this proceeding to establish Competitive Response Rates. As discussed in the Application, approval of Competitive Response Rates would allow DEO to adjust base rates and riders for customers that have competitive options for distribution service. Approval of the request to establish Competitive Response Rates is necessary for DEO to retain customers on its system. If Competitive Response Rates are not approved, the trend of customers leaving DEO's system will continue, ultimately causing remaining customers to experience an increase in both base rates and rider rates.

OCC's Motion to Intervene and "protest" is based on a fundamental misunderstanding of DEO's Application. According to OCC, DEO's residential customers "may be 'adversely affected'" by DEO's Application because the proposed Competitive Response Rate tariff "puts all of the cost responsibility for the competitive response on the backs of Dominion's customers." (Mem. Support at 2.) OCC asks the Commission to reject the Application and "direct the Company to submit its Applications [sic] as part of a rate case filing so that the PUCO could consider the reduced risk to Dominion's shareholders from such waivers in the context of setting the Company's rate of return." (Mem. Support at 4.)

The Commission should deny OCC's request to intervene because OCC has not and cannot satisfy the statutory criteria for intervention, as required by R.C. § 4903.221. In arguing that approval of Competitive Response Rates would "put all of the cost responsibility . . . on the backs of Dominion's customers" (Mem. Support at 2), OCC assumes that DEO seeks approval for recovery of so-called "delta revenues"¹ as part of its Application. OCC is wrong. The Application does *not* seek recovery of delta revenues associated with Competitive Response Rate contracts that will provide for discounted base distribution rates. To the extent such contracts produce revenues lower than what DEO is otherwise authorized to collect in base distribution rates, this lost revenue will be borne by DEO shareholders. Although DEO reserves the right to request recovery of delta revenues as part of its next base rate case or other subsequent filing, it is not doing so now. Thus, approval of the Application will not result in a distribution rate increase for any customer. To the contrary, approval of the Application will lead to a *decrease* in base rates for certain customers with competitive alternatives. Thus, the legal issues raised in

¹ "Delta revenue" represents the difference between tariff rates and discounted rates. For example, discounting a tariff rate of \$1 to \$.90 results in delta revenue of \$.10.

OCC's Motion to Intervene regarding cost recovery simply have no bearing on the merits of DEO's Application.

The Commission should also issue a stay of discovery, including the discovery served by OCC on December 17, 2010. The purpose of discovery is for parties to prepare for hearing. The Commission does not need to hold an evidentiary hearing to approve DEO's Application. More importantly, there is no basis for authorizing a potential intervenor who has not satisfied the statutory standard for intervention to take discovery of other parties. The Commission should deny OCC's request for intervention and grant DEO's requested stay of discovery.

II. ARGUMENT

A. OCC Has Not Satisfied The Statutory Criteria For Intervention.

Intervention is discretionary, not mandatory. Pursuant to R.C. 4903.221, any person "who may be adversely affected by a public utilities commission proceeding may intervene in such proceeding...." The statute requires the Commission to consider four criteria when ruling on a motion to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; and
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

R.C. 4903.221(B). The Commission's rules also require an intervenor to have "a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties." O.A.C. 4901-1-

11(A)(2). Finally, the Commission considers whether a potential intervenor's interest is represented by existing parties. O.A.C. 4901-1-11(B)(5).

Contrary to OCC's reading of *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 384, 2006-Ohio-5853 ¶¶ 13-20, the Commission is not required to grant intervention in all cases. *Consumers' Counsel* stands for the unremarkable proposition that the Commission must consider the four criteria in R.C. § 4903.221 in deciding whether to grant intervention. *Id.* at ¶¶ 18, 20. The Court did *not* hold that the Commission must grant intervention based on unsupported conclusions by OCC that it meets the criteria for intervention. As explained in *Office of Consumers' Counsel v. Pub. Util. Comm'n*, 56 Ohio St. 2d 220, 224 n.3 (1978), in enacting R.C. 4903.221 the legislature did not "confer[] upon [OCC] an unlimited right of intervention beyond the procedural control of the commission." OCC must demonstrate that it meets the statutory criteria for intervention, and here it has failed to do so.

1. OCC Cannot Establish That DEO's Residential Customers Will Be Adversely Affected By DEO's Application.

A threshold requirement for intervention is a demonstration that the potential intervenor "may be adversely affected" by an order in the proceeding. R.C. § 4903.221. As the statutory advocate of residential consumers, OCC argues that DEO's residential customers "may be 'adversely affected' by these cases" because the "cost responsibility for the competitive response [is] on the backs of Dominion's customers...." (Mem. Support at 2.) "Before any such discounting authority is granted," claims OCC, "it is imperative that the Company be required to documents [sic] that the competitive alternative actually exists." (Mem. Support at 8.)

DEO is certainly willing to "document" the existence of competitive alternatives by providing supplemental information to Commission Staff, to the extent deemed necessary by Staff. But for its part, OCC has provided no information to suggest that competitive alternatives

do not exist for DEO customers. And customers who have competitive alternatives have an obvious financial incentive to switch to the competitor and leave DEO's system. This is a problem not only for DEO, but for its customers as well. As stated in the Application, "[t]o the extent that DEO loses customers to competitive distribution providers, DEO's remaining customers must pay the entire cost of service – including the cost of service to lost customers – through base distribution rates." (*Id.* at ¶ 9.) Thus, in the absence of the Competitive Response Rate tariff, DEO's customers will bear additional costs to support DEO's cost of service because the loss of customers and load to competitors will lead to higher riders and base rates for remaining customers.

Unlike other utilities for whom the Commission has approved competitive rates, DEO is *not* seeking recovery of delta revenues associated with base rates as part of the Application. Instead, shareholders will absorb the revenue difference between tariffed base rates and competitive rates until such time as base rates are reset in a future rate case. No customer will experience a base rate increase as a consequence of approval of the Application. Indeed, contrary to OCC's claims, certain customers with competitive alternatives will receive service at *lower* base rates. Maintaining customers through Competitive Response Rates will ultimately mitigate rate increases to all remaining customers. DEO's proposal is truly a "win-win," and customers are not adversely affected by it.

The Application would also provide authority for DEO to reduce or waive riders and fuel retention rates. It is true that if riders are waived for certain customers, remaining customers will bear a larger share of the expense for which the rider is designed to recover. However, that will certainly occur if DEO loses customers to a competing LDC. To the extent that DEO retains any of those customers through the use of a Competitive Response Rate, the burden on remaining

customers will be less. Furthermore, OCC overstates the impact of the response on individual customers because any such increases would be *de minimus*. DEO has approximately 1.1 million customers. The Company expects to offer a limited number of Competitive Response Rate contracts. As stated in its application, since 2005 DEO has lost 642 customers with annual volumes of 237,900 MCF. The PIPP rider currently has the highest rate of all DEO riders, at \$1.7078 per month. Reducing annual volumes in the rider rate calculation by 237,900, the amount that the remaining customers would otherwise pay would have been \$1.7104 per MCF, a difference of a small fraction of one cent. The increased amount that these other customers would have paid would not even constitute a rounding error on monthly bills. To suggest that customers would be "adversely affected" by such a negligible increase strains credibility. And, even though customers might pay a slightly higher rider rate due to the existence of competitive response contracts, they would pay this higher rate anyway if additional customers leave the system -- as well as higher distribution rates.

DEO's Application presents a measured, balanced and reasonable approach to dealing with the further loss of customers to competing LDCs. To the extent base rates are reduced, delta revenues will be absorbed by shareholders, while customers will absorb any negligible rate increase that occurs through the waiver of certain riders or the fuel retention rate. The fact that DEO bears the financial impact of discounted base rates provides an incentive to offer discounts only where necessary. Every Competitive Response Rate contract will be provided to the Commission. And every customer -- whether extended a Competitive Response Rate contract or not -- will benefit from a program that mitigates further erosion of DEO's customer base. In fact, the Commission has encouraged LDCs to respond to competition by making efforts to retain existing customers. In approving a program for Cincinnati Gas & Electric, for example,

the Commission more or less required CG&E to continue to honor a special contract for a large customer:

We believe that it is a *prudent management decision* for CG&E to try to retain AK Steel as a customer and the company's failure to continue to honor the contract price, until at least the end of the current contract, may be well considered by this Commission to be an imprudent management decision, as noted by staff witness Maag's testimony.

Application of The Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996), at 34, n. 9 (emphasis added). In CG&E, the Commission plainly recognized that the loss of a substantial customer would be detrimental to remaining customers. This is no less true for DEO and its customers even if the customers in question are much smaller. As a matter of simple mathematics, spreading the same level of costs among fewer customers will increase rates for those customers. Approval of DEO's Application will help mitigate this situation in DEO's service territory. Contrary to "adversely affecting" customers, the Application benefits all customers, including those who are not receiving discounted rates.

Because OCC has not shown that residential customers will be adversely affected by DEO's Application, OCC does not meet the threshold requirement for intervention.

2. OCC Failed To Satisfy The Criteria Contained In R.C. § 4903.221(B).

Even if OCC could somehow show that residential customers will be adversely affected by the Application, OCC's Motion fails to establish several criteria for intervention contained in R.C. § 4903.221(B).

First, pursuant to R.C. § 4903.221(B)(2), a potential intervenor must describe its legal position and how the legal position relates to the merits of the proceeding. In its Motion, OCC defines its legal position by stating that "Dominion's rates should be no more than what is

reasonable and lawful under Ohio law, for service that is adequate under Ohio law.” (Mem. Support at 3.) OCC then concludes, without explanation, that its legal position is directly related to the merits of this proceeding. *Id.*

Contrary to OCC’s concern with an alleged rate increase, as explained above and in DEO’s Application, approval of Competitive Response Rates will not increase base rates. The Competitive Response Rate service agreements will “maintain distribution rates *at or below* the distributions rates approved by the Commission in DEO’s most recent distribution base rate case....” (Application at ¶ 7 (emphasis added).) DEO has also committed that “[i]n no event shall the volumetric charge be less than the variable cost of service.” *Id.* DEO is requesting to offer negotiated distribution rates, waive certain riders and reduce the unaccounted for gas percentage to eligible customers in order to compete with other public utilities. Base rates will not be “more than what is reasonable and lawful under Ohio law” as a result of approval of the Application.

Second, prior to granting intervention, the Commission must determine whether the potential intervenor would unduly prolong or delay the proceedings. R.C. § 4903.221(B)(3). OCC claims its intervention will not unduly prolong or delay the proceedings, claiming that its “longstanding expertise and experience in PUCO proceedings” would allow for the “efficient processing of these cases with consideration of the public interest.” (Mem. Support at 3.) In stark contrast to this claim, however, elsewhere in its Motion OCC urges the Commission to “*slow down* this process to allow interested parties an opportunity to more thoroughly investigate the Company’s proposal.” (*Id.* at 8 (emphasis added).) OCC’s efforts to “slow down” this proceeding include the service of 43 interrogatories and multiple requests for production of documents, which were served on December 17, 2010. OCC’s proposed intervention, as evident

from its own admissions and as demonstrated by its lengthy discovery requests, would unduly delay and prolong this proceeding.

Third, the Commission must consider whether the intervening party would significantly contribute to the full development and equitable resolution of the factual issues of the proceeding. R.C. § 4903.221(B)(4). OCC argues that its intervention would contribute to this proceeding because “OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding these cases in the public interest.” (Mem. Support at 3.) Aside from information gathering, OCC provides no explanation of how the information it intends to gather will assist the Commission, or why the Commission Staff is not capable of gathering this information itself.

Simply because a party is able to propound discovery does not equate to its participation with contributing to the full development and equitable resolution of factual issues. Furthermore, the Commission is well equipped to obtain and develop information that the Commission deems is necessary and serves the public interest. OCC’s participation will hinder rather than promote a timely resolution of this docket.

B. Because OCC Has Not Satisfied The Statutory Criteria For Intervention, Discovery Should Be Stayed.

Concurrent with the filing of its Motion to Intervene, OCC also served discovery. The Commission’s discovery rules are intended to ensure “prompt and expeditious use of *prehearing* discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.” O.A.C. 4901-1-16 (emphasis added). Without a hearing scheduled or an indication from the Commission that a hearing is even necessary, OCC’s discovery requests are premature.

Moreover, although OCC has moved to intervene, DEO has demonstrated why the intervention request should be denied. There is no basis for allowing discovery by parties who have not satisfied the statutory criteria for intervention. To allow discovery of such parties would only serve to unduly delay commission proceedings.

Furthermore, discovery and a hearing are not warranted or needed. As DEO explained in its Application, the Commission has a long history approving competitive response rates pursuant to R.C. § 4905.31. (Application at ¶ 10.) For example, in Case 87-304-GA-AEC, the Commission approved Competitive Response Contracts between DEO and customers that had competitive options allowing them to leave DEO's distribution system. In Case No. 92-1743-EL-AEC, the Commission approved the competitive pilot program of The Cleveland Electric Illuminating Company ("CEI"), which was virtually identical to DEO's proposed program, except that CEI's proposed program targeted commercial customers and its price incentives were associated with its Demand Side Management programs. As discussed above, the Commission also approved competitive rates for CG&E in Case No. 95-656-GA-AIR.

The Application provides sufficient information for the Commission to issue a ruling. The Application explains that DEO has lost 642 distribution service customers to competing natural gas companies. (Application at ¶ 4.) This customer loss equated to an annual revenue loss of \$340,768. *Id.* Competitive Response Rates will allow DEO to offer a negotiated distribution rate, waive certain riders and reduce the unaccounted for gas percentage to eligible customers. (*Id.* at ¶ 5.) If the eligible customer accepts the negotiated distribution rate, then DEO and the customer will enter into the service agreement, included as Application Attachment 2. *Id.* To ensure Commission oversight, DEO would file each service agreement under seal with the Commission to allow the Commission to verify that each agreement is consistent with the

approved service agreement form. (Application at ¶¶ 5, 6.) Permitting intervention and discovery will simply delay implementation of a program that will benefit customers.

III. CONCLUSION

For the reasons explained above, the Commission should deny OCC's Motion to Intervene and grant DEO's Motion to Stay Discovery.

Dated: January 3, 2011

Respectfully submitted,



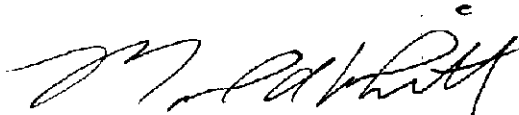
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Motion to Intervene and Motion to Stay Discovery was served by ordinary U.S. mail, postage prepaid, to the following on this 3rd day of January, 2011:

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