BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code.	))))	Case No. 11-5590-GA-ORD

APPLICATION FOR REHEARING OF
COLUMBIA GAS OF OHIO, INC.,
DUKE ENERGY OHIO, INC.,
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO,
AND VECTREN ENERGY DELIVERY OF OHIO

Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code, Columbia Gas of Ohio, Inc. ("Columbia"), Duke Energy Ohio, Inc. ("Duke Energy Ohio"), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO"), and Vectren Energy Delivery of Ohio ("VEDO") (collectively "the Companies") hereby file their Application for Rehearing of the Entry issued in the above-captioned case on July 2, 2012 ("the Entry").

The Entry is unreasonable and unlawful for the following reasons:

- The Entry adopts certain rules—namely, Rules 4901:1-19-06(C)(1), -06(C)(2), -06(C)(3), and -07(C)—that unlawfully add to the requirements of statute and manifestly contradict the revisions to R.C. 4929.05 made by recently enacted Am. Sub. H.B. No. 95 ("HB 95").

- The rules disregard the direction of the General Assembly and impose procedural requirements that are contrary to law.

- The rules fail to give proper effect to both R.C. 4929.05 and R.C. 4909.18.

For these reasons, as explained in detail in the attached Memorandum in Support, the Commission should grant this Application for Rehearing and modify the proposed rules so that they are consistent with Ohio law.

Dated: August 1, 2012

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
WHITT STURTEVANT LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3911
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

ATTORNEYS FOR VECTREN ENERGY DELIVERY OF OHIO AND THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

/s/ Jeanne W. Kingery *per authorization*

Amy B. Spiller
Deputy General Counsel
Jeanne W. Kingery (Counsel of Record)
Associate General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, Ohio 45202-0906
Telephone: (513) 287-4359
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com

ATTORNEYS FOR DUKE ENERGY OHIO, INC.

/s/ Stephen B. Seiple *per authorization*

Stephen B. Seiple, Asst. General Counsel
Brooke E. Leslie, Counsel
200 Civic Center Drive
Columbus, Ohio 43216-0117
Telephone: (614) 460-4648
sseiple@nisource.com
bleslie@nisource.com

ATTORNEYS FOR COLUMBIA GAS OF OHIO, INC.

MEMORANDUM IN SUPPORT

Several of the Commission's proposed rules conflict with the law they purport to implement. The rules in question (4901:1-19-06(C)(1), -06(C)(2), -06(C)(3), and -07(C)) would essentially require utilities to prepare and file a base rate case as a condition of filing an alternative rate plan. Not only is this contrary to the procedures established by law, but the substantial costs imposed by these rules will discourage utilities from even availing themselves of the opportunities the legislature plainly desired to afford them under the statute. Therefore, the Companies respectfully request that the Commission grant rehearing and revise the rules in question.

I. BACKGROUND

On July 2, 2012, the Commission issued an entry directing Staff "to send its attached comment summary, recommendations, drafts of the proposed rules, and [business impact assessment] evaluation to [the Common Sense Initiative Office] for review and recommendations in accordance with Section 121.82." Entry at 3. The Commission stated that it "may not file the proposed rules for legislative review under Section 119.032, Revised Code, earlier than the sixteenth business day after the proposed revisions to the rules are submitted to CSI." *Id*. at 2. It is unclear to the Companies whether the July 2, 2012 Entry is the Commission's last word on the proposed rules or whether there will be another entry. To ensure they do not forfeit their rights, the Companies seek rehearing of the July 2, 2012 Entry.

II. ARGUMENT

A. The Commission's rules unlawfully add to the requirements of statute and manifestly contradict the revisions to R.C. 4929.05 made by HB 95.

Several of the proposed rules effectively require applicants to make a full rate-case filing any time an alternative rate plan is requested. *See* Rules 4901:1-19-06(C)(1), -

06(C)(2), -06(C)(3), and -07(C). By proposing these rules, the Commission has reinstituted requirements that were eliminated by statute. The Companies ask the Commission to bring the rules into compliance with the law by deleting these requirements.

1. HB 95 eliminated the automatic imposition of rate-case filing requirements.

An alternative rate plan is defined by statute as "a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges." R.C. 4929.01(A).

Nevertheless, before the enactment of Am. Sub. H.B. No. 95 ("HB 95"),[1] a condition of approval of an alternative rate plan was that the Commission "determin[e] just and reasonable rates . . . pursuant to section 4909.15." HB 95 at 19; *see* R.C. 4929.05(A). HB 95 deleted this requirement, which essentially required a full rate-case filing, and replaced it with a general requirement that alternative rate plans be "just and reasonable." HB 95 at 20; *see* R.C. 4929.05(B)(3).

2. The proposed rules automatically impose rate-case filing requirements.

The Commission's proposed rules do not accord with these changes to R.C. 4929.05.

Most notably, despite HB 95's elimination of the requirement to "determine just and reasonable rates . . . pursuant to R.C. 4909.15," the proposed rules continue to require applicants to file voluminous exhibits so that the Commission may "determine just and reasonable rates under section 4909.15." Proposed Rule 4901:1-19-06(C)(1). Alternative-rate-plan applications must include "the exhibits described in divisions (A) to (D) of section 4909.18 of the Revised Code, and standard filing requirements pursuant to rule 4901-7-01 of the Administrative Code." *Id*. These are the filing requirements for an application for an increase in rates, and they are costly, time-consuming, and burdensome to comply with. Building off of this requirement,

[1] HB 95 is available online at www.legislature.state.oh.us/BillText129/129_HB_95_EN_N.pdf.

Rules 4901:1-19-06(C)(2) and (3) add conditions found nowhere in the statute anytime an applicant seeks to "deviate from traditional rate of return regulation."

Likewise, proposed Rule 4901:1-19-07(C) requires "a written report which addresses, at a minimum, the reasonableness of the current rates," and "[i]f the application is for an increase in rates, the written report shall also address section 4909.15 of the Revised Code." But an alternative rate plan *by definition* is an "alternate to the method of section 4909.15 of the Revised Code." R.C. 4929.01(A). And as already addressed, the legislature specifically deleted the requirement to "determin[e] just and reasonable rates . . . pursuant to 4909.15." HB 95 at 19. The rules again pay no heed to the new law.

Confirming that the proposed rules unlawfully add to the requirements of statute, the rules *also* require that "the applicant shall demonstrate that the alternative rate plan is just and reasonable." Rule 4901:1-19-06(C)(2)(f). This seems to reflect the new requirement in HB 95, that the plan be "just and reasonable." R.C. 4929.05(A)(3); *see* HB 95 at 20. Thus, while the statute replaced a stringent requirement with a more flexible one, the Commission's rules now impose *both*: the replacement *and* the replaced.

Thus, what the legislature has removed from the law, the proposed rules add back in.

B. By adopting these rules, the Entry disregards the direction of the General Assembly and imposes procedural requirements that are contrary to law.

The proposed rules reverse the legislature's decision that alternative rate plans should not automatically trigger full base-rate-case filing requirements. This is contrary to the Commission's role, which is to discern the guidance of the General Assembly, not to reverse legislative decisions. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 402, 2011-Ohio-958, ¶ 21 ("the commission is obligated to follow its legislative mandate"); *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 17 Ohio St. 2d 45, 47 (1969) ("The commission is a creature of statute and has only

those powers given to it by statute"); *Cincinnati v. Pub. Util. Comm.*, 96 Ohio St. 270, paragraph 1 of the syllabus (1917) ("The powers of the public utilities commission are conferred by statute and it possesses no authority other than that thus vested in it"); *cf. Van Meter v. Pub. Util. Comm.*, 165 Ohio St. 391, 403 (1956) (the court "has the authority to determine what the General Assembly meant by what it said; but it has no power . . . to add to legislation something which was not enacted as legislation by the General Assembly").

Ohio Bell is particularly compelling. In that case, the Court reversed the Commission's attempt to apply R.C. 4909.18's filing requirements outside the context of an application for an increase in rates. The Commission had argued "that under its broad powers it has authority to require the same procedures to be followed with regard to applications for the filing of a rate for a new service as . . . for increases in rates." *Ohio Bell*, 17 Ohio St. 2d at 47. But this "position [was] not supported by the language of the statute," which did not impose the filing requirements in that context. *Id*. The Court pointed out that if the statute's streamlined procedures were not followed, the proposed rate reduction or new service could "not be made effective until a lengthy and often long-delayed review by the Public Utilities Commission is completed," and that this in turn would delay the availability of the benefit of the new rate or service. *Id*. at 48. Because this procedural delay contradicted "the procedures established by the General Assembly," the Court found the order "contrary to law" and reversed it. *Id*. at 48–49.

While *Ohio Bell* did not involve applications under R.C. 4929.05, the same principle applies. Under HB 95, the legislature manifestly decided to relieve alternative-rate-plan filers of the mandatory burden of the standard filing requirements. Disregarding this legislative relief, the rules reinstate the procedural burden. No less than in *Ohio Bell*, this imposition contradicts the procedures established by law. The Commission should not adopt these rules.

C. The rules fails to give proper effect to both R.C. 4929.05 and R.C. 4909.18.

Staff raised two points in response to these problems, which the Commission appears to have accepted. But neither response cures the problems.

First, Staff stated that the requirements are "appropriate" because the law requires applications to "be filed under R.C. 4909.18." Entry, Attachment A at 25 (July 2, 2012). But this appeal to R.C. 4909.18 does not support the Commission's proposal to require a full rate-case filing in every case.

The fact that applications must be "fil[ed] . . . under section 4909.18" should be read as adopting that statute's procedural requirements (to the extent they are consistent with R.C. 4929.05), but this language cannot be read to impose the *substantive* standards applicable to a base rate case. R.C. 4929.05 provides its own substantive standards: it states the Commission "shall" approve an alternative rate plan if three showings are made, *see* R.C. 4929.05(A)(1)–(3), and none of them entail a base-rate determination. Putting the enactment of the new statute into context confirms this: before HB 95, the Commission *was* required to make a base rate determination before ruling on an alternate plan, but HB 95 specifically eliminated this requirement. If two statutes impose inconsistent requirements, the Commission should "apply the more specific provision, the one meant to govern the particular situation involved, rather than the more general rule." *Troyer v. Janis*, 2012-Ohio-2406, ¶ 15. Thus, R.C. 4909.18 should govern only to the extent it is consistent with R.C. 4929.05.

Second, Staff argues that filing parties could "file a request for waiver," Entry, Att. A at 25, but the availability of a waiver does not eliminate the problems with the Commission's proposed rules. It does not change the fact that the manifest legislative intent was to eliminate automatic imposition of rate-case filing requirements. Nor does it change the fact that the extra-statutory condition may discourage filings under R.C. 4929.05 and will certainly delay their

processing by requiring waiver filings and rulings. Moreover, if the availability of a waiver justified otherwise unreasonable rules, then every rule would be immune from challenge. And this approach to rulemaking would allow the Commission to draft rules without regard to statutory requirements, essentially leaving parties subject to the Commission's *ad hoc* judgment regarding procedural matters—which is fundamentally contrary to a law- and rule-based system. The cure for a rule that is contrary to law is not case-by-case waiver review. The proper course is for the Commission to revise its rules so that the rules accord with the law.

Applicants bear the burden of supporting their applications. If a case arises in which the burden of proof demands use of the rate-case filing requirements, then that is the place to require it. If a company fails to prove its case, that would justify rejection of the application. But whatever companies must prove in an alternative-rate-plan case, and whatever else is entailed by a filing under R.C. 4909.18, HB 95 makes it clear that companies need not prove "just and reasonable rates under R.C. 4909.15." And R.C. 4929.01(A) makes clear that an alternative rate plan is "a method, *alternative to the method of section 4909.15*." R.C. 4929.01(A) (emphasis added). Therefore, it is inappropriate to require alternative-rate-plan applicants either to make R.C. 4909.15's burdensome showing or to dissuade the Commission from requiring it.

III. REQUESTED RELIEF

The Companies request the Commission to revise the rules as follows:

Rule 4901:1-19-06(C)(1)

Delete in its entirety and renumber.

Rule 4901:1-19-06(C)(2)

(C) Exhibits to an alternative rate plan application

. . . .

~~(2) In addition to the requirements of appendix A to rule 4901-7-01 of the Administrative Code, the applicant shall provide the following information. This additional information shall be considered to be part of the standard filing requirements for a natural gas company filing an alternative rate plan. The applicant shall have the burden of proof to document, justify, and support its plan.~~

~~(a)~~ (1) The applicant shall provide a detailed alternative rate plan, which states the facts and grounds upon which the application is based, and which sets forth the plan's elements, transition plans, and other matters required by these rules. This exhibit shall also state and support the rationale for the initial proposed tariff changes for all impacted natural gas services.

~~(b) The applicant shall fully justify any proposal to deviate from traditional rate of return regulation. Such justification shall include the applicant's rationale for its proposed alternative rate plan, including how it better matches actual experience or performance of the company in terms of costs and quality of service to its regulated customers.~~

~~(c) If the alternative rate plan proposes a severing of costs and rates, the applicant shall compare how its proposed alternative rate plan would have impacted actual performance measures (operating and financial) during the most recent five calendar years. Include comparisons of the results during the previous five years if the alternative rate plan had been in effect with the rate or provision that otherwise was in effect.~~

~~(d)~~ (2) If the applicant has been authorized to exempt any services, the applicant shall provide a listing of the services which have been exempted, the case number authorizing such exemption, a copy of the approved separation plan(s), and a copy of the approved code(s) of conduct.

~~(e)~~ (3) The applicant shall provide a detailed discussion of how potential issues concerning cross-subsidization of services have been addressed in the plan.

~~(f)~~ (4) The applicant shall provide a detailed discussion of how the applicant is in compliance with section 4905.35 of the Revised Code, and is in substantial compliance with the policies of the state of Ohio specified in section 4929.02 of the Revised Code. In addition, the applicant shall also provide a detailed discussion of how it expects to continue to be in substantial compliance with the policies of the state specified in section 4929.02 of the Revised

Code, after implementation of the alternative rate plan. Finally, the applicant shall demonstrate that the alternative rate plan is just and reasonable.

~~(g)~~ (5) The applicant shall submit a list of witnesses sponsoring each of the exhibits in its application.

Rule 4901:1-19-06(C)(3)

Delete in its entirety.

Rule 4901:1-19-07(C)

The commission staff will file a written report which addresses, at a minimum, the justness and reasonableness of the proposed alternative rate plan~~current rates pursuant to section 4909.15 of the Revised Code~~.

IV. CONCLUSION

For these reasons, the Companies respectfully request that the Commission grant rehearing and revise the rules as requested above.

Dated: August 1, 2012

Respectfully submitted,

/s/ Mark A. Whitt

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
WHITT STURTEVANT LLP
PNC Plaza, Suite 2020
155 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3911
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com

ATTORNEYS FOR VECTREN ENERGY DELIVERY OF OHIO AND THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

/s/ Jeanne W. Kingery *per authorization*
Amy B. Spiller
Deputy General Counsel
Jeanne W. Kingery (Counsel of Record)
Associate General Counsel
Duke Energy Business Services, Inc.
139 Fourth Street, 1303-Main
P.O. Box 960
Cincinnati, Ohio 45202-0906
Telephone: (513) 287-4359
amy.spiller@duke-energy.com
jeanne.kingery@duke-energy.com

ATTORNEYS FOR DUKE ENERGY OHIO, INC.

/s/ Stephen B. Seiple *per authorization*
Stephen B. Seiple, Asst. General Counsel
Brooke E. Leslie, Counsel
200 Civic Center Drive
Columbus, Ohio 43216-0117
Telephone: (614) 460-4648
sseiple@nisource.com
bleslie@nisource.com

ATTORNEYS FOR COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing was served by electronic mail on the 1st day of August, 2012, to the following:

William Wright
Ohio Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
william.wright@puc.state.oh.us

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
mhpetricoff@vorys.com

Larry S. Sauer
Joseph P. Serio
Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, Ohio 43215
sauer@occ.state.oh.us
serio@occ.state.oh.us

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney2@columbus.rr.com

/s/ Andrew J. Campbell
One of the Attorneys for Vectren Energy Delivery of Ohio and The East Ohio Gas Company d/b/a Dominion East Ohio

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Summary: App for Rehearing Joint Application for Rehearing electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio and Columbia Gas of Ohio, Inc. and Duke Energy Ohio, Inc. and Vectren Energy Delivery of Ohio