

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)
East Ohio Gas Company d/b/a Dominion) Case No. 09-2011-GA-PIP
East Ohio for Adjustment of its Interim)
Emergency and Temporary Percentage of)
Income Payment Plan Rider)

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PUCO

**REPLY MEMORANDUM
TO DEO'S MEMORANDUM CONTRA OCC'S MOTION TO COMPEL
RESPONSES TO DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

In this case where the East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "Company") seeks to collect money from 1.1 million residential consumers in northern Ohio, DEO has refused to answer discovery from the Office of the Ohio Consumers' Counsel ("OCC") regarding the issues. DEO's refusal led to OCC's motion to compel responses to the discovery. OCC now replies to DEO's memorandum contra OCC's motion to compel, in which DEO continues its theme that this case should not have any participation by a consumer advocate and that DEO should not have to answer questions about its case from a representative of the people that DEO wants to charge the higher rates. This case relates to DEO's request to increase its Percentage of Income Payment Plan ("PIPP") rider to collect from customers certain costs associated with PIPP.

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II. ARGUMENT

To recap OCC's argument for the PUCO to compel DEO to answer discovery, OCC is entitled to timely and complete responses to its discovery inquiries. Ohio law provides that "[a]ll parties and intervenors shall be granted ample rights of discovery." Discovery is important in this case where DEO is seeking to significantly increase its collections from customers. As the statutory representative of DEO's 1.1 million residential consumers, OCC has a vital interest in obtaining responses to the discovery requests served upon DEO in January, but is unable to do so without the Commission compelling such a result. In a case that dealt, in part, with the PUCO denying OCC the right to discovery, including the denial of an OCC Motion to Compel, the Supreme Court of Ohio found that the Commission erred in its decision.¹ The Supreme Court also based its decision in part on its interpretation of R.C. 4903.082 "Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable."² The Commission should grant the OCC's Motion to Compel.

DEO states in its Memorandum Contra that "OCC does not have the right to participate in this proceeding."³ DEO then claims that since OCC allegedly has no right to participate, DEO allegedly does not have to respond to OCC's discovery.⁴ DEO further asserts that Ohio Adm. Code 4901-1-16(H), regarding who is deemed to be a "party", does

¹ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶83 (2006). "The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding")"

² *Id.* at ¶82.

³ DEO Memorandum Contra at 1.

⁴ *Id.*

not apply to this proceeding because DEO has determined that OCC has not met the criteria for intervention.⁵ Finally, DEO justifies its failure to respond to OCC's discovery requests by making note of the Commission's "unique" review process for the consideration of PIPP rider adjustments by stating that such applications "are automatically approved if the Commission takes no action within 45 days of filing an application."⁶

In essence, DEO's argument is that, in this case, there are special rules for responding to discovery and there is a special procedure for the PIPP rider adjustment process itself. When added together these two special provisions equal no discovery and no intervention for anyone with an interest in utility charges to consumers in northern Ohio. DEO's procedural math is mistaken. DEO does not address the actual content of the Commission's rules regarding discovery. DEO has also ignored the fact that its application was suspended some time ago.

OCC is entitled to discovery within the scope provided by the Commission's rules: "[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding."⁷ DEO has not provided information responsive to OCC's discovery inquiries. DEO has not moved for a protective order pursuant to Ohio Adm. Code 4901-1-24, and its non-responsiveness to OCC's requests is inappropriate. Even more significant is that DEO's opposition is contrary

⁵ Id. at 1-2.

⁶ Id. at 2. Of course, in the present case, DEO's Application has been suspended and is not on an automatic approval track.

⁷ Ohio Adm. Code 4901-1-16.

to the law on discovery, in R.C. 4903.082. Under the statute, OCC is entitled to “full and reasonable discovery....”

The Commission’s rules require that a movant to compel responses to discovery requests demonstrate that it has “exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought” and that it document such efforts by affidavit, that it provide copies of the discovery requests, and that it briefly explain why the information is sought. Ohio Adm. Code 4901-1-23. OCC complied with each of these requirements for a motion to compel, when DEO left no doubt that it would not cooperate in this case.

The PUCO should order DEO to do what DEO should have done without the need for the PUCO to devote time to a ruling—provide full responses to OCC’s discovery requests and provide copies of all documents requested by OCC, particularly in light of the suspension of the Company’s pending Application. The Commission should order DEO to provide an immediate response to OCC’s requests for the production of documents, with the information to be provided to OCC according to a date certain set within the next two weeks.

III. CONCLUSION

As the representative of DEO’s 1.1 million residential customers, OCC respectfully requests that the Commission grant OCC’s Motion to Compel and reject DEO’s arguments for a non-transparent regulatory process and for exclusion of consumer representatives from that process. The Commission should protect the residential consumers of DEO by ensuring that all interested parties have sufficient information to

review DEO's application and to make recommendations to the Commission. Consistent with Ohio law, PUCO rule and the precedent of the Supreme Court of Ohio, OCC's motion to compel responses to discovery should be granted.

Respectfully submitted,

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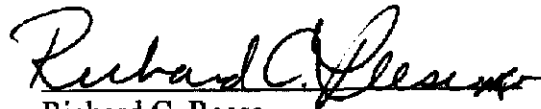
A handwritten signature in black ink, appearing to read "Richard C. Reese", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Memorandum To DEO's Memorandum Contra OCC's Motion To Compel Responses to Discovery By The Office Of The Ohio Consumers' Counsel* was served on the persons stated below via regular U.S. mail this 23rd day of March 2010.



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