

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Report of The)
East Ohio Gas Company d/b/a Dominion)
Energy Ohio for Approval of an Adjustment)
to its Infrastructure Development Rider Rate.)

Case No. 21-519-GA-IDR

**THE EAST OHIO GAS COMPANY D/B/A DOMINION ENERGY OHIO
MEMORANDUM CONTRA MOTION OF THE OFFICE OF
THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On August 13, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to strike or, in the alternative, for leave to file a reply to, the response of The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company) to OCC's motion to intervene and comments with respect to DEO's application to adjust its Infrastructure Development Rider (IDR). In accordance with Ohio Adm.Code 4901-1-12(B), DEO files this memorandum contra.

II. BACKGROUND

In Case No. 20-1703-GA-EDP, DEO submitted the economic development project (EDP) notice (Notice) for its Tractor Supply Company (TSC) project. The TSC Notice explained that relocation of an existing six-inch gathering line was "necessary to accommodate the proposed site development and mainline extension and will involve approximately 3,320 feet of pipeline." (TSC Notice (Nov. 12, 2020) at 2.) The Commission did not suspend the TSC Notice filing within 30 days, meaning the TSC EDP was automatically approved as filed by operation of law. R.C. 4929.163(E). The Commission also made clear that the TSC EDP costs would be subject to audit for prudence and reasonableness during the annual IDR report process, but not subject to disallowance for any other reason. Case No. 20-1703-GA-EDP, Entry (Dec. 21, 2020) ¶ 9.

In the TSC EDP case, OCC belatedly filed comments claiming the costs to relocate the gathering line cannot be properly recovered through the IDR. OCC, however, did not seek rehearing of the Commission's entries or the automatic approval of the TSC EDP. Instead, OCC has filed comments in this annual update proceeding, again claiming the costs to relocate the gathering line cannot be properly recovered through the IDR. (*See generally* OCC Cmts. at 3-6.) On August 6, 2021, DEO responded to OCC's comments, explaining that they were both procedurally improper and without merit. OCC now contends that DEO's comments should be stricken in their entirety, claiming that "[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." (Mem. in Support at 2.)

III. ARGUMENT

A. Utilities have a due process right to respond to parties challenging the merits of their applications.

The Supreme Court of Ohio and the Commission have recognized that utilities must be afforded due process in proceedings before the Commission. *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm'n of Ohio*, 113 Ohio St. 3d 180, 192 (2007); *In re Cobra Pipeline Co.*, Case No. 16-1725-PL-AIR, *et al.*, Fourth Entry on Reh'g (Apr. 8, 2020) ¶ 34. An essential requirement of due process is that the utility be given a reasonable opportunity to be heard to confront and rebut the claims of other parties. *See, e.g., In re Duke Energy Ohio, Inc.*, Case No. 12-1685-GA-AIR, *et al.*, Opin. & Order (Nov. 13, 2013) at 8 (rejecting OCC's claim that Duke's due process rights were protected by merely affording Duke the opportunity to respond to OCC's late-filed website documents in Duke's reply brief); *Toliver v. Vectren Energy Delivery of Ohio, Inc.*, Case No. 12-3234-GS-CSS, Opin. & Order (July 13, 2013) at 6 (granting Vectren's motion to strike documents attached to Complainant's brief not previously admitted into the record).

In seeking to strike DEO's response, OCC effectively asks the Commission to deny the Company any opportunity to respond to OCC's arguments. Indeed, OCC specifically argues that the Commission "should rule in this case *without giving any weight to Dominion's response.*" (Mot. to Strike at 2 (emphasis added).) That request by OCC does not "assure that fundamental fairness and due process are served." *In re Lake Buckhorn Util., Inc.*, Case No. 86-519-WW-AEM, Opin. & Order, 1987 WL 1466395 (Feb. 10, 1987) at *19 (denying OCC's motion to strike prefiled testimony as frivolous argument); *see also City of Cincinnati v. The Cincinnati Gas and Elec. Co., et al.*, Case No. 91-377-EL-CSS, Finding & Order, 1991 WL 11811022 (June 27, 1991) (recognizing the Commission's "obligation, as a quasi-judicial body, to conduct its hearings in a manner that comports with the elements of fundamental fairness and due process").

OCC nevertheless argues that "[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." (Mem. in Support at 2.) The sole basis for this claim is that the Commission's procedural rules do not explicitly permit a gas utility to file a response in this type of proceeding. (Mot. to Strike at 1-2.) OCC offers no credible, relevant authority to support the position the rules must expressly permit a response, or otherwise DEO is prohibited from responding to challenges to its applications before the Commission.

OCC cites the complaint case, *City of Reynoldsburg, Ohio v. Columbus S. Power Co.*, for the proposition that the Commission "will strike" any pleading not expressly allowed under the Commission's rules or a procedural schedule. (Mem. in Support at 1-2.) That case, however, does not stand for such a broad proposition. In *City of Reynoldsburg*, the Commission struck additional record support that Reynoldsburg had included in a post-hearing motion, after the filing of initial and reply briefs, to accept corrected citations to an agreed-upon statement of

facts. Columbus Southern Power argued – and the Commission agreed – that this additional support constituted an impermissible surreply brief. Case No. 08-846-EL-CSS, Opin. & Order (Apr. 5, 2011) at 26-28. But in that case, the parties had already held a hearing and submitted post-hearing briefing.

Here, DEO has not already had an opportunity to respond to OCC’s arguments. There has not been a hearing scheduled. And OCC has asked for the Commission to rule upon its claims without any consideration of DEO’s position. Thus, whereas Reynoldsburg had the opportunity to offer testimony, conduct cross-examination, and file two rounds of post-hearing briefing to respond to the utility’s applications, OCC argues that DEO in this case should have *no opportunity* whatsoever to respond to the merits of OCC’s allegations. As pointed out above, such a request does not adhere to the principles of fundamental fairness and due process.

Moreover, OCC’s position would require the Commission to ignore DEO’s position until rehearing, after the Commission has ruled. Not only is this unfair, but it also burdens the Commission with having to make two decisions – one based on an incomplete record, and one again on rehearing. Indeed, the Commission recently considered another utility’s comments in response to a Staff report in an annual update of that utility’s IDR, even though the Commission’s rules do not expressly permit that responsive pleading. *See, e.g., In re Columbia Gas of Ohio, Inc.*, Case No. 21-521-GA-IDR, Finding & Order (July 28, 2021) (considering Columbia’s comments in response to Staff recommendations regarding the utility’s infrastructure development program); *see also, e.g., In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 17-2514-GA-ATA, *et al.*, Finding & Order (May 2, 2018) ¶ 8 (noting that DEO filed reply comments in response to OCC comments to DEO’s initial IDR application).

For these reasons, the Commission should deny OCC’s motion to strike.

B. DEO does not object to OCC being permitted to file its reply.

OCC also asks that the Commission permit OCC to file its attached reply, if the Commission does not strike DEO's response. Provided its response to OCC's comments is not stricken, DEO does not object to OCC being permitted to file its reply.

IV. CONCLUSION

For the reasons identified herein, the Commission should deny OCC's motion to strike DEO's response to OCC's comments. The Company does not object to OCC being permitted to file its reply.

Dated: August 30, 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 August 30, 2021:

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/s/ Christopher T. Kennedy
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Summary: Memorandum Memorandum Contra Motion of the Office of the Ohio Consumers' Counsel electronically filed by Christopher T Kennedy on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio