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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) Case No. 07-829-GA-AIR
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 East) Case No. 07-830-GA-ALT
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 East) Case No. 07-831-GA-AAM
Ohio for Approval to Change Accounting)
Methods.)

- 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) Case No. 08-169-GA-ALT
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 East)
Ohio for Approval of Tariffs to Recover)
Certain Costs Associated with a Automated) Case No. 06-1453-UNC
Meter Reading Deployment through an)
Automatic Adjustment Clause, And for)
Certain Accounting Treatment.)

MOTION TO STAY IMPLEMENTATION OF RESIDENTIAL STAGE 2 TARIFFS;
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
THE CITY OF CLEVELAND,
THE NEIGHBORHOOD ENVIRONMENTAL COALITION,
THE EMPOWERMENT CENTER OF GREATER CLEVELAND,
CLEVELAND HOUSING NETWORK,
THE CONSUMERS FOR FAIR UTILITY RATES,
AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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The Office of the Ohio Consumers' Counsel ("OCC"), the City of Cleveland, a citizens coalition comprised of the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumers for Fair Utility Rates ("Citizens Coalition"), and Ohio Partners for Affordable Energy ("OPAE") (collectively "Joint Consumer Advocates"), moves, pursuant to Ohio Adm. Code 4901-1-12, to stay the Public Utilities Commission of Ohio ("Commission" or "PUCO") Opinion and Order ("Order") implementing the Stage 2 Tariff Rate General Sales Service ("GSS") and Energy Choice Transportation Service ("ECTS") GSS and ECTS together ("Tariffs"), as submitted by The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "the Company") in response to the Commission's Order of October 15, 2008.¹

The PUCO should stay the implementation of these Stage 2 Tariffs to avoid irreparable harm to consumers and above all else, to serve the public interest in conservation and protecting Ohio's low-income customers during these especially difficult economic times. Moreover, the stay will protect consumers who were denied adequate notice and due process of this rate increase.²

Therefore, in order to prevent irreparable harm to DEO's 1.2 million residential customers and to properly realign DEO's rate design with the public interest, the Joint Consumer Advocates respectfully request that the Commission grant this Motion to Stay of Stage 2 rates during the appeal of this case.³ In order to protect DEO's residential consumers, Joint Consumer Advocates seek a stay at the PUCO (and likely will also seek a stay from the Court). These

¹ Entry at 2 (March 19, 2008) (OCC is not seeking an expedited ruling because the Attorney Examiner established an expedited schedule for the filing of Memorandum Contra of seven days.)

² Order at 14 (GSS/ECTS fixed monthly customer charge will increase from \$12.50 (Year 1 or Stage 1) to \$15.40 (Year 2 or Stage 2) (October 15, 2008).

³ *OCC v. PUCO*, S.Ct. Case No. 08-1837 (September 16, 2008)..

pleadings must be acted upon before the Stage 2 rate is scheduled to go into effect in October 2009. The reasons for granting the Joint Consumer Advocates' Motion are further set forth in the attached Memorandum in Support.

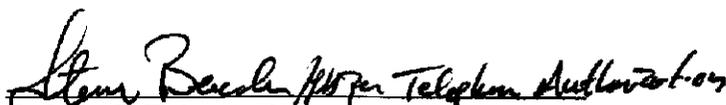
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**BEFORE
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In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service.))))	Case No. 07-829-GA-AIR
In the 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-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 a Automated Meter Reading Deployment through an Automatic Adjustment Clause, And for Certain Accounting Treatment.))))))))	Case No. 06-1453-UNC

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 15, 2008, the Commission issued an Order which included the approval of a modified residential rate design subject to the filing and approval of tariffs. The Commission's modifications include tariffs which employ a straight-fixed variable ("SFV") rate design. A number of parties, including DEO, OCC, PUCO Staff, City of

Cleveland (“City”), the Citizens Coalition⁴ and Ohio Partners for Affordable Energy (“OPAE”) among others reached a settlement agreement on most issues with the exception of DEO’s rate design and the customer notice. This settlement agreement was not opposed by the other parties to the proceeding. The Order approved the settlement agreement without modification. The Order ruled on the remaining issues of rate design and notice, finding that an SFV rate design should be implemented as part of a two-stage process. The Order also concluded that the customer notice of the resulting SFV rate design substantially complied with the applicable statutes.⁵

On November 14, 2008, the Joint Consumer Advocates applied for rehearing of the October 15, 2008 Order issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”). Through this Joint Application for Rehearing, the Joint Consumer Advocates sought to protect DEO’s residential consumers from the consequences of the SFV rate design ordered by the Commission.

The Joint Application for Rehearing by the Joint Consumer Advocates asserted the following:

- A. The Commission erred when it failed to comply with the requirements of R.C. 4903.09, and provide specific findings of fact and written opinions that were supported by record evidence.
- B. The Commission erred by approving a rate design for a two-year transition period without establishing R.C. 4909.18 and R.C. 4909.19 as governing the process for determining the rate design that will be implemented after the two-year transition period.
- C. The Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without

⁴ The Citizens Coalition consisted of: Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumers for Fair Utility Rates.

⁵ Order at 27 (October 15, 2008).

providing consumers adequate notice of the SFV rate design pursuant to R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43.

- D. The Commission erred by approving an SFV rate design that discourages customer conservation efforts in violation of R.C. 4929.05 and R.C. 4905.70.
- E. The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.

On December 19, 2008, the Commission denied the Joint Consumer Advocates Application for Rehearing. Because the rejected Joint Application for Rehearing presents the very real possibility of irreparable harm to residential consumers, and involves issues of public interest, the Joint Consumer Advocates now respectfully request that the PUCO grant the Motion to Stay the approval and implementation of the Stage 2 GSS and ECTS Tariffs submitted by DEO.

On January 29, the Joint Consumer Advocates filed a Joint Motion to Reopen the Record in which the PUCO considered a distribution rate increase for DEO. The Commission was asked to reopen the record for the limited purpose of taking additional evidence in the form of the updated cost-of-service study ("COSS") that DEO filed with the PUCO on January 13, 2009. The PUCO has not yet ruled upon that Joint Motion.

Residential consumers will be irreparably harmed during the appeal process if Stage 2 rates are implemented. The public interest is best served by protecting consumers during the appellate processes; thus, the PUCO should grant this Motion to Stay the implementation of the Stage 2 rates. Instead of permitting Stage 2 rates to go into effect in October 2009, as proposed and approved by the Commission, the PUCO should rule that Stage 1 rates will remain in effect until the final adjudication of the appeal of this matter.

II. STANDARD OF REVIEW

Factors or “standards” that may be employed to evaluate a Motion to Stay were presented by Ohio Supreme Court Justice Douglas in a dissenting opinion in *MCI Telecommunications Corp. v. Public Utilities Commission* (1987):

These standards should include consideration of whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, where lies the interest of the public.⁶

Although these standards have not been adopted by the Ohio Supreme Court, the PUCO has relied upon these factors for determining whether to grant a stay of its own order.⁷

When these factors are applied to the circumstances in this case, it is clear that the PUCO should stay the implementation of DEO’s Stage 2 GSS and ECTS Tariffs. The arguments are set forth in detail below.

III. ARGUMENT

A. The Public Interest Lies In Encouraging Customers To Reduce Individual Household Usage.

In a dissent in the Supreme Court case in which Justice Douglas recommended standards for a stay of a PUCO decision, he noted that PUCO Orders “have effect on everyone in this state -- individuals, business and industry.”⁸ That effect on customers is more pronounced given the well documented economic challenges in DEO’s service

⁶ *MCI Telecommunications Corp. v. Public Utilities Commission* (1987), 31 Ohio St.3d 604, 606, 510 N.E.2d 806.

⁷ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009).

⁸ *MCI*, 31 Ohio St.3d at 606.

territory where customers can ill afford increases in the essential services such as utilities in general, and the supply of natural gas fuel in particular.⁹ It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is “above all in these types of cases, where lies the interest of the public” and that “the public interest [] is the ultimate important consideration for this court in these types of cases.”¹⁰

The difficult economic times also serve to highlight the fact that, as pointed out in the Application for Rehearing, through the SFV rate design, low-use, low-income residential customers will subsidize larger, high-use commercial and industrial customers.¹¹ This is certainly not in the public interest. This stay would provide some relief to customers who are already burdened by the fragile state of the economy by allowing them to continue to pay Stage 1 rates, which include a greater volumetric charge and a smaller fixed customer charge -- a general configuration that more appropriately aligns the bill with the customer’s usage. A stay; therefore, would further the public interest.

In addition, the state policy encouraging conservation and energy efficiency efforts is contradicted by the Stage 2 rates -- rates that have a high customer charge with a greatly reduced volumetric rate. The language of R.C. 4929.02(A)(4) encourages “innovation and market access for cost-effective supply and demand side natural gas services and goods.” This policy is undermined by the SFV rate design’s emphasis on removing DEO’s disincentive to promote conservation and demand side management,

⁹ DEO Ex. No.1.1 (Murphy Direct Testimony) at 21-22 (September 13, 2007).

¹⁰ *MCI*, 31 Ohio St.3d at 606.

¹¹ Joint Application for Rehearing at 9. See also, Joint Motion to Reopen the Record at 5-7 (January 29, 2009).

rather than providing DEO's residential customers with the necessary price signals that would encourage energy efficiency investments such as the purchase of insulation and other conservation retrofits. The Stage 2 rates further exacerbate this impact.

Furthermore, the recent developments in high-efficiency furnaces and set-back thermostats -- which promote conservation and energy efficiency -- were innovations that were provided "market access" because individual consumers were motivated by the effort to conserve and more efficiently utilize purchased fuel. The price signal from an SFV design discourages individual conservation, because it extends the payback period for conservation and efficiency retrofits and compromises their overall cost-effectiveness. Again, the Stage 2 rates would further extend the payback period and reduce the positive impact of conservation measures on customers' bills.

In addition to being contrary to state policy, discouraging energy conservation means the PUCO is also out of compliance with R.C. 4905.70, which charges the Commission with encouraging these kinds of retrofits and innovations. The SFV rate design reduces the demand for energy conservation retrofits and energy efficiency innovations will be reduced in the DEO service territory by the Commission's approval of the SFV design utilized in the Stage 2 rates. Therefore, the Joint Consumer Advocates' Motion to Stay the approval of the Stage 2 rates should be granted because it is in the public interest.

B. Irreparable Harm will be Suffered by Residential Customers In the Absence of Action by the Commission.

Harm is irreparable "when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be

‘impossible, difficult, or incomplete.’¹² In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect, to determine whether to stay the proceedings.¹³ In the case before the Commission the harm caused by permitting Stage 2 rates to be implemented is irreparable in a number of respects. Irreparable harm will exist because for certain customers, such as low-income low-usage customers, rate collections will increase under Stage 2 and the Commission will likely rule that Ohio law does not permit refunds for such an overpayment.

Another example of irreparable harm from implementing Stage 2 rates flows from the fact that Stage 2 rates as structured will cause customers to forego or limit conservation efforts. The lost opportunities for conservation cannot be remedied.

Further, with the implementation of Stage 2 rates, low-usage customers may migrate off of DEO’s distribution service by switching to alternative fuel. The loss of customers is irreparable harm. Irreparable harm is also found here because the hearing process itself was fundamentally flawed due to lack of notice. Finally, the Company’s updated cost of service study demonstrates the irreparable harm to residential customers who are being asked to subsidize certain Commercial and Industrial customers. These arguments are discussed in detail below.

1. **The PUCO would likely rule that Ohio law does not permit the Commission to refund any overpayment of rates later found by the Ohio Supreme Court to be unjust and unreasonable, in the absence of a stay or rates being collected subject to refund. An**

¹² *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App. 3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App. 3d 1, 12, appeal dismissed, 78 Ohio St.3d 1419 (1997).

¹³ See, e.g., *Tilberry v. Body* (1986), 24 Ohio St.3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St.3d 158, 161.

example of the harm related to this result is the overpayment of rates by low-income low-usage customers.

The Commission should stay the implementation of the Stage 2 GSS and ECTS rates because there is no remedy at law for consumers if the Stage 2 rates are ultimately found to be unjust and unlawful. DEO's Stage 2 rates are to take effect on October 2009. It is possible or likely that these rates could go into effect prior to a resolution by the Ohio Supreme Court on an appeal. The aforementioned harm caused by implementing Stage 2 rates will be irreparable for consumers such as low-income low-usage customers. These customers in particular will be irreparably harmed because under the Stage 2 rates they will be paying increased fixed customer charge and a reduced volumetric charge; therefore, even if their usage is unchanged their bill will increase despite the fact that their use is minimal. Given the PUCO's likely adverse ruling against any future opportunities for refunds, there will not be an opportunity for a refund of these rates, if the Joint Consumer Advocates were to prevail on appeal.

The Ohio Supreme Court expressed this principle in its landmark holding in *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957). The Supreme Court limited retroactive ratemaking, according to its interpretation of R.C. 4905.32:

Under this section a utility has no option but to collect the rates set by the Commission and is clearly forbidden to refund any part of the rate collected.¹⁴

Without a stay, the implementation of the Stage 2 GSS and ECTS rates would cause DEO's residential customers to suffer irreparable harm even if the Joint Consumer

¹⁴ *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, (1957), 166 Ohio St. 254, 257. If the PUCO denies a stay, then Movants reserve their rights to later argue that there is no bar to a refund of the amounts, such as in the event the Court overturns the PUCO's decision.

Advocates were to prevail on appeal. Therefore, the PUCO should protect the Company's residential customers from this harm and grant the Joint Consumer Advocates' Motion to Stay the implementation of these tariffs.

2. Irreparable harm will result from lost opportunities for customers to conserve.

Under Stage 2 rates, customers will be burdened by a fixed \$15.40 unavoidable customer charge and a reduced volumetric charge. This rate structure will not encourage energy conservation, and may in fact provide customers an incentive to use more gas because the average cost per unit will decrease as a customer uses more than the average volume of gas.¹⁵ Under Stage 2 rates, customers lose certain tools to reduce their gas bill. No matter how little gas a customer uses or how great their conservation efforts are, the fact remains that their distribution bill will not go down.

Customers will begin making choices about their gas service -- choices of whether to engage in conservation and choices about alternatives to paying a large customer charge when their usage is low. Customers may determine not to pursue energy efficiency programs or implement energy efficiency measures, because the new rate structure provides them fewer opportunities to reduce their bills. Customers may also discontinue using energy efficiency measures if the rate structure implemented makes it less attractive to them. Certainly conservation is much less attractive if no matter how much you conserve, you do not achieve the type of reductions in your gas bill that you previously achieved -- or more importantly the type of reductions that you thought you would achieve based on the state policy encouraging conservation. The opportunities for

¹⁵ Transcript cite from public testimony where witness said this.

conservation and the ensuing savings on customers' bills are opportunities that will be lost if a stay is not granted. It is impossible to reach back and achieve the energy conservation and savings that would have been implemented and achieved by customers under a different set of rates.

3. The SFV rate design may force low-use customers to migrate off the system, and cause irreparable harm to remaining customers who will have responsibility for system costs that are recovered from those remaining customers.

The SFV rate design may also cause low-usage customers to drop off the system for periods of time or permanently.¹⁶ Residential customers, primarily low-usage customers, may opt to discontinue service for non-winter heating season months or possibly altogether if a stay is not granted maintaining the current rate structure. Low-use, low-income customers may determine that the significantly higher fixed customer charge is too great a price to pay to have gas service. Even low use higher income customers may reach the same conclusion. The potential loss of customers would place an even greater burden on remaining customers who might then become responsible for the recovery of the costs associated with the facilities and fixed costs used to serve those customers no longer taking gas service. It would be impossible to undo the harm from such losses.

4. Lack of due process constitutes irreparable harm.

Inasmuch as DEO did not file for the SFV rate design, neither of its notices to consumers could, and did not, mention the proposed SFV rate design, and its impact and implications for customers, and are thus deficient and fatally inadequate. Because of this

¹⁶ OCC Initial Brief at 2 (September 10, 2008); See also, OCC Ex. No. 21 (Radigan Direct Testimony) at 12-13 (June 23, 2008).

inadequacy, customers were denied their fundamental opportunity to be heard -- they were not made aware of the proposed changes in the rate design, and thus were unable to determine whether to participate in the hearing. This is a denial of their due process rights, guaranteed by the 14th amendment to the U.S. Constitution, and reinforced under R.C. 4909.18 and R.C. 4909.19.

The notice requirements for an application for a traditional rate case and for an alternative regulation case can be found under R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43. In this case, the Company failed to provide consumers notice with sufficient detail of the residential rate design as approved by the Commission. R.C. 4909.18 provides that, unless otherwise ordered by the Commission, the public utility must file, along with its application to the Commission, “[a] proposed notice for newspaper publication fully disclosing the substance of the application.” And, irrespective of whether the utility is required to file such notice with the Commission, R.C. 4909.19 provides that the utility must publish once a week for three consecutive weeks in newspapers of general circulation throughout the affected areas **the substance and prayer of its application.**¹⁷ Instead of such a notice, DEO provided the following notice to the mayors and legislative authorities of each municipality pursuant to R.C. 4909.43:

As customer usage declines, base rates would be adjusted automatically to keep our base rate revenues per customer the same. Customers would still gain all of the benefits of reduced gas costs, which comprise over three-fourths of a typical customer's bill.¹⁸

¹⁷ R.C. 4909.19 (emphasis added).

¹⁸ PFN at Tab 5 (July 20, 2007).

This notice describes a rate design that features a decoupling mechanism with annual true-ups which is substantially different than the residential SFV rate design that the Commission approved in its Order.¹⁹

In addition, and as noted in the Joint Application for Rehearing, the notice fails to comply with two required components established by the Ohio Supreme Court that must be met in order for the notice to be considered adequate.²¹ First, the notice did not “fully [disclose] the essential nature or quality” of the application.²² This failure occurred because the notice did not reveal the extent of the increase to the fixed monthly customer charge to be borne by customers in the GSS or ECTS Tariffs. Therefore, the Court’s requirement of full disclosure was not satisfied due to the deficiency of the notice.

The second component established by the Court is that the notice must be understandable and the proposal must be in a format “that consumers can determine whether to inquire further as to the proposal or intervene in the rate case.”²³ Again, as pointed out in the Joint Application for Rehearing, the straight-fixed variable rate design is a dramatic departure from the rate design employed by utilities over the past thirty years.²⁴ Thus the notice failed to comply with the statutory requirements of R.C. 4909.18 and R.C. 4909.19 and failed to meet standards adopted by the Ohio Supreme Court.

Because of the inadequate notice, customers could not determine whether to participate in the process, whether by comment or intervention. The fundamental

¹⁹ Order at 25.

²¹ Joint Application for Rehearing at 24 (November 14, 2008).

²² *Ohio Assoc. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St.2d 172, 176.

²³ *Id.* at 176.

²⁴ Joint Application for Rehearing at 35.

requisite of procedural due process of law is the opportunity to be heard.²⁵ Procedural due process for individuals is a constitutional right protected by the Fourteenth Amendment. The opportunity to be heard can have no meaning, however, if one is not informed of the issues in contention and consequently can not make a decision as to whether to challenge or object to the matter.²⁶

Since DEO's notice did not sufficiently inform its customers of the issues in contention, DEO's customers were unable to make a decision as to whether to challenge or object to the matter. Customers' opportunity to be heard could not be assured under such circumstances. Consequently, customers' rights to procedural due process in the form of an opportunity to be heard were violated.

Some courts have judiciously ruled that when the process is flawed or biased, this may be sufficient to warrant injunctive relief, if events subsequent to the process produce irreparable harm.²⁷ Similar circumstances exist in this case. The lack of adequate notice under R.C. 4909.18 and R.C. 4909.19 caused the hearing process undertaken to be flawed. DEO customers were not given sufficient information to determine the impact of the proposed rate design on their individual bills. Therefore, the implementation of the Stage 2 rates, which are the result of a proceeding in which due process was violated due to inadequate notice, will result in irreparable harm to DEO's residential customers.

²⁵ *Grannis v. Ordean*, 234 U.S. 385, 394, 43 S. Ct. 779, 784 (1914), citing *Louisville & N.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900); *Simon v. Craft*, 182 U.S. 427, 436 (1901).

²⁶ See for example *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652 (1950), where the Court noted that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

²⁷ *United Church of the Medical Center v. Medical Center Commission*, 689 F.2d 693, 701.

5. DEO's updated cost of service study articulates the irreparable harm suffered by DEO's residential customers who are asked to subsidize certain commercial and industrial customers.

On January 13, 2009, DEO filed its updated COSS, as Ordered by the PUCO.²⁸

The updated COSS showed that the GSS class is comprised of non-homogenous residential and non-residential (Commercial and Industrial) consumers with widely varying usage. In the test year under the traditional rate design, the residential GSS customers were providing slightly less than the overall return and the non-residential GSS customers were providing a slightly higher relative return.

However, under the SFV rate design that differential is reversed, in year one, where the residential GSS customers' rate of return increases to 8.13% and the non-residential GSS customers' rate of return plummets to 6.13%.²⁹ The overall system average return in year one is 8.48%.³⁰ In year two of the transition under the SFV rate design (Stage 2), the residential GSS and ECTS customers rate of return increases to 8.74% (meaning that residential GSS consumers are paying rates that result in the Company earning a higher than the system average return) and the non-residential GSS and ECTS customers rate of return plunges to a mere 3.23% (meaning that the non-residential GSS and ECTS consumers are paying rates that result in the Company earning far less than the system average return).³¹ The overall system average rate of return remained at 8.48%.³²

²⁸ Order at 10 (October 15, 2008).

²⁹ Joint Motion to Reopen the Record at 6-8 (January 29, 2009).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The revenue shift is equally dramatic for residential consumers who will be paying a significantly larger portion of the overall rate increase than the PUCO contemplated in its Order absent the updated COSS. The GSS and ECTS residential distribution base rate increase in year one is \$28 Million whereas the GSS and ECTS non-residential base rate revenues actually decrease in year one by \$5 million, a total revenue shift of \$33 million that requires that much more to be paid by residential consumers under the PUCO's new rate design. In year two the GSS and ECTS residential base revenues increase another \$9 million while the GSS and ECTS non-residential base rate revenues decrease by that same \$9 million, for a total revenue shift of \$42 million to be paid by residential consumers. With DEO's filing of the updated COSS study, there is unrefuted evidence provided by the Company of the irreparable harm that the SFV rate design causes residential customers due to the fact that these customers are subsidizing the commercial and industrial customers served under the GSS and ECTS tariffs.

C. A stay of implementation of the Stage 2 Residential Tariffs would not cause substantial harm to the Company.

No substantial harm will inure to the Company as a result of the Stay being granted. DEO is currently collecting the revenue requirements approved by the Commission in its Order under the Stage 1 Residential Tariffs. Granting the Motion to Stay would mean that the current Stage 1 rates will remain. The current Stage 1 rates reflect an increased monthly customer charge (that itself is inappropriate) and a larger volumetric rate, relative to the Stage 2 rate design. The implementation of Stage 2 rates means that the current tariff will continue to be collected, and the level of revenue

collected by the Company remains unaffected. This ensures the Company will not suffer any economic shortfall, or sustain substantial harm as a result of granting the Joint Consumer Advocates' Motion to Stay. Notably, the Company did not even propose this rate design as part of its Application -- thus not implementing something that the Company did not ask for cannot be deemed to be a harm. Therefore, the Commission should grant the Joint Consumer Advocates' Motion to Stay.

D. The Joint Consumer Advocates have provided a strong showing that they are likely to prevail on the merits of the appeal.

These matters, when fully weighed and addressed, make it likely that the Joint Consumer Advocates will prevail on the merits in the appeal. Moreover, it should be persuasive for a stay that, in the pending appeal, the Joint Consumer Advocates are likely to prevail on the merits with their arguments that include violations of the law regarding notice and state objectives for conservation. Therefore, the Motion to Stay the implementation of the Stage 2 rates should be granted.

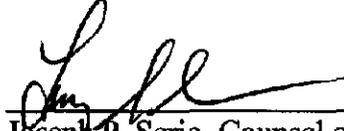
IV. CONCLUSION

For the reasons set forth herein, the Commission should grant the Joint Consumer Advocates' Motion to Stay the implementation of the Stage 2 rates as submitted by DEO. The Joint Consumer Advocates have demonstrated that under the factors of consideration employed by the PUCO, granting the Joint Consumer Advocates' motion will prevent irreparable harm and allow the Commission to realign its orders with the public interest. In addition, no substantial harm will be sustained by the Company if the Motion is granted. The Joint Consumer Advocates are likely to prevail on the merits of the appeal when serious consideration is given to the issues presented upon appeal. Therefore, the

Joint Consumer Advocates respectfully requests the Commission grant the Motion to Stay implementation of DEO's Stage 2 GSS and ECTS Tariffs.

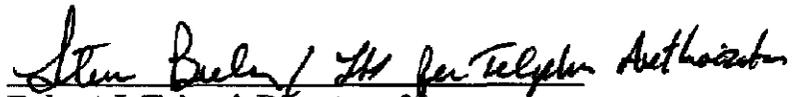
Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Motion to Stay* has been served upon the below-named persons via electronic transmission³³ this 31st day of March, 2009.



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³³ Entry at 2 March 19, 2008 (the Attorney Examiner instructed parties to serve motions by electronic means.).

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