

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Report of The)
East Ohio Gas Company d/b/a Dominion) Case No. 21-519-GA-IDR
Energy Ohio for Approval of an)
Adjustment to its Infrastructure)
Development Rider Rate.)

**MOTION TO STRIKE
OR, IN THE ALTERNATIVE,
MOTION FOR LEAVE
TO FILE REPLY INSTANTER
AND REPLY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 13, 2021

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Dominion filed an unauthorized pleading to oppose the Office of the Ohio Consumers' Counsel's ("OCC") consumer proposals. The Public Utilities Commission of Ohio ("PUCO") should correct for this unfairness by striking Dominion's filing (or, if not, the PUCO should accept the attached OCC Reply in response to Dominion's opposition).

This case involves the annual review of Dominion's infrastructure development rider. OCC filed its motion to intervene and comments in this proceeding on July 30, 2021, as permitted by O.A.C. 4901:1-43-04.¹ This rule allows interested parties to intervene and file comments when the reviews the annual report of a gas utility's infrastructure development rider.² On August 6, 2021, Dominion filed a response to OCC's comments.³ Dominion did not seek leave to file its response. The PUCO's rules

¹ OCC Motion to Intervene and Comments (July 30, 2021).

² O.A.C. 4901:1-43-04(E)(2).

³ Dominion Response (August 6, 2021).

do not provide for the utility to file a response to comments. And the PUCO has not allowed the filing of a response through a procedural entry or otherwise.

For the reasons stated in the accompanying memorandum in support, OCC moves to strike Dominion's response, filed on August 6, 2021.⁴ The PUCO should rule in this case without giving any weight to Dominion's response. In the alternative, if Dominion's response is allowed to stand, the PUCO should grant OCC leave to file reply comments *instanter*. OCC's reply comments (attached hereto) are limited to replying to Dominion's unauthorized response.

Respectfully submitted,

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⁴ *Id.*

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MEMORANDUM IN SUPPORT

This case involves the review of Dominion’s annual report for its infrastructure development rider, as required under R.C. 4929.165. The rules for reviewing the annual report are established by O.A.C. 4901:1-43-04. These rules provide for interested parties to intervene and file comments,⁵ but do not provide for the filing of a memorandum contra or reply comments.⁶

As allowed by these rules, OCC filed its motion to intervene and comments on July 30, 2021.⁷ Dominion filed a response on August 6, 2021.⁸ OCC moves to strike Dominion’s response because: (1) the rules do not allow for a gas utility to file a memorandum contra or any other type of responsive pleading to a party’s comments; and (2) Dominion did not seek leave to file its response.

The PUCO will strike a party’s pleading when the PUCO’s orders and rules do not allow one to be filed. *In the Matter of the Complaint of the City of Reynoldsburg, Ohio v. Columbus Southern Power Co.*⁹ In that case, parties filed briefs following a

⁵ O.A.C. 4901:1-43-04(E).

⁶ *Id.*

⁷ OCC Motion to Intervene and Comments (July 30, 2021).

⁸ Dominion Response (August 6, 2021).

⁹ Case No. 08-846-EL-ESS, Opinion and Order (April 5, 2011).

hearing. One party then filed a motion styled as a “motion to accept corrected citations.”¹⁰ The PUCO granted the motion to the extent that it actually corrected certain citations but struck the remainder of the pleading because the PUCO concluded it was, in fact, a surreply brief that was not allowed under the procedural schedule or the PUCO’s rules.¹¹

Applying *City of Reynoldsburg* to the present facts, the PUCO should strike Dominion’s response filed on August 6, 2021.¹² That is because the rules do not allow for it. A gas utility may not file a memorandum contra or any other type of responsive pleading to a party’s comments in a proceeding to review the annual report of a gas utility’s infrastructure development rider. A party can seek leave to file a pleading that is not provided for in the PUCO’s rules, but Dominion chose not to do so. Under these circumstances, the PUCO should strike Dominion’s response.

If the PUCO does not strike Dominion’s response, then OCC moves for leave to file instanter the attached reply to Dominion’s response. Dominion’s “response” is in the nature of a memorandum contra to OCC’s comments. In effect, Dominion treated OCC’s comments as a motion, such that Dominion filed what is essentially a memorandum contra to OCC’s comments. If Dominion’s response is allowed to stand, OCC should be entitled to file a reply to Dominion’s response because the PUCO’s rules for motions allow for the filing of a reply memorandum.¹³

¹⁰ *Id.* at 27-28.

¹¹ *Id.*

¹² Dominion Response (August 6, 2021).

¹³ O.A.C. 4901:1-1-12(B)(2).

Based on the foregoing, if the PUCO does not strike Dominion's response, then OCC moves for leave to file instant the attached reply to Dominion's response.

Respectfully submitted,

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**ATTACHMENT OF
REFERENCED OCC REPLY**

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") filed its motion to intervene and comments on July 30, 2021, as permitted by O.A.C. 4901:1-43-04. The rule allows interested parties to file motions to intervene and comments.¹⁴ The rule does not allow for the utility to file a response, just as the underlying statute does not allow Dominion to include the costs of relocating its gathering line in its infrastructure development rider.

For the reasons stated in OCC's initial comments and explained more fully below, the Public Utilities Commission of Ohio ("PUCO") should direct Dominion to identify and remove from its infrastructure development rider all costs for relocating the gathering line that were included in Case No. 20-1703-GA-EDP. Alternatively, the PUCO should suspend the 75-day automatic approval process in this case and establish a procedural schedule for a formal hearing. At such hearing, Dominion should have the burden of

¹⁴ O.A.C. 4901:1-43-04(E)(2).

proof to establish that the costs to relocate the gathering line were prudent and reasonable and were can properly be considered as line extension costs under R.C. 4929.16(B).

II. ARGUMENT

A. Interested parties may challenge a gas utility's inclusion of costs during the PUCO's annual rider review, where the PUCO determines which costs can legally be collected from consumers through an infrastructure development rider.

Dominion argues that OCC has no right to challenge Dominion's request to collect its gathering line relocation costs and that the PUCO already decided the issue when Dominion filed the economic development project ("EDP") notice for the Tractor Supply Company project.¹⁵ This argument has no merit and should be rejected.

The infrastructure development rider is authorized under R.C. 4929.161 through 4929.167. The law requires the utility to file an annual report on the costs that it seeks to collect from consumers through its infrastructure development rider.¹⁶ The PUCO may conduct a financial audit to determine whether the costs the utility seeks to collect are proper.¹⁷ In the annual report proceeding, interested parties may intervene and comment on the utility's request to collect costs.¹⁸

If Dominion's position were correct and interested parties could not challenge the utility's costs during the annual report proceeding, the annual proceeding would serve no purpose. Under Dominion's suggested approach, all issues related to whether the costs are

¹⁵ Dominion Response at 1 (August 6, 2021).

¹⁶ R.C. 4929.165.

¹⁷ R.C. 4929.167.

¹⁸ O.A.C. 4901:1-43-04.

within the scope of the statute would be decided at the stage where the utility gives the PUCO notice of the EDP. Dominion's suggested approach is contrary to statute.

Dominion argues that the PUCO has already ruled that it can recover its gathering line relocation costs through the rider and the PUCO cannot revisit this ruling.¹⁹

Dominion's argument has no merit. This outcome is completely consistent with the PUCO's Entry granting Dominion's motion for clarification in Case No. 20-1703-GA-EDP.²⁰ The Entry approved Dominion's notice of EDP for the Tractor Supply Company, but the Entry also called for review of the lawfulness and eligibility of the gathering line relocation costs as part of the financial and prudence review.²¹

The OCC challenged the gathering line relocation costs when Dominion filed notice of the EDP for the Tractor Supply Company.²² The Attorney Examiner overruled OCC's motion to intervene, and ruled that "OCC's concerns regarding Dominion's recovery of the costs to complete this economic development project may be raised by OCC or other interested persons in the Company's annual report proceeding, consistent with the process set forth in Ohio Adm.Code 4901:1-43-04."²³ This is exactly what OCC is doing now. Dominion's arguments that OCC has no right to challenge the rider costs or that the issue has been decided are without merit.

¹⁹ Dominion Response at 3 (August 6, 2021).

²⁰ *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Economic Development Project with Tractor Supply Company*, Case No. 20-1703-GA-EDP, Entry (December 21, 2020).

²¹ *Id.* at ¶ 9.

²² *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Economic Development Project with Tractor Supply Company*, Case No. 20-1703-GA-EDP, Motion to Intervene, Comments and Memorandum in Support of the Office of the Ohio Consumers' Counsel (December 10, 2020).

²³ *Id.*, Entry at 3 (December 14, 2020).

In essence, Dominion argues that this proceeding is limited to a prudence and financial review of its infrastructure development rider costs and, during a prudence and financial review, the PUCO cannot consider whether the costs at issue can legally be recovered through the infrastructure development rider. This argument has no merit and should be rejected.

The PUCO must evaluate the legality of its rulings at every stage of a proceeding. The PUCO is a creature of statute and it cannot authorize Dominion to recover different types of costs through the infrastructure development rider than what the statutes allow.²⁴ When a PUCO ruling is appealed, the Supreme Court does a *de novo* review of questions of law and it will reverse a PUCO ruling if the ruling is contrary to law.²⁵ As a result, in this proceeding the PUCO cannot authorize Dominion to include any costs in the infrastructure development rider that are not expressly authorized by statute.

B. Ohio law does not allow a gas utility to collect the costs of relocating a gathering line (which is used to transport gas to Dominion itself, not a customer) from consumers through an infrastructure development rider.

The PUCO lacks the statutory authority to allow Dominion to collect the gathering line relocation costs through the infrastructure development rider. This is because relocating Dominion's own gathering line were not part of "constructing the extension" of Dominion's gas main to serve the Tractor Supply Company.

An "infrastructure development" is defined "*constructing extensions of* transmission or distribution facilities that a natural gas company owns and operates."²⁶

²⁴ *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51 ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers").

²⁵ *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1977).

²⁶ R.C. 4929.16(A).

Relocating a utility's own facilities falls outside of this statutory definition.

"Infrastructure development costs" are defined as "planning, development, and construction costs and, if applicable, any allowance for funds used during construction."²⁷

And all these planning, development and construction costs must fall under the ambit of "constructing the extension." Again, the statute does not include costs for relocating a gas utility's own gathering line.

A gathering line is "a pipeline that transports gas from a current production facility to a transmission line or main."²⁸ A gas main extension involves building out a utility's distribution line to serve a particular customer's premises. A distribution line is defined as "a pipeline other than a gathering or transmission line."²⁹ Quite clearly, "constructing or extending" a distribution line cannot possibly include any costs related to gathering line or transmission line facilities. These are two different types of facilities serving two different purposes. The gathering line delivers the gas to the utility's transmission line or gas main, while the distribution line delivers the gas to the ultimate consumer. These two different types of facilities involve different diameters of pipe, different operating pressures, different maintenance and inspection requirements, different depreciation timelines and different rules for how costs are allocated to consumers.

If Dominion were allowed to recover the costs for relocating its gathering line, then why shouldn't the rider also include costs for relocating other utility facilities like underground electric lines, sewer lines or water mains? If all these costs were included in

²⁷ R.C. 4929.16(B)(2).

²⁸ 49 CFR § 192.3.

²⁹ *Id.*

the rider, it might make it easier for Dominion to sell new economic development projects because the business owner would bear less of the cost for the construction project. But it wouldn't be fair to Dominion's other consumers and it would be contrary to the plain language of the statute.

If the General Assembly had intended that other site development costs such as demolition of existing structures, relocation of water, sewer, or electric facilities, leveling the site, etc. could be included in EDPs and collected from gas utility customers via the infrastructure development rider, it would have said so. But it didn't include these other site development costs. Instead, it limited the recoverable costs to "constructing an extension." And this doesn't permit Dominion to recover the cost of relocating its gathering line, which is a completely different type of facility with a completely different purpose than constructing the extension of the distribution main itself.

C. The PUCO should not allow the costs for relocating the gathering line to be collected from consumers through the infrastructure development rider because Dominion failed to prove that such costs were prudently incurred as part of the line extension project.

Even if Ohio law allowed a gas utility to collect these costs through an infrastructure development rider, the PUCO should still remove the costs for relocating the gathering line from the infrastructure development rider because Dominion failed to establish that such costs were prudently incurred as part of the line extension project.

The PUCO is authorized to approve a utility's infrastructure development rider under R.C. 4929.161. The statute allows a gas utility to seek recovery of "prudently incurred infrastructure development costs."³⁰ Dominion acknowledged this when it filed a motion to clarify in the underlying economic development project case:

³⁰ R.C. 4929.161(A).

In short, [Dominion] asks the Commission to clarify that, once an Economic Development Project (EDP) is approved ... the annual report proceeding to update the rate for the Infrastructure Development Rider (IDR) allows for prudence and/or financial reviews of the EDP costs to be recovered.³¹

In response to Dominion's motion to clarify, the PUCO acknowledged that "the project costs remain subject to audit for prudence and reasonableness during the annual report proceeding."³² In addition, the PUCO must determine that rates are "just and reasonable" before they can be approved.³³

In the present case, no presumption exists that Dominion acted prudently because the costs for relocating the gathering line were Dominion's own costs for supplying and transmitting gas to its distribution system. Affiliate transactions present too many opportunities for self-dealing at the consumers' expense. Due to the elevated concern of impropriety in transactions between affiliated companies, "a presumption of prudence should not be applied to affiliate transactions."³⁴ As noted by the National Association of Regulatory Utility Commissioners, of which the PUCO is a member, "[t]here is no presumption of prudence for affiliate transactions, whether they are for expenditures or investments."³⁵

³¹ *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Economic Development Project with Tractor Supply Company*, Case No. 20-1703-GA-EDP, Motion and Memorandum in Support for Clarification of The East Ohio Gas Company D/B/A Dominion Energy Ohio at 1 (December 16, 2020).

³² *Id.*, Entry at 3 (December 21, 2020).

³³ R.C. 4909.15(A).

³⁴ *Office of the Pub. Counsel v. Missouri Pub. Serv. Comm.*, 409 S.W.3d 371, 372 (Mo. 2013).

³⁵ NARUC, *Model State Protocols for Critical Infrastructure Protection Cost Recovery, Version 1* (July 2004).

Dominion failed to establish that relocating the gathering line was the most efficient way to extend its gas main to serve the Tractor Supply Company. Even if this was the most efficient way to serve the consumer, Dominion failed to establish that it was just and reasonable to collect the costs through the infrastructure development rider. These costs instead should be treated like all other site preparation costs.

Even if Dominion's view prevails that the PUCO is limited to only conducting a prudence and financial review of its Tractor Supply EDP costs (which it is not because the PUCO cannot simply ignore the legality or eligibility of the costs for collection from consumers), Dominion still cannot escape review of the gathering line relocation costs. Prudence and financial reviews necessarily involve consideration of the lawfulness and eligibility of proposed costs for collection from customers, as well as the justness and reasonableness of whether the utility can collect the costs. That is the very purpose of such reviews.

A financial review involves a review of costs for conformance with financial and legal standards such as the Uniform System of Accounts ("USoA"), Generally Accepted Accounting Principles ("GAAP"), PUCO entries and orders, and applicable laws and rules. Similarly, a prudence review examines what would reasonable utility managers do in similar circumstances with similar facts and knowledge at the time decisions were made. The purpose of such reviews is to prevent excessive and unjust and unreasonable costs. And, by definition, costs not permitted by law for collection from consumers are unjust, unreasonable, and imprudent.

In the present case, the gathering line relocation costs that Dominion seeks to collect are not statutorily authorized for collection in an infrastructure development rider.

In addition, even if the law allowed for the collection of these costs through the rider, Dominion has failed to establish that: (1) it prudently incurred these costs; and (2) it is just and reasonable to collect these costs through an infrastructure development rider.

III. CONCLUSION

For the reasons stated herein and in OCC's initial comments, the PUCO should reject Dominion's request to collect costs for relocating its gathering line through the infrastructure development rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike or, in the Alternative, Motion for Leave to File Reply Instantly and Reply was served on the persons stated below via electronic transmission, this 13th day of August 2021.

/s/ John Finnigan
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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