FILE

30

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 Authority to Increase Rates for its Gas Distribution Service.	))))	Case No. 07-829-GA-AIR
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of an Alternative Rate Plan for its Gas Distribution Service.	))))	Case No. 07-830-GA-ALT
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval to Change Accounting Methods.	))))	Case No. 07-831-GA-AAM
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment.	))))))))	Case No. 08-169-GA-UNC

MOTION TO DISMISS DOMINION EAST OHIO'S PIPELINE INFRASTRUCTURE REPLACEMENT APPLICATION AND MEMORANDUM CONTRA DOMINION EAST OHIO'S MOTION TO CONSOLIDATE THE APPLICATION FOR AN AUTOMATIC ADJUSTMENT CLAUSE TO RECOVER CERTAIN COSTS ASSOCIATED WITH A PIPELINE INFRASTRUCTURE REPLACEMENT PROGRAM BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Joseph P. Serio, Counsel of Record
Larry S. Sauer
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
serio@occ.state.oh.us
sauer@occ.state.oh.us
poulos@occ.state.oh.us

March 14, 2008

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 Authority to Increase Rates for its Gas Distribution Service	))))	Case No. 07-829-GA-AIR
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of an Alternative Rate Plan for its Gas Distribution Service	))))	Case No. 07-830-GA-ALT
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval to Change Accounting Methods	))))	Case No. 07-831-GA-AAM
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment.	))))))))	Case No. 08-169-GA-UNC

MOTION TO DISMISS DOMINION EAST OHIO'S PIPELINE INFRASTRUCTURE REPLACEMENT APPLICATION
AND
MEMORANDUM CONTRA DOMINION EAST OHIO'S MOTION TO CONSOLIDATE THE APPLICATION FOR AN AUTOMATIC ADJUSTMENT CLAUSE TO RECOVER CERTAIN COSTS ASSOCIATED WITH A PIPELINE INFRASTRUCTURE REPLACEMENT PROGRAM
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all the approximately 1.1 million residential utility consumers of The East Ohio Gas Company

d/b/a Dominion East Ohio ("DEO" or "the Company"), moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to dismiss DEO's Application to collect $2.5 billion from customers because the Commission lacks jurisdiction to consider it based on the Company's failure to follow the statutory requirements of R.C. 4909.15, R.C. 4909.18, R.C. 4909.19, R.C. 4909.43, R.C. 4929.05 and R.C. 4929.11.

OCC is also filing a Memorandum Contra[1] to oppose DEO's motion to consolidate its infrastructure replacement case with its pending distribution rate case. DEO's motion should be denied because it would vitiate the process afforded by Ohio law for participating in Commission cases and would violate Ohio's ratemaking statutes in a case where DEO is seeking to collect $2.5 billion from northern Ohio customers.

The reasons for granting OCC's Motion to Dismiss and denying DEO's Motion to Consolidate are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Joseph P. Serio, Counsel of Record
Larry S. Sauer
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
serio@occ.state.oh.us
sauer@occ.state.oh.us
poulos@occ.state.oh.us

[1] Ohio Adm. Code 4901-1-12(B)(1).

TABLE OF CONTENTS

PAGE

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 Authority to Increase Rates for its Gas Distribution Service	))))	Case No. 07-829-GA-AIR
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of an Alternative Rate Plan for its Gas Distribution Service	))))	Case No. 07-830-GA-ALT
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval to Change Accounting Methods	))))	Case No. 07-831-GA-AAM
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment.	))))))))	Case No. 08-169-GA-UNC

MEMORANDUM IN SUPPORT OF OCC'S MOTION TO DISMISS
AND
MEMORANDUM CONTRA DEO'S MOTION TO CONSOLIDATE

I. INTRODUCTION

By way of background, on August 30, 2007, DEO filed an application for an increase in rates for all of its customers, including approximately 1.1 million residential customers in Ohio.[2] Within a month of filing its rate case application, on September 20,

---

[2] *In the Mater 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, ("DEO Rate Case").

2007, DEO moved to consolidate with its rate case application a previously existing, nine-month-old application to recover the costs associated with DEO's deployment of automated meter reading ("AMR") devices[3] ("AMR application"). The AMR device is a meter that allows for remote reading by radio signal. The AMR application was originally filed in December 2006, purportedly under R.C. 4929.11, and was docketed as Case No. 06-1452-GA-UNC. Although the Commission never ruled upon the Motion to Consolidate in either Case No. 06-1452-GA-UNC or in the present rate case, both the rate case and the AMR application were incorporated into the public notice approved by the Commission.[4]

In its rate case DEO requests a base rate revenue increase of approximately $75.5 million.[5] The AMR application, as proposed, seeks to fund the AMR program through an over-accrued depreciation reserve balance. This balance otherwise would have been used to reduce rate base, and thus reduce the need for rate increases.[6] DEO's proposed AMR application, which now seeks to divert the customer-funded over-accrued depreciation reserve balance to fund, in part, the AMR, will undoubtedly have a profound effect on the rates.[7] This results from the fact that residential consumers will be asked to pay increased

---

[3] *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Waivers of Certain Provisions Contained in Chapter 4901:1-13, Ohio Administrative Code*, Case No. 06-1452-GA-UNC, ("DEO Waiver Request"), Application, (December 13, 2006).

[4] DEO Rate Case, Application at Volume 1, Part 2 of 2, S-3, page 120-122. See also DEO Rate Case, Entry at page 3. (October 24, 2007). (The Commission approved the public notice with a slight modification that is irrelevant to this discussion.)

[5] DEO Rate Case, Application at Volume 1, page 7. (August 30, 2007).

[6] DEO Waiver Request, Application at 4.

[7] DEO also proposes to use the over-accrued depreciation reserve to increase its conservation spending from current levels ($3.5 million) to $6 million per year. OCC strongly supports DEO's intent to increase conservation spending in order to provide DEO's customers with tools to control their gas bills.

rates as a direct result of the funding proposed for the AMR.

Most recently, six months into the rate case review process, on February 22, 2008, DEO filed a second motion to consolidate.[8] This time the motion to consolidate sought to add yet another revenue requirement to the rate case application -- a $2.5 billion (in 2007 dollars) pipeline infrastructure replacement program proposal ("PIRP" and "PIRP application").[9] The plan was filed as a "UNC" filing which in the PUCO's parlance is an unclassified filing, and assigned Case No. 08-169-GA-UNC. The Company claims that consolidating the PIRP application with the rate case application "would promote conservation of Commission resources without prejudicing any party."[10] DEO is mistaken.

The potential magnitude of the PIRP proposal eclipses the already significant $72.5 million revenue increase requested in the August 30, 2007 rate case application. The main part of the proposal is the Company's request to recover the costs to replace bare-steel, copper, cast and wrought-iron pipelines at a cost to residential customers of approximately $1.6 billion (in 2007 dollars) over 25-years.[11] The pipeline that the Company proposes to replace was identified as 4,122 miles long and varies in age from pre-1909 to the 1960's.[12]

---

[8] *In the Mater of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with A Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment*, Case No. 08-169-GA-UNC, Motion to Consolidate, (February 22, 2008). ("DEO PIRP Case").

[9] DEO PIRP Case.

[10] DEO PIRP Case, Motion to Consolidate at 1.

[11] DEO PIRP Case, Application at 2.

[12] Id.

The PIRP application also includes a proposal to replace the service lines directly associated with the bare-steel and cast- and wrought-iron pipeline infrastructure.[13] The Company estimates the cost of replacing the service lines to be an additional $500 million (in 2007 dollars).[14] The PIRP application also includes a proposal to replace main-to-curb connections and take over ownership of the curb-to-meter service lines.[15] The main-to-curb replacement cost is expected to add about $500 million (in 2007 dollars) to the cost.[16] Finally, the PIRP application proposes to recover the revenue requirement associated with infrastructure expenditures "for other transmission and distribution pipeline replacements and relocations, (and) system improvements.

DEO proposes to collect from customers the vast revenue requirement associated with the PIRP application through a PIR cost recovery charge. The PIR cost recovery charge would be calculated based on the effect of creating regulatory assets in Account No. 182.3 for incremental depreciation expense, incremental O&M expenses, incremental property taxes, and a return on rate base for PIR expenditures. DEO also seeks accounting authority to record the expenses on a monthly basis and to defer them for subsequent collection from customers through the PIR cost recovery charge. The PIR cost recovery charge would initially be set at zero, with the first round of the twenty-five year charges going into effect in November 2009, and continuing for 24 years thereafter. DEO states, in part, that the PIRP will benefit residential customers by: (a) lowering

---

[13] Id. at 6.

[14] Id.

[15] DEO PIRP, Application at 5.

[16] Id.

O&M expenses for the Company; (b) more gradualism in rate increases; and (c) fewer rate cases.[17] Overall, in a mere fourteen pages DEO's PIRP application seeks $2.5 billion over a 25-year period.[18]

II. SUMMARY OF ARGUMENTS

The PUCO should grant OCC's motion to dismiss the PIRP application. The PIRP application is nothing more than a request by DEO to increase rates. Since DEO failed to meet the statutory requirements associated with an application for an increase in rates, the Commission is without jurisdiction to accept the PIRP application. Moreover, even if the Commission determines that the PIRP application is not an application for a rate increase, the Company has failed to show how the application qualifies under Chapter 4929 as an alternative rate plan. Additionally, DEO has failed to comply with R.C. 4929.05 requirements that include a simultaneous filing of an alternative regulation plan with an application to increase rates under R.C. 4909.18, and notice to the public.

The PUCO should deny DEO's motion to consolidate the PIRP application with the rate case. DEO failed to place the PIRP costs in issue in its application, which it had over 15 years to prepare for. Permitting consolidation at this late date will severely limit the ability of interested parties to effectively review the PIRP program, thereby hindering the Commission and OCC in performing their statutory duties. Notwithstanidng OCC's arguments to the contrary, if the Commission determines to accept DEO's motion to consolidate, it should, at a minimum, toll DEO's rate case application to give parties more time to evaluate DEO's PIRP application.

---

[17] Id. at 4.

[18] Id. at 5–6.

In accordance with past precedent the Commission has the authority to toll the two hundred seventy-five day period of R.C. 4909.42 to give applicants more time to address problems with their applications. Along with the tolling of the application, the Commission should require new notice to be published which includes the substance and prayer of the PIRP application. Additionally, the discovery period should be extended to permit ample discovery related to the PIRP application.

III. ARGUMENT IN SUPPORT OF OCC'S MOTION TO DISMISS DEO'S PIRP APPLICATION

A. DEO's PIRP Application is An Application for a Rate Increase and as Such Must Comply with the Applicable Statutory Requirements including R.C. 4909.15, 4909.18, 4909.19, and 4909.43.

The applicable standards for granting a Motion to Dismiss are well established. A Motion to Dismiss for failure to state a claim is procedural in nature and tests the sufficiency of the pleading.[19] All factual statements made in the pleading must be accepted as true.[20]

The facts as they relate to the PIRP application are not disputed. DEO filed the PIRP application pursuant to R.C. 4929.11[21] and requests that the PIRP application be consolidated with an ongoing rate case. In the ongoing rate case, the Commission has already approved (and the Company has already published) notice of the "substance and prayer" of the August 30, 2007 rate case application.

---

[19] *State ex. rel. Hanson v. Guernsey County Bd. of Comm.* (1992), 65 Ohio St. 3d 542, 549.

[20] *Lucas County Comm'rs v. PUC*, (1997) 80 Ohio St. 3d 344, 347.

[21] DEO PIRP Case, Application at 1.

DEO's PIRP Application was filed without regard to meeting any of the procedural requirements for an application filed under R.C. 4909.18. Simultaneously, DEO attempted to consolidate the PIRP Application into its rate case application.

DEO's request to consolidate the PIRP application into the rate case is an attempt to back-door a $2.5 billion (in 2007 dollars) rate increase into the already pending rate case without DEO having to comply with the mandatory notice and informational requirements of R.C. 4909.15, 4909.18, 4909.19, and 4909.43. Moreover, DEO's proposed consolidation would circumvent the numerous parts of the standard filing requirements ("SFR's) for rate increases under Ohio Adm. Code 4901-7-01. in Appendix A, Chapter II, Section (A)(1) of the SFR's, the Commission expects the SFR's to ensure "a thorough and expeditious review of applications for rate increases." DEO's proposal would also circumvent the standard filing requirements applicable to alternative rate plans under 4901:1-19-05.

The $2.5 billion PIRP application could have been filed as a part of the Company's rate case application in August as an application to increase rates ("AIR"). However, the Company chose not to include the PIRP as part of its rate application, which the Company has had over 15 years to prepare.

The PIRP clearly falls under R.C. 4909.18, which states, in part:

> Any public utility desiring to establish any rate, joint rate, toll, classification charge, or rental or to modify, amend charge, increase, or reduce any existing rate, joint rate, toll, classification, charge or rental, or any regulation or practice affecting the same, shall file a written application.

The PIRP Application submitted by DEO is a rate increase. Under the proposal submitted by the Company the PIRP will result "in an incremental cost per residential

customer of $1.12 per month for the first year of the PIR Cost Recovery Charge, with subsequent increases of less than $0.90 per year in 2007 dollars."[22] Thus, the PIRP will increase rates to residential customers, which rate increase will be implemented once the rider is set, after the Commission approves the accounting that creates regulatory assets and consequently provides reasonable assurance that the expenses will be collected.

Under Ohio ratemaking law, DEO's rates may only be increased: (1) after pre-filing notice in accordance with R.C. 4909.43, (2) upon written application and notice to the public under R.C. 4909.18, (3) after a hearing under R.C 4909.19, and (4) upon an order of the Commission under R.C. 4909.18 and R.C. 4909.15(D) fixing and establishing the rates as just and reasonable rates (and after compliance with certain other statutes and rules). In this regard, DEO has failed to file an appropriate pre-filing notice, failed to file an appropriate application, and has failed to issue appropriate notices to the public, as required by the Revised Code.

Not only is there no statutory authority to use R.C. 4929.11 to increase rates to customers, but DEO's PIRP application also contravenes, at a minimum, the specific rate-fixing process and formula of R.C. 4909.15. To give effect to this specific rate formula set forth in R.C. 4909.15, DEO's PIRP application must be struck down. Otherwise, the rate formula under R.C. 4909.15 will be thwarted.

DEO is evading the ratemaking provisions enacted by the General Assembly by adjusting a fundamental component of rates outside traditional ratemaking processes. The PIRP application circumvents the General Assembly's intent that defined procedures be used, under R.C. 4909.18, when the PUCO considers an application to increase rates.

---

[22] DEO PIRP Case, Application at 4.

In R.C. Chapter 4909 the General Assembly has established specific proceedings and processes for setting utility rates. Whenever a utility desires to increase its rates and collect more money from customers, it must comply with the procedures set forth in R.C. 4909.18 or R.C. 4929.05 and the rate formula promulgated under R.C. 4909.15.

In enacting R.C. 4909.15, the General Assembly determined that rates would be set on a prospective basis according to a detailed, comprehensive, and mandatory ratemaking formula.[23] R.C. 4909.15(A) is the ratemaking formula that the Ohio Supreme Court has addressed in numerous appeals since the law's inception in its modern form in 1976. It requires the PUCO to make a series of determinations: the value of the utility's property in service as of date certain, a fair and reasonable return on that investment, and the expenses incurred in providing service during the test year. The test year is determined essentially by the date at which the utility files its application. The Ohio Supreme Court has admonished that adjustments to the test year may be made, but are "exceptions" and "ad hoc tinkering with the statutory formula is not to become the rule."[24]

As the Ohio Supreme Court has noted, the formula under R.C. 4909.15 reflects a balance between investor and consumer interests.[25] Adjusting for one aspect of the formula while not adjusting for any other element creates an imbalance that is not permissible under R.C. 4909.15. DEO attempts to cherry-pick one element -- and one

---

[23] *Columbus Southern Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535,536, 620 N.E.2d 835, citing *Gen. Motors Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58; 1 O.O.3d 35; 351 N.E.2d 183.

[24] *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 95, 4 OBR 341, 447 N.E.2d 733 (where the court refused to overturn a PUCO ruling that excluded a post-test year wage adjustment).

[25] See *Columbus Southern Power Co.*, 67 Ohio St.3d 540, citing *Dayton Power & Light Co.*, 4 Ohio St.3d 91.

only --out of Ohio's ratemaking formula so that it can guarantee itself full recovery of costs associated with the 25-year PIRP.

The extraordinary rate increase proposed by DEO contravenes Ohio's ratemaking formula, including that it violates the test year concept preserved in R.C. 4909.15. This ad-hoc tinkering should not be tolerated.

B. The PIRP Application is not a proper Alternative Rate Plan because it does not meet the requirements of R.C. 4929.01 or R.C. 4929.11.

DEO filed its PIRP Application as an automatic rate adjustment pursuant to R.C. 4929.11.[26] Revised Code 4929.11 states:

> Nothing in the Revised Code prohibits, and the public utilities commission may allow, any automatic adjustment mechanism or device in a natural gas company's rate schedules rate schedules that allows a natural gas company's rates or charges for a **regulated service or goods to fluctuate automatically in accordance with changes in a specified cost or costs.** (Emphasis added)

DEO's PIRP application, however, does not meet the definition of an "automatic rate adjustment" as described by R.C. 4929.11. The PIRP costs are not charges for services or goods that "fluctuate automatically in accordance with changes in a specified cost or costs." There is little to the PIRP that fluctuates and any changes in costs are largely within DEO's control.

The burden is on the Company to demonstrate that the PIRP proposal is "just and reasonable." Based on past precedent, in order to qualify for the special treatment under R.C. 4929.11, proposals must meet a three-prong test:

(1) The Company must establish that there is extreme volatility in the expenses;

---

[26] DEO PIRP Case, Application.

(2) The Company must demonstrate that it lacks control over the volatility, for example, changes in the weather, and

(3) The Company must show that the current amount of money allotted for the costs is no longer appropriate.[27]

DEO's PIRP Application does not meet any of the prongs set out in the *DEO Uncollectible Expense Adjustment Mechanism Case.* The PIRP application does not address the volatility of the costs related to any segment of the PIRP application. Rather, the Company has a great deal of control over the costs of the program, including negotiating contracts, scheduling, and manpower assignments for the project, the scope of the project, and how quickly the work is to be completed.

In addition to not complying with R.C. 4929.11, DEO's PIRP application does not meet the definition of an Alternative Rate Plan as defined by R.C. 4929.01. By definition R.C. 4929.01(A) describes automatic rate adjustments, as an alternative rate plan. R.C. 4929.01(A) states, in part, "Alternative rate plans also may include, but are not limited to, **automatic adjustments based on a specific index or changes in a specified cost or costs**."[28]

At this time, DEO has not filed an appropriate application, nor obtained the necessary approvals of that application, in order to take advantage of the alternative rate plan provisions of R.C. Chapter 4929.

The proposed dollar-for-dollar recovery of the PIRP costs proposed by DEO

---

[27] *In the Matter of the Joint Application of the East Ohio Company d.b.a. Dominion East Ohio, Columbia Gas of Ohio Inc., Vectren Energy Delivery of Ohio, Northeast Ohio Natural Gas Corp., and Oxford Natural Gas Company for Approval of an Adjustment Mechanism to Recover Uncollectible Expenses,* Case No. 03-1127-GA-UNC, Finding and Order at 10-11, (December 17, 2003). (DEO Uncollectible Expense Adjustment Mechanism Case").

[28] R.C. 4929.01(A). (Emphasis added).

improperly removes the incentives for the Company to keep costs down. A proposal that insulates the company and its billion dollar proposals from many of the procedural safeguards required by statutory rate cases merits critical deliberation and an extensive opportunity for public review and input. Under DEO's proposal there will be no critical deliberation nor opportunity for public review and input.

As part of the PIRP Application, DEO cites Duke Energy Ohio's ("Duke") Accelerated Mains Replacement Program ("AMRP") as support for the Application.[29] However, procedurally, Duke presented its program and requested consideration of the AMRP as part of its entire rate case application pursuant to R.C. Chapters 4909 and 4929.[30] More specifically, Duke's initial AMRP application was filed pursuant to R.C. 4909.18 and R.C. 4929.05 "to maximize flexibility."[31] In support of its AMRP proposal and "as required by R.C. 4929.05 and the Commission's Standard Filing Requirements for Alternative Regulation Plans set forth in OAC 4901:1-19-05" Duke filed numerous documents with the Commission including Alternative Regulation Plan schedules A through J. In addition, Duke's public notice specifically mentions the AMRP and the associated costs for consumers.[32]

Duke's AMRP is clearly distinguishable from DEO's attempt to back door the PIRP application into the DEO rate case. As addressed above, Duke's proposal was a part of its rate increase application from the start, as an alternate rate plan and was well

---

[29] Id. at 3.

[30] *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Rates*, Case No. 01-1228-GA-AIR, Application, Volume 1 at 4. (July 31, 2001). ("Duke Rate Case").

[31] Id.

[32] Id. at 5-6.

supported with documentation in accordance with R.C. 4929.05 requirements. DEO's PIRP application on the other hand was submitted after all the public notices were completed and the only supporting documentation for the $2.5 billion (in 2007 dollars) proposal is fourteen-pages. OCC does agree with DEO that the Company should be required to complete all of the steps completed by Duke as part of the application process.

C. Even if the Commission determines that the PIRP Application meets the definition of an Alternative Regulation filing, then DEO must comply with the statutory mandates of Chapter 4929, which it has not.

R. C. Chapter 4929 permits natural gas companies to have alternative rate plans. All alternative rate plans, whether defined under R.C. 4929.01(A) or 4929.11, must comply with the seminal provision of the chapter, 4929.05. Yet, DEO's Application, if considered as a proposed alternate rate plan, failed in several respects to comply with the terms and conditions of R.C. 4929.05.

Revised Code 4929.05 states, in pertinent part:

> (A) **as part of an application filed pursuant to section 4909.19 of the Revised Code, a natural gas company may request approval of an alternative rate plan. After notice, investigation, and hearing,** and after determining just and reasonable rates and charges for the natural gas company pursuant to section 4909.15 of the Revised Code, the public utilities commission shall authorize the applicant to implement an alternative rate plan if the natural gas company has made a showing and the commission finds that both of the following conditions are met....[33]

Accordingly, to comply with R.C. 4929.05, DEO was required to file its PIRP alternative rate plan "as a part of an application filed pursuant to section 4909.19 of the Revised Code."

---

[33] R.C. 4929.05 (Emphasis added).

"When the language [of a statute] *** clearly expresses the legislative intent, the court need look no further[,]" because "at that point the interpretative effort is at an end, and the statute must be applied accordingly."[34] Under R.C. 4929.05, the Commission is permitted to use alternative rate-making only as "part of an application filed pursuant to 4909.18***." Any other interpretation defies the express language and clear intent of the General Assembly.

DEO's filing was made under R.C. 4929.11, and did not comply with R.C. 4929.05 because it was not filed "as part of an application filed pursuant to section 4909.19." In addition, DEO's proposed $2.5 billion (in 2007 dollars) program had to comply with the notice requirements of R.C. 4929.05. It did not.

The notice requirements of R.C. 4929.05 are those that must be met with an application for an increase in rates under R.C. 4909.18. It is axiomatic that the "notice" required under R.C. 4929.05 is the same notice required when a utility applies for a rate increase under R.C. 4909.18. This is because R.C. 4929.05 is based upon a filing under R.C. 4909.18 -- "as part of an application filed pursuant to section 4909.18 of the Revised Code."

---

[34] *Time Warner v. Pub. Util. Comm.* (1996), 75 Ohio St. 3d 229, 237 citing Provident Bank v. Wood (1973), 36 Ohio St. 2d 101.

IV. ARGUMENT IN SUPPORT OF OCC'S MEMORANDUM CONTRA DEO'S MOTION TO CONSOLIDATE

In accordance with R.C. 4909.18, DEO bears the burden to show that the proposals in the application are just and reasonable. As stated in *Ohio Edison Co. v. Pub. Util. Comm.* (1992) 63 Ohio St. 3d. 555, 558 "the company appropriately bears the risk that property not included in its application and not made available for timely verification will be excluded from rate base."[35]

DEO's request to consolidate a $2.5 billion (in 2007 dollar) proposal into a rate case that is already six months into the process is too late. The Company has not made the proposal available to the Commission or other parties in a timeframe that will permit a proper investigation by the Commission. Nor has this eleventh hour proposal permitted parties, including the OCC, to adequately prepare their cases by engaging in the ample discovery they are entitled to under R.C. 4903.082. In addition and more importantly, as discussed in more detail below, DEO's late submittal of the proposal precludes the program from being properly noticed to the public. DEO's $72 million rate case application was fifteen years in the making and now six months into the process the Company wants to add a $2.5 billion program at the last minute.

A. DEO's Attempt To Amend the Rate Case At This Late Date Is Prejudicial to OCC and Inconsistent with R.C. 4909.18 and 4909.19 Requirements for a Rate Increase Application.

1. DEO's Attempt To Amend the Rate Case At This Late Date Means the Public Will Not Receive the Statutorily Required Public Notice For this Significant Rate Increase.

---

[35] *Ohio Edison Co. v. Pub. Util. Comm.* (1992) 63 Ohio State 3d. 555, 558.

The notice requirements for an application for a traditional AIR rate case (and an alternative rate case) can be found under R.C. 4909.18, 4909.19, and 4909.43. In this case, DEO has failed to meet any of these notice requirements.

R.C. 4909.18(E) sets forth requirements relating to the substance of the application; R.C. 4909.19 establishes the method of publication. Under R.C. 4909.18(E),

> If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:
>
> ***
>
> (E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The **notice shall** further include the average percentage increase in rate that a representative industrial, commercial, and residential customer **will bear** should the increase be granted in full. (Emphasis added.)

R.C. 4909.19 requires that the "substance and prayer" of the application must be approved by the PUCO and published once a week for three consecutive weeks in "newspapers published and in general circulation throughout the territory in which such utility operates." DEO has not complied with, nor does DEO's "UNC" PIRP proposal attempt to comply with, either R.C. 4909.18(E) or R.C. 4909.19. The Ohio Supreme Court has stated the purpose of R.C. 4909.18(E) is "to provide **any person,** firm, corporation, or association, **an opportunity to file an objection to the increase under**

R.C. 4909.19."[36]

Additionally, DEO has failed to comply with the associated notice provisions of R.C. 4909.43(B) which states:

> Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.

Because DEO has failed to meet the statutory requirements related to filing an application for a rate increase, the Commission has no jurisdiction to accept DEO's filing.

The Commission, as a "creature" of statute, may exercise only that jurisdiction conferred upon it by statute.[37] The Commission's jurisdiction is limited by the plain language contained within the confines of R.C. 4909.18. That language sets forth distinct mandatory requirements for an application for an increase in rates. These requirements were not met, and thus the Commission cannot accept the filing.

2. DEO's Attempt To Amend the Rate Case At This Late Date Interferes With the Statutory Duties of the Commission and OCC.

R.C. 4909.19 states, in part that upon the filing of any application for increase under R.C. 4909.18 the Commission has the duty to investigate. When a utility applies to increase its rates under R.C. 4909.18 (or R.C. 4929.05[38]), an official Staff investigation must be conducted, per R.C. 4909.18.

---

[36] *Committee Against MRT et al. v. Public Util. Comm.* (1977), 52 Ohio St.2d 231, 234. (Emphasis added.).

[37] *Columbus Southern Power Co. v. Public Utilities Comm.* (1993), 67 Ohio St.3d 535, 537.

[38] The obligation of the Commission to investigate any application for increase under R.C. 4909.18 also applies to for ALT rate cases filed under R.C. 4929.05 since ALT rate cases are based upon a filing under R.C. 4909.18.

> **Upon the filing of an application** *** the commission shall at once cause an investigation to be made of the facts set forth in said application, and the exhibits attached thereto and of the matters connected therewith. (emphasis added).

DEO's request to consolidate a $2.5 billion fourteen-page PIRP proposal into a $72 million rate case creates a huge shift in focus for the rate case. The costs associated with the PIRP is the largest gas rate filing in the past 25 years and perhaps ever, and over thirty times greater that the value of the original rate case application. If consolidated the PIRP would amount to over 90% more than the original publicly noticed rate increase.

Moreover, DEO's proposed consolidation would circumvent the numerous parts of the standard filing requirements ("SFR's) for rate increases under Ohio Adm. Code 4901-7-01. In Appendix A, Chapter II, Section (A)(1) of the SFR's, the Commission expects the SFR's to ensure "a thorough and expeditious review of applications for rate increases" -- which will be violated by DEO's proposed consolidation. DEO's proposal would also circumvent the standard filing requirements applicable to alternative rate plans under 4901:1-19-05.

In addition, DEO's proposal is six months late and severely limits the ability of OCC and other interveners to exercise their rights to ample discovery under R.C. 4903.082. Such discovery is crucial in order to "facilitate thorough and adequate preparation for participation in commission proceedings." See Ohio Adm. Code 4901-1-17(A). Moreover, DEO's actions here are adversely affecting and prejudicing OCC's statutory duty to represent residential consumers, pursuant to R.C. 4911.15. OCC cannot adequately represent its clients if it is effectively precluded from thoroughly examining the PIRP proposal, filed weeks before the staff report is expected to be issued. DEO should not be permitted to prejudice the Commission, OCC or other interveners and

prevent them from properly exercising their statutory rights and duties.

OCC's right to ample discovery on all aspects of the rate case application has already been adversely affected by DEO's failure to timely respond to discovery requests. Although OCC has been working with DEO informally to address the untimely responses, the fact remains that currently, a quarter of the Company's responses to OCC's discovery are past due -- including some that is over 60 days late. If DEO is permitted to belatedly bring the PIRP issues into the rate case, there will be a need to do significant additional discovery.

In addition, because the Company made the PIRP application at this late date, the OCC was unable to exercise its statutory rights under R.C. 4911.12 to "contract for the services of technically qualified persons" to assist the Consumers Counsel in carrying out the duties of her office, which include, inter alia, representing residential customers. Given the magnitude and technical nature of the PIRP application, it would have been likely that the OCC would have sought such contracts. Now, with the Staff Report expected imminently, there will be insufficient time to engage consultant services to address the infrastructure replacement issue. Once again OCC is prejudiced by the lateness of the PIRP application which hinders OCC's ability to adequately review the PIRP application which is crucial to OCC being able to represent its clients.

C. If the Commission permits consolidation, then the Commission Should Toll DEO's Application to Give the Parties an Appropriate Amount of Time to Adequately Review the PIRP Application.

If the Commission does not grant OCC's motion to dismiss and allows the PIRP application to be rolled into the rate application, then the Commission should toll the rate case application. Tolling the application would provide the Commission and the

interested parties the time necessary to fully evaluate DEO's PIRP application -- the largest natural gas rate increase ever requested.

The Commission has the authority to delay acceptance of DEO's application until all the parties are given a reasonable time to review the proposal. In accordance with past precedent, the Commission has tolled the two hundred seventy-five day period of R.C. 4909.42 to give applicants more time to address problems with their applications or to punish applicants who were not cooperating with the discovery process. Tolling the Application would allow all parties the time needed to review the $2.5 billion proposal and if appropriate, hire experts to assist in that review.

As discussed above, the Commission has considered tolling R.C. 4909.42 in situations where the applicant has attempted to take liberties with the application process. In a case involving Cincinnati Bell, the Commission's Staff requested that the Commission use its authority to toll the two hundred seventy-five day period of R.C. 4909.42 to thwart the company's delays in responding to discovery.[39] The Commission agreed with the Staff that it had the authority to toll the two hundred seventy-five day period of R.C. 4909.42, but chose to defer taking action until absolutely necessary.[40] *Cincinnati Bell* is not an isolated instance of the Commission contemplating tolling the

---

[39] *In re Application of Cincinnati Bell Telephone Company*, Case No. 84-1272-TP-AIR, Finding and Order at 3-4, (May 7, 1985). ("Cincinnati Bell").

[40] Id. at 4.

two hundred seventy-five day period. The Commission has suspended this requirement when needed and reserved its right to toll the time period in other cases.[41]

Tolling the entire rate case application would essentially start the entire case over again. If the Commission rules that DEO's Rate Case should be tolled, then DEO would have to submit a new public notice and would be required to establish a new test year. Under such a scenario, all parties would have the appropriate opportunity to engage in ample discovery that would permit a full evaluation of DEO's PIPR application.

V. CONCLUSION

For the reasons stated above, the Commission should dismiss DEO's PIRP application and deny DEO's motion to consolidate. In the event that the Commission allows the motion to consolidate, it should, as a minimum, toll the entire DEO rate case application to give all parties a reasonable opportunity to review the application.

DEO's PIRP application is nothing more than a belated request by DEO to increase its rates even more than that sought in its filed rate case. Yet, DEO did not follow the statutory requirements of R.C. 4909.18 and R.C. 4909.19 for an application for an increase in rates. DEO made the decision not to put into issue the costs associated with its pipeline infrastructure replacement program as part of the rate case. To permit

---

[41] *In re Application of Lake Buckhorn Utilities*, Case No. 86-518-WW-AIR, Finding and Order at 5. (April 5, 1988). (The Commission granted the applicant's request for an extension to file the two month update, however, as a condition of the extension the Commission suspended the 275 day requirement imposed by R.C. 4909.42.) *In re Application of Central Telephone Company of Ohio*, Case No. 84-1431-TP-AIR, Finding and Order at 3. (May 29, 1985). See also *In re Application of The Toledo Edison*, Case No. 85-554-EL-AIR, Finding and Order at 2-3. (July 23, 1985).

DEO to supplement its rate case application at this late date, severely limits the ability of interested stakeholders to adequately review the PIRP program, effectively impeding the OCC and the Commission in the exercise of their statutory duties.

Even if the Commission determines that the PIRP Application is governed by R.C. R.C. 4929.11, the PIRP application must still be dismissed because DEO has not met the statutory requirements of an alternative rate regulation filing under Chapter 4929. DEO's PIRP application also fails to meet the statutory requirements of Chapter 4929 because, as filed, it fails to qualify as an alternative rate plan under both 4929.01(A) and as an automatic rate adjustment under R.C. 4929.11. Moreover, the Company failed to file the "alternative rate plan" as part of its R.C. 4909.18 application and failed to properly notice the PIRP, as required by R.C. 4929.05.

Thus, in the interests of 1.1 million residential utility consumers in northern Ohio who are being asked to pay much of DEO's $2.5 billion request, the Commission should dismiss the PIRP application and deny the motion to consolidate. If the Commission determines to permit the PIRP application to be rolled into the rate case, despite the contrary arguments of the OCC, the Commission should at a minimum toll the entire rate case application to allow parties to adequately address the PIRP proposal.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Joseph P. Serio, Counsel of Record
Larry S. Sauer
Gregory J. Poulos
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
serio@occ.state.oh.us
sauer@occ.state.oh.us
poulos@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's forgoing *Motion to Dismiss and Memorandum Contra* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 14th day of March, 2008.

Gregory J. Poulos
Assistant Consumers' Counsel

Stephen Reilly
Anne Hammerstein
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215

Mark A. Whitt
Andrew J. Campbell
Jones Day
P.O Box 165017
Columbus, Ohio 43216-5017

Joseph P. Meissner
Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, Ohio 44113

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3900

Joseph M. Clark
McNees, Wallace & Nurick
Fifth Third Center
21 East State Street, Suite 1700
Columbus, Ohio 43215

David A. Kutik
Jones Day
North Point, 901 Lakeside Ave.
Cleveland, Ohio 44114-1190

David Rinebolt
Ohio Partners for Affordable Energy
231 West Lime Street
P.O. Box 1793
Findlay, Ohio 45839-1793

John M. Dosker
General Counsel
Stand Energy Corporation
1077 Celestial Street, Suite 110
Cincinnati, Ohio 45202-1629

Stephen M. Howard
Ohio Gas Marketers Group
Vorys, Sater, Seymour &Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

Todd M. Smith
Schwarzwald & McNAir LLP
616 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114

W. Jonathan Airey
Gregory D. Russell
Ohio Oil & Gas Association
Vorys, Sater, Seymour &Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

David F. Boehm
Michael L. Kurtz
Ohio Energy Group
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202