BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of an Alternative Form of Regulation.	))))	Case No. 20-1634-GA-ALT

REPLY BRIEF OF THE EAST OHIO
GAS COMPANY D/B/A DOMINION ENERGY OHIO

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I. INTRODUCTION AND SUMMARY

The Office of the Ohio Consumers' Counsel (OCC) is the only party opposing a Stipulation that resolves the application of The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO) to continue deferring costs under its Pipeline Infrastructure Replacement program (PIR program) and recovering them through the PIR Cost Recovery Charge for the investment years 2022 through 2026. In doing so, OCC points to no new evidence, or change in law, to justify its insistence that the Commission reverse itself on longstanding precedent regarding diversity of parties to a stipulation and use of the rate of return authorized in the utility's last base rate case, including recent decisions approving settlements that involve similar facts and the same OCC objections. The Commission should reject OCC's claims again here.

OCC claims the Stipulation should be rejected because it fails the first element of the three-part test for approving settlements "given the lack of diversity of those who signed it and given that OCC, the statutory representative of Ohio's residential consumers, opposes it." (OCC Br. at 3.) This is contrary to clear, established Commission precedent, announced "many times," and recently reaffirmed when the Commission rejected the same OCC objection when it initially approved DEO's Capital Expenditure Program Rider (CEP Rider) less than a year ago.

OCC also claims the Stipulation fails the second and third elements of the three-part test because it adopts the rate of return from DEO's last base rate case. But this is consistent with the Commission's *uniform practice for decades* of using the last base rate case rate of return in subsequent rider and alternative rate proceedings, a practice that was recently reaffirmed as to DEO specifically, over the same OCC objections, when the Commission authorized DEO's CEP Rider.

OCC's arguments reject Ohio law and Commission precedent and subject DEO and the Commission to continued litigation on settled issues, all motivated by OCC's aversion to Ohio's alternative regulation laws and related Commission decisions that permit natural gas companies to timely recover their capital investment costs. Continuing to relitigate the same issues time and time again, with no change in law or facts, is wasteful and burdensome to other parties and to the Commission.

The Commission should reject OCC's arguments in their entirety and approve the Stipulation as filed.

II. ARGUMENT

In Section A of this brief, DEO will show that OCC has failed to rebut DEO and Staff's affirmative showing that the Stipulation satisfies the Commission's three-part test. In Section B, DEO will respond to the two issues OCC raises in opposition to the Stipulation. In short, nothing in OCC's Initial Brief undermines the conclusion that the Stipulation satisfies the Commission's test.

A. OCC has not rebutted DEO and Staff's showing that the Stipulation satisfies the Commission's three-part test for approving settlements.

1. OCC cannot dispute that the Stipulation is the product of serious bargaining among capable, knowledgeable parties.

It strains credulity for OCC to argue that the first element of the three-part test has not been satisfied. The purpose of the first prong is to ensure that settlements are not the product of collusion or back-room dealing. If settlement negotiations are transparent, all parties were invited to participate, and their counsel were competent and diligent, the first prong is satisfied. *In re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 05-219-GA-GCR, Entry on Reh'g (Mar. 21, 2007) ¶ 7 ("[W]hile not all parties signed the stipulation, all parties to this proceeding had ample opportunity to be involved in the development of the stipulation and to present evidence for the Commission's consideration.").

The record here shows the Stipulation is a product of serious bargaining among capable, knowledgeable parties. It was preceded by Staff's thorough investigation of DEO's application to continue the PIR program and by settlement meetings attended by all parties. (DEO Br. at 2-3.) As Staff explained, "[t]he bargaining among the Signatory Parties was serious in both process and result" across "numerous negotiating sessions," and the resulting "Stipulation was the product of an open process in which all intervenors were provided an opportunity to participate." (Staff Br. at 5.) Staff concludes that "the Stipulation reflects a comprehensive compromise of the issues raised by parties with diverse interests." (*Id.*) That OCC ultimately decided not to settle—the only party to do so—does not taint the process in any way.

Finally, OCC did not allege that the parties that negotiated the Stipulation lacked the capability and knowledge necessary to enter into a settlement. Nor could it. All of the parties to the negotiations, including OCC, were represented by attorneys, most if not all of whom have years of experience in regulatory matters before this Commission, and all of the parties either employed or had access to technical experts with comparable experience. (DEO Ex. 3.0 at 10.)

2. OCC ignores the benefits of the Stipulation.

OCC claims that the Stipulation "does not benefit consumers or the public interest." (OCC Br. at 2.) As established in DEO's initial brief, however, the Stipulation continues benefits previously recognized by the commission and provides significant new benefits, all of which OCC ignores. Specifically, the Stipulation promotes safety and reliability by continuing the PIR program, enabling the accelerated replacement of corrosion-prone pipelines. It continues the PIR Cost Recovery Charge that encourages necessary investment in DEO's systems by permitting timely recovery of costs and deferrals. And it continues significant bill-mitigation benefits previously recognized by the commission: annual rate increase caps, the operation and maintenance expense savings offset, and Staff's annual review of PIR investments. (DEO Br. at 8-9.)

Additionally, the Stipulation provides several substantial new benefits: an interim review of the PIR program conducted by an independent third-party consultant to be selected by Staff, DEO's voluntary commitment to prospectively remove capitalized financial incentives that would otherwise be recoverable under Commission precedent, and DEO's voluntary commitments to reflect PIR plant balances in the Company's proposed rate base and address the proposed treatment of PIR-associated EDIT in its next rate case application. (*Id.* at 9-11.)

As Staff observed, "[a]lthough the Commission's test does not require the Stipulation package's benefits to be 'substantial,' many of these enumerated benefits may prove to be quite substantial, to the economy, the environment, the energy market, and to individual ratepayers." (Staff Br. at 6.). Staff concludes that "the record adequately demonstrates that the Stipulation, taken as a package, benefits customers and is in the public interest" (*Id.* at 7.)

3. <u>OCC also cannot show that the Stipulation violates any important regulatory principle or practice.</u>

By continuing the PIR program and related cost recovery charge, the Stipulation supports (and does not violate) important regulatory principles and practices, as established by DEO's Initial Brief. (DEO Br. at 12.) As discussed in more detail below, OCC cannot show otherwise. Staff agrees, finding that "[t]he Stipulation adheres to long-standing Commission practice, and should be approved." (Staff Br. at 7.)

OCC complains that "[t]he statutes governing alternative rate plans provide that the PUCO shall approve a program filed under the plan only if it finds the program to be *just and reasonable.*" (OCC Br. at 1-2, 12.) But the Commission has already made that very finding *three times* when it initially approved DEO's PIR program in 2008 and extended the program and related cost recovery in 2011 and 2016. (DEO Br. at 2.) As DEO's and Staff's Initial Briefs demonstrate, that conclusion is fully supported again here.

In sum, there is no credible reason to reject or materially modify the Stipulation, given the Commission's prior decisions and the evidence in the record in this proceeding.

B. OCC's two arguments against approval of the Stipulation are contrary to well-established Commission precedent and should be rejected.

1. Diversity of parties is not a requirement for satisfying the first element of the Commission's three-part test and OCC does not have a veto, as OCC admits.

OCC argues that the first element of the three-part test has not been met because the Stipulation "lacks diversity of interest as there is no signatory party that represents the interests of residential customers who will pay the PIR charge." (OCC Br. at 2.) Despite Staff's support for the Stipulation, OCC asserts that "no … signatory party truly represents residential customers." (*Id*. at 3.)

This misstates the law and Staff's role. OCC is not the only agency charged with protecting residential ratepayers. "The Public Utilities Commission of Ohio is the representative of the people of the state of Ohio. It is the intermediary between the citizen-consumer on the one side and the public utility on the other." *City of Cleveland v. Public Util. Comm'n*, 127 Ohio St. 432, 435 (1934). Commission Staff work "under the direction of the commission" and "perform such duties as the commission prescribes." R.C. 4901.19. The Commission Staff, in its investigation of utility applications, "has a duty to balance the interests of all customer classes, including residential customers." *In re Ohio Power Co*., Case No. 14-1158-EL-ATA, Opin. & Order (Apr. 27, 2016) at 7.

OCC's insinuations that Staff has disregarded the interests of residential ratepayers are objectively untrue. Here, the Commission Staff thoroughly reviewed DEO's application and negotiated a Stipulation that goes further in favor of ratepayers than both the application and the

Staff Report initially provided. (DEO Br. at 2-4, 9-11.) Additionally, the Stipulation is supported not only by Staff, but two intervenors representing consumer interests, Ohio Partners for Affordable Energy (OPAE), and Industrial Energy Users-Ohio (IEU-Ohio). (*Id*. at 7.)

OCC admits that "[d]iversity is not required, and no single party can veto a settlement." (OCC Br. at 3.) But a veto is essentially what OCC insists the Commission should give it when it argues that the Commission should "reject the Settlement given the lack of diversity of those who signed it." (*Id.)* Such a diversity requirement, as OCC essentially advocates, would mean that any non-unanimous settlement would be *per se* invalid.

This is contrary to longstanding Commission precedent. *See In re Ohio Power Co*., Case No. 14-1158-EL-ATA, 2nd Entry on Reh'g (Feb. 1, 2017) ¶ 14 ("We have repeatedly held that we will not require any party to agree to a stipulation in order to meet the first part of the three-part test."); *In re Ohio Power Co*., Case No. 14-1693-EL-RDR, et al., Opin. & Order (Mar. 31, 2016) at 52 ("The three-prong test utilized by the Commission and recognized by the Ohio Supreme Court does not incorporate the diversity of interest component . . . ."); *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).

The Commission recently affirmed these principles when it approved DEO's CEP Rider less than a year ago, rejecting identical arguments advanced by OCC. *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 19-468-GA-ALT, Opin. & Order (Dec. 30, 2020) ¶ 44 (*DEO CEP Order*). The Commission should do the same here.

2. <u>OCC's arguments regarding the stipulated rate of return are inconsistent with long-standing Commission precedent and are based on an incomplete "cherry picking" analysis.</u>

a. OCC's arguments regarding the stipulated rate of return are inconsistent with the Commission's findings when authorizing DEO's CEP Rider over OCC's identical objections less than a year ago.

In its Initial Brief, OCC argues that the second and third elements of the Commission's three-part test are not met because using the same rate of return authorized in DEO's last rate case would supposedly harm consumers and violate "important regulatory principles and state policies." (OCC Br. at 4, 9.) OCC complains that "neither Dominion nor the PUCO Staff have provided any factual support" for continuing to use the same rate of return. (*Id.* at 7.)

In making these arguments, however, OCC ignores decades of consistent Commission precedent and raises identical issues with respect to rate of return that the Commission carefully considered and resolved in DEO's favor in the *DEO CEP Order* less than a year ago. OCC fails to heed the Commission's guidance in that decision, and ironically engages in exactly the kind of incomplete analysis the Commission in that case expressed concerns about.

The Commission cited a number of factors supporting its decision in the *DEO CEP Order*, all of which continue to apply here.

- For example, the Commission "acknowledge[d] that the cost of capital may increase, just as it has recently fallen, resulting in an adverse impact to customers' bills" if the rate of return was routinely updated between a utility's rate cases. *DEO CEP Order* ¶ 68.

- The Commission also recognized that "cost of capital components should apply equally to credits for customers and the cost recovery mechanism," such as Tax Cuts and Job Acts credits to customers. *Id*.

- Moreover, the Commission noted that DEO's cost of capital "is intricately tied to the Company's capital structure and risk assessment, at the time of evaluation, and may be determined by various methods, each method with its own advantages and shortcomings." *Id*.

- The Commission cautioned that "[m]odifying the long-term debt rate in this cost recovery case, which is just one of the costs of capital components, would necessarily involve 'cherry picking,' while ignoring any cost increases that have occurred since [DEO's last base rate case]." *Id*.

- Finally, the Commission "believe[d] it to be an efficient use of Commission and utility resources to continue to follow the practice of utilizing the last approved rate of return and return on equity in subsequent proceedings" and found that "evaluating and re-evaluating the financial market to determine the appropriate rates to use in each alternative rate plan and rider case would be inefficient and subject to volatility." *Id*. ¶ 70.

This outcome and rationale have not only been applied to DEO. The use of cost of capital components determined in the utility's last base rate case is also consistent with the Commission's recent orders in other alternative rate proceedings. *See In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT, Opin. & Order (Apr. 21, 2021) ¶¶ 66-68; *In re Columbia Gas of Ohio, Inc.*, Case No. 17-2202-GA-ALT, Opin. & Order (Nov. 28, 2018) at 16.

Notwithstanding the Commission's prior rulings on this very issue, over the same OCC objections, OCC persists in relitigating whether the Commission should deviate from "the practice [it has] undertaken for decades." *DEO CEP Order* ¶ 68. But the sound policy reasons supporting the Commission's consistent determination to use the base rate case rate of return in alternative rate proceedings remain applicable here.

If this were a base rate case, the parties would have devoted significant time and resources to litigating a new rate of return. If utilities in every alternative rate plan proceeding were required to litigate rate of return issues (ordinarily the costliest and most time-consuming issues to litigate), it would waste Commission resources and defeat a key goal of alternative regulation, to "minimize the cost and time expended in the regulation process," contrary to legislative intent. R.C. 4929.01(A).

Indeed, to follow OCC's position to its logical conclusion, the Commission would be required to review and reset the rate of return based on then-current market conditions, not just at the time alternative rate plans are initially authorized, but also every time each plan and associated cost recovery charge are updated—not just for DEO, but for every utility subject to Commission jurisdiction, gas, electric, and water. That continuous update would be a laborious, never-ending task that would hamstring the Commission's ability to provide efficient regulation, as it previously recognized. *DEO CEP Order* ¶ 70 ("[E]valuating and re-evaluating the financial market to determine the appropriate rates to use in each alternative rate plan and rider case would be inefficient and subject to volatility."). The better practice is what the Commission has been consistently doing "for decades"—relying on the last authorized return and not turning alternative rate plan cases into more complicated base rate cases. *Id.* ¶ 68.

Additionally, DEO has committed to a rate case filing in 2024, in the midst of the proposed 2022–2026 reauthorization period, in which all capital structure components (both amounts and costs) can be appropriately evaluated. (DEO Ex. 3.0 at 22.)

OCC claims that it "is the only party in this proceeding to present any evidence regarding a reasonable rate of return based on current market conditions and Dominion's own business and financial risks." (OCC Br. at 7.) This point illustrates the concerns raised above and previously recognized by the Commission as it suggests that DEO, Staff and other parties should have presented expert testimony on rate of return. Additionally, when approving DEO's CEP rider, the Commission rejected OCC's similar argument that the testimony of Dr. Duann should be given substantial weight because OCC was the only party to present expert testimony on the issue. *DEO CEP Order* ¶¶ 54, 70.

Dr. Duann's opinions are in no way unopposed, as OCC implies here. The Company absolutely challenges his opinions that components of the last authorized rate of return should be modified on the grounds that they are inconsistent with Commission's consistent, longstanding practice of using the base rate case rate of return in alternative rate plan proceedings. (DEO Ex. 3.0 at 21-22 ("The Company continues to maintain the same position and support the same policy rationales explained in its testimony and briefing in [the DEO CEP Rider case] and continues to oppose OCC's position. The Company does not believe there are any new facts or other changes that would support relitigating the ROR issue.").)

Thus, while neither DEO nor Staff offered witness testimony on how to establish a new rate of return, that is because this is not a rate case; the Commission had recently confirmed that a rate of return update was not needed in authorizing DEO's CEP Rider; and neither party recommended updating the embedded cost of capital. Requiring the Company and Staff to present evidence on the issue to rebut OCC's unnecessary arguments would lead to the very waste of resources, contrary to the goals of alternative regulation, that the Commission policy seeks to avoid. *DEO CEP Order* ¶¶ 68, 70

b. OCC's reliance on incomplete analysis confirms why the rate of return should not be adjusted in every rider filing.

Ignoring the legal determinations that the Commission has clearly and consistently made on this issue, OCC insists instead that the Commission should adopt a lower 7.20% pre-tax rate of return based on the testimony of OCC witness Dr. Duann. But Dr. Duann's proposed pre-tax rate of return reflects a selective, limited, and incomplete analysis. For example, Dr. Duann does not explain the source of his proposed return on equity, much less develop any economic models to support it. In addition, although he proposes to update the costs of debt and equity, he does not propose to update the amount of either, simply relying on DEO's capital structure from the last rate case. As a result, his proposal lacks the comprehensive expert assessment that would be used to determine cost of capital in a rate case. *See DEO CEP Order* ¶ 68 (contrasting this kind of incomplete analysis with the more comprehensive analysis undertaken in a full rate case); *Duke*

CEP Order ¶ 68 (observing that "a traditional return on equity analysis, in particular, often proves quite complex," and noting that Dr. Duann had failed to perform such an analysis); *see also*, *e.g.*, *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 18-298-GA-AIR, Opin. & Order (Aug. 28, 2019) ¶¶ 94-98 (finding the stipulated rate of return to be reasonable based on Staff and Vectren's expert testimony and analysis). Dr. Duann's "analysis" thus reinforces the very policy concerns the Commission has repeatedly stated in rejecting proposals to update the rate of return for every rider and alternative rate program. *See Duke CEP Order* ¶¶ 66-68 (declining to adopt the pre-tax return proposal by Dr. Duann, which was substantially similar to the one in this case).

OCC claims that DEO's business and financial risk is lower than at the time of the last rate case. But that opinion is based solely on Dr. Duann's comparison of a single element of DEO's cost of capital, its cost of debt. Dr. Duann does not analyze DEO's capital structure, expenses, or external risk factors, as would be required to fully assess financial risk. (*See* OCC Br. at 6-7, *citing* Duann Direct at 6-7.)

OCC also claims its proposed pre-tax rate of return of 7.20% would "provide sufficient profits and debt cost coverage to Dominion based on current market conditions and Dominion's current business and financial risks." (*Id.* at 7-8.) OCC asserts that "Dominion would not encounter any difficulty in obtaining funding (both equity and debt) to make the PIR investments, collecting returns on deferrals, and covering operating expenses if the 7.20% pre-tax rate of return were adopted." (*Id.*) These sweeping conclusions lack any foundation and are supported only by Dr. Duann's conclusory analysis, again apparently relying on a simplistic, selective comparison of DEO's cost of debt in its last full rate case and today. As it did in the DEO CEP case, OCC again fails to recognize that DEO's capital structure, a critical component of the cost of capital, has changed since its last base rate case – the same problem the Commission recognized the last time OCC made these arguments. *See DEO CEP Order* ¶ 68.

All of these shortcomings of OCC's approach illustrate why a base rate case is the appropriate proceeding in which to set a utility's overall rate of return, and why it is inappropriate to do so here.

c. This is not the appropriate proceeding in which to address consumer protection concerns related to commodity costs.

Finally, OCC argues that the Commission should modify the rate of return to "protect consumers" because of rising gas costs, claiming that consumers "are being asked to pay more – a lot more" and comparing the current PIR Rider cost of $14.98 per month with the maximum potential PIR Rider cost of $20.27 in 2025 (which assumes all rate increase caps are reached). (OCC Br. at 8-9.) Here, as elsewhere, OCC's arguments also ignore the critical need for these distribution and transmission PIR investments, and the significant benefits provided by the Stipulation, including bill-mitigation benefits and new DEO commitments that indisputably result in revenue requirements that will be lower than they would be otherwise, benefitting ratepayers. (DEO Br. at 7-11.)

OCC made an analogous argument in DEO's CEP Rider case that linked the CEP Rider with unrelated issues, arguing that the Commission should reject the stipulation there because "customers are experiencing health and financial impacts as a result of the pandemic" and that "the pandemic is a bad time to increase the charges Dominion's residential customers will pay." *DEO CEP Order* ¶¶ 49-50. The Commission rejected these arguments and approved the Stipulation, finding it "better to address consumer protection concerns due to the pandemic as a separate matter rather than within certain cases filed during the pandemic." *DEO CEP Order* ¶ 67; *see also 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.").

The Commission should reach the same result here. If it believes that issues regarding natural gas commodity costs require additional consumer protections, such issues can be addressed in a targeted manner in other proceedings that examine the resources and protections available for individual customers to help make their service more affordable. But whether such a separate proceeding is necessary,[1] this does not provide a basis for disapproving the Stipulation.

III. CONCLUSION

As established above and in DEO's and Staff's Initial Briefs, the evidence shows that the Stipulation complies with all three parts of the Commission's test. For these reasons, the Commission should approve the Stipulation as filed.

Dated: December 8, 2021

Respectfully submitted,

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[1] The Commission's own publications show that the cost of natural gas service in DEO's service area remains considerably less than other regions of Ohio. *See* https://analytics.das.ohio.gov/#/site/+PUCPUB/views/UtilityRateSurvey/+URSBillbyCity (last viewed December 7, 2021).

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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 December 8, 2021:

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