FILE



**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |
| 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 Automated Meter Reading and for Certain Accounting Treatment. | ) ) ) ) ) | Case No. 06-1453-GA-UNC |

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# APPLICATION FOR REHEARING
# BY
# THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**APPLICATION FOR REHEARING**
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The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the April 9, 2008 Entry issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"), to protect approximately 1.2 million residential utility customers of Dominion East Ohio ("DEO" or "the Company") from the consequences of violations of law and

rule, including fundamental due process requirements, associated with the PUCO's consolidation of DEO's $2.5 billion Pipeline Infrastructure Replacement proposal into a long-pending rate case where the time period for case preparation is about to end.[1] By Entry dated April 9, 2008 ("April 9 Entry"), the Commission denied OCC's Motion to dismiss DEO's $2.5 billion proposal, and allowed the Company to consolidate that proposal into the ongoing rate case.[2]

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the April 9 Entry was unjust, unreasonable and unlawful because:

A. The Commission Erred In Not Providing For Required Case Preparation And Finding That All Parties Will Have Every Opportunity To Engage In Discovery And Participate When It Failed To Adopt A Schedule That Ensures Such A Result.

   1. In order to allow OCC and the other Parties adequate time to investigate the Pipeline Replacement Plan the Issuance of the Staff Report must be postponed.

   2. The Commission Erred in concluding that it is not necessary at this time to toll the time frame associated with rate case proceedings.

B. The Commission Erred By Failing To Require the Statutory Notice to the Public, Which Denies The Public The Opportunity To Participate.

C. The Commission Erred In Finding That The Pipeline Replacement Plan Constitutes An Automatic Adjustment Mechanism Under R.C. 4929.11.

D. The Commission Erred In Finding That Applications For Automatic Adjustment Mechanisms Under R.C. 4929.11 Need Not Be Considered An Alternative Regulation Plan Under R.C. 4929.05.

E. The Commission Erred By Unlawfully Adopting A Procedure That Will Facilitate An Increase In Rates To Customers, Without Adhering To The Statutory Requirements Of R.C. 4909.18 And Other Authority.

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[1] *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 Consolidate (February 22, 2008) ("Pipeline Replacement Plan").

[2] *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, Entry at 9 (April 9, 2008) ("Rate Case").

F. The Commission Erred When It Failed To Comply With The Requirements Of R.C. 4903.09, And Provide Findings Of Fact And Written Opinions That Were Supported By Record Evidence.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of errors, the PUCO should "abrogate or modify" the April 9 Entry.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

## I. PROCEDURAL HISTORY

The Ohio General Assembly enacted a comprehensive statutory scheme for regulation of public utilities in the public interest and with process protections for public participation. Through procedural machinations not contemplated under Ohio law, DEO has short-cut the regulatory review process and cast a shadow over transparency related to

one of the most costly proposals ($2.5 billion) ever filed before the PUCO. The PUCO must act now, consistent with the process concerns that the PUCO itself acknowledged in its Entry of April 9, 2008, to protect the public process of these cases and the ability of parties to prepare and advocate on behalf of the Ohio customers whose interests it is the PUCO's responsibility to hear.

On August 30, 2007, DEO filed an application to increase rates for all of its customers, including approximately 1.2 million residential customers in Ohio.[3] On September 12, 2007, OCC filed a Motion to Intervene in the rate case in order to protect the Company's residential customers and investigate the Company's need to increase its revenue requirement by $72.5 million. OCC has committed significant time and resources over the past seven months thoroughly analyzing DEO's $72.5 million application through the discovery process.

Despite the fact that DEO's rate case was years in the making, within a month of filing its rate case application, on September 20, 2007, DEO moved to consolidate into the rate case a previously existing, nine-month-old application in order to recover the costs associated with deploying automated meter reading ("AMR") devices,[4] 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. It is noteworthy that, despite the fact that the Motion to Consolidate the AMR Application with the Company's Rate Case was still pending, the AMR Application was incorporated into the public notice and approved by

[3] Rate Case, Application (Volume 1) at 4-5 (August 30, 2007).

[4] *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 Automated Meter Reading and for Certain Accounting Treatment*, Case No. 06-1453-GA-UNC. (December 13, 2006) ("AMR Application"). AMR devices are meters that permit remote meter reading through the use of a radio signal.

the Commission -- indicating through their actions that, according to the Company (who proposed the notice) and the Commission (who approved the notice) the AMR Application was a substantive part of DEO's Rate Case Application.[5] DEO's Motion to Consolidate the AMR Application was pending from September 20, 2007 until the Commission's recent April 9 Entry when the Commission granted DEO's Motion.[6]

Six months into the rate case review process, on February 22, 2008, DEO filed a $2.5 billion (in 2007 dollars) pipeline construction proposal, and a second Motion to Consolidate.[7] In this second Motion to Consolidate, DEO requested approval to consolidate its $2.5 billion Pipeline Replacement Plan into the Rate Case Application. The entire $2.5 billion Pipeline Replacement Plan was outlined in a sparse 16-page filing.[8] Similar to the AMR Application, the Pipeline Replacement Plan was filed as an automatic adjustment mechanism under R.C. 4929.11 and as a "UNC" filing.

However, unlike the AMR Application, the Pipeline Replacement Plan was not included in any public notice, and thus the public has never received the required statutory notice. In addition, unlike the Rate Case and the AMR Application, OCC has had virtually no opportunity to investigate DEO's sixteen-page, $2.5 billion proposal. OCC is compelled, on behalf of DEO's 1.2 million residential customers, to commit significant time and resources to reviewing the Pipeline Replacement Plan (while simultaneously devoting resources to the rate case), but to this point only six weeks has

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[5] *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,* 07-829-GA-AIR, Entry at 3 (October 24, 2008).

[6] *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,* 07-829-GA-AIR, Entry at 9 (April 9, 2008) ("April 9 Entry").

[7] Pipeline Replacement Plan, Motion to Consolidate (February 22, 2008).

[8] This stands in sharp contrast to the hundreds of pages of data that the Company filed as part of its rate case application for "only" a $72.5 million increase.

past since the filing of the Pipeline Replacement Plan. Accordingly, OCC has had very limited opportunity to engage in discovery and to analyze DEO's Pipeline Replacement Plan.

On March 14, 2008, OCC filed a Motion to Dismiss DEO's Pipeline Replacement Plan Application and a Memorandum Contra DEO's Motion to Consolidate the Pipeline Replacement Plan Application. Also on March 14, 2008, Ohio Partners for Affordable Energy ("OPAE") filed a Memorandum Contra DEO's Motion, presenting arguments that were similar to those made in OCC's Memorandum Contra.

OCC's Motion to Dismiss argued that the Pipeline Replacement Plan failed to meet the statutory requirements associated with an application for an increase in rates and could not be accepted by the Commission.[9] Additionally, as a R.C. Chapter 4929 filing, the Company failed to demonstrate how the Pipeline Replacement Plan Application qualifies as an alternative rate plan and failed to show how the filing meets the requirements of R.C. 4929.05.[10]

OCC stated that allowing DEO to consolidate such a significant proposal with the Rate Case at such a late time severely limits OCC's ability to perform its statutory duties and effectively review and analyze the Pipeline Replacement Plan.[11] OCC also pointed out that allowing DEO to amend the rate case proceedings at this late date would deny the

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[9] *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's Consumers' Counsel at 6-10 (March 14, 2008) ("OCC Motion to Dismiss").

[10] OCC Motion to Dismiss at 10-15.

[11] OCC Motion to Dismiss at 17-19.

public the statutory notice required when seeking an increase in rates.[12] Finally, OCC refuted DEO's contention that consolidating the Pipeline Replacement Plan with the ongoing Rate Case would not prejudice OCC.[13]

OCC requested that if the Commission accepted DEO's Motion to Consolidate, it should take three actions to protect consumers' rights and the public interest. First, OCC requested that the Commission toll DEO's Rate Case. Second, OCC asked that the Commission extend the discovery period to give the parties sufficient time to evaluate the Pipeline Replacement Plan.[14] Third, along with tolling the Rate Case, OCC argued that the Commission should require the Company to publish a notice which includes the substance and prayer of the Pipeline Replacement Plan.[15] On March 26, 2008, DEO submitted a Memorandum Contra.

In its April 9 Entry the Commission accepted DEO's Pipeline Replacement Plan as an automatic adjustment mechanism under R.C. 4929.11.[16] In addition, the Commission determined that DEO's Pipeline Replacement Plan Application did not need to be filed as part of a rate case proceeding or as an alternative regulation plan because the proposal only requested approval of the proposed methodology to recover costs of the Pipeline Replacement program.[17]

The April 9 Entry also granted DEO's Motion to Consolidate the Pipeline Replacement Plan with the ongoing Rate Case. The Commission again asserted that

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[12] OCC Motion to Dismiss at 15-17.

[13] OCC Motion to Dismiss at 3.

[14] OCC Motion to Dismiss at 19-21.

[15] OCC Motion to Dismiss at 21.

[16] April 9 Entry at 5.

[17] April 9 Entry at 5-6.

DEO's Pipeline Replacement Plan is not a request to increase rates but rather only a request for the Commission to consider the methodology proposed for the plan.[18] The Commission also determined that it was "optimal" to have the methodology proposed for the Pipeline Replacement Plan considered with the Rate Case.[19] The Commission also noted that all parties will have "every opportunity to engage in discovery and participate in the hearings in these proceedings"[20] Finally, although the Commission determined it was not necessary to toll the time frame, it indicated it would "reserve for future consideration the tolling of the statute, in light of the fact that DEO filed its request to consolidate 08-169 so late in the process of the rate case proceedings"[21]

## II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing under the statute must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."

In considering an application for rehearing, R.C. 4903.10 provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."

[18] April 9 Entry at 8.

[19] Id.

[20] Id.

[21] Id.

Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *."

Pursuant to R.C. 4903.221, OCC moved to intervene on March 3, 2008. In the short period since the Pipeline Replacement Plan has been filed, OCC has been actively investigating the proposal at the same time of its ongoing investigating of DEO's Rate Case. OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant a rehearing on the matters specified below.

## III. ARGUMENT

The Commission's Entry was unjust, unreasonable and unlawful in the following particulars:

### A. The Commission Erred In Not Providing For Required Case Preparation And Finding That All Parties Will Have Every Opportunity To Engage In Discovery And Participate When It Failed To Adopt A Schedule That Ensures Such A Result.

In its April 9 Entry, the Commission rejected OCC's Motion to Dismiss, in part because the Commission concluded that "all parties will have **every opportunity** to engage in discovery and participate in the hearings in these proceedings."[22] However, the Commission's failure to toll the rate case, and its decision to consolidate the Pipeline Replacement Plan with the pending rate case, will not provide OCC or other interveners with "every opportunity to engage in discovery and the hearings in these proceedings."

[22] April 9 Entry at 8. (Emphasis added.)

In the $72.5 million rate case, OCC has had approximately eight months since the Company filed its Application (on August 30, 2007) to engage in discovery and to review the voluminous Rate Case Application data and filings submitted by the Company. In contrast, OCC will have only a fraction of that time to engage in discovery and review the data associated with the Company's late filing for the $2.5 billion Pipeline Replacement Plan proposal -- a proposal that is valued at almost 40 times the amount of the increase requested in the rate case. In addition, to date, the Company has provided no filed testimony to support its $2.5 billion request. It would seem beyond argument that interested parties should be permitted more time and should receive more information to review a $2.5 billion (proposal than a $72 million proposal). But, instead of providing parties the same opportunity to engage in discovery and review, the Commission's Entry has the practical effect of severely limiting OCC and other parties' ability to engage in the ample discovery guaranteed by R.C. 4903.082, and Ohio Adm. Code 4901-1-16.

In the April 9 Entry, the Commission has failed to explain how it will ensure that OCC and other parties will have "every opportunity to engage in discovery and participate in the hearings." Nor has the Commission presented any action plan to "ensure that due process is afforded to parties in these cases." The most the Commission seems to offer is that it expects "DEO to work with the parties to alleviate their concerns over the time frames to be followed in these cases."

For OCC, the reality is that the Commission, while recognizing the problems it has created by permitting the request to consolidate "so late in the process," has presented no viable solution. In fact, as time continues to tick away, OCC and other parties' rights to investigate the Pipeline Replacement filing are dwindling. The Staff Report in the rate

case is due out any day now. Once the Staff Report is issued, all parties must file objections to it within thirty days after its filing.[23]

Because the filing of objections to the Staff Report are statutory requirements under R.C. 4909.19, they cannot be waived. Thus, OCC will be forced to file objections to a Staff Report that purportedly will address the Pipeline Replacement Plan, without the benefit of thoroughly reviewing the $2.5 billion proposal. Hence, OCC's due process rights to thoroughly investigate and conduct discovery will be severely limited as a result of the Company's request to consolidate "so late in the process" of the rate case. Moreover, by operation of the Ohio Administrative Code the discovery cut-off will follow two weeks after issuance of the staff report.[24] In addition, OCC will not be able to exercise it right to hire "technically qualified persons" under R.C. 4911.12(B) -- the contracting process will be irreparably impaired under the remaining time frame for investigating the Pipeline Replacement Plan Application.

**1. In order to allow OCC and the other parties adequate time to investigate the Pipeline Replacement Plan the issuance of the Staff Report must be postponed.**

Under R.C. 4909.19 objections to the Staff report must be filed within thirty (30) days after the issuance of the Staff Report. This is a statutory requirement and cannot be waived. Thus, if the Staff Report is issued, it requires objections to be filed thirty (30) days later.

OCC is not currently in a position to file objections regarding the Pipeline Replacement Plan due to the limited time for discovery and the sheer magnitude of the

[23] R.C. 4909.19.

[24] Ohio Adm. Code 4901-1-17(B).

issues. As recognized by the Commission in the April 9 Entry, the inequities that have been created by this situation arise from DEO's late Pipeline Replacement Plan filing,

> The Commission will reserve for future consideration the tolling of the statute, **in light of the fact that DEO filed its request to consolidate 08-169 so late in the process of the rate case proceedings.**[25]

When the Staff Report is filed OCC's narrow window of opportunity to investigate the Pipeline Replacement Plan for purposed of submitting objections in accordance with R.C. 4909.19, will end. Additionally the time for submitting discovery requests will be shut down two weeks following issuance of the Staff Report.[26]

The Commission's April 9 Entry assured that "all parties will have **every opportunity** to engage in discovery and participate in the hearings in these proceedings"[27] To ensure that the Commission's edict is met and not hollowed, the PUCO should hold the issuance of the Staff Report in abeyance to ensure that the parties have every opportunity to complete discovery and that "due process is afforded."[28]

OCC is requesting that the Staff Report not be issued earlier than ninety (90) days from now. A ninety (90) day timeline is reasonable in light of the fact that "DEO filed its request to consolidate 08-169 so late in the process." This will ensure that OCC will be guaranteed additional time to conduct the ample discovery it is entitled to under R.C. 4903.082, Ohio Adm. Code 4901-1-16, and the "due process" and "opportunity to engage in discovery" referred to by the Commission in its April 9 Entry. A ninety (90) day timeline would mean a filing date of approximately July 17 -- five months from the time

[25] April 9 Entry at 8. (Emphasis added.)

[26] Ohio Admin Code 4901-1-17(B).

[27] April 9 Entry at 8. (Emphasis added.)

[28] Id.

the Pipeline Replacement Plan Application was filed (February 22, 2008). Given the magnitude of the Pipeline Replacement Application and the lack of information to support the $2.5 billion proposal, three additional months is an appropriate length of time to permit OCC to review the application.

Moreover, the Commission has the authority to defer the issuance of the Staff Report through a number of mechanisms. First, it is clear that R.C. 4909.19 only requires that the Staff Report be filed "[**w]ithin a reasonable time as determined by the commission**" after the filing of the application* * *.[29] Based on the fact that "DEO filed its request to consolidate 08-169 so late in the process" a ninety (90) day abeyance is well within reason and for good cause. In fact, viewing the situation in reverse, allowing only fifty-five (55) days between the date the Pipeline Replacement Plan Application was filed and today's date (Friday, April 18), is not a reasonable time frame for review of a $2.5 billion, 25-year plan.

Second, the legal director, deputy legal director, or attorney examiner, under the direction of the Commission has the authority to hold the Staff Report. Under R.C. 4901.18, the legal director, deputy legal director, or the attorney examiner may "perform such other duties as are prescribed by the commission." Deferring the issuance of the Staff Report is a procedural matter that would be within the scope of authority for the legal director, deputy legal director, or attorney examiner. See also Ohio Adm. Code 4901-1-14, permitting the hearing examiner to rule in writing upon any procedural motion or other procedural matter.

[29] R.C. 4909.19. (Emphasis added.)

In addition, deferring the issuance of the Staff Report would facilitate the Commission's edict to ensure parties "every opportunity to engage in discovery" because it would extend, not truncate, the discovery period for the Pipeline Replacement Plan. Moreover, it is clear that the Commission has the authority to extend the time frame for parties to complete discovery where good cause is demonstrated. For example, in accordance with Ohio Adm. Code 4901-1-17(G), the Commission, the legal director, deputy legal director, or attorney examiner have the authority to enlarge the time periods for discovery on their own motion or for good cause shown by one of the parties. In this case, DEO's decision to consolidate "so late in the process of the rate case proceedings" a $2.5 billion, 25-year proposal amounts to good cause for an extension. Particularly when the proposal is submitted almost six months after the Rate Case is filed and approximately two months before the issuance of the Staff Report.

**2. The Commission erred in concluding that it is not necessary at this time to toll the time frame associated with rate case proceedings.**

Although the Commission did reserve "for future consideration the tolling of the statute in light of the fact that DEO filed its request to consolidate 08-169 so late in the process" the Commission offered no solution to the statutory timing limitations that will arise upon the filing of the Staff Report in the rate case docket.[30] In this regard a ninety (90) day tolling of the Rate Case and more specifically, a tolling of the filing of the Staff Report, would be reasonable and lawful and would insure that "all parties have every opportunity to engage in discovery" and ensure that "due process is afforded to parties in

[30] April 9 Entry at 8.

these cases" -- both propositions deemed to be appropriate by the PUCO in its April 9 Entry.

Once the Staff Report is filed, the parties have thirty (30) days by statute to file objections.[31] The statutory deadline for objections may not be waived. Tolling the time period including the filing of the Staff Report is an appropriate way to effectively extend deadlines for objections, testimony, discovery, and the evidentiary hearing.

Thus far, DEO has provided limited information to permit the parties to initiate discovery and review of the Pipeline Replacement Plan -- no pre-filed accompanying testimony to support the $2.5 billion Application, and a mere sixteen-page application (equating to $156 million per page) that had no attachments. In addition, the end result of the Company filing its request to consolidate "so late in the process" is to further shorten the current discovery timeline by providing the parties with only the bare minimal necessary information as part of the Application.

Moreover, the current timeline precludes OCC from being able to hire a consultant or complete a thorough review of the Pipeline Replacement Plan Application.[32] Nothing, short of deferring the filing of the Staff Report or tolling the rate case would alleviate the predicament the Company has created by filing its request to consolidate "so late in the process of the rate case proceedings."[33]

Tolling the Rate Case Application would provide the Commission and the interested parties the time necessary to more fully evaluate DEO's Pipeline Replacement

[31] R.C. 4909.19.

[32] Interestingly enough, the Commission has not been concerned with the additional time needed to conduct the Staff review perhaps due to the fact that the staff was able to hire outside consultants in the current DEO rate case.

[33] April 9 Entry at 8.

Plan. Indeed tolling of an application is permitted in circumstances where the applicant has failed to comply with the standard filing requirements of the Ohio Administrative Code. See Ohio Adm. Code 4901-7-04(i) where the Commission may deem the application as filed on the date at which supplemental information is filed bringing the application into substantial compliance with the rules.

In the past, the Commission has tolled the two hundred seventy-five (275) day period of R.C. 4909.42 to give applicants more time to address problems with their applications or punish applicants who were not cooperating with the discovery process. Authority for tolling an application is set out in the Standard Filing Requirements[34] and by case precedent.[35] In this case, tolling the procedural time frame of the Rate Case would similarly allow the parties such as OCC more time that is needed to review the Pipeline Replacement Plan and if appropriate, hire consultants to assist in that review.

Tolling the Rate Case Application for ninety (90) days would allow OCC and other parties the opportunity to fully investigate the Pipeline Replacement Plan, including potentially hiring a consultant in order to properly review all of the implications associated with the Pipeline Replacement Plan. Without an order tolling the Rate Case Application the statutory deadlines imposed for filing objections and all that follow from

[34] See Ohio Adm Code 4901-7-01(A)(4)(b)(i). (Applications may be tolled where the Staff determines that the application fails to substantially comply with the standard filing requirements and informs the applicant of that within thirty days of the filing of the application. The application will be tolled until the application is deemed to be in substantial compliance with the standard filing requirements.)

[35] *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).

the issuance of the Staff Report -- testimony, discovery cut-off, and evidentiary hearings -- will significantly impinge upon OCC's due process rights.

### B. The Commission Erred By Failing To Require the Statutory Notice to the Public, Which Denies The Public The Opportunity To Participate.

The Commission's ruling that DEO's Pipeline Replacement Plan does not need to be filed as part of a rate case proceeding or an alternate regulation plan[36] severely limits the public's opportunity to participate. The notice requirements for an application for a traditional rate case and for an alternative rate case can be found under R.C. 4909.18, 4909.19 and 4909.43. In this case, the Commission's ruling that DEO's Pipeline Replacement Plan is an automatic rate adjustment mechanism that does not have to be filed as a part of a rate case proceeding, means (according to the PUCO but not according to the statute) that DEO does not have to meet many of the 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. DEO has not provided notice to the public about the Pipeline Replacement Plan and thus, DEO has not complied with R.C. 4909.18(E) or R.C. 4909.19. The Ohio Supreme Court has stated that 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.**"[37]

Without notice of DEO's proposal, the public does not have the statutory opportunity to participate in the proceedings. The Commission's ruling permitting DEO to proceed with its Pipeline Replacement Plan without a public notice acts as a censure

[36] April 9 Entry at 5.

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

against the public's involvement in a core piece of the proceedings -- a $2.5 billion part of the proceedings that only recently has been included in these proceedings.

### C. The Commission Erred In Finding That The Pipeline Replacement Plan Constitutes An Automatic Adjustment Mechanism Under R.C. 4929.11.

The April 9 Entry unlawfully and unreasonably permits DEO to increase the rates its customer must pay through a mechanism that is not part of a rate case.[38] It is well settled that the Commission is a creature of statute and may exercise no power, authority, or jurisdiction beyond that conferred upon it by statute.[39] The jurisdiction of the Commission is limited by the language contained within the confines of R.C. Chapter 4929 -- the gas alternative regulation provisions. In accordance with R.C. 1.42, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." Accordingly, attention must be paid to the plain language of the statute, R.C. 4929.11.

The statutory language of R.C. 4929.11 is clear -- automatic adjustments may be permitted only where the costs being tracked fluctuate on the same automatic basis. The Commission's ruling disregards the General Assembly's statutory definition by determining that the threshold for automatic fluctuation in costs occurs whenever there is any change in cost measured over the long term. Under the definition adopted by the Commission in this case, there is no cost that would not fit the Commission's definition of a fluctuating cost.

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[38] April 9 Entry at 5.

[39] See for example, *Cincinnati v. Pub. Util. Comm.*, 96 Ohio St. 270, 275 (1917); *Ohio Central Tel. Corp. v. Pub. Util. Comm.*, 166 Ohio St. 180, 182 (1957); *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St. 2d 97, 99 (1973).

While the Commission has adopted an expansive interpretation of the statutory terms of R.C. 4929.11, the Ohio Supreme Court's precedent suggests that it is more appropriate to strictly construe the statutory terms of R.C. 4929.11. While not directly ruling on this statute, the Court has, in the past, strictly construed other automatic adjustment provisions of Title 49.[40]

The Court's position has been that the automatic adjustment provisions should be strictly construed, otherwise the regulatory framework of R.C. 4909.15 will be compromised. *Pike Natural Gas Company v. Pub. Util. Comm.*[41] is the landmark case where the Court emphasized the need to maintain the integrity of the ratemaking process. In *Pike Natural Gas*, the Court rejected a single automatic adjustment to one component of customers' rates -- excise taxes. The Court found that the only statute that authorized an adjustment clause, R.C. 4905.302, allowed for adjusting customers' rates due to "fluctuations" in the price of gas to a utility.[42] The Court went on further to say that allowing automatic adjustment rider for one discrete utility expense could be equated with proceeding down a "slippery slope."[43]

Based upon the Commission's ruling that automatic adjustment mechanism applications brought under R.C. 4929.11 do not need to be a part of a rate case, the Commission has created a loop-hole for companies to bring rate increases without complying with the procedural safeguards required for a rate case. The ability of companies to use the automatic adjustment mechanism for any rate increase request is

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[40] *See for example Montgomery County Board of Commissioners v. Pub. Util. Comm.*, 28 Ohio St. 3d 171 (1986); *Pike Natural Gas Company v. Pub. Util. Comm.*, 68 Ohio St. 2d 181 (1984).

[41] 68 Ohio St. 2d. 181 (1984).

[42] Id. at 183.

[43] Id. at 186.

greatly enhanced and a clear slippery slope has already been created for DEO's customers who are subject to DEO's proposed $2.5 billion increase in rates.

### D. The Commission Erred In Finding That Applications For Automatic Adjustment Mechanisms Under R.C. 4929.11 Need Not Be Considered An Alternative Regulation Plan Under R.C. 4929.05.

The Commission erred when it found that automatic adjustment mechanism provisions brought under R.C. 4929.11 are exempted from the rest of the provisions in R.C. Chapter 4929.[44] The April 9 Entry states:

> Chapter 4929, Revised Code, permits the Commission to consider applications for automatic adjustment mechanisms, as described in Section 4929.11, Revised Code, and does not require such applications necessarily be filed as part of a rate case proceeding or an alternative regulation plan.

However, R.C. 4929.11 was created a part of House Bill 476 and became effective September 17, 1996.

Statutes that are *in pari materia* must be harmonized unless they are "irreconcilable and in hopeless conflict"[45] Statutes are considered *in pari materia* if they pertain to the same subject matter. R.C. 4929.11 and 4929.05 are *in pari materia*, as both were promulgated as part of the same House Bill, and pertain to natural gas alternative rate regulation, as the regulatory scheme set forth as R.C. Chapter 4929 of the Revised Code.

[44] April 9 Entry at 8.

[45] *Hughes v. Registrar, Ohio Bureau of Motor Vehicles*, 79 Ohio St. 3d 305, 308 (1997).

A statute, such as R.C. 4929.11, cannot be examined in a vacuum,[46] as suggested by the Commission's Entry. Rather, R.C. 4929.11 should be construed in connection with the other statutes and sections of R.C. Chapter 4929.

The purpose of H.B. 476 was to enable natural gas companies to apply for alternative rate regulation and R.C. 4929.11 is squarely couched in this context. As part of an alternative rate plan, natural gas companies could seek to establish automatic rate adjustments mechanisms.[47] To establish an alternative rate plan, however, a natural gas company must undergo an application procedure that affords the public notice, the opportunity to comment, and a hearing – especially where DEO's Pipeline Replacement Plan Application seeks $2.5 billion from DEO's customers over the next twenty-five years. At the very least every attempt should be made to ensure that the procedural safeguards established by the General Assembly are adhered to.

### E. The Commission Erred By Unlawfully Adopting A Procedure That Will Facilitate An Increase In Rates To Customers, Without Adhering To The Statutory Requirements Of R.C. 4909.18 And Other Authority.

DEO's $2.5 billion Pipeline Replacement Plan was filed without regard to the statutory procedural requirements for an application filed under R.C. 4909.18, R.C. 4909.19, or R.C. 4929.05. The Commission's Entry stated that DEO's Pipeline Replacement Plan "does not constitute an application for an increase in rates" because the proposal "is only requesting consideration of the methodology for the [Pipeline Replacement Plan] and is proposing that the [Pipeline Replacement Plan] be set at

[46] 85 Ohio Jur Statutes 176, citing *State ex rel Quirke v. Patriarca*, 100 Ohio App.3d 367 (11th Dist. Lake County 1995).

[47] See R.C. 4929.01(A).

zero."[48] However, the Pipeline Replacement Plan is clearly a rate increase. Under DEO's proposal the Pipeline Replacement Plan will result "in an incremental cost per residential customer of $1.12 per month **for the first year** of the Pipeline Replacement Cost Recovery Charge, with subsequent increases of less than $0.90 per year in 2007 dollars."[49] Thus, the Company itself acknowledges that rates to residential customers will increase, 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, in this proceeding.

Contrary to this procedure, Ohio ratemaking law only permits a rate increase: (1) after the 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 notice and 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 (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 Pipeline Replacement Plan Application also contravenes, at a minimum, Ohio Supreme Court precedent regarding single-issue rate making[50] and the specific rate-fixing process and formula of 4909.15. To give effect to these specific rate formulas set forth in R.C. 4909.15, DEO's Pipeline Replacement Plan Application must

[48] April 9 Entry at 6.

[49] Pipeline Replacement Plan, Application at 4. Emphasis added.

[50] *Pike Natural Gas Company v. Pub. Util. Comm.*, 68 Ohio St. 2d 181 (1984).

be struck down. Otherwise, the rate formula under R.C. 4909.15 will be completely sidestepped.

The simple charade of setting the initial rider at zero does not transform the Pipeline Replacement Plan into an application that is not for a rate increase for customers. The Commission's ruling ignores the obvious -- consumers will be forced to pay higher rates for DEO's proposed costs, regardless of what the Company labeled the increase. The Commission's ruling suggests that the Pipeline Replacement Plan rate increase cannot be imposed until the rider is ready to be imposed on customers, even though the accounting, the regulatory framework, the concepts for recovery, review, and approval would have all been determined by the Application. At that point the Commission will have no choice but to determine how much the Company can increase rates under this recovery mechanism.

At this time the Commission has determined that DEO may request approval of the accounting authority needed to allow the Company to defer, for financial accounting purposes, $2.5 billion in expenses for the Pipeline Replacement Plan.[51] The Ohio Supreme Court has recently ruled that accounting orders, similar to DEO's proposal here, were final appealable orders.

The Court ruled that the accounting order itself was enough to determine harm to the customers:

> The fact that subsequent orders may result in more direct effects does not mean that the orders allowing accounting procedure changes are not final. Thus the Consumers' Counsel may argue in these appeals that customers have already been harmed by PUCO actions that she claims were unreasonable or unlawful.[52]

[51] April 9 Entry at 6.

[52] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d. 384, 25.

The Court's decision in the *FirstEnergy* cases recognized the reality of automatic adjustment mechanism ratemaking -- the customers end up paying in rates what Commission accounting orders allow to be booked. Through *FirstEnergy* the Court recognized that when the Commission creates a regulatory asset, or permits deferral of expenses in an accounting case, there is an inextricable "influence"[53] on future rates. Like the deferral of expenses in the *FirstEnergy* case, the expenses to be sought from DEO's customers in this case are real and amount to billions of dollars. Therefore, the Commission must follow the ratemaking requirements of R.C. Chapters 4909 and 4929.

### F. The Commission Erred When It Failed To Comply With The Requirements Of R.C. 4903.09, And Provide Findings Of Fact And Written Opinions That Were Supported By Record Evidence.

Under R.C. 4903.09, the Commission's opinions must be based upon findings of fact: "the commission shall file, with the records of such cases, finding of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." To meet the requirements of this statute, the PUCO's Order must show, in sufficient detail, *the facts in the record* upon which the order is based, and the reasoning followed in reaching the conclusion.[54]

However, the Commission in this case, made findings without having facts in the record to support such findings. Among the findings that are without record support, thus violating R.C. 4903.09, are the following:

- That there are "regulated service or goods [that will] fluctuate automatically in accordance with changes in a

[53] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St. 3d 377, 380, (Locher, R.S., dissenting) (Where Justice Locher recognized that the purpose of an accounting change is to "influence rates").

[54] *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 2 Ohio St.3d 306. (Emphasis added.)

specified cost or costs"[55] This finding was used to deny OCC's Motion to Dismiss the Pipeline Replacement Plan. The Commission must establish what regulated services or goods are fluctuating automatically before it can determine DEO has proposed an automatic rate adjustment in accordance with R.C. 4929.11.

- That the Commission believes it is optimal for the Pipeline Replacement Plan to be considered together with the rate case proceedings.[56] This finding was used to bolster the Commission's conclusion that the other parties are not prejudiced by DEO's late Pipeline Replacement Plan filing.

- That "all parties will have every opportunity to engage in discovery and participate in the hearings in these proceedings."[57] This finding ignores the fact that parties who have received no public notice of the Pipeline Replacement Plan proposal are effectively denied the opportunity to object to and participate in the hearing under which the essential framework of the $2.5 billion proposal, and the means through which these costs will be imposed on customers will be approved.

Where the finding and order of the Commission is manifestly against the weight of the evidence -- or there is no evidence -- the Ohio Supreme Court has overturned the judgment of the Commission.[58] The PUCO here should grant rehearing on the issues of fact, and should ultimately reverse its findings, based on the evidence that is in, not outside, the record in this proceeding.

## IV. CONCLUSION

For the reasons stated above, the Commission should grant OCC's Application for Rehearing. The Commission should issue an Entry on Rehearing that dismisses DEO's

[55] R.C. 4929.11

[56] April 9 Entry at 8.

[57] April 9 Entry at 8.

[58] See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 85 Ohio St. 3d. 87, 90-91; *Motor Service Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 5 (1974).

Pipeline Replacement Plan Application. In the event that the Commission does not grant OCC's Motion to Dismiss, the Commission should, at a minimum, toll the entire DEO rate case application ninety (90) days to give all parties a reasonable opportunity to review the application.

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. Allowing DEO to supplement its rate case application at this late date, severely limits the ability of interested stakeholders to adequately review DEO's $2.5 billion proposal.

Even if the Commission determines that the Pipeline Replacement Plan Application is governed by R.C. 4929.11, the Application must still be dismissed because DEO has not met the statutory requirements of an alternative rate regulation filing under Chapter 4929. DEO's Pipeline Replacement Plan 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 Pipeline Replacement Plan as required by R.C. 4929.05.

Thus, as discussed above, the Commission should reconsider its April 9 Entry and dismiss the Pipeline Replacement Plan Application, and deny the Motion to Consolidate. If the Commission permits the Pipeline Replacement Plan Application to be consolidated with the rate case, then the Commission should at a minimum toll the entire rate case application to allow parties to adequately investigate the proposal.

As stated above, the Ohio General Assembly enacted a comprehensive statutory

scheme for regulation of public utilities in the public interest and with process protections for public participation. Through procedural machinations not contemplated under Ohio law, DEO has short-cut the review process and cast a shadow over transparency related to one of the most costly proposals ever filed before the PUCO. The PUCO must act now, consistent with the process concerns that the PUCO itself acknowledged in its Entry of April 9, 2008, to protect the public process of these cases and the ability of parties to prepare and advocate on behalf of the Ohio customers whose interests it is the PUCO's responsibility to hear.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Application for Rehearing* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 18th day of April 2008.

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