

**FILE**

**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

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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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
APPLICATION FOR REHEARING  
AND MEMORANDUM IN SUPPORT**

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Ohio Partners for Affordable Energy ("OPAE"), an intervenor in the above-captioned cases, hereby submits this application for rehearing from the Public Utilities Commission of Ohio's ("Commission") Entry dated April 9, 2008 in these


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proceedings initiated by The East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion"). The Commission's April 9, 2008 Entry was unreasonable and unlawful in the following respects:

1. The Commission acted unreasonably and unlawfully in failing to dismiss Case No. 08-169-GA-UNC, which is an unlawful application to increase rates or an unlawful application for an alternative rate plan.
2. The Commission acted unreasonably and unlawfully in finding that it was appropriate to consolidate the unlawful Case No. 08-169-GA-UNC with the pending rate case and alternative rate plan proceedings.
3. The Commission acted unreasonably and unlawfully in finding that all parties will have every opportunity to engage in discovery and participate in the hearings in spite of the Commission's acknowledgement that Dominion filed its request to consolidate so late in the process of the rate case proceedings.

The grounds supporting these allegations of error are set forth in the attached memorandum in support.

Respectfully submitted,

  
Colleen L. Mooney  
David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 W. Lima Street  
Findlay, Ohio 45839-1793

## MEMORANDUM IN SUPPORT

- I. **The Commission acted unreasonably and unlawfully in failing to dismiss Case No. 08-169-GA-UNC, which is an unlawful application to increase rates or an unlawful application for an alternative rate plan.**

In its May 9, 2008 Entry, the Commission denied the Office of the Ohio Consumers' Counsel's motion to dismiss Case No. 08-169-GA-UNC on the basis that applications for automatic adjustment mechanisms as described in R.C. §4929.11 do not require a rate case proceeding or an alternative regulation plan. Entry at 5-6. The Commission's finding is unlawful. First, the application in Case No. 08-169-GA-UNC is clearly for an increase in rates. Dominion intends to increase rates to recover the costs of its pipeline replacement program. When the Commission approves the creation of regulatory assets, rates to customers inevitably increase. The Commission's acceptance of Dominion's argument that Case No. 08-169-GA-UNC merely sets forth a proposed methodology to recover costs and proposes that the cost recovery charge be initially set at zero simply serves to facilitate Dominion's strategy of avoiding the statutory and procedural requirements of an application for an increase in rates or an application for an alternative rate plan. The result of the Commission's Entry is a violation of Ohio law for applications for an increase in rates or for an alternative rate plan.

Second, the Commission unlawfully finds that applications for automatic adjustment mechanisms do not require an alternative rate plan. Revised Code Chapter 4929 was adopted by the Ohio General Assembly and became effective on September 17, 1996. R.C. §4929.01 defines alternative rate plan as follows:

(A) **“Alternative rate plan” means** a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges, under which rates and charges may be established for a commodity sales service or ancillary service that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company, provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced and readily available natural gas services and goods at just and reasonable rates and charges. **Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.**

Emphasis added.

R.C. §4929.10 states that the Commission shall adopt rules to carry out this chapter, i.e., Chapter 4929. Initial rules were to be adopted within one hundred eighty days after the effective date of the law, September 17, 1996. Accordingly, the Commission adopted Chapter 4901:1-19 of the Ohio Administrative Code for Alternative Rate Plans. Ohio Adm. Code Rule 4901:1-19-01(A) tracks the language of R.C. §4929.01(A), including the language that alternative rate plans also may include automatic adjustments based on a specified index or changes in a specified cost or costs.

Continuing on in Chapter 4929 for alternative rate plans, the General Assembly included R.C. §4929.11, which also became effective on September 17, 1996. This section reads as follows:

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 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.

Clearly R.C. §4929.11 tracks the language in R.C. §4929.01 and O.A.C. Rule 4901:1-19-01(A) for alternative rate plans. R.C. §4929.11 is a part of Chapter 4929, which sets forth the alternative rate plan provisions for natural gas companies. Therefore, there is no credible basis upon which the Commission can assert that the automatic adjustment mechanism under R.C. §4929.11 need not be a part of an alternative rate plan. An automatic adjustment mechanism under R.C. §4929.11 is part of an alternative rate plan under Chapter 4929. All the requirements for an alternative rate plan set forth in Chapter 4929 apply to applications for automatic adjustment mechanisms.

Moreover, automatic adjustments are permitted only where the costs being tracked fluctuate on the same automatic basis; as the statute states, the automatic adjustment mechanism is to fluctuate automatically in accordance with changes in a specified cost or costs. The costs to be associated with Dominion's pipeline replacement program are not costs that will fluctuate automatically in accordance with changes in a specified cost or costs.

The Commission's interpretation of R.C. §4929.11 is so loose that any application for a single-issue rider and for the recovery of any cost could be considered outside the alternate rate plan statutory and regulatory provisions. The Supreme Court has previously rejected automatic adjustment clauses that were not explicitly adopted by the General Assembly. *Pike Natural Gas v. Pub. Util. Comm.*, 68 Ohio St. 2d 181 (1984).

The Commission's unlawful opinion that applications for automatic adjustment mechanisms do not require a rate case or alternative rate plan also means that there are no notice requirements associated with the automatic adjustment mechanism applications. Thus, the Commission has blessed Dominion's strategy of providing no notice to the public pursuant to R.C. §§4909.18, 4909.19 and 4909.43 of its plan to increase distribution rates. Without notice to the public, the public does not have the statutory opportunity to participate in the proceedings.

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. Case No. 08-169-GA-UNC is unlawful and should have been dismissed. A request for a pipeline replacement program with alternative cost recovery for such a program might lawfully be made in an application to increase rates or an alternative rate plan pursuant to the statutory and regulatory provisions for those applications. Dominion made no such requests for an increase in rates or an alternative rate plan in Case No. 08-169-GA-UNC. The Commission has allowed Dominion to pursue a rate increase without the procedural safeguards required for rate cases or alternative rate plans.

**II. The Commission acted unreasonably and unlawfully in finding that it was appropriate to consolidate the unlawful Case No. 08-169-GA-UNC with the pending rate case proceedings.**

The May 9, 2008 Entry also granted Dominion's motion to consolidate Case No. 08-169-GA-UNC with the pending rate cases on the basis that, while it is not required by statute, it is "optimal" to have the pipeline replacement program

methodology considered together with the pending rate case proceeding. Entry at 5-6. The Commission does not explain why it finds it “optimal” to consolidate the proceedings, but it is probable that the Commission does not have the courage of its (unlawful) conviction that applications for automatic adjustment mechanisms need not be made as applications for an increase in rates or for an alternative rate plan. No doubt the Commission seeks to join Dominion in conferring an illusion of legality and due process on the unlawful Case No. 08-169-GA-UNC by consolidating it with the pending applications for an increase in rates and for an alternative rate plan that, at least, followed the statutory and regulatory framework.

The consolidation seeks to cloak the unlawful application in Case No. 08-169-GA-UNC with applications that followed the statutory and regulatory procedures. Unfortunately, the rate increase application and the alternate rate plan application were filed eight months ago, and, with the Staff Report expected to be issued in only a few days, it is far too late to amend the pending applications to bootstrap the unlawful Case No. 08-169-GA-UNC application. The cases should not have been consolidated; Case No. 08-169-GA-UNC should have been dismissed.

**III. The Commission acted unreasonably and unlawfully in finding that consolidation of these cases presents no due process problems even though the Commission acknowledges that Dominion filed its request to consolidate very late in the process of the rate case proceedings.**

The Commission found that all parties will have “every opportunity” to engage in discovery and participate in the hearings. The Commission also

refused to toll the statutory time frame associated with the rate case proceedings. The Commission found that the consolidation presented no due process problems for the parties even though the Commission acknowledged that Dominion filed its request to consolidate very late in the rate case proceedings.

Consolidation of Case No. 08-169-GA-UNC with the pending applications for an increase in base rates (Case No. 07-829-GA-AIR), an alternative rate plan (Case No. 07-830-GA-ALT) and accounting authority (Case No. 07-831-GA-AAM) denies the parties due process. The three pending rate applications were initiated on July 20, 2007, and the rate increase application was filed on August 30, 2007. Therefore, the pending applications for an increase in rates and for an alternative rate plan were made over eight months ago. The process for review of these applications is already eight months old, and the Staff Report of Investigation will be issued any day. Presumably, the Staff Report will address the pipeline replacement program, although, given the magnitude of the program, it is unlikely that the Staff Report will do anything more than offer its cursory support. Once the Staff Report is issued, all parties must file objections to it within thirty days after its filing. Again, this is a very short time frame for the parties to address the substance of the Case No. 08-169-GA-UNC application.

The Commission's contention that consolidation will not prejudice any party or cause due process problems is wrong. There has been no notice to the public of the pipeline replacement program. There has been no time to review the application, and certainly no fairness in putting Case No. 08-169-GA-UNC on the same timeline as the applications for an increase in rates and for an



alternative rate plan that were initiated over eight months ago. Contrary to the Commission's finding, the parties' ability to review the application in Case No. 08-169-GA-UNC will be severely prejudiced by consolidation of Case No. 08-169-GA-UNC with the pending rate applications.

#### **IV. CONCLUSION**

In conclusion, the Commission should grant this application for rehearing. Case No. 08-169-GA-UNC is unlawful and should be dismissed; it should not be consolidated with the pending rate and alternative rate plan applications. The proposal in Case No. 08-169-GA-UNC requires either an application for an increase in rates or an application for an alternative rate plan. The Commission's finding that Case No. 08-169-GA-UNC should be consolidated with Dominion's currently pending applications also denies due process to the parties. Consolidation of Case No. 08-169-GA-UNC with the pending rate and alternative rate plan cases does not cure the statutory and procedural deficiencies in the Case No. 08-169-GA-UNC application.


Respectfully submitted,



Colleen L. Mooney  
David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 W. Lima Street  
Findlay, Ohio 45839-1793

## CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Partners for Affordable Energy's Application for Rehearing and memorandum in support has been electronically delivered to the following parties in the above-captioned proceedings on this 9<sup>th</sup> day of May 2008.

  
Colleen L. Mooney  
David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 W. Lima Street  
Findlay, Ohio 45839-1793

## PARTIES

Mark A. Whitt  
Andrew J. Campbell  
Jones Day  
P.O. Box 165017  
Columbus, Ohio 43215-5017  
[mawhitt@jonesday.com](mailto:mawhitt@jonesday.com)  
[ajcampbell@jonesday.com](mailto:ajcampbell@jonesday.com)

Joseph M. Clark  
McNees, Wallace & Nurick  
Fifth Third Center, 21<sup>st</sup> Floor  
21 East State Street  
Columbus, Ohio 43215  
[jclark@mwncmh.com](mailto:jclark@mwncmh.com)

Anne L. Hammerstein  
Stephen B. Reilly  
Attorney General's Office  
Public Utilities Commission Section  
180 E. Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215-3793  
[Anne.hammerstein@puc.state.oh.us](mailto:Anne.hammerstein@puc.state.oh.us)  
[Stephen.reilly@puc.state.oh.us](mailto:Stephen.reilly@puc.state.oh.us)

Joseph Serio  
Office of the Consumers' Counsel  
10 W. Broad Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
[serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)

David Boehm  
Boehm, Kurtz & Lowry  
36 E. Seventh St. Ste. 1510  
Cincinnati, Ohio 45202  
[dboehm@bkllawfirm.com](mailto:dboehm@bkllawfirm.com)

Neighborhood Environmental  
Coalition, Empowerment Center  
of Greater Cleveland, Cleveland  
Housing Network and Consumers  
for Fair Utility Rates  
Joseph Meissner  
The Legal Aid Society of Cleveland  
1223 West 6<sup>th</sup> Street  
Cleveland, Ohio 44113

John W. Bentine  
Chester, Wilcox & Saxbe LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215-4213  
[jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)

Howard Petricoff  
Vorys, Sater, Seymour & Pease  
52 East Gay Street  
Columbus, Ohio 43216-1008  
[mhpetricoff@cssp.com](mailto:mhpetricoff@cssp.com)

Barth Royer  
Bell, Royer & Sanders  
33 South Grant Avenue  
Columbus, Ohio 43215  
[broyer@brscolaw.com](mailto:broyer@brscolaw.com)

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

UMUA Local G555  
Todd M. Smith  
Schwarzwald & McNair LLP  
616 Penton Media Building  
1300 East Ninth Street  
Cleveland, Ohio 44114