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 to Adjust its Automated Meter Reading Cost Recovery Charge and Related Matters.	)))))	Case No. 11-5843-GA-RDR

MEMORANDUM CONTRA DOMINION EAST OHIO'S MOTION FOR A STAY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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October 16, 2012

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THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

This case was initiated by Dominion East Ohio Gas Company ("Dominion" or "the Company") on November 30, 2011, to collect the costs associated with the installation of automated meter reading devices that customers pay. The Company followed its Pre-filing Notice ("PFN") with its Application on February 28, 2012. There, Dominion requested an Automated Meter Reading ("AMR") Cost Recovery Charge Rider of $0.54 per month, per customer.[1] Pursuant to a March 30, 2012 Entry ("March 30 Entry") by the Attorney Examiner in this docket[2] the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE")[3] and the Staff of the Public Utilities Commission of Ohio ("Commission" or "PUCO") filed Comments on March 30, 2012.

[1] DEO Ex. No. 10 (Application) (February 28, 2012) at 1.

[2] March 30 Entry at 2. (The Attorney Examiner granted OCC's Motion for One week Continuance to the Procedural Schedule).

[3] OCC and OPAE filed Joint Comments.

An evidentiary hearing was held on May 2, 2012. OCC, OPAE, Staff and Dominion filed Initial Briefs on June 6, 2012 and Reply Briefs on June 20, 2012. The Commission issued its Opinion and Order on October 3, 2012. In the Opinion and Order, the Commission determined that the term of Dominion's AMR Program was five years ending December 31, 2011.[4] The Commission also ruled that Dominion should have installed AMR devices and rerouted meter reading routes in a manner that would have permitted the Company to achieve maximum savings by the end of the 2011 project year.[5] The Commission determined that Dominion had not acted accordingly and adopted an Operation and Maintenance ("O&M") cost savings calculation and recommendation by Staff that reduced the AMR charge to customers from the $0.54 proposed by Dominion to $0.42.

Pursuant to R.C. 4903.10, any party that elects to challenge the Commission's Opinion and Order may do so through then filing of an Application for Rehearing. Such an Application for Rehearing would be due within thirty days after the entry of the order upon the journal of the Commission, or November 2, 2012. However, rather than avail itself of this course of action, Dominion elected to file a Motion for a Stay, on October 11, 2012. Because of the expedited time line in this case, any Memorandum Contra the Dominion Motion for a Stay is due on October 16, 2012. Accordingly, OCC is submitting this Memorandum Contra the Dominion Motion for Stay.

[4] Opinion and Order at 13.

[5] Opinion and Order at 17.

II. ARGUMENT

A. The Precedent of the PUCO is that Stays, Such as What Dominion Seeks, are Frequently Denied. Dominion's Motion Should be Denied.

The PUCO has consistently used a four-part standard to consider Motions for Stays. That standard's elements are:

1. whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;
2 whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
3. whether the stay would cause substantial harm to other parties; and
4. where lies the public interest.[6]

Through the application of this standard, the PUCO rarely grants stays, when considering these elements. The following precedent of denying Motions for Stay should be noted. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code,* Case No. 11-4920-EL-RDR et al., Entry at para. 11 (August 22, 2012); *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO et al., Entry at para. 9 (March 30, 2009); *In the Matter of the Application of Time Warner Cable Information Services (Ohio), LLC for Authority to Offer Local and Interexchange Voice Services in Ohio Using Voice Over the Internet Protocol,* Case No. 03-2229-TP-ACE, Entry at para. 7 (February 11, 2004); and *In the Matter of the*

[6] See Dominion Motion for Stay at 6-7 citing *In re Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Co.*, Case No. 09-423-EL-CSS, 2009 Ohio PUC LEXIS 481, at *2–3 (July 8, 2009).

Commission's Investigation into the Modification of Intrastate Access Charges, Case No. 00-127-TP-COI, Entry at para. 9 (February 20, 2003).

B. Dominion's Interpretation of the Stay Requirement Would Guarantee a Utility Stay in Every Case.

Dominion argues that, instead of the four-factor test relied on by the Commission to determine whether a stay should be granted, a stay should be granted as a matter of right.[7] That is wrong. Dominion has missed the numerous instances where the Commission previously denied Motions for Stay.[8]

Instead, the Company argues that a Stay is an undeniable right that is only contingent upon the party requesting the stay providing adequate financial security.[9] However, the end result of Dominion's argument is that in virtually every case, the Utility would be guaranteed a Stay of any and every PUCO Order upon providing adequate financial security.

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[7] Dominion Motion for Stay at 6-7.

[8] *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA et al, Entry (June 11, 2008); *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, Entry on Rehearing (March 9, 2011); *In the Matter of the Investigation of the East Ohio Gas Company d/b/a Dominion East Ohio Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 12-380-GA-GPS, Entry (April 20, 2012); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC, et al. Entry (January 27, 2012); *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR et al., Entry (July 29, 2009); *In the Matter of the Complaint of Infotelecom, LLC, Complainant, v. The Ohio Bell Telephone Company dba AT&T Ohio, Respondent*, Case No. 11-4887-TP-CSS, Entry (October 11, 2011); *In the Matter of the Joint Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a Generation Charge Adjustment Rider*, Case No. 05-704-EL-ATA et al, Entry (September 27, 2005); *In the Matter of the Application of CenturyTel of Ohio, Inc. for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 04-62-TP-ALT, Finding and Order (February 26, 2004).

[9] Dominion Motion for Stay at 14.

On the other hand, customers -- residential, commercial and industrial -- would be routinely denied the same ability to obtain a stay. This would result in customers being denied equal protection of the law because customers are not in the same position to provide the adequate financial security as Dominion or any utility company. Perhaps even more ironic is the fact that the Utility's ability to provide the adequate financial security is only made possible by the revenues raised from customers themselves. Such a result should be rejected.

C. Dominion Claimed that the PUCO's Decision was the Result of "Inattention to the Record and the Post Hearing Briefs."

Dominion argues that the only way the PUCO could reach the result of reducing the AMR charge from $0.54 to $0.42 was due to "inattention to the record and the post hearing briefs."[10] That claim should be denied.

In making this claim, Dominion ignores the possibility that the PUCO relied on the evidence in the record presented by its Staff through the testimony of witness Adkins. For example, the Opinion and Order specifically noted that the Commission was revising the O&M cost savings amount from $3,511,695 to $5,139,971 based on a Staff calculation because three shops (covering 345,218 meters or 27% of Dominion's total meter population) had not been completely rerouted by the end of 2011.[11] Dominion may not like the fact that the PUCO relied on the PUCO Staff's testimony to make the O&M cost savings adjustment. But the fact remains that in doing so the PUCO's decision was based on record evidence and not inattention to the record and post hearing briefs.

[10] Dominion Motion for Stay at 3.

[11] Opinion and Order at 14-15, citing Staff Ex. 9A; Staff Ex. 9 at 18-19.

Dominion's arguments in the Motion to Stay also ignore the notice provided by the Commission in an earlier May 5, 2010 Opinion and Order in a prior Dominion AMR proceeding. That May 5, 2010 Opinion and Order was an important part of the record in this case and was relied on by Staff in its recommendation.

In this case, the PUCO Staff presented evidence in the form of the direct testimony of Kerry Adkins.[12] Mr. Adkins testified that Dominion did not maximize its efforts to accelerate installation of AMR devices and rerouting of AMR reading routes in a manner that would maximize meter reading O&M cost savings as directed by the Commission in its May 5, 2010 Opinion and Order in Case No. 09-1875-GA-RDR. The Commission stated in that Order that:

> While the evidence in this case supports DEO's calculation, the Commission finds that **DEO should be installing the AMR devices such that savings will be maximized and rerouting will be made possible in all of the communities at the earliest possible time**. Therefore, the Commission expects that DEO's filing in 2011, for recovery of 2010 costs, will reflect a substantially greater number of communities rerouted. The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of [Dominion's] communities. **To that end, the Commission finds that, in its 2011 filing, [Dominion] should demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time.**[13] (Emphasis added).

Dominion downplayed this failure to reroute the Western and Youngstown Local Offices by the end of 2011, when the Company claimed, "[I]t had begun or completed

[12] Staff Ex. No. 9 (Direct Testimony of Kerry Adkins) (April 27, 2012) at 11-12.

[13] Dominion Case No. 09-1875-GA-RDR, Opinion and Order (May 5, 2010) at 7.

rerouting all but two local offices, * * *."[14] In its Motion for Stay, the Company is ignoring this earlier PUCO order.

In this case, the Company focused on the "installation" directive in the PUCO's May 5, 2010 Opinion and Order in Case No. 09-1875-GA-RDR, while ignoring the "rerouting" directive that appears in the very same sentence. The PUCO ordered that Dominion "* * * should be **installing** the AMR devices such that savings will be maximized and **rerouting** will be made possible in all of the communities at the earliest possible time."[15] Obviously the PUCO intended for installation and rerouting to enable maximum O&M cost savings because installation without rerouting does not produce the intended O&M cost savings because until an area has been rerouted the meters are still read manually instead of automatically using vehicles.[16]

Dominion has argued that the PUCO did not require that all communities be rerouted by the end of 2011, but only that it had to be possible to reroute by the end of 2011.[17] This argument is designed to separate the Company's failure to act from the negative financial implications of its actions for customers. To the extent that the PUCO mentioned "installation," "rerouting" and "maximized" cost savings in the same sentence means that the Commission intended for the action to occur to maximize O&M cost savings for customers.

To read the Order as done by Dominion in briefs and in the Motion for Stay would require the belief that the Commission wanted maximized O&M cost savings from

[14] Dominion Initial Brief at 1.

[15] Dominion Case No. 09-1875-GA-RDR, Opinion and Order (May 5, 2010) at 7. (Emphasis added).

[16] Tr. at 155.

[17] Dominion Initial Brief at 14.

installations by the end of 2011, as separated from maximized O&M cost savings from rerouting by the end of 2011. The problem with this interpretation is that O&M cost savings are not achieved with installation but only after rerouting.[18] In fact, Dominion has gone as far as to interpret the PUCO's May 5, 2010 Opinion and Order in the 09-1875-GA-RDR case as being a **planning** requirement and not an **installation** requirement.[19]

Dominion's argument also ignores the cost savings impact of the Company's actions of not completing the rerouting in time to implement the maximum O&M cost savings by the December 31, 2012. If the Commission had merely intended the May 5, 2012 Opinion and Order in the 09-1875-GA-RDR case to be for planning purposes, then there would be no cost savings impact and no need to mention maximized cost savings in the same sentence. Moreover, even if the requirement was only a planning one, then the Company failed to demonstrate that its AMR Installation Plan in response to the May 5, 2010 Opinion and Order in Case No. 09-1875-GA-RDR was different than its AMR Installation Plan prior to the Order.[20] In fact, as noted in the record both Company witnesses Friscic[21] and Fanelly[22] acknowledged that the Company planned to **continue to use the same two-prong strategy** on AMR installations after the PUCO May 5, 2010 Opinion and Order in the 09-1875-GA-RDR case as it used prior to that Order.

The PUCO Staff concluded that this result did not comply with the PUCO's May 5, 2010 Opinion and Order in Case No. 09-1875-GA-RDR:

[18] DEO Ex. No. 2 (Direct Testimony of Carleen Fanelly) (April 27, 2012) at 5-6.

[19] Dominion Initial Brief at 15.

[20] See OCC Initial Brief at 7-14.

[21] OCC Initial Brief at 8; Tr. at 126.

[22] OCC Initial Brief at 13; Tr. at 152.

> The Staff believes that DEO has not "deployed the AMR devices in a manner that will maximize savings by allowing rerouting at the earliest possible time" as directed by the Commission and that, as a result, its proposed O&M savings in this case are inadequate.[23]

Thus there is ample evidence in the record that the PUCO's decision was based on the record evidence and not due to inattention to the record and the briefs. The PUCO should deny the Company's Motion for Stay.

D. Dominion Claimed that Denying Its Motion for Stay Would Indicate "An Improper Desire to Inflict Irreparable Harm on DEO."

Dominion argues in its Motion for Stay, that a denial of the Company's Motion for Stay would indicate "an improper desire on the part of the PUCO to inflict irreparable harm on Dominion.[24] That claim should be denied.

This argument ignores the possibility that Dominion failed to meet the criteria for a Stay and instead avers that the PUCO would intentionally inflict irreparable harm on the Company. This argument also ignores the possibility that a Stay may be denied because the Company's Motion for Stay is nothing more than an improper collateral attack on the Opinion and Order.

The Company's allegation is meritless as there has been no evidence submitted or cited from the record by Dominion to establish that the PUCO would make any decision intended to inflict irreparable harm on the Company. The Commission should deny the Company Motion.

[23] Staff Comments (April 6, 2012) at 12.

[24] Dominion Motion for Stay at 5.

E. Dominion Claimed that the PUCO's Opinion and Order is "Unreasonable, Failing at the Level of Basic Logic."

Dominion argues that the PUCO's Opinion and Order is "unreasonable, failing at the level of basic logic."[25] Yet despite the vitriolic tone of its comment, there is no legal precedent that establishes the standard that a PUCO decision must achieve the level of basic logic. Moreover, there is no citation to the Company's alleged standard. Instead of the "basic logic" standard that Dominion references, the standards for the PUCO are set forth in law and rule. The Commission should deny the Company's Motion.

F. Dominion Claimed that the PUCO's Opinion and Reduced the AMR Charge "Simply Because it [the PUCO] Feels like it" and It Allowed the PUCO to "Pull Numbers Out of the Air in Doing So."

Dominion claimed that the PUCO's Opinion and Order reduced the level of the AMR charge "simply because it [the PUCO] feels like it,"[26] or that the PUCO "pull[ed] numbers out of the air in doing so." That is mistaken.[27]

Dominion's Motion for Stay fails to establish that the Opinion and Order was against the manifest weight of the evidence. Dominion's claim also ignores the fact that the Opinion and Order clearly cites to Staff testimony as the basis for its decision,[28] consistent with R.C. 4903.09. Dominion may not like the content of the Staff testimony, but the fact remains that Staff submitted testimony, that the Company had the opportunity to conduct cross-examination of that testimony and that after that cross-examination the testimony was accepted into the record by the Attorney Examiner. Thus the PUCO did not reduce the AMR charge simply because the PUCO felt like it but rather because the

[25] Dominion Motion for Stay at 8.

[26] Dominion Motion for Stay at 10.

[27] Dominion Motion for Stay at 10.

[28] For example, see Opinion and Order at 14-15, citing Staff Ex. 9A; Staff Ex. 9 at 18-19.

PUCO relied on the weight of the evidence presented in the testimony of Staff Witness Adkins.[29] Moreover, the PUCO relied on Staff Testimony in making its decision and did not simply pull numbers out of the air. Dominion's Motion should be denied.

III. CONCLUSION

For all the above-stated reasons, Dominion has failed to establish that it has met the PUCO's criteria for a Motion to Stay the effect of the PUCO's October 3, 2012 Opinion and Order in this case. The PUCO should deny the Company's Motion for Stay.

Respectfully submitted,

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[29] For example see Opinion and Order at 14-15 citing Staff Ex. 9A; Staff Ex. 9 at 18-19.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra* was served via Electronic Mail upon the following persons on this 16th day of October, 2012.

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Summary: Memorandum Memorandum Contra Dominion East Ohio's Motion for a Stay by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Serio, Joseph P.