

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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RECEIVED-DOCKETING DIV  
2009 OCT 15 PM 4:33  
PUCO

In the Application of the East Ohio )  
Gas Company d/b/a Dominion East )  
Ohio to Adjust its Pipeline )  
Infrastructure Replacement Program ) 09-458-GA-UNC  
Cost Recovery Charge and Related )  
Matters. )  
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)  
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**THE EAST OHIO GAS COMPANY'S D/B/A DOMINION EAST OHIO  
MEMORANDUM CONTRA THE MOTION TO STRIKE AND REQUEST FOR AN  
EXPEDITED RULING FILED BY THE OFFICE OF THE OHIO CONSUMERS'  
COUNSEL**

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**I. INTRODUCTION**

The motion by the Office of the Ohio Consumers' Counsel ("OCC") filed on October 14, 2009 to strike the testimony of Dominion East Ohio ("DEO") witnesses Eric Hall, Vicki H. Friscic and Mike Reed is an unfounded attempt to prevent DEO from making an affirmative case regarding this proceeding. OCC's motion is incorrect because: (1) contrary to OCC's assertion, DEO had authority from the Commission's Docketing Division to file electronically in this case and had previously filed its Notice of Deposition to OCC electronically without objection from OCC; (2) DEO timely filed all of its testimony beginning at 11:56 and ending at 12:21; and (3) DEO immediately served OCC and Staff by e-mail and by hand delivery pursuant to the September 8, 2009 Attorney Examiner's Entry to ensure that OCC and Staff received the filed testimony as soon as possible to prevent harm to any Party given the expedited time frame agreed to for this case.

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## **I. ARGUMENT**

### **A. DEO Received Authority From the Commission's Docketing Division to File Electronically in This Proceeding.**

DEO first contacted the Commission's Docketing Division to inquire whether it could file documents electronically in Case No. 09-458-UNC on October 6, 2009. The Docketing Division informed DEO that the case was available for electronic filing and DEO proceeded to file its Notice of Deposition to OCC electronically on that date. DEO subsequently served OCC with the Notice of Deposition. OCC did not object to the electronic filing of the Notice for Deposition and agreed upon a deposition schedule with DEO. By its failure to object to the electronic filing of the Notice of Deposition OCC has waived of its right to object to electronic filing in this proceeding. *See Colonial Village v. Washington County Board of Revision*, 114 Ohio St. 3d 493, 497, 873 N.E.2d 298, 302 (2007) (a party's failure to object at the Board of Tax Appeals ("BTA") concerning the Board of Revision's failure to properly certify the appeal waives any objection to the method of certification); *State of Ohio v. Robb*, 88 Ohio St. 3d 59, 72, 723 N.E.2d 1019, 1037 (2000) (defendant's failure to object to the admission of photographs in a criminal case waive the defendant's right to object); *Bisher v. Richards*, 9 Ohio St. 495 (1859) (failing to object to the jurisdiction of the court and instead proceeding to a trial on the merits waives any challenge to jurisdiction).

DEO also contacted the Commission's Docketing Division on the morning of October 9, 2009, the day DEO's testimony was due to be filed. On this occasion the Docketing Division checked internally with personnel at the Commission and subsequently contacted DEO again indicating that electronic filing was proper in Case No. 09-458-GA-UNC. Later on October 9, 2009, DEO was informed that there was some ambiguity at the Commission regarding whether electronic filing was proper in this proceeding whereupon DEO voluntarily offered to re-file

paper versions of the testimony with the Commission's Docketing Division and perform service by hand delivery. Then, out of an abundance of caution, DEO in fact filed paper versions of the testimony and hand delivered service to OCC and Staff.

Even if OCC has not waived its right to object to DEO's ability to file electronically in this proceeding, pursuant to multiple contacts with the Commission's Docketing Division and filing multiple documents in Case No. 09-458-GA-UNC, DEO properly filed the testimony at issue in OCC's Motion to Strike.

**B. DEO Timely Filed Its Testimony.**

The October 8, 2009 Attorney Examiner's Entry ordered DEO to file its testimony by 12:00 PM on October 9, 2009. DEO started the process of filing its testimony electronically at approximately 11:45 and completed the electronic filing of its testimony at 12:21. Specifically, the Commission's electronic filing confirmation process confirms that DEO filed the testimony of Eric Hall at 11:56, Vicki Friscic at 12:04 and Mike Reed at 12:21. Had DEO walked into the Commission's Docketing Division at 11:56 AM with three pieces of testimony due at noon and the Docketing Division had time stamped and processed one after the other it is possible that one or more pieces of testimony would have been docketed after 12:00 PM, yet all of the testimony would be timely filed. In this instance the Commission's electronic filing system accepts one document at a time in PDF form. If DEO had filed all of the testimony at once the electronic filing system would have shown all three pieces of testimony as one document instead of three separate filings. That would have resulted in undue confusion. Instead, DEO properly filed one document after the other. The reason that there was a gap between the filing of Vicki Friscic's testimony and the testimony of Mike Reed is that it was difficult to get the electronic filing system to accept the Excel spreadsheet attachment to Mike Reed's testimony on one page. DEO

filed all three pieces of testimony, one immediately following the other, and began the process prior to the 12:00 PM filing time set by the Attorney Examiner. As there would be no question that DEO timely filed its testimony had it filed paper at the Commission's Docketing Division, DEO should not be penalized for filing electronically.

**C. OCC Has Not Been Harmed by DEO's Filing of Testimony.**

Even assuming that DEO filed its testimony late (which is not the case), in order to prevail on its Motion to Strike the OCC must demonstrate that it was prejudiced by DEO's allegedly late filing. *In the Matter of the Application of T.S. Expediting Services, Inc. for a Certificate of Public Convenience and Necessity*, Case No. 88-1538-TR-ACE (Opinion) (Apr. 19, 1990). In Case No. 88-1538-TR-ACE two protestants to an application for a certificate of convenience and necessity failed to appear at a hearing and upon oral motion their protests were dismissed. *Id.* Each protestant filed a motion to reinstate their protests so that they could present direct testimony. *Id.* The Commission reinstated both protestants to offer present direct testimony in part, because "applicant has not set forth any evidence that its case has been jeopardized, prejudiced or delayed as a result of the protestants' failure to appear, the protestants should be afforded the opportunity to participate in this proceeding in the manner which most appropriately promotes their interests." *Id.*

Similarly here, the OCC has failed to demonstrate that it has been prejudiced in any way, even assuming arguendo that the testimony in question was filed 21 minutes late.

Immediately after DEO electronically filed its testimony beginning at 11:56 AM and ending at 12:21 PM, DEO immediately served OCC and Staff by e-mail. OCC acknowledged receipt of service at 1:03 PM by e-mail and acknowledged receipt of service by hand delivery at

3:20 PM.<sup>1</sup> Thus OCC received DEO's testimony before DEO filed paper testimony at the Commission's Docketing Division and shortly after DEO filed the testimony electronically. The prompt transmission of the testimony to OCC ensured that OCC had time to develop testimony or cross-examination. OCC has chosen not to sponsor witnesses and therefore has three hours shy of an entire week to focus on developing cross-examination of DEO's witnesses. Further, OCC could have accessed the electronically filed testimony at 12:21. OCC thus was not prejudiced in any way. OCC's motion is not filed to correct any wrong or alleviate any harm; the motion is simply a tactic to preclude DEO from making its case. This case should be decided on the facts. Granting OCC's motion would be unfair and not in the interest of the public.

### III. CONCLUSION

For the above reasons the Commission should deny OCC's Motion to Strike.

October 15, 2009

Respectfully submitted,



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<sup>1</sup> Assistant Consumers' Counsel Larry Sauer sent an e-mail at 4:12 PM on October 9, 2009 acknowledging receipt of the testimony by e-mail and hand delivery.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by electronic mail to the following party on this 15th day of October, 2009.



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