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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-ALT**
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 Deployment Through an Automatic Adjustment Clause, and for Certain Accounting Treatment	**Case No. 06-1453-GA-UNC**

MEMORANDUM CONTRA THE MOTION TO DISMISS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL ON BEHALF OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "Company"), pursuant to Rule 4901-1-12, Ohio Administrative Code, and the Entry of May 28, 2008, files its

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Memorandum Contra the Motion to Dismiss filed on July 21, 2008, by the Office of the Ohio Consumers' Counsel.

I. INTRODUCTION

It appears OCC has settled on a strategy of attrition. Perhaps recognizing that the Commission has approved similar riders under less compelling circumstances, OCC has launched waves of non-substantive, procedural attacks in an attempt to delay the implementation of a process which will allow the Company to begin replacing major parts of its infrastructure in order to maintain reliable service. Since the PIR Application was filed in February, OCC has averaged one filing per month[1] procedurally attacking the PIR.

It is poetically just, then, that OCC's motion itself suffers irredeemable procedural flaws. The current filing reproduces virtually every argument OCC has raised over the life of the PIR Application—some verbatim and some for the third or fourth time. Repetition of these arguments, however, has not infused them with merit. The PIR Application *still* is not for a rate increase; an alternative rate plan application *still* is not subject to the same statutory requirements as an application for an increase in rates; and the legal notice in the PIR case *still* complies with all applicable legal standards. The motion presents arguments that have already been fully briefed, fully considered, and fully rejected—the Commission should simply dismiss this motion out of hand.

[1] *See* Motion to Dismiss (March 14, 2008); Application for Rehearing (April 18, 2008); OCC Memorandum Contra DEO's Motion to Approve Legal Notice (June 6, 2008); Application for Rehearing of Entry Scheduling Local Public Hearings (July 10, 2008); Motion to Dismiss (July 21, 2008).

II. ARGUMENT

A. OCC's Arguments Have Already Been Raised, Briefed, Considered, and Rejected.

OCC should not be allowed to rehash the same arguments *ad infinitum*. Where "arguments merely repeat positions previously presented to the Commission and do not offer anything new," and the Commission "has already considered, decided, and discussed such positions," the Commission need not and should not "repeat those discussions" in subsequent entries. *In re CG&E's Application to Modify Its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing*, Case No. 03-93-EL-ATA, Entry on Rehearing ¶ 6 (Dec. 19, 2007); *see also In re the Application of Columbus So. Power Co.*, Case No. 07-63-EL-UNC, Entry on Rehearing ¶ 17 ("AEP-Ohio and OCC have raised no new issues on rehearing that have not already been thoroughly considered. Accordingly, the Commission concludes that the applications for rehearing filed by AEP-Ohio and OCC should be denied in their entirety.").

As in the cited cases, the vast majority of OCC's Motion does not even warrant comment, much less discussion. Some arguments appear to have been reproduced verbatim, and others are being raised here for the third or fourth time. The chart below shows, for each of the arguments raised in the current motion, when and where that argument was raised before, and in what entry the Commission has already rejected it:

Section of Motion	**Substance of Argument**	**When raised before**	**When rejected by the PUCO**
III.A, III.B.1	Rate case notice under R.C. 4909.18 and 4909.19 allegedly failed to disclose PIR Application	3/14 Mot. Dismiss (IV.A.1); 4/18 Reh'g App. (III.B); 6/6 Memo. Contra (III.B, III.C)	4/9 Entry; 5/28 Entry on Reh'g; 6/18 Entry
III.B.2, IV.C.2	PIR Notice allegedly did not adequately describe the substance of the PIR Application	6/6 Memo. Contra (III.D); 7/10 Reh'g App. (III.B)	6/18 Entry
III.C	DEO allegedly failed to file R.C. 4909.43(B) prefiling notice for PIR Application	3/14 Mot. Dismiss (IV.A.1); 4/18 Reh'g App. (III.B, III.E); 6/6 Memo. Contra (III.C)	4/9 Entry; 5/28 Entry on Reh'g; 6/18 Entry
IV.A, IV.B	PIR Application allegedly does not satisfy the procedural requirements of R.C. 4929.05.	3/14 Mot. Dismiss (III.C); 6/6 Memo. Contra (III.A)	5/28 Entry; 6/18 Entry
IV.C.1	PIR Application allegedly is subject to and does not satisfy the rate-increase notice requirements.	3/14 Mot. Dismiss (III.A); 4/18 Reh'g App. (III.B, III.E); 6/6 Memo. Contra (III.B)	4/9 Entry; 5/28 Entry on Reh'g; 6/18 Entry

The common error underlying most of OCC's arguments, however and whenever raised, is that the PIR Application is for an increase in rates. This is so fundamentally and demonstrably *wrong* that OCC's repeated use of this premise as the springboard for its arguments defies explanation. The tariff proposed for approval in this case states an initial charge of $0.00 per month for all customers—that is, zero dollars and zero cents. Approval of this application will not result in the present increase of any rate, charge, fee, or bill by a single cent.

The other common error underlying OCC's arguments is that all applications R.C. 4929.05 must be treated as rate-increase applications. True, R.C. 4929.05 does state that a utility "may request approval of an alternative rate plan" as "part of an application filed pursuant to

section 4909.18 of the Revised Code." But OCC's conclusion that this language transforms all ALT cases into full-blown AIR cases ignores the unambiguous language of the statute.

R.C. 4909.18 provides for two kinds of applications: "for an increase in rates" *and* "not for an increase in any rate." The procedural requirements that OCC insists have been violated apply only to the former. The PIR Application does not propose a rate increase. As a procedural matter—so far as Chapter 4909 is concerned—if an application is "not for an increase in any rate," no hearing is even required. *See* R.C. 4909.18 ("If the commission determines that such application is not for an increase in any rate . . . , the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect.").

Only a couple items warrant any further discussion. DEO will address each in turn.

B. *Time Warner* is not on point.

Although OCC cited *Time Warner AxS v. Public Utilities Commission* (1996), 75 Ohio St.3d 229, in its March 14 Motion to Dismiss (*see* p. 14) and in its June 6 Memorandum Contra DEO's Motion for Approval of Legal Notice (*see* p. 9), it discusses that case for the first time in the current motion (*see* OCC Mot. at 20–21). According to OCC, *Time Warner* stands for the proposition that "[t]he Commission is precluded from crafting an after-the-fact solution to the fatal flaws in DEO's notice filings." (*Id.* at 20.) This is not true, and *Time Warner* is otherwise consistent with the Commission's handling of this case.

In *Time Warner*, the Supreme Court held that the Commission could not use alternative rate-setting methods under R.C. 4927.04 except "when [it] is reviewing an application filed pursuant to R.C. 4909.18 and 4909.19." 75 Ohio St.3d at 236. No application under R.C. 4909.18 or 4909.19 was ever filed in or otherwise made part of the proceeding. Because the issue was first raised by the Supreme Court sua sponte, *see id.* at 233, the Commission never took any steps to cure this flaw during the proceeding. Thus, to the degree *Time Warner* stands

for anything as to "crafting after-the-fact solution[s]" (OCC Mot. at 20), it is that it may be too late to craft such solutions *on appeal.*

Indeed, if anything, *Time Warner* supports the notion that the Commission may cure a non-compliant application "after the fact." There, the Court pointed out that "the commission never found or held that Ameritech's application was filed pursuant to R.C. 4909.18." *Id.* at 236. Here, the Commission has held that "the PIR case should be treated as an alternative rate plan and considered under the provisions of Section 4929.05, Revised Code." *See* Entry on Rehearing, ¶ 14 (May 28, 2008). And this holding was accompanied by the express observation that "such application[s must] be filed as part of an application under Section 4909.18." It is true that because "the PIR case has been consolidated with the rate case proceedings," the Commission found it "unnecessary . . . to consider whether the PIR application is or is not for an increase in rates." *Id.* ¶ 17.[2] But either way, it is implicit that the Commission is considering the PIR Application under R.C. 4909.18 and 4929.05. Given OCC's apparent appellate aims, it may be worthwhile to make this holding more explicit.

Thus, in two critical respects, *Time Warner* is not on point. There, a R.C. 4909.18 application was never filed in the proceeding; here, DEO did file one. And there, the Commission "never found or held" that the application was filed under R.C. 4909.18; here, one way or another, the Commission has made this finding and ordered DEO to supplement the application accordingly.

[2] Given that the PIR Application clearly is not proposing a present rate increase, there is no reason for the Commission to delay holding that it is considering the alternative rate plan application under R.C. 4909.18 as an application "not for an increase" in rates.

C. OCC's Position Would Effectively Bar the Commission from Consolidating Rate Cases with Any Later Filed Case.

OCC's arguments, if followed, would effectively deprive the Commission of any ability to consolidate any kind of case with an underway rate case. Implied throughout, this position is stated clearly at page 12 of its motion: "DEO's decision to consolidate the $2.6 billion PIR Application into the Rate Case Application, six months later, *nullified* the August 30 [Rate Case] Notice." (Emphasis added.) This proves far too much.

At its essence, this argument reduces to either of the following absurdities:

(a) A non-rate case, when consolidated with a rate case, retroactively invalidates the rate-case notice and hence the rate case itself.

(b) A non-rate case, when consolidated with a rate case, must retroactively satisfy all rate-case procedural requirements.

Understandably, OCC cites no authority for either proposition. And if either proposition was true, the Commission would be effectively denied the power to consolidate any case with an ongoing rate case—unless, that is, the applicant could either see the future (and include the future application in the rate-case notice) or travel backward in time (and amend the rate-case notice).

It would be odd indeed if the Commission's ability to consolidate were as limited as OCC makes it out to be. The decision to consolidate is a matter entrusted to the discretion of the Commission, and is subject to abuse-of-discretion review on appeal. *See, e.g., City of Cincinnati v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 168, 170 ("As a general rule, an administrative agency's decision to consolidate or not consolidate two or more proceedings is a matter of administrative discretion and does not affect the party's rights to due process."), *departed from on other grounds by City of Cleveland v. Pub. Util. Comm.* (1980), 63 Ohio St.2d 62. The

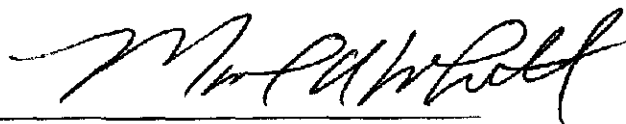
Commission acted well within its discretion to consolidate the rate case with other matters dealing with the prospective accounting treatment and potential recovery of certain costs.

At bottom, for all of its arguments about notice, OCC has failed to show that DEO did not satisfy a notice requirement applicable to the PIR Application. R.C. 4929.05 merely requires "notice." DEO gave actual notice to OCC, Ohio Partners for Affordable Energy, and the Citizens' Coalition at the time of filing and sent a detailed letter regarding the PIR Application to dozens of public officials on February 29, 2008. (*See* DEO Memo. Contra OCC Mot. to Dismiss, Exhibits A and B (Mar. 26, 2008).) These notices were given approximately four months before the deadline for intervention closed. The City of Cleveland, among others, intervened in the case following the issuance of these notices.[3] Further, as ordered by the Commission on June 18, 2008, DEO provided publication notice throughout its service territory. OCC lacks any credible argument that the notice requirements applicable to the PIR Application were violated.

III. CONCLUSION

For the reasons set forth above, DEO respectfully requests the Commission deny OCC's Motion to Dismiss in its entirety.

Respectfully submitted,



David A. Kutik
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

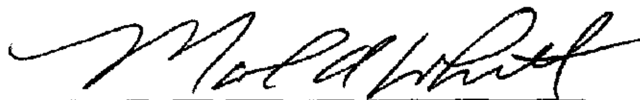
[3] The presence in this case of no less than *six* consumer groups, plus a city of nearly half a million—all of whom received notice from DEO and all of whom have filed objections in the case—further belies the notion this case presents any notice issue.

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
JONES DAY
325 John H. McConnell Blvd., Suite 600
P. O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
mawhitt@jonesday.com
ajcampbell@jonesday.com

ATTORNEYS FOR THE EAST OHIO GAS
COMPANY D/B/A DOMINION EAST OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Motion to Dismiss by the Office of the Ohio Consumers' Counsel on Behalf of the East Ohio Gas Company d/b/a Dominion East Ohio was sent by electronic mail to the following parties on this 28th day of July, 2008.



Mark A. Whitt

Interstate Gas Supply, Inc.
John Bentine, Esq.
Mark Yurick, Esq.
Chester, Wilcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213
jbentine@cwslaw.com
myurick@cwslaw.com

The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, The Cleveland Housing Network, and The Consumers for Fair Utility Rates
Joseph Meissner, Esq.
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
jpmeissn@lasclev.org

Office of the Ohio Consumers Counsel
Joseph Serio, Esq.
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
serio@occ.state.oh.us

Ohio Energy Group
David Boehm, Esq.
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@BKLlawfirm.com

Ohio Partners for Affordable Energy
David Rinebolt, Esq.
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com

Dominion Retail
Barth E. Royer
33 South Grant Avenue
Columbus, OH 43215-3927
barthroyer@aol.com

Industrial Energy Users-Ohio
Samuel C. Randazzo, Esq.
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com

Stand Energy Corporation
John M. Dosker, Esq.
General Counsel
1077 Celestial Street, Suite 110
Cincinnati, OH 45202-1629
jdosker@stand-energy.com

UWUA Local G555
Todd M. Smith, Esq.
Schwarzwald & McNair LLP
616 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114
tsmith@smcnlaw.com

Integrys Energy Services, Inc.
M. Howard Petricoff
Stephen M. Howard
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com

The Ohio Oil & Gas Association
W. Jonathan Airey
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
wjairey@vssp.com

Roberta Triozzi
City of Cleveland
Cleveland City Hall
601 Lakeside Avenue, Room 206
Cleveland, Ohio 44114-1077
RTriozzi@city.cleveland.oh.us
SBeeler@city.cleveland.oh.us

Stephen Reilly
Anne Hammerstein
Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
stephen.reilly@puc.state.oh.us
anne.hammerstein@puc.state.oh.us