

FILE

**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
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 JOINT ADVOCATES'
JOINT MOTION TO STRIKE
OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

I. INTRODUCTION

In response to the Memorandum Contra the Joint Advocates' Joint Motion to Reopen the Record, etc., filed by The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO"), the Joint

Advocates filed a Motion to Strike. For the reasons set forth below, the Motion to Strike should be denied and the Commission should consider DEO's Memorandum Contra in ruling on the Motion to Reopen the Record.¹

II. ARGUMENT

A. The March 2008 Procedural Entry Should No Longer Apply to Motions Filed in these Proceedings.

The Joint Advocates' sole argument for striking DEO's Memorandum Contra the Motion to Reopen is that it was untimely pursuant to an eleven-month-old procedural entry. (Mot. to Strike, pp. 2–3.) The Commission should reject this argument. This proceeding has concluded, and the final order has been appealed. Thus, the generally applicable response times set forth in the Commission's rules should apply to the Motion to Reopen and any other motions made in this docket, not a modification to those rules made when the case stood in a manifestly different procedural posture.

On March 19, 2008, the Commission found "that good cause exist[ed] to modify" the generally applicable deadlines for responding to motions. *See* Entry ¶ 5 (Mar. 19, 2008) ("Entry"). In finding good cause, the Commission cited only three facts. First, it noted that DEO had filed its application for a rate increase on August 30, 2007, *id.* ¶ 1, nearly eight months before the Entry. Second, it noted that DEO had moved in February to consolidate the rate-case application with its pipeline infrastructure replacement ("PIR") application. *Id.* ¶ 2. Lastly, it noted that two motions had been filed on March 14, 2008, including a Motion to Dismiss the PIR application by the Office of the Ohio Consumers' Counsel ("OCC"). *Id.* ¶ 3. These motions had

¹ The Joint Advocates also filed a Reply to DEO's Memorandum Contra. Because the Commission's rules do not provide for surreply, DEO will make no response to the Reply. DEO's silence on any issues discussed in the Reply should not be construed as acquiescence or agreement.

been filed only five days before the Entry. Having set forth these facts, the Commission found good cause to reduce the response time for motions from 15 days to 7 days.

While it was not expressly stated, the reduction in response time appeared to be driven by a specific confluence of circumstances: DEO's application had been pending for eight months—and at the time without issuance of the Staff Report²—and was now subject to a motion that, if granted, potentially could have required restarting or substantially delaying the entire application process. (*See, e.g.*, OCC Mot. to Dismiss, pp. 17, 19 (arguing that rate-case notice statutes would be violated by consolidation; alternatively arguing that “the Commission should toll the rate case application”). Under these circumstances, the Commission justifiably found good cause to reduce the response time for motions. Time was of the essence.

This is no longer true. As evidenced by the Notices of Appeal filed by OCC and others, the proceeding before the Commission has concluded, including any opportunity for rehearing. The justification for reduced response times no longer exists. The March 2008 Entry should no longer control the filing of responses in this case. Because DEO's pleading was filed in compliance with the deadlines set forth in Rule 4901-1-12, it should be considered timely.

B. Even If the Entry Controls, the Commission Should Waive the Requirements of that Entry and Consider DEO's Pleading.

Even if the response times that were effective before the hearing in this case continue to control motions filed in this docket after the final order has gone up on appeal, the Commission nevertheless may—and should—waive the response time set by the Entry and consider DEO's Memorandum Contra.

² Review of recent rate case dockets at that time showed that Staff Reports were typically issued about five months after the filing of the application. *See, e.g.*, Case Nos. 07-689-GA-AIR (Suburban Natural Gas); 07-589-GA-AIR (Duke Energy Ohio); 05-824-GA-AIR (Pike Natural Gas); 04-1779-GA-AIR (Eastern Natural Gas); 04-571-GA-AIR (Vectren Energy Delivery of Ohio); 01-1228-GA-AIR (Cincinnati Gas & Electric).

The Commission clearly *may* do so. In contrast with the provisions governing rehearing, no statute sets response times for general motions, and procedural matters are entrusted by statute to the discretion of the Commission. *See, e.g.,* R.C. 4901.13 (“The public utilities commission may adopt . . . rules to govern its proceedings”); *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St.3d 15, 19 (“Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings.”). Among other things, the rules adopted by the Commission provide that it may set (and waive) response times for motions. *See* Ohio Adm. Code, Rule 4901-1-12(B)(1) (“Any party may file a memorandum contra within fifteen days after the service of a motion, *or such other period as the commission . . . requires.*”) (emphasis added); *id.* 4901-1-38(B) (“The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.”). Thus, the Commission may consider DEO’s pleading. Good cause to do so exists for two reasons.

First, the Joint Advocates have shown no prejudice. Nowhere in their Motion to Strike do the Joint Advocates explain how they were prejudiced by DEO’s compliance with the generally applicable rules. Even under the Entry’s response times, they were able to timely file a Reply to DEO’s pleading. Notably, however, they failed to identify any argument they were prevented from developing, any research they were prevented from conducting, or any evidence they were prevented from adducing by DEO’s purportedly late filing. If such problems *had* been presented by DEO’s pleading, the appropriate course would have been to contact the parties and file an expedited motion for an extension of time. The Joint Advocates, perhaps sensing a potential technicality in their favor and an opportunity to avoid the merits, did none of these things and simply moved to strike. Because DEO’s compliance with the general response time

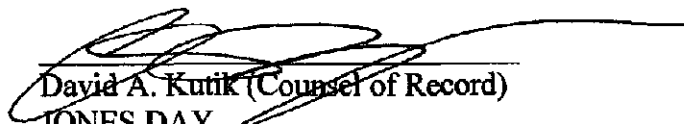
has not prejudiced the Joint Advocates, good cause exists to waive the Entry's requirement (if applicable) and consider DEO's pleading.

Second, the primary argument raised by DEO in its pleading goes to the jurisdiction of the Commission. (See Memo. Contra Mot. to Reopen, pp. 2-5.) Thus, even if DEO had filed out of time and even if the Joint Advocates had been gravely prejudiced, the Commission nevertheless would be required to take into account whether it has jurisdiction to consider the January 29, 2009 Motion to Reopen. It cannot "ignore" whether it has jurisdiction, despite the Joint Advocates' invitation. (See Mot. to Strike, p. 3.) The parties cannot, by act or omission, infuse the Commission with power to consider an untimely application for rehearing. Therefore, at the very least, the Commission must consider the arguments DEO raised regarding the Commission's jurisdiction in the Memorandum Contra the Motion to Reopen.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Joint Advocates' Motion to Strike.

Respectfully submitted,

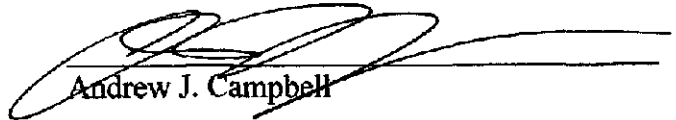

David A. Kutik (Counsel of Record)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

Andrew J. Campbell
Grant W. Garber
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
ajcampbell@jonesday.com
gwgarber@jonesday.com

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra of The East Ohio Gas Company d/b/a Dominion East Ohio was delivered to the following persons by electronic mail this 19th day of February, 2009.



Andrew J. Campbell

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

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

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

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

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

Integrus 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

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

Robert 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