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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**PUCO**

In the Matter of the Application of The )  
East Ohio Gas Company d/b/a Dominion ) Case No. 07-829-GA-AIR  
East Ohio for Authority to Increase Rates )  
For its Gas Distribution Service. )

In the Matter of the Application of the )  
East Ohio Gas Company d/b/a Dominion ) Case No. 07-830-GA-ALT  
East Ohio for Approval of an Alternative )  
Rate Plan for its Gas Distribution Service. )

In the Matter of the Application of the )  
East Ohio Gas Company d/b/a Dominion ) Case No. 07-831-GA-AAM  
East Ohio for Approval to Change )  
Accounting Methods. )

In the Matter of the Application of the )  
East Ohio Gas Company d/b/a Dominion ) Case No. 08-169-GA-ALT  
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. )

In the Matter of the Application of the )  
East Ohio Gas Company d/b/a Dominion ) Case No. 06-1453-GA-UNC  
East Ohio for Approval of Tariffs to )  
Recover Certain Costs Associated With )  
Automated Meter Reading and for Certain )  
Accounting Treatment. )

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**REPLY TO EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO'S  
MEMORANDUM CONTRA OCC'S  
MOTION TO DISMISS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 1, 2008

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## I. SUMMARY

On July 21, 2008, the Office of the Ohio Consumers' Counsel ("OCC") filed *its first and only* motion to dismiss ("Motion to Dismiss") East Ohio Gas Company d/b/a Dominion East Ohio's ("DEO" or "Company") August 30, 2007 Rate Case Application<sup>1</sup> and OCC's second motion to dismiss DEO's February 22, 2008 Pipeline Infrastructure Replacement Program ("PIR") Application.<sup>2</sup> On July 28, 2008, DEO filed a Memorandum Contra OCC's Motions to Dismiss<sup>3</sup> and in accordance with the timeframes ordered in the Hearing Examiner's May 28, 2008 Entry, OCC files this reply.<sup>4</sup>

The Company spends considerable time in its *Memo Contra* focusing on the number of motions OCC has filed "attacking" DEO's PIR Application.<sup>5</sup> OCC's motions have not attacked the substance of the PIR Application that are factual issues. OCC will address the factual issues (i.e. DEO's failure to complete a business case study or make a determination that there is an emergency necessitating a \$2.6 billion program to overhaul the entire system<sup>6</sup> to name two) during the hearing. What OCC has addressed in its

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<sup>1</sup> *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 et al., Application (August 30, 2007). ("Rate Case Application")

<sup>2</sup> *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, Application (February 22, 2008). ("PIR Application")

<sup>3</sup> *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 et al., 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 at 2 (July 28, 2008). ("Memo Contra")

<sup>4</sup> According to Ohio Adm. Code 4901-1-12(B)(2) and the Hearing Examiner's May 28, 2008 Entry, OCC's reply brief was due on Friday August 1, 2008. However, on Thursday July 31, 2008, one day before OCC's reply was due, the Commission issued an Entry that Denied OCC's July 21, 2008 Motions to Dismiss. Nonetheless, OCC is filing this reply as entitled by the Ohio Administrative Code and PUCO's May 28, 2008 Entry.

<sup>5</sup> *Memo Contra* at 2.

<sup>6</sup> *PIR Application* at 2. ("While DEO's pipeline system presently provides safe and reliable service. . . .")

motions<sup>7</sup> is DEO's failure to comply with the statutory requirements for a rate case under R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43(B).

It was DEO that made the decision on February 22, 2008, to consolidate the \$2.6 billion, 25-year PIR case -- one of the largest natural gas programs ever proposed to the PUCO-- with its \$75 million Rate Case, six months into the Rate Case. It was DEO's decision to file the PIR program so late and it was the Company's decision to consolidate it into the Rate Case. By consolidating the PIR Application into the Rate Case, DEO has created a Rate Case with five core components -- rather than the four core components proposed by the Company on August 30, 2007:<sup>8</sup>

1. DEO's request for authority to increase the rates and charges for natural gas distribution service;
2. The Company's request under R.C. 4929.05 to institute a sales reconciliation rider;
3. The Company's proposed Automated Meter Reading ("AMR") cost recovery charge;
4. The Company's proposed Gross Receipts Tax Rider;<sup>9</sup> and
5. The Company's request under R.C. 4929.05 for a \$2.6 billion PIR program.<sup>10</sup>

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<sup>7</sup> See *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, Motion to Dismiss at 15-17 (March 14, 2008); *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, Motion to Dismiss at 8-16 and 21-24 (July 21, 2008).

<sup>8</sup> *DEO Rate Case, Application, Volume 1 at 6 (August 30, 2007)*.

<sup>9</sup> *Rate Case, Application (August 30, 2007)*. (The AMR application was incorporated into the public notice by DEO even the Commission had not yet ruled upon DEO's Motion to Consolidate the AMR Application, Case No. 06-1452 into the rate case.)

<sup>10</sup> *DEO Rate Case, Entry at 8 (April 9, 2008)*. (The Commission granted DEO's motion to consolidate the PIR case with the Rate Case.)

Because the Commission granted DEO's Motion to Consolidate the PIR Application into the Rate Case,<sup>11</sup> DEO's PIR Application must meet the Rate Case statutory requirements of R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43(B). It has not.

DEO argues that the PIR Application is not for an increase in rates.<sup>12</sup> DEO further states that approval of the PIR Application will not result in the present increase of any rate, charge, fee, or bill by a single cent.<sup>13</sup> DEO refuses to acknowledge the reality that the PIR Application is a request for \$2.6 billion in increased base rates that will result in hundreds of millions of dollars in higher rates to be paid by consumers over the next 25 years.

Second, DEO argues that the Company was "merely require[d to give] notice" under the PIR notice requirements.<sup>14</sup> DEO's argument fails because the Company chose to consolidate the PIR Application into the Rate Case and the Rate Case public notice statutes require more than "mere notice." Revised Code statutes, 4909.18(E) and 4909.19 require the Company to publish the substance of the application.

In addition, DEO argues that the Company gave the appropriate notice to the public officials about the PIR Application.<sup>15</sup> Yet, DEO fails to recognize that the consolidation of the PIR Case into the Rate Case meant the PIR public official notice was no longer adequate.

Finally, in Section C of the *Memo Contra* the Company's blanket statements regarding OCC's position on the Commission's discretionary authority to consolidate

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<sup>11</sup> *Id.*

<sup>12</sup> *Memo Contra* at 6.

<sup>13</sup> *Memo Contra* at 4.

<sup>14</sup> *Memo Contra* at 8.

<sup>15</sup> *Memo Contra* at 8.

cases into existing rate cases badly mischaracterizes OCC's position. OCC's Motion to Dismiss only addresses situations where the consolidation of a case into an existing rate case would violate a statute. Under these circumstances OCC asserts that the Commission may not consolidate a case into an existing rate case when doing so would violate statutory obligations of the Company. In this case, the consolidation of the PIR Application into DEO's rate case violated the public notice statutes of R.C. 4909.18(E) and R.C. 4909.19 and the Statutory requirements to timely notify public officials under R.C. 4909.43(B). Under these circumstances the Commission does not have discretion to allow DEO to violate the law.

**A. DEO's PIR Application is a Request for an Increase in Rates to Customers and Must Comply with the Statutory Requirements of R.C. 4909.18.**

DEO continues to argue that the PIR Application is not "for an increase in rates."<sup>16</sup> The Company perpetuates its attempt at unreality for its customers and the other parties to this case by reiterating the argument that:

The tariff proposed for approval in this case states an initial charge of \$0.00 per month for all customers – this 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.<sup>17</sup>

DEO's argument is an unfortunate example of misleading rhetoric that disserves consumers who should be provided with the clearest, most accurate and transparent information about the higher rates that will result from the PIR proposal.

In reality, PUCO history teaches that the result of the initial supposed accounting case becomes the rate increase, with a \$2.6 billion at issue here. The Ohio Supreme

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<sup>16</sup> *Memo Contra* at 4.

<sup>17</sup> *Memo Contra* at 4.



Court has recently addressed an argument similar to that of DEO. In the *FirstEnergy* Case the Court found that accounting mechanisms -- similar to the arrangement proposed in DEO's PIR Application -- were in fact appealable orders, because customers had already been harmed by the Commission's actions:

The fact that subsequent orders may result in more direct effects does not mean that orders allowing accounting procedure changes are not final. Thus the Consumer' Counsel may argue in these appeals that customers have already been harmed by PUCO actions that she claims were unreasonable or unlawful.<sup>18</sup>

The Court's decision in the *FirstEnergy* cases recognized the reality of PUCO ratemaking – customers end up paying in rates what PUCO accounting orders allow to be booked as expenses. 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 in additional rate base.

Finally, DEO concedes in its *Memo Contra* that if the Commission -- or the Ohio Supreme Court -- makes the determination that DEO's PIR Application is "for an increase in rates" under R.C. 4909.18 that the Company had to file the Application as part of an application filed pursuant to section 4909.18 of the Revised Code.<sup>19</sup> Meaning the Company also concedes that once the decision is made that the PIR Application is for an increase in rates the procedural requirements of R.C. 4909.18(E) and R.C. 4909.19 apply.<sup>20</sup> At this point the Commission has not made a ruling regarding whether the PIR Application is or is not for an increase in rates.<sup>21</sup>

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<sup>18</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d, 384, 389.

<sup>19</sup> *Memo Contra* at 4-5.

<sup>20</sup> *Memo Contra* at 4-5.

<sup>21</sup> *DEO Rate Case*, Entry on Rehearing at 12 (May 28, 2008).

**B. DEO's Amendment of the Rate Case Six Months Into the Process Means the Public Never Received the Statutorily Required Public Notice.**

DEO spends a considerable amount of time in its *Memo Contra* justifying the Company's refusal to provide its customers with the *complete* facts about its Rate Case:

"The Commission has approved similar riders under less compelling circumstances."<sup>22</sup>

"R.C. 4929.05 merely requires 'notice.'"

"[DEO] sent a detailed letter regarding the PIR Application to dozens of public officials on February 29, 2008" – seven days after filing the PIR Application.

However, as currently before the Commission, DEO's Rate Case Application has five core components yet, to date DEO has **never included all five components in any one public notice.**

DEO filed its first request for approval of a public notice about the Rate Case almost one year ago (August 30, 2007), yet over the last year DEO has failed to provide a single notice to the public that includes all five components of the Rate Case. The Company outlined four of the five core components of the current Rate Case in the public notice that was approved by the Commission on October 24, 2007 and then the Company published a public notice strictly addressing the fifth core component, the PIR Application, as approved by the Hearing Examiner on June 18, 2008. This piecemeal attempt to provide notice to the public does not meet the requirements of R.C. 4909.18(E) or R.C. 4909.19. The closest the Company has come to publishing all five components of the Rate Case in one notice is the Company's May 30, 2008 PIR legal notice which stated:

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<sup>22</sup> *Memo Contra* at 2.

This [PIR] Application has been assigned Case No. 08-169-GA-ALT by the Commission, and the case has been consolidated for review with DEO's rate case proceedings in Case Nos. 07-829-GA-ALT...<sup>23</sup>

Once consolidated with the Rate Case DEO had to publish a public notice that met the requirements of R.C. 4909.18(E) and R.C. 4909.19. Specifically, R.C. 4909.18(E) set forth requirements relating to "fully disclosing the substance of the application." R.C. 4909.19 states that the "public utility shall forthwith publish the substance and prayer of such application in a form approved by the public utilities commission." The May 30, 2008 legal notice failed to meet these statutory requirements.

DEO has recognized the fact that R.C. 4909.18(E) and R.C. 4909.19 require an applicant to include the substance of the Application in the rate case public notice. In the Company's Reply to OCC's Memorandum Contra Motion for Approval of a Legal Notice by DEO, the Company improperly attempts to distinguish the facts in this case from its statutory notice requirements by stating:

As an initial matter, OCC assumes that R.C. 4909.18(E) and R.C. 4909.19 govern DEO's [PIR Application] notice. Although OCC is incorrect to rely on these statutes (they only govern rate-increase applications), it makes no difference, as DEO's [PIR Application] notice satisfies these statutes as well.

The proposed notice under R.C. 4909.18 need only convey the 'substance' of the application and the notice published pursuant to R.C. 4909.19 need only contain the 'substance and prayer' of the application....

...

Substance" simply means "the essence of something." Black's Law Dictionary 1442 (7<sup>th</sup> ed. 1999).... The substance, or essence,

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<sup>23</sup> PIR Application, Case No. 08-169-GA-ALT, Legal Notice of Application for Approval of a Pipeline Infrastructure Replacement Cost Recovery Charge filed on behalf of The East Ohio Gas Company dba Dominion East Ohio at 1 (May 30, 2008).

of the PIR Application is for approval of a mechanism to recover in the future infrastructure-related investments, which is precisely what the notice discloses.<sup>24</sup>

While OCC disputes DEO's position that the PIR Application described the substance of that program – particularly without clearly stating the \$2.6 billion price tag that DEO's consumers ultimately will be saddled with – there can be no dispute that under DEO's definition the Company's failure to include the PIR Application into the Rate Case public notice means that notice did not include the “essence” or the “substance” of the current Rate Case. This fact has not been lost on members of the public. Recently, an editorial comment in the Cleveland Plain Dealer made this point.<sup>25</sup>

The Company is statutorily obligated to publish a public notice that incorporates the substance of the entire rate case application. The Company has never done this.

Yet, despite the Company's incomplete attempts at providing notice to the public the Company asserts that it has complied with the notice requirements for the Rate Case Application.<sup>26</sup> Although the Company has submitted two public notices that have been approved by the Commission in this case, one for the Rate Case<sup>27</sup> and one for the PIR Application,<sup>28</sup> the consolidation of the PIR Application into the Rate Case Application has resulted in a situation where customers have not yet received a notice that

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<sup>24</sup> *DEO Rate Case*, Reply to the Memorandum Contra Motion for Approval of Legal Notice of OCC at 4-5 (June 9, 2008).

<sup>25</sup> The Cleveland Plain Dealer Newspaper, Editorial Section, “PUCO must hold its public hearings on rate increase when members of the public can actually attend” (July 27, 2008).

<sup>26</sup> *Memo Contra* at 8.

<sup>27</sup> *DEO Rate Case*, Application, Volume 1, Schedule S-3 at 120-122 (August 30, 2007).

<sup>28</sup> *DEO Rate Case*, Motion for Approval of Legal Notice (June 2, 2008).

incorporates the substance of the five core components of the Rate Case Application.

Because customers have not received such a notice, the requirements of R.C. 4909.18(E) and R.C. 4909.19 have not been fulfilled and the Commission should dismiss the current consolidated Rate Case Application.

**C. DEO's Only Letter to the Affected Public Officials that Addressed the PIR Application Failed To Include the Other Four Core Components of the Consolidated Rate Case.**

In its *Memo Contra*, DEO insinuates that the Company met the notice requirements for the PIR Application by, in part, by sending a detailed letter to the effected public officials "at the time of filing [the PIR Application]."<sup>29</sup> However, what DEO failed to address was the fact that DEO's decision to consolidate the PIR Application into the Rate Case Application also resulted in DEO's failure to comply with the associated notice provisions of R.C. 4909.43 for a Rate Case Application. R.C. 4909.43(B) 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.**<sup>30</sup>

Without addressing the requirements about the timing of the notice again, DEO still has never sent notice to the public officials with all five components of the Rate Case included. Thus, sending a letter to the public officials – one that did not discuss all five components of the Rate Case – does not meet the statutory requirements of R.C. 4909.43(B).

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<sup>29</sup> *Memo Contra* at 8.

<sup>30</sup> R.C. 4909.43(B) (Emphasis added.)

**D. The Commission Does Not Have Discretion to Allow DEO to Consolidate the PIR Application Into the Rate Case When Doing So Violated State Law.**

DEO's *Memo Contra* mischaracterizes OCC's position regarding the Commission authority to consolidate cases into existing rate cases and should be disregarded by the Commission. The Company states:

At its essence, [OCC's] 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.<sup>31</sup>

The Company's misstates the situation at hand. OCC has only made the assertion that that the Company may not consolidate a case into an existing rate case where doing so would violate a statutory requirement. By consolidating the PIR Application into the Rate Case without publishing a timely comprehensive public notice that contains the entire substance of the Rate Case Application, DEO has failed to comply with the statutory requirements of R.C. 4909.43(B) for notice to public officials and R.C. 4909.18(E) and R.C. 4909.19 for the notice requirements to the public. What DEO characterizes as an "absurdity" is in reality the law of Ohio—a law that has the non-absurd and well founded objective of including the public in the PUCO's state regulatory process. The Commission does not have discretion to allow DEO to violate statutory requirements.

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<sup>31</sup> *Memo Contra* at 7.

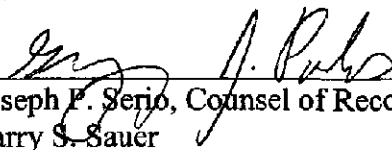
It should be recognized that DEO is attempting to shoehorn a \$2.6 billion 25-year pipeline replacement Application into an existing Rate Case, six months after the Rate Case was filed and three months after the public was notified about the Rate Case. It does not fit, under Ohio law. R.C. 4909.18(E), R.C. 4909.19 and R.C. 4909.43(B) are written to require any substantive aspect of the Rate Case to be publicly identified in one comprehensive note and that has not been done in this case. DEO's failure to include the PIR Application as part of a comprehensive Rate Case Application public notice precluded customers from having the statutorily required opportunity to participate that is provided under R.C. 4909.18(E) and R.C. 4909.19. Therefore, the Rate Case Application must be dismissed.

## **II. CONCLUSION**

Ohio's ratemaking statutes require that the public receive proper notice as part of any utility request to increase rates. Statutory requirements and Ohio Supreme Court precedent specifically require that highly controversial and material changes should be included in any notice to customers and public officials for a proposed rate increase. DEO's customers and their public officials have never received notice of the current consolidated rate case which includes a controversial and material change in the form of the \$2.6 billion PIR Application. Therefore, the Commission should dismiss the current consolidated Rate Case Application because it has failed to adhere to the statutory requirements.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing *Reply to DEO's Memorandum Contra OCC's Motion to Dismiss by the Office of the Ohio Consumers' Counsel* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 1<sup>st</sup> day of August, 2008.

  
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