

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The East)	
Ohio Gas Company d/b/a Dominion Energy)	Case No. 15-1712-GA-AAM
Ohio for Approval to Change Accounting)	
Methods	

**REPLY COMMENTS OF
THE EAST OHIO GAS COMPANY D/B/A DOMINION ENERGY OHIO**

I. INTRODUCTION

On June 1, 2018, The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company) filed its annual report regarding the Pipeline Safety Management Program (PSMP). On August 29, 2018, the Commission’s Staff filed its comments, recommending the removal of nearly \$770,000 in deferrals. In accordance with the Commission’s November 3, 2016 Order, DEO files its reply comments objecting to Staff’s recommendation.

II. REPLY COMMENTS

Staff recommends removing nearly \$770,000 in deferrals on the basis they were associated with “two new safety initiatives that were not part of the original PSMP.” (Staff Recommendation at 1.) According to Staff, DEO’s original PSMP application did “not discuss other safety initiatives that may supplant or be added to those originally authorized by the Commission.” (*Id.* at 2.) Thus, Staff claims that the Commission did not grant DEO “authority to replace approved PSMP initiatives with new initiatives or to add new initiatives to the PSMP.” (*Id.*)

“Newness” is the only issue that Staff identifies with these initiatives, and it is the only basis cited for recommending their removal. As DEO will explain, this recommendation is plainly incorrect: the application and procedures approved by the Commission *did* provide for the addition of new initiatives.

More fundamentally, the recommendation is grossly unfair. DEO notified Staff of its intent to include these new initiatives both informally during a meeting before *last year's* annual report, and then formally in the report itself filed June 1, 2017. DEO made clear that the initiatives were new, yet Staff not only failed to object to their inclusion in the PSMP at that time, it recommended accepting DEO's report "as filed." In reliance on Staff's prior recommendation, DEO has invested over \$3.6 million in these programs. If Staff believed that new initiatives were not permitted under the PSMP, it needed to raise this issue in its 2017 recommendation—at the time the initiatives were first proposed, not a year later.

DEO does not object to *prospectively* modifying the procedures governing the PSMP. But it would be both unlawful and unfair to change the rules and recommendations after the fact, and then penalize DEO for relying on them. This, however, is precisely what Staff recommends. For these reasons, as explained in detail below, the Commission should not accept the Staff Recommendation.

A. The application and stipulation approved by the Commission allowed for the development and inclusion of new initiatives within the PSMP.

According to the Staff Recommendation, DEO's application did not contemplate the addition of "new initiatives" to the PSMP. To that end, Staff discusses in detail several provisions of the original PSMP application, the stipulation, and Order. But surprisingly, Staff does not even mention the provision of the application that clearly and directly addresses this issue:

Although the foregoing [original four] initiatives are prudent, reasonable, and reflective of currently available information, ***the PSMP is intrinsically forward looking and thus subject to further development.*** Such development could be in response to planned investigations under the PSMP or in response to changing conditions or regulations. ***In response to such contingencies, DEO may develop new initiatives,*** and it intends to measure the effectiveness of all initiatives, which may reveal that various initiatives should be enhanced or scaled back. Given the dynamic nature of the PSMP, DEO proposes biannual meetings with Staff to keep

it apprised of current progress under the PSMP, the results of new and ongoing investigations and evaluations, *and any proposed changes to the program.*

(Appl. at 4–5 (emphasis added).) What does this say? The PSMP is “forward looking” and “subject to further development.” The further development could be in response to “changing conditions or regulations.” In response, “DEO may develop new initiatives.” And as this evaluation and development occurs, DEO would meet with Staff twice a year and “keep it apprised of . . . any proposed changes to the program.”

This provision was never questioned by Staff during settlement negotiations nor altered by the Commission in its approval of the ensuing Stipulation and Recommendation. The stipulation did not modify the provisions permitting the development and proposal of “new initiatives.” Under the stipulation, “The Signatory Parties recommend that the Commission approve the implementation of the Pipeline Safety Management Program (PSMP) and the deferral of PSMP costs *as described in the Company’s Application*, subject to the following provisions,” which followed. (Stip. at 2 (emphasis added).) None of those provisions, however, modified the parts of the application that permitted the development of new initiatives and changes to the PSMP.

So contrary to the Staff comments, the Commission did not approve a “fixed” PSMP, with the four original initiatives and no other. The application expressly stated that “new initiatives” may be necessary in response to new regulations and conditions. No provision of the application, stipulation, or Order contradicts this concept, and other provisions of the application are consistent with it. For example, the PSMP is subject to a \$15 million annual cap (Appl. at 6), well in excess of the expenditures associated with the original four proposed programs. Rather than a static program, the Staff and the Commission should have reasonably expected DEO to implement a dynamic program in response to a dynamic regulatory environment and examine

new initiatives that, within that \$15 million annual cap, would enhance pipeline safety and further reduce risks.¹

DEO does not know why the Staff Recommendation fails to acknowledge these provisions permitting new initiatives. Obviously, the provisions directly contradict Staff's position that new initiatives are not allowed. But regardless of whether they were overlooked or ignored, that does not make them go away. As DEO discusses below, the Commission can modify the terms and conditions of the program *prospectively*. But it is improper for Staff to recommend *retroactively* revising those terms and conditions to the detriment of DEO. Having been approved by the Commission, the procedures set forth in the application have the force of law. DEO was entitled to rely upon them; they cannot be simply disregarded.

B. In compliance with the approved procedures, DEO notified Staff on two separate occasions of its intent to include the new initiatives *before* it commenced the deferrals.

The foregoing discussion shows that the application and procedures approved by the Commission permitted the inclusion of new initiatives. Staff does not question whether DEO complied with these procedures.

1. The existing procedures provide for a regular meeting and reporting process between DEO and Staff, with Commission intervention only needed if issues cannot be resolved.

To recap the approved procedures: DEO meets with Staff twice a year. Under the application, if DEO intends to propose new initiatives, scale back existing initiatives, or make any other changes to the program, the Company advises Staff during these meetings. If DEO opts to include a new initiative, it will be disclosed in DEO's annual report, filed June 1 each

¹ Indeed, this dynamism goes both ways: just as DEO has included new initiatives, it has also scaled back and removed some of the original initiatives. The point is to respond to changing compliance requirements and risks and, in so doing, get the best results out of the program, not to limit the program to certain initiatives just because they were first.

year. Staff, in turn, is given a three-month period to review each annual report and make any recommendations or raise any objections.

Contrary to the insinuations of the Staff Recommendation, these procedures do not give DEO a blank check to “simply add new safety initiatives to the PSMP.” (Staff Recom. at 2.) Rather, if Staff opposes a new initiative, for any reason, it could object to that initiative following its inclusion in the annual report. If DEO did not accept Staff’s position, the issue could then be elevated for the Commission to decide.

2. DEO complied with these procedures and provided Staff with clear notice of its intent to include the new initiatives during 2017.

DEO complied with these procedures. Before it deferred a single dollar, DEO advised Staff of its intention to include the two new initiatives. During one of the regular bi-annual meetings, on May 10, 2017, DEO described both of the new initiatives to Staff and expressed its intent to propose them for deferral in the 2017 annual report. During that meeting, Staff did not indicate any opposition to the inclusion of either of the two new initiatives.

A few weeks later, on June 1, 2017, DEO filed its annual report and proposed the two initiatives.² DEO did not attempt to “slip them in” unnoticed. On the contrary, DEO called Staff’s attention to the approved provisions authorizing DEO to develop and include new initiatives, and expressly stated that it was proposing “*two new initiatives that were not included in DEO’s original application.*” (2017 Annual Report at 3 (emphasis added).) Under the approved procedures, Staff then had 90 days to review and file comments on DEO’s report.

² DEO originally filed the 2017 annual report in a different docket, *see* Case No. 17-1383-GA-AAM, because the original PSMP docket (the present docket) had been closed. The original docket was later reopened, and on August 3, 2017, DEO refiled the June 1, 2017 annual report in this docket. (*See* DEO Correspondence (Aug. 3, 2017).)

If there were ever a time for Staff to notify DEO that it objected to these initiatives on *any* basis (newness or otherwise), that would have been it. DEO had proposed the initiatives in its annual report and clearly called attention to the fact they were “new initiatives . . . not included in DEO’s original application.” Staff had three months to review DEO’s filing and to consider its own position. If Staff believed that DEO had misconstrued the PSMP application, and that new initiatives were not authorized, it should have raised this issue in its 2017 recommendation. But when Staff filed its recommendation on August 30, 2017, it did not indicate any opposition to the new initiatives. Other than a recommended modification to future external auditor reports, “Staff ha[d] no objection to the information contained in Dominion’s 2017 Annual Report and recommends that the Commission accept it as filed.” (2017 Staff Recom. at 1.) If Staff had voiced any opposition or concern at that time, DEO would have discussed it with them right then and there and, in all likelihood, would have filed an additional application seeking approval *before* spending millions of dollars on programs that may have been questioned at a later point in time. As it turned out, DEO never had that chance because Staff was raised no concerns regarding those initiatives but recommended acceptance of DEO’s report.

Every box required under the Commission-approved procedures was checked: the initiatives had been brought to Staff’s attention during the appropriate biannual meeting, formally proposed by DEO in the annual report, reviewed by Staff, and recommended for acceptance in Staff’s 2017 Review and Recommendation. In turn, DEO relied on the approved procedures and Staff’s recommendation and began incurring, and deferring, costs associated with the new initiatives. Deferrals began on one of the initiatives that August, and the other that

November. By the end of 2017, DEO had deferred nearly \$770,000 on these initiatives, and as of July 31, 2018, it has deferred nearly \$3.6 million.

3. In 2018, despite having raised no objection at the time the new initiatives were proposed, Staff recommended removing all associated deferrals.

On June 1, 2018, DEO filed its 2018 annual report, including the amounts deferred on the two new initiatives in 2017. On August 29, 2018, Staff objected. This was over a year and three months *after* DEO first advised Staff of its intention to implement the initiatives, and it was after a year of business activity, expenditures, and deferrals in reliance on the 2017 annual proceedings. But despite raising no concerns in either May or August 2017, Staff now “recommends that the Commission direct Dominion to remove any dollars included in the 2017 deferral for new safety initiatives that were not part of the original PSMP and not approved by the Commission.” (Staff Recom. at 2.)

Contrary to this recommendation, DEO *did* have authority to record these deferrals. DEO complied with the procedures approved by the Commission. It is Staff, not DEO, that is acting in contradiction to the procedures governing the program. DEO followed the approved procedures, and Staff does not show otherwise.

C. Staff’s recommendation is unlawful and unfair.

The application expressly contemplated, and the approved procedures permitted, new initiatives, and DEO complied with those procedures. The recommended removal of these deferrals lacks any legal support and must be rejected. But the Commission should ask a more fundamental question—is Staff’s recommendation fair?

1. By remaining silent in 2017, Staff deprived DEO of fair notice and an opportunity to modify its plans.

DEO provided timely notice to Staff of its intention to implement the new initiatives. It formally proposed them in its annual report. It made clear to Staff that they were new. Staff

recommended acceptance of the 2017 report that contained these proposals, raising no objection for over a year, in full knowledge that DEO was implementing the initiatives. But only *after* DEO relied on the approved procedures and Staff's acceptance, Staff recommended disallowing \$770,000 in costs based on a fact that was known to it before a single dollar was deferred.

DEO does not see what legal or regulatory interest could possibly be served by Staff's handling of this case. DEO had a good faith basis (at a minimum) for believing new initiatives were permitted, and it clearly notified Staff it was proposing them. If Staff believed otherwise, why didn't it say anything? That at least would have given DEO an opportunity to respond in a timely fashion. DEO could have accepted the exclusion and planned accordingly, or elevated the issue for Commission resolution, or—most likely—just filed a new application. But Staff raised no objections, DEO relied accordingly, and after a long silence Staff now recommends the infliction of a financial penalty on DEO. This is not only unfair, it is unconscionable.

2. The adoption of a similar recommendation resulted in unanimous reversal on appeal.

The Company trusts that the Commission will not accept the invitation to rewrite history and erase the dollars that DEO was duly authorized to defer. Were the Commission to do so, numerous legal and constitutional issues would follow: at a minimum, violations of due process, equal protection, and the prohibition against retroactive laws and retroactive ratemaking, as well as a blatantly unreasonable decision.

Unfortunately, there is precedent at the Commission for the adoption of a similarly unfair Staff recommendation. Fortunately, the order in question was stayed and then unanimously reversed on appeal by the Supreme Court of Ohio. *See* Case No. 11-5843-GA-RDR; *In re Application of E. Ohio Gas Co.*, 141 Ohio St. 3d 336, 2014-Ohio-3073. As it did in this case, Staff recommended retroactively penalizing DEO for failing to comply with a standard that was

not announced until *after* the fact. Some years earlier, the Commission had instructed DEO to complete a certain program by “the end of 2011,” and DEO structured the program in reliance on that deadline. But then in its 2012 comments—after 2011 had come and gone—Staff recommended penalizing DEO for failing to meet an *earlier* deadline (August 2011).

This was incomprehensible: that deadline had never previously been communicated to DEO, and it was too late to do anything about it. Yet the Commission, over DEO’s vigorous objection, adopted this clearly unfair position and imposed a seven-figure disallowance. DEO appealed to the Supreme Court of Ohio, the order was stayed, and then overturned 7-0: “it was substantively unreasonable” to penalize DEO “based on a program deadline that neither the commission nor its staff had previously set or announced to [DEO].” *Id.* ¶ 30.

That case dealt with a straightforward yet critical principle: *utilities must be able to rely on the Commission’s orders and formal actions*. This should not be a debatable point, yet the Staff Recommendation demonstrates a failure to grasp it. Were the Commission to adopt that recommendation, it would be making the same misstep that led the Court to unanimously overturn an order that approved another after-the-fact disallowance.

If the Commission wishes to change the PSMP deferral process going forward, that may well be appropriate, and DEO will comply with whatever process is in effect, just as it did in this case. But as a matter of law, the Commission must reject this invitation to retroactively penalize DEO for relying on the approved procedures and Staff’s past actions.

D. Prospective modifications may be appropriate, but should not affect the initiatives and deferrals already undertaken in reliance on the approved procedures.

As noted above, DEO does not object in principle to prospective modifications to the procedures governing the PSMP. If Staff or the Commission believe that DEO should, in the

future, file a formal application if it wishes to propose a new initiative for inclusion in the PSMP, DEO is willing to do so.

This is not to say that DEO sees any problems with the current procedures. Staff has identified no substantive concerns with the new initiatives, but if it had such concerns, the approved procedures would have allowed for their resolution. Under the existing procedures, all of the following either took place or were available if needed:

- DEO provided information regarding its proposal to Staff;
- DEO formally proposed the initiative in its annual report;
- Staff had a three-month opportunity to review the report;
- If Staff had concerns, it could have raised them in its comments;
- If DEO did not accept Staff's concerns, it could have objected; and
- If any dispute were left unresolved, the Commission could have set additional proceedings and eventually settled the matter with an order.

This is the same fundamental review process observed or available in every regulatory matter, and any differences between these procedures and Staff's proposed new procedures would be merely formal. Nevertheless, if the Commission wishes to prospectively adopt a new or revised process, there is nothing wrong with that in principle.

With respect to the two new initiatives at issue, however, there is no need for additional procedures. The initiatives were authorized and deferrals recorded under a Commission-approved process, they have been reviewed now twice by Staff, and Staff has identified no reason for excluding them other than a perceived procedural issue. Staff does *not* claim that the initiatives are unreasonable, imprudent, unnecessary, over-budget, not incremental, unrelated to new regulations, or otherwise excludable on any other basis. DEO initiated these programs in

response to the 2017 proceedings, and the two initiatives, and all dollars deferred thus far, should remain part of the PSMP.

DEO does not have a general objection to using a different process than the current one, if the Commission believes that would be best. But DEO firmly objects to any recommendation that its use of the approved process, and the alleged “failure” to use a process that was *not* in place, be held against it.

III. CONCLUSION

For the foregoing reasons, DEO recommends that the Commission reject the Staff Recommendation to remove any deferrals from the 2017 Annual Report and otherwise cease deferrals associated with the two initiatives. DEO instead urges the Commission to consider whether any procedural changes should be made—and the Company does not believe any are necessary—but, if so, only on a prospective basis and for other new initiatives beyond those at issue in this proceeding.

Dated: September 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Annual Report was served by electronic mail this 28th day of September 2018 to the following:

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Summary: Text Reply Comments electronically filed by Ms. Rebekah J. Glover on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio