BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of The East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Alternative Form of Regulation.	)))	Case No. 19-0468-GA-ALT

MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE EAST OHIO GAS COMPANY D/B/A DOMINION ENERGY OHIO

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I. INTRODUCTION

An application for rehearing must specifically allege in what respect the order was unreasonable or unlawful, in order to satisfy the requirements in R.C. 4903.10. *Discount Cellular, Inc. v. Pub. Util. Comm'n*, 112 Ohio St.3d 360, 375 (2007) ("when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met"). "The General Assembly did not intend for a rehearing to be a *de novo* hearing." *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm'n*, 10 Ohio St.3d 12, 13 (1984).

The rehearing application that has been submitted by the Office of the Ohio Consumers' Counsel (OCC) and Northeast Ohio Public Energy Council (NOPEC) (collectively, the Joint Applicants) pays no heed to these requirements. As The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company) will explain below, their application for rehearing for the most part does little more than recapitulate arguments already advanced in their post-hearing briefs and that were carefully considered and rejected in the Order.

The few "new" arguments presented lack any merit. The Joint Applicants claim that the Commission violated R.C. 4903.09 by failing to address their rate of return arguments, but this is belied merely by reading the Order's lengthy discussion of this precise issue. The Joint Applicants may disagree with its outcome, but the statutory process was plainly followed. They also assert that the Commission erred in not modifying the Stipulation to increase DEO's shareholder contribution for bill payment assistance. This proposal was not presented to the Commission, so the Commission could not have erred by not adopting it, and regardless it is unsupported by any legal authority. Finally, they conclude their pleading with an odd argument premised solely on a hypothetical ex parte communication between the Commission and its own

Staff. This claim fails as a matter of law: the Joint Applicants adduce no evidence of an ex parte communication, and absent such evidence, the law presumes procedural regularity.

For these reasons, as explained below, the Commission should deny the Joint Applicants' rehearing application in its entirety.

II. ARGUMENT

A. The Commission lawfully and reasonably approved a stipulation that satisfied the Commission's three-prong test. (Response to Assignment of Error No. 1)

Assignment of Error No. 1 is a mishmash of arguments that the Joint Applicants made in their post-hearing briefings. As DEO explains below, the Commission has already fully considered and addressed these issues, and nothing new has been presented that warrants revisiting them.

1. The Commission correctly recognized—and the Joint Applicants disregard—many, substantial ratepayer benefits that the Stipulation produces.

The Joint Applicants repeat their contention that the Commission erred in approving a Stipulation that did not benefit customers and the public interest. (*See* Reh'g App. at 7, 14.) These claims simply are not true.

The Stipulation recommended approval of a rider—a rider specifically permitted under the law, fully audited, and shown to reflect prudent investments benefiting customers—and added to it significant customer benefits, indeed greater benefits than other stipulations that have approved the same rider:

- Supporting DEO's obligation under R.C. 4905.22 to furnish necessary and adequate service and facilities by allowing for recovery of CEP assets placed in service and CEP-related deferrals, timely recovery of future CEP investment, and the encouragement of future investment in Ohio;
- Mitigating bill impacts of CEP rates by, among other things, (a) incorporating a depreciation offset of $310 million, (b) establishing an annual residential rate cap, and (c) providing for an annual review of the lawfulness, used and usefulness, prudence, and reasonableness of CEP assets placed in service;

- Specifying the effect of the residential rate caps on DEO's deferral authority and the treatment of any CEP assets and CEP-related deferrals that are excluded from recovery in the CEP Rider;

- Further refining DEO's commitment as to the timing of the filing of its next application to adjust base rates;

- Requiring a new application to continue DEO's authority to accrue CEP-related deferrals after the effective date of new base rates and to recover CEP investment placed in service after December 31, 2023;

- Agreeing to evaluate Blue Ridge's recommended adjustments to base rate net plant balances in DEO's next base rate case; and

- Providing for an incremental contribution of shareholder funding to DEO's EnergyShare program for billing assistance for DEO's lower income residential customers

(DEO Init. Br. at 11-15; DEO Rep. Br. at 6-8.) At no point have the Joint Applicants refuted any of these clear benefits associated with the CEP and the Stipulation.

The Order correctly and explicitly found that the Stipulation provides such benefits to customers. "[T]he Stipulation benefits ratepayers and the public interest by promoting safe and reliable service through Dominion's replacement of aging facilities and the development and deployment of information technology to enhance customer service and support." Order ¶ 66. It "facilitates Dominion's recovery for such investments in a timely manner." *Id*. But in addition to facilitating continued Ohio investment, the Commission also recognized the Stipulation "also includes financial benefits that will accrue to ratepayers." *Id*. It "includes rate caps that establish a limit on the impact to customers' bills and that serve to limit the amount of Dominion's CEP investments." *Id*. The Order recognized "the depreciation offset which reflects the portion of depreciation expense collected from customers through base rates, but not yet recognized as an offset to rate base." *Id*. And, "particularly for customers who may need financial assistance," the Stipulation provides "a contribution of $750,000 in shareholder funds to support EnergyShare." *Id*.

That these benefits support approval is confirmed by comparison with other CEP filings. As DEO also explained, the Commission approved alternative rate applications for other companies, including Columbia Gas of Ohio, Inc. (Columbia). *See In re Columbia Gas of Ohio, Inc.*, Case No. 17-2202-GA-ALT, Opin. & Order (Nov. 28, 2018). The record confirms that the benefits afforded to customers were substantially greater under DEO's Stipulation than Columbia's. Both Columbia and DEO agreed to a significant depreciation offset, and both agreed to rate caps, neither of which is required by statute. DEO's Stipulation, however, goes further as the following table demonstrates:

	Columbia - Approved	**DEO - Stipulation**
Residential Rate Cap (Investment through:)	12/31/2017: $3.51 (Initial)	12/31/2017: n/a
	12/31/2018: $4.56	12/31/2018: $3.86 (Initial)
	12/31/2019: $5.61	12/31/2019: n/a
	12/31/2020: $6.66	12/31/2020: $5.51
	12/31/2021: $7.71	12/31/2021: $6.31
		12/31/2022: $6.96
		12/31/2023: $7.51
Depreciation Offset	Yes	Yes
Incremental Bill Payment Assistance	None	$750,000, which has been made available to customers
Pass Through of TCJA Savings	Approval simultaneous with and contingent on CEP Rider	Begun at least seven months prior to, and independent of, approval of CEP Rider

(DEO Rep. Br. at 7.) Although each company initiated its CEP at the same time (October 2011), DEO's residential rate caps are lower for every comparable year; and DEO's average incremental rate-cap increase is lower by a considerable margin ($0.73 per program year, compared to $1.05 per program year). (DEO Init. Br. at 14.) DEO's Stipulation also contains shareholder funding for bill payment assistance—made available to customers *before the CEP Rider was approved*, and a customer benefit not part of the Columbia stipulation. (*Id*. at 15.) And

although the Columbia stipulation tied the pass-through of savings related to the Tax Cuts and Jobs Act (TCJA) to the approval of the new CEP charge, DEO's customers had been enjoying a significant TCJA credit ($5.41/month) since April 2020 (DEO Ex. 4.0 at 18-19), eight months *before* the CEP Rider was approved.[1]

If the Commission erred approving DEO's Stipulation, then it erred approving other settlements as well, including settlements OCC recommended for approval. In short, the evidence fully supported the Commission's finding that the Stipulation provided ample customer benefits.

2. The Commission properly rejected the Joint Applicants' contention that the rate of return for the CEP Rider should be modified.

The Joint Applicants repeat their post-hearing arguments that the Commission erred by not adopting the recommendations of their witness Dr. Duann on rate of return. (Reh'g App. at 8-11.) As before, they fail to show that the Commission committed error by approving the use of the cost of capital and capital structure approved in DEO's last base rate case to calculate CEP rates.

First, the record clearly refutes the assertion that DEO is overearning or reaping "windfall" profits. The Commission's Staff specifically investigated this issue, and confirmed that *DEO did not have excessive earnings* during the period from 2011 through the end of 2018—the period of investment reflected in the initial CEP Rider rate. (Staff Ex. 1.0 at 8.) Neither of the Joint Applicants presented any evidence rebutting this finding. The Stipulation

[1] In addition to the factors that promoted gradualism and mitigated the impact of CEP rates from a total bill perspective, (DEO Init. Br. at 19-20), the Commission's own review of utilities' natural gas bills shows that the typical gas bills in cities in DEO's service territory compared very favorably to those in other territories. (DEO Rep. Br. at 15.) The weight of this and other evidence demonstrates that the stipulated CEP rates are "just and reasonable" and result in "reasonably priced" service, contrary to the Joint Applicants' claims. (Reh'g App. at 17.)

also recognizes Staff's ability to conduct a similar review in future cases, as the Commission specifically recognized. *Id*. ¶ 70; *see also id*. ¶ 39. Indeed, the Commission went even further and initiated a forum for stakeholders to evaluate cost-of-capital issues outside of base rate cases. *Id*. ¶¶ 69, 110. It is simply not credible for the Joint Applicants to continue to suggest that DEO is overearning or that the Commission failed to consider this issue.[2]

Further, the Commission's auditor, Blue Ridge, examined and approved the use of the rate of return authorized by the Commission in DEO's most recent base rate case. (Staff Ex. 2.0 at 113.) The Blue Ridge report recognized that "the Company appropriately used the rate of return . . . approved in its last rate case." (*Id*. at 107.) The report also found that this "rate-of-return approach is consistent with the stipulation approved by the Commission for the Columbia Gas of Ohio CEP Rider." (*Id*.) Staff then fully adopted Blue Ridge's recommendations, including this rate of return. (Staff Ex. 1.0 at 7.) The Order pointed out: "importantly, the Commission notes Blue Ridge concluded that the Company's CEP, with a few exceptions, was consistent with the Commission-approved process, prudent, and reasonable, *which includes the cost of capital*." Order ¶ 70 (emphasis added).

To this end, among other points relied on by the Commission, the Order made the following findings:

- It would be inconsistent to use the embedded cost of capital to determine *customer credits* (such as those associated with tax reform) but then to reduce that cost in recovering investment. *See id*. ¶ 68 ("The cost of capital components should apply equally to credits for customers and the cost recovery mechanism.");

[2] Perhaps recognizing the evidence that no overearning has occurred, the Joint Applicants attempt to claim that the Stipulation "guarantees" the Company a 9.91% pre-tax rate of return on its CEP investments. (Reh'g App. at 16.) There is no "guarantee" that DEO will achieve that rate of return on its CEP investments; there are any number of factors that could affect the Company's earned rate of return. The Stipulation provides the Company with the opportunity to earn a rate of return on its investments; while the rider mechanism reduces regulatory lag, it does not "guarantee" an earned rate of return. (DEO Ex. 4.0 at 27-28.)

- The cost of capital goes up and down over time;
- "Cherry picking" the long-term debt rate would change only one of many cost components and ignore other cost increases since the last rate case;
- The cost of capital cannot be examined without also examining at the same time the Company's capital structure and risk assessment, and may be determined by various methods; and
- It would be an inefficient use of Commission and utility resources to evaluate and re-evaluate financial markets in every alternative rate plan and rider case in litigating and determining debt and equity rates.

Id.¶¶ 68–70. Based on these findings, the evidence in the record "presented adequate justification for the Commission to uphold the precedent." *Id*. ¶ 79. With all this in mind, the Joint Applicants' overwrought assertion that "precedent should change with the times to provide justice" rings hollow, as does any suggestion the Commission has "abdicated" its responsibilities. (Reh'g App. at 9.) The Commission appreciated the complexity of the issue, reviewed it carefully, and explained in detail its reasons for not revisiting precedent in this case. It is easy enough to throw intemperate accusations at the Commission and other stakeholders, but the Joint Applicants have not even begun to carry their burden of refuting the facts or the rationale relied on in the Order.

3. The Commission did not unlawfully or unreasonably disregard the effects of the COVID-19 pandemic in approving the Stipulation.

The Joint Applicants continue to argue that the Commission erred in disregarding the effects of the COVID-19 pandemic when considering whether the Stipulation, as a package, benefited customers and the public interest. (Reh'g App. at 12-15.) The Joint Applicants have offered no new arguments here that the Commission has not already addressed and rejected.

There is no reasonable basis to conclude that the Commission ignored issues associated with COVID-19. But unlike the Joint Applicants, the Commission took into account its prior response to the COVID-19 pandemic in other dockets, DEO's voluntary actions, and its own

ability going forward to assist and protect consumers. Order ¶¶ 65, 76. (*See also* DEO Init. Br. at 22-25; DEO Rep. Br. at 13-15 (discussing the Commission's efforts to respond to COVID-19, existing assistance programs, the immediate bill relief that the Company provided to customers, and other available COVID-19 relief).) All this is in addition to the specific customer benefits afforded under the Stipulation, including the EnergyShare bill payment assistance, and the other external mitigating factors, such as the TCJA credits and low commodity prices, which directly address the issue of customer affordability. (*Id*.)

It is not necessary to recount all this evidence again in detail. The Joint Applicants habitually rely on a one-sided picture of the situation and ignore any factor working in favor of customers. This may be convenient, but it is not persuasive. The ongoing effects of the pandemic are serious. No one disputes that. These conditions, however, do not require an "either/or" choice between providing bill relief to customers and permitting DEO to recover the costs of its investment. The Stipulation takes affordability concerns into account, and unlike the intervenor proposals, strikes an appropriate balance of all interests involved. The Commission also made it clear in the Order that it is continuing to address the effects of the COVID-19 pandemic, outside of contested cases. Order ¶ 67 ("The Commission finds it better to address consumer protection concerns due to the pandemic as a separate matter rather than within certain cases filed during the pandemic."); *id*. ¶ 79. ("The financial impact of the pandemic has been and will continue to be addressed, as determined by the Commission, in other proceedings that focus on consumer protection."); *id*. ¶ 65 ("Given that we have no way of determining when this pandemic will end and the state's economy rebound, as the Commission deems it necessary, we will direct other measures to assist and protect utility consumers.")

The Joint Applicants ignore the Commission's past actions to help customers and its continued commitment, and they do not support their claim that a reduction in CEP rates is a necessary response to the pandemic.

B. The Commission sufficiently set forth the reasons for rejecting the Joint Applicants' modified rate of return. (Response to Assignment of Error No. 2)

In their second assignment of error, the Joint Applicants argue that the Commission violated R.C. 4903.09. They claim that the Order, in rejecting their objection to the CEP Rider's rate of return, failed to address certain "regulatory principles" that the Joint Applicants claim approval of the Stipulation violates. (Reh'g App. at 16-17.) The Joint Applicants misconstrue the governing statute and yet again fail to demonstrate any error.

The purpose of R.C. 4903.09 is "'to enable this court to review the action of the commission without reading the voluminous records in Public Utilities Commission cases.'" *MCI Telecomms. Corp. v. Pub. Util. Comm'n*, 32 Ohio St.3d 306, 311 (1987), *quoting Commercial Motor Freight, Inc. v. Pub. Util. Comm'n*, 156 Ohio St. 360, 363 (1951). Strict compliance with the terms of the statute is not required. *Tongren v. Pub. Util. Comm'n*, 85 Ohio St.3d 87, 89 (1999). The Commission is required only to set forth "some factual basis and reasoning based thereon in reaching its conclusion." *Allnet Commc'n Serv., Inc. v. Pub. Util. Comm'n*, 70 Ohio St.3d 202, 209 (1994); *see also MCI Telecomms. Corp.*, 32 Ohio St.3d 306, 312 (requiring "enough evidence and discussion in an order to enable the PUCO's reasoning to be readily discerned"). The Commission is *not* required to specifically and separately address every stray assertion that may be contained in a party's brief. *See, e.g.*, *Allen v. Pub. Util. Comm'n*, 40 Ohio St.3d 184, 187 (1988); *Office of Consumers' Counsel v. Pub. Util. Comm'n*, 589 Ohio St.2d 108, 116 (1979).

The Commission clearly complied with these requirements in this case. The Commission's Order totaled 57 written pages, including multiple paragraphs specifically analyzing the cost of capital issue. There is no doubt that the Commission complied with the statute's requirement of "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." R.C. 4903.09. And review of this written decision demonstrates that the Commission provided a considered, reasonable basis for rejecting all of the Joint Applicants' positions.

This is clearly true with respect to the rejection of the Joint Applicants' position on rate of return. Paragraphs 68 through 70 and Paragraph 79 contain a detailed evaluation of the evidence and the rationale supporting the Commission's rejection of the Joint Applicants' rate of return arguments. That discussion speaks for itself, has been summarized above, and there is no need to recapitulate it again here. But the Order is clear that the Commission carefully considered the Joint Applicants' arguments, and found that "no argument presented by opposing Intervenors convinces the Commission to change or revise this practice." Order ¶ 79.

As for the Joint Applicants' claim that the Commission failed to address a particular species of their rate of return argument, this is formalism. Between the two of them, OCC and NOPEC repetitively presented the same points in multiple permutations across multiple briefs. The Commission acknowledged all of their arguments and engaged them on the substance. But the Commission was under no obligation to repetitively set forth the same rationale, again and again under different headings, just because the Joint Applicants chose to repetitively present the same argument, again and again under different headings. Although the Joint Applicants may disagree with the outcome, the Commission's reasoning and its conclusions are clear and well-supported. There is no issue under R.C. 4903.09.

For these reasons, the Commission should reject the Joint Applicants' Assignment of Error No. 2.

C. The Commission reasonably approved a stipulation that included meaningful shareholder funds for bill payment assistance. (Response to Assignment of Error No. 3)

In their third assignment of error, the Joint Applicants argue that the Commission "erred" in not modifying the Stipulation to increase DEO's shareholder contribution for its EnergyShare program to $5 million. (Reh'g App. at 18.) They argue that $5 million would be "a more reasonable contribution" and ask the Commission to modify the Stipulation on rehearing to increase the EnergyShare funding to that amount. (*Id*. at 19.)

Neither OCC nor NOPEC presented these recommendations prior to the Commission's Order. It is unclear how the Order could be unlawful or unreasonable for failing to adopt a proposal that had not been made. The Joint Applicants offer no explanation for why their witnesses or their post-hearing briefing failed to raise these points. The Commission can and should reject this assignment of error as procedurally defaulted.

Regardless, even if this assignment of error was properly presented, it lacks merit. The Commission correctly found that the EnergyShare funding was a benefit of the Stipulation. Order at ¶ 66. The Joint Applicants do not contend that this finding is in error. Indeed, they "appreciate this effort to help consumers during the coronavirus pandemic and financial emergency." (Reh'g App. at 18.) But they claim that the shareholder funding in the Stipulation is "not nearly enough." (*Id*.)

Not surprisingly, the Joint Applicants do not point to any statute, regulation, or decision of this Commission or the Supreme Court supporting their argument. The CEP Rider provides cost recovery for many years of investment, investment that an extensive audit confirmed was prudent and reasonable. That investment benefits customers and enables the provision of a

valuable service, and the basic point of the rider was to recover that investment. But in recognition of the difficulties of the pandemic, and absent any legal requirement to do so, DEO agreed to significant curbs on recovery of future investment—much more severe than agreed to by any other natural gas company—and *also* agreed to provide nearly one million dollars in no-strings-attached shareholder funding. That funding was committed and provided regardless of whether the Stipulation was approved. No other settlement providing for a CEP Rider included such a commitment.

These were concessions that DEO was willing to make. This commitment of funds, which come on top of other forms of aid and energy assistance, will do far more to help customers in need than any of Joint Applicants' requests to delay or reduce the CEP Rider. While it is easy for the Joint Applicants to say "more" and "not enough" with respect to that funding, this does not constitute an argument or a showing that the Order was unreasonable or unlawful.

For these reasons, the Commission should reject the Joint Applicants' Assignment of Error No. 3.

D. The Commission lawfully approved a nonunanimous settlement. A diversity of interests and the agreement by any specific party have never been preconditions for Commission approval of a stipulation. (Response to Assignment of Error No. 4)

In Assignment of Error No. 4, the Joint Applicants argue yet again that the Commission should reject the Stipulation, for failure to satisfy the first prong of the Commission's three-part test for reviewing stipulations, because of the lack of "diversity" of the parties signing the settlement. (Reh'g App. at 19-20.) The Commission has consistently rejected this argument for many years, although these decisions seem to fall on deaf ears. Regardless, the Commission did not err in adhering to this precedent.

The Commission frequently has stressed that "[t]he three-prong test utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate the diversity of interest component." *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, *et al.*, Opin. & Order (Mar. 31, 2016) at 52; *see also In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, *et al.*, Opin. & Order (Sept. 26, 2019) ¶ 90; *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, 2d Entry on Reh'g (Feb. 1, 2017) ¶ 14; *In re Ohio Edison Co.*, *et al.*, Case No. 12-1230-EL-SSO, 2d Entry on Reh'g (Jan. 30, 2013) ¶ 21. Despite that clear and consistent guidance, the Joint Applicants argue that the first prong "should be construed to include diversity." (Reh'g App. at 19.) Continuing to relitigate a position that has been rejected numerous times only serves the purpose of compelling the Commission to issue yet another decision dismissing their request.

The Joint Applicants criticize the Commission's Order as "another demonstration that consumer advocates are not *indispensable* for PUCO settlements." (*Id*. at 1 (emphasis added).) This is just another way of saying that they should have veto power over stipulations—an argument the Commission has also rejected many times. *In re Columbia Gas of Ohio*, *Inc.*, Case No. 07-0478-GA-UNC, Opin. & Order (Apr. 9, 2008) at 32 ("No one possesses a veto over stipulations, as this Commission has noted *many times*.") (emphasis added); *see also In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, *et al.*, Opin. & Order (Sept. 26, 2019) ¶ 90; *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, 2nd Entry on Reh'g (Feb. 1, 2017) ¶ 14; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opin. & Order (Feb. 19, 2014) at 10; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, *et al.*, Opin. & Order (Apr. 13, 2005) at 9.

The Joint Applicants also suggest that the parties to the Settlement did not adequately represent customers' interests. (Reh'g App. at 20 (arguing they are "the only parties in this case

representing the interests of parties who will pay the costs proposed in the Settlement").) The Commission, however, has recognized that Staff represents customers' interests, and Staff signed this Stipulation. *See In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, *et al.*, Opin. & Order (Sept. 26, 2019) ¶ 90; *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, Opin. & Order (Apr. 27, 2016) at 8. Moreover, negotiations were lengthy and complex, and the fact that the Joint Applicants did not sign the Stipulation does not mean that their positions are not reflected in the Stipulation ultimately signed.

Finally, the Joint Applicants complain at length that utilities "seem to be an indispensable party for PUCO settlements" and "there virtually is *never* a PUCO settlement that lacks inclusion of the utility in the case." (Reh'g App. at 1 (emphasis in original); *see also id*. at 19.) The Company cannot speak to every settlement; each one has to be evaluated on its own merits. The only settlement before the Commission at this time is the Stipulation, the merits of which have been well examined and need not be reviewed yet again here.

But if larger Commission practice is being discussed, DEO would offer just a couple notes. First, the utility is almost always the applicant before the Commission, and it is natural that the utility would almost always be party to a settlement resolving a case it filed. Moreover, DEO would add that in its experience, settlements before the Commission typically involve significant concessions *by the utility*, not in its favor. This case is a perfect example—DEO's application intentionally followed processes and frameworks previously approved by the Commission for other utilities, and DEO's CEP Rider was extensively audited and recommended for approval as filed, with only minor exceptions accepted by DEO. DEO would have had ample reason not to concede anything, but to litigate the case. Nevertheless, DEO made numerous concessions *not* required by law (no law or regulation, for example, requires rate caps or

shareholder-funded energy assistance), but offered in the interest of minimizing disputes and resolving the case. A fully litigated case could very easily have resulted in the same initial CEP Rider rate recommended by the Staff Report and the same review process going forward, *minus* the many extra benefits agreed to by DEO in the Stipulation.

Other settlements are beyond the scope of this case. But this one resulted in significant added benefits for customers. For these reasons, the Commission should reject the Joint Applicants' Assignment of Error No. 4.

E. The Commission lawfully approved CEP cost recovery through an automatic adjustment mechanism. Ohio law does not dictate that the Commission require DEO to file a base rate application in 2021. (Response to Assignment of Error No. 5)

In the fifth assignment of error, NOPEC continues to argue that the Commission must compel DEO to file a base rate case in 2021. (Reh'g App at 21-23.) NOPEC acknowledges that Ohio law permits DEO to recover the costs of its CEP investments through alternative regulation. (*Id*. at 22.) Yet, NOPEC argues that the Commission should have "denied" DEO from using that very option. (*Id*.)

The governing law affords DEO options for CEP recovery other than a base rate case. It expressly permits DEO to pursue CEP cost recovery under an alternate rate plan, including an automatic adjustment mechanism: "the commission shall authorize the natural gas company to defer or recover in an application that the natural gas company *may file under section 4909.18, 4929.05, or 4929.11* of the Revised Code." R.C. 4929.111(D) (emphasis added). And the Commission's Order correctly acknowledged this. "Ohio statutes clearly permit a natural gas company to pursue recovery for capital investments in either a base rate case, pursuant to R.C. 4909.18, or under the alternative rate regulations, pursuant to R.C. 4929.05." Order ¶ 67.

NOPEC suggests that the Commission can deny DEO from using alternative regulation and force the Company to recover its CEP costs through base rates. (Reh'g App. at 22.) But the

Commission is "a creature of statute" and "has no authority to act beyond its statutory powers." *Discount Cellular, Inc. v. Pub. Util. Comm'n*, 112 Ohio St.3d 360, 373 (2007). The Order rightfully recognized that "R.C. Chapter 4929 has been adopted by the General Assembly as the law in the state of Ohio, which the Commission is obligated to follow." Order ¶ 79. And it properly found that the Commission "will not deny Dominion's CEP application where the law permits a utility to pursue the alternative regulation path." *Id*. ¶ 73. The Commission found that DEO's application and the Stipulation itself complied with these laws, as discussed in detail elsewhere. Following the law cannot possibly be construed as specific grounds on which the Order is unreasonable or unlawful. It certainly, however, would have been improper for the Commission to arbitrarily deny DEO from utilizing a statutorily authorized rate mechanism.

NOPEC argues that the Commission has the option to dismiss DEO's application, if it finds that the Stipulation's "rate of return applied to the CEP Rider unjust and unreasonable and violates R.C. 4929.02, 4929.05 and 4905.22." (Reh'g App. at 21.) Whether or not this is true as a matter of law is a moot point—the Commission *did* evaluate this precise issue and rejected it on the merits. Order ¶¶ 79-80 (finding that the Stipulation supported DEO's obligations under R.C. 4905.22, that DEO will continue to be in substantial compliance with the policy of the state as specified in R.C. 4929.02 after implementation of the Commission-approved alternative rate plan, and that the alternative rate plan, with the implementation of the Stipulation as approved by the Commission, is just and reasonable).

Finally, NOPEC continues to ask the Commission to force DEO to file a base rate case earlier than 2024. However, the Commission—and the other Joint Applicant, OCC—already found DEO's commitment to file a rate case no later than October 2024 to be a "benefit" of the stipulation approved in DEO's TCJA proceeding just one year earlier. *In re The East Ohio Gas*

Co., Case No. 18-1908-GA-UNC, *et al.*, Finding & Order (Dec. 4, 2019) ¶ 31. And DEO agreed to refine that commitment in this case to make clear that the Company's rate case application, and not just its notice of intent, will be filed no later than October 2024 and that the Company will propose a date certain that is no later than two months after the application's filing date. Thus, the Stipulation addresses and provides more certainty on the precise timing of the next rate case. NOPEC has not demonstrated that the Commission should revisit its prior findings on the timing of DEO's next base rate case.

For these reasons, the Commission should reject NOPEC's Assignment of Error No. 5.

F. The Joint Applicants do not demonstrate that improper ex-parte communications on the merits occurred or that they were prejudiced by any discussions between a member of the Commission and a member of Staff that might have occurred. (Response to Assignment of Error No. 6)

In their last assignment of error, the Joint Applicants argue that the Commission "erred" in approving the Stipulation "*to the extent* that communications were made between the PUCO Staff and PUCO Commissioners, as referenced during the PUCO's public meeting for approving the Order, in violation of R.C. 4903.081 and/or O.A.C. 4901-1-09." (Reh'g App. at 23 (emphasis added).) On its face, this argument is fatally flawed.

R.C. 4903.081 prohibits a Commissioner from discussing "the merits of the case" with any "party" to the proceeding, unless all other parties are given notice and opportunity to be present or a full disclosure of the communication. DEO will assume for the sake of argument that Staff is a "party" for the purposes of these provisions.[3] To show a violation of this statute, the Joint Applicants would need to demonstrate that an improper communication occurred. But not

[3] The Joint Applicants request that the Commission address on rehearing "whether the PUCO staff is subject to" R.C. 4903.081 and Ohio Adm.Code 4901-1-09. (Reh'g App. at 23.) This question is not ripe for review, given that the Joint Applicants cannot demonstrate a violation of the provisions or prejudice.

only do they fail to *show* that an improper communication occurred, they *do not even allege it*. A party cannot claim a reversible error "to the extent" some hypothetical event *may* have occurred.

As a matter of law, public boards and administrative officers are presumed to have performed their duties regularly, faithfully, and lawfully. *See State ex rel. Shafer v. Ohio Turnpike Comm'n*, 159 Ohio St. 581, 590, (1953) ("in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner"); *Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, paragraph seven of the syllabus (1944) ("The action of an administrative officer or board within the limits of the jurisdiction conferred by law is presumed, in the absence of proof to the contrary, to be valid and to have been done in good faith and in the exercise of sound judgment"). To overcome the presumed validity of the governmental action, the presumption must be rebutted with actual evidence, and not bare allegations. *In re Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, ¶ 23 (2010).

Here, the Joint Applicants have not offered any evidence of improper conduct. Importantly, R.C. 4903.081 does not prohibit all communications, only those that concern *the merits* of an open case. *Cincinnati v. Pub. Util. Comm'n*., 64 Ohio St.3d 279, fn. 4 (1992). The only "evidence" that the Joint Applicants submit are public remarks by the Acting Chair giving the Director of Rates and Analysis a "thank you" for "her attentiveness and working with commissioners and better understanding everything in the case and how it came about." (Reh'g App. at 23.) It is of course Staff's role to assist the Commission in its business, *see* R.C. 4901.19, and thanking a Staff member for performing these duties does not even suggest, much less prove, that an improper discussion occurred on the "merits" of a contested issue.

The Joint Applicants' assignment of error is entirely speculative and hypothetical. Given that they have not shown error, there is no need to consider whether they were prejudiced by such a communication. But it bears noting that absent a showing that the communication prejudiced the party seeking reversal, a Commission order that was otherwise supported by the record would not be reversed on the basis of an improper communication. *Cincinnati v. Pub. Util. Comm'n*, 64 Ohio St.3d 279, 283 (1992). Indeed, the Joint Applicants should also take into account the remarks of Commissioner Conway, which affirmatively show that the Commissioners were independently and thoroughly engaged in evaluating the Stipulation and the issues raised by the Joint Applicants. And the Commission ordered the initiation of a forum for stakeholders to discuss revision of a utility's cost of capital and capital structure outside of a rate case—a key issue for the Joint Applicants, far from a sign of prejudice. Order ¶¶ 69, 110.

For these reasons, the Commission should reject the Joint Applicants' Assignment of Error No. 6.

III. CONCLUSION

For the reasons identified herein, the Commission should reject all of the Assignments of Error offered by the Joint Applicants.

Dated: February 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on February 8, 2021:

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Summary: Memorandum Memorandum Contra Application for Rehearing electronically filed by Christopher T Kennedy on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio