

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Gas Company for Authority to Establish a Right-of-Way Rider	) ) )	Case No. 21-0943-GA-RDR
In the Matter of the Application of Ohio Gas Company for Tariff Approval	) )	Case No. 21-0944-GA-ATA
In the Matter of the Application of Ohio Gas Company for Approval to Change Accounting Methods	) ) )	Case No. 21-0945-GA-AAM

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**OHIO GAS COMPANY'S MEMORANDUM CONTRA TO  
THE APPLICATION FOR REHEARING FILED BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Matthew R. Pritchard (Reg. No. 0088070)  
(Counsel of Record)  
Bryce A. McKenney (Reg. No. 0088203)  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 719-2842  
Telecopier: (614) 469-4653  
mritchard@mcneeslaw.com  
bmckenney@mcneeslaw.com  
(willing to accept service via email)

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**Counsel for Ohio Gas Company**

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Ohio Gas Company (“Ohio Gas” or “Company”) filed a proper application under R.C. 4939.07 to recover costs directly incurred as the result of local regulation of rights-of-way through a new charge, the Right-of-Way Rider (“ROW Rider”), Part A of the ROW Rider, and to recover any rights-of-way fees imposed on the Company, Part B of the ROW Rider. Future cost recovery through the ROW Rider will be subject to review by the Public Utilities Commission of Ohio (“Commission”) and its Staff each year. The ROW Rider also includes an annual reconciliation process. The Commission reviewed the Company’s application, as supplemented through discovery and set forth in Staff’s review and recommendation, and the Commission properly determined that the application was reasonable, practical, and complied with the legal requirements of R.C. 4939.07.

The Office of the Ohio Consumers’ Counsel (“OCC”) objected to only Part A of the Company’s new ROW Rider and on the unfounded basis that it would allow the Company to double-recover costs and based on OCC’s incorrect interpretation of the statute. OCC

reaches its conclusion by asserting that accounting rules applicable to regulatory assets require the Commission to interpret the term “cost” used through R.C. 4939.07 as really meaning “expense.” The Commission properly rejected OCC’s arguments in its December 15, 2021, Finding and Order. OCC raises these same arguments through an untimely and improper application for rehearing.

As discussed in more detail below, the Commission should deny OCC’s application for rehearing because:

- (1) OCC failed to file its accounting-related assignment of error in the ROW Rider accounting case within the statutory 30-day timeframe and OCC failed to comply with the requirements to seek rehearing in a case where OCC has not intervened;
- (2) The ROW Rider will not double-recover costs;
- (3) The ROW Rider is consistent with how costs are recovered in Infrastructure Development Riders;
- (4) The ROW Rider is a reasonable and lawful structure and will result in less overall charges to customers than OCC’s alternative proposal; and,
- (5) OCC asks the Commission to rewrite an unambiguous statute rather than apply the plain meaning of the statute.

## **I. ARGUMENT**

### **A. The Commission must deny OCC’s application for rehearing because it is untimely and improper.**

The Commission must deny OCC’s application for rehearing because it is untimely and fails to comply with the statutory requirements under R.C. 4903.10. This proceeding involves three separate cases: a rider case, a tariff case and an accounting case. OCC did not intervene in the accounting or tariff cases and did not file its application for rehearing in the accounting or tariff cases. Yet, its application for rehearing raises alleged errors related to the accounting for the ROW Rider. Failure to comply with the statutory

requirements contained in R.C. 4903.10 is a jurisdictional bar to further consideration of an assignment of error.<sup>1</sup> Because OCC failed to timely raise challenges to the accounting of the ROW Rider the Commission must deny OCC's application for rehearing.

There are several relevant requirements regarding the timely and proper filing of an application for rehearing. Initially, R.C. 4903.10 authorizes a party that made an appearance in the case prior to the decision to seek rehearing within 30 days of the issuance of the decision. If an entity did not make an appearance prior to the issuance of the decision the party must first seek leave from the Commission to seek rehearing.<sup>2</sup> The Commission is precluded from granting leave to file rehearing unless the entity who did not make an appearance demonstrates that:

- (A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,
- (B) The interests of the applicant were not adequately considered in the proceeding.<sup>3</sup>

The Ohio Supreme Court has held that the requirements of R.C. 4903.10 are "strictly enforce[d]."<sup>4</sup> Failure to file a timely and proper application for rehearing "jurisdictionally bars" the Commission from consideration of the assignments of error raised therein.<sup>5</sup>

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<sup>1</sup> See *In re Ohio Power Co.*, 159 Ohio St.3d 130, 2020-Ohio-143, 149 N.E.3d 451, ¶ 14, citing *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 55 ("We have therefore explained that a party's failure to present a claim to the PUCO on rehearing "jurisdictionally bars" this court's consideration of that claim on appeal."); *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, ¶15 (argument not raised at the PUCO is forfeited).

<sup>2</sup> R.C. 4903.10.

<sup>3</sup> *Id.*

<sup>4</sup> *Harris Design Servs. v. Columbia Gas of Ohio, Inc.*, 154 Ohio St.3d 140, 2018-Ohio-2395, 112 N.E.3d 858, ¶ 20 (citing *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59).

<sup>5</sup> *In re Ohio Power Co.*, 159 Ohio St.3d 130, 2020-Ohio-143, 149 N.E.3d 451, ¶ 14, citing *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 55; *In the Matter of the*

To properly file an application for rehearing it must be filed in the correct PUCO case.<sup>6</sup> The party making the filing bears responsibility to correctly caption a case, and bears all responsibility for correctly e-filing a document.<sup>7</sup> In instances of consolidated cases where an application and order address multiple case numbers, the party seeking rehearing must file the application for rehearing in each case number through the Commission's e-filing system.<sup>8</sup> Failing to file an application for rehearing in each case addressed by a single Commission decision precludes the Commission from addressing arguments specific to the omitted cases.<sup>9</sup> This exact issue has come before the Commission before where it held:

[t]he party making an electronic filing controls in which case or cases the party will file its document, i.e., the Commission's electronic filing process requires the filer to select or input the case number(s) in which the document is to be filed. In this situation, [the filing party] did not select or input Case No. 09-1090-EL-POR and, therefore, the filing of its application for rehearing did not occur in Case No. 09-1090-EL-POR. As a result, there is no application for rehearing for the Commission to consider in 09-1090-EL-POR.<sup>10</sup>

OCC failed to follow these requirements with respect to the single assignment of error addressing alleged accounting issues for the ROW Rider. OCC filed its application for rehearing in only Case No. 21-943-GA-RDR. The Company's application, Staff's

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*Complaint of Cynthia Wingo v. Nationwide Energy Partners LLC*, Case No 16-2401-EL-CSS, Third Entry on Rehearing at 5-8 (Jan. 9, 2018).

<sup>6</sup> See *In the Matter of the Application of Columbus Southern Power Company for Approved of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 09-1089-EL-POR, *et al.*, Entry on Rehearing at 4 (July 14, 2010).

<sup>7</sup> See Rule 4901-1-02(D)(7), O.A.C.

<sup>8</sup> See *In the Matter of the Application of Columbus Southern Power Company for Approved of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 09-1089-EL-POR, *et al.*, Entry on Rehearing at 4 (July 14, 2010).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

review and recommendation, and most importantly, the Commission's Finding and Order cover three separate cases. The two cases where OCC did not seek rehearing address a request for authority to modify the Company's tariff to include a new tariff sheet reflecting the ROW Rider (Case No. 21-944-GA-ATA), and the case where the Company requested accounting authority for the ROW Rider (Case No. 21-945-GA-AAM).

OCC also did not make an appearance in Case Nos. 21-944-GA-ATA or 21-945-GA-AAM prior to the issuance of the Commission's December 15, 2021, Finding and Order, and has not subsequently sought to intervene in these two cases or sought leave to file rehearing in these two cases.

OCC's application for rehearing filed in Case No. 21-943-GA-RDR does not address any of the requirements that must be satisfied to seek leave to file rehearing.

And, it is clear that OCC's assignment of error challenges the accounting for the ROW Rider. OCC's argument is based, albeit incorrectly, on "accounting rules."<sup>11</sup> The bulk of OCC's application for rehearing focuses on OCC's interpretation of the application of accounting rules specific to "regulatory assets."<sup>12</sup> But, again, OCC did not intervene in the ROW Rider accounting case, has not sought leave to seek rehearing in that case, and has not docketed any application for rehearing in that case. Due to OCC's error, the Commission is jurisdictionally barred from considering OCC's accounting-related assignment of error.

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<sup>11</sup> OCC Application for Rehearing at 4 (January 14, 2022).

<sup>12</sup> *Id.* *In passim.*

**B. OCC is incorrect that the ROW Rider will allow the Company to double-recover costs.**

In support of its untimely and improper accounting issue assignment of error, OCC also asserts that not adopting its position will permit the Company to double-recover the costs being collected through the ROW Rider.<sup>13</sup> OCC's argument is incorrect.

Throughout each calendar year the Company expects to incur some level of directly incurred right-of-way costs eligible for recovery under Part A of the ROW Rider. These annual directly incurred costs will be recognized in an annual true-up filing made by March 31<sup>st</sup> each year and rates anticipated to be effective each October 1<sup>st</sup>. As the ROW Rider rates recover the annually authorized amount over the 12-month collection period it will be accounted for in the same manner as other contributions in aid of construction. That is, the ROW Rider collections will be accounted for as a reduction to rate base.

By example, the Commission authorized the Company to initially recover \$541,808.02 in directly incurred right-of-way costs for 2018 through 2020. The currently in effect ROW Rider rates are designed to collect this initial amount through September 2022. At that time, and setting aside the potential true-up reconciliation, there will be a contra-asset on the Company's books in the amount of \$541,808.02. For base ratemaking purposes, these amounts offset each other and there is no effect on rate base or customers rates. Simply put, the costs collected through the ROW Rider will not show up in future base rates. Furthermore, both the Staff and the Commission have reviewed and addressed costs collected through riders in numerous base rate proceedings and

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<sup>13</sup> OCC Application for Rehearing at 7.

both are amply equipped to review a future rate case filing from the Company to ensure the costs collected through the ROW Rider do not show up in future base rates.

**C. The ROW Rider structure is very similar to the cost-recovery mechanics of the Infrastructure Development Riders.**

The Commission has already authorized a number of Infrastructure Development Riders (“IDR”) with nearly identical mechanics to the ROW Rider, undermining OCC’s unfounded opposition to the mechanics to the ROW Rider. The ROW Rider mechanics are reasonable and consistent with Commission precedent.

The statutes authorizing the ROW Rider and the IDR use similar language. R.C. 4939.07 authorizes a utility to recover “directly incurred costs” and in total uses the term “cost” or “cost-recovery” 15 times while using the term “expense” zero times. The statutory provisions addressing an IDR, R.C. 4929.16 through 4929.163 similarly authorize recovery of “prudently incurred infrastructure development costs” and exclusively use the term “cost” and contain no reference to the term “expense.” The Commission has authorized an IDR for Dominion Energy Inc., Columbia Gas of Ohio, Duke Energy Ohio, Vectren Energy Delivery of Ohio Inc., and recently for the Company as well.

In addition to similar statutory language, the accounting of the ROW Rider and IDRs is also similar. In the case of Dominion’s Commission-approved IDR, Dominion explained the accounting for its IDR as follows:

Construction costs for each Commission-approved economic development project will be specifically tracked. IDR amounts billed to customers net of applicable taxes to recover such costs will be treated as a contribution in aid of construction (CIAC), *i.e.*, as a credit to plant costs for the applicable project. During the course of construction for an approved project, associated IDR amounts billed to customers will be recorded in a regulatory liability account. Upon completion of the project, accumulated IDR amounts

for that project will be reclassified to offset the infrastructure development costs. If the asset is placed in service before all associated IDR amounts have been billed, CIAC will be recorded for the remainder to be collected through the rider and a regulatory asset will be established. The regulatory asset will be reduced to reflect post-in-service IDR amounts billed to customers until all associated IDR amounts have been billed.<sup>14</sup>

Dominion's Commission-approved IDR, like the Company's IDR, allow for directly incurred economic development project costs to be recorded as a regulatory asset until collected.<sup>15</sup>

The Company looked to the IDR statutes and Commission precedent in authorizing IDRs in designing the proposed ROW Rider. The ROW Rider complies with the requirements of R.C. 4939.07 and is substantially similar to other Commission-approved rider mechanisms. The ROW Rider structure is reasonable.

**D. The authorized ROW Rider is lawful and reasonable and will result in less overall charges to customers than OCC's alternative proposal.**

The overall structure of the ROW Rider is sufficient for the Company to have voluntarily proposed to waive its right for an opportunity to earn its authorized rate of return on investment. This extremely reasonable position from the Company will reduce amounts charged to the Company's customers.

One alternative approach OCC proposed in its comments, a Capital Expenditure Program ("CEP") Rider, would not be a structure that would allow the Company to waive its right to earn a return on its investment.<sup>16</sup> Moreover the alternative CEP Rider approach

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<sup>14</sup> *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval to Establish an Infrastructure Development Rider*, Case Nos. 17-2515-GA-IDR, *et al.*, Application at Exhibit C-1 & C-2 (Dec. 20, 2017); *see also In the Matter of the Infrastructure Development Rider of Ohio Gas Company*, Case No. 21-511-GA-IDR, Annual Report of Ohio Gas Company at Schedule B-1 (Apr. 14, 2021).

<sup>15</sup> *Id.*

<sup>16</sup> OCC Comments at 5 (December 13, 2021).

OCC suggested would include a much broader universe of cost recovery.<sup>17</sup> While the Company has a statutory right to request to recover these costs (and others) under a CEP Rider, that alternative approach would result in a greater overall amount of charges to customers.

Another alternative approach OCC identified in its comments was to collect the right-of-way costs through a rider established under an alternative rate plan.<sup>18</sup> The alternative regulation statutes allow for any form of alternative regulation so long as it is just and reasonable, meets the state energy policies and is not unduly discriminatory.<sup>19</sup> The alternative regulation statutes provide the Commission with authority to create a rider identical to the ROW Rider under those statutory sections.

While the Company could have availed itself of the CEP Rider or alternative regulation cost recovery mechanisms as OCC points out, R.C. 4939.07 provides independent authority for the creation of the ROW Rider to permit the Company to recover the costs outlined in the statute. The fact that OCC acknowledges that there are other statutory mechanisms that allow the Company to recover these types of costs undercuts OCC's unfounded assertion that the ROW Rider "turns longstanding and fundamental utility ratemaking on its head and leads to an absurd result."<sup>20</sup> The ROW Rider is reasonable and will result in lower overall charges to customers than the alternative CEP approach OCC suggested in its comments.

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<sup>17</sup> R.C. 4929.111(A).

<sup>18</sup> OCC Comments at 5.

<sup>19</sup> See R.C. 4929.05.

<sup>20</sup> OCC Application for Rehearing at 7.

**E. OCC improperly seeks the Commission to rewrite a statute that OCC concedes is unambiguous rather than apply the plain meaning of the statute.**

OCC's application for rehearing recommends that the Commission engage in impermissible statutory construction.<sup>21</sup> To this end OCC asks the Commission to rewrite the statutory language in R.C. 4939.07 to remove references to the recovery of "costs" and replace it with recovery of "expenses."<sup>22</sup> OCC then claims that because the Company seeks to recover "costs" and not "expenses" the Commission should grant rehearing and deny the Company's right to recover its directly incurred municipal rights-of-way costs.<sup>23</sup> OCC's request that the Commission rewrite the statutory language of an unambiguous statute is unlawful and unreasonable and must be rejected.

Initially, OCC correctly recognizes that R.C. 4939.07 is unambiguous.<sup>24</sup> OCC is also correct that unambiguous statutes are applied and not interpreted.<sup>25</sup> In applying an unambiguous statute, one looks at the plain language "as written, making neither additions to the statute nor subtractions."<sup>26</sup> While OCC correctly recognizes these first two principles it throws the third out the window.<sup>27</sup>

R.C. 4939.07 uses the term "cost" 15 times in the statutory language. The statute authorizes the Commission to "establish a charge and collection mechanism to permit the

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<sup>21</sup> OCC Application for Rehearing, *in passim*.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 3 ("Where, as here, a statute is clear and unambiguous, it should be applied as written.")

<sup>25</sup> *Id.*

<sup>26</sup> *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶ 20-23.

<sup>27</sup> OCC's argument is also undermined by the fact that the General Assembly has used the term "expense" in other ratemaking statutes in lieu of "cost." See, e.g., R.C. 4909.15. The General Assembly knows how to write a statute that limits recovery to items that were expensed, but did not so limit R.C. 4939.07.

public utility full recovery of that cost.”<sup>28</sup> Relevant to this discussion, the statute defines a “cost eligible for recovery” under the statute as needing to meet two requirements: (1) “the cost is directly incurred” . . . and (2) “the cost is incurred by the public utility” after a specific date.<sup>29</sup> The term “cost” is used throughout the remaining divisions of the statute. Nowhere in the statute did the General Assembly use the term expense. Applying the plain language of the statute requires the Commission to utilize the term “cost” and not “expense” when considering whether the Company’s costs can be recovered through a mechanism authorized under the statute.

Moreover, OCC’s suggested “interpretation” is unfounded. The Company’s ability to recover costs through its Commission-regulated rates is governed by Ohio law and Commission orders. In the context of R.C. 4939.07, the Commission correctly noted that the statute, “is, with little exception, mandatory.”<sup>30</sup> R.C. 4939.07 compels the Commission to authorize Ohio Gas to record the directly incurred costs as a regulatory asset.

OCC’s reliance on R.C. 4905.13 and Rule 4901:1-13-13, O.A.C., as prohibiting Ohio Gas from recording the directly incurred rights-of-way costs as a regulatory asset, is also misplaced. The Statute grants the Commission jurisdiction over a public utilities accounting for regulatory purposes.<sup>31</sup> The Statute does not require the Commission to follow third party accounting procedures.<sup>32</sup> The Rule provides that natural gas utilities should generally follow the system of accounts prescribed by the Federal Energy

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<sup>28</sup> R.C. 4939.07(D)(3) (emphasis added).

<sup>29</sup> R.C. 4939.D(1) (emphasis added).

<sup>30</sup> Finding and Order at 8.

<sup>31</sup> R.C. 4905.13.

<sup>32</sup> *Id.*

Regulatory Commission (“FERC”) “except to the extent that the provisions of said uniform system of accounts are inconsistent in any way with any outstanding orders” of the Commission.<sup>33</sup> The same Rule also provides that the Commission “reserves to itself the right to require the creation and maintenance of such additional accounts as may hereafter be prescribed to cover the accounting procedures of gas or natural gas companies operating within the state of Ohio.”<sup>34</sup> This Statute and Rule confirm that the Commission has authority to permit the result reflected in the ROW Rider, and not the other way around as OCC would argue.

Applying the plain language of the statute as written produces a clear result consistent with the Commission’s Finding and Order. OCC concedes throughout its application that the Company seeks to recover its costs through the ROW Rider and acknowledges that is what the Commission authorized.<sup>35</sup> OCC’s proffered statutory interpretation is both procedurally and substantively without merit. Because the statute authorizes recovery of costs directly incurred as a result of municipal regulation of its rights-of-way, and there is no dispute that is what will occur through the ROW Rider, OCC’s argument is without merit and should be rejected.

## **II. CONCLUSION**

The Company presented the Commission with a reasonable request that will allow the Company to recover costs outside of its control and in a manner consistent with R.C. 4939.07. The ROW Rider structure proposed by the Company and approved by the Commission will result in less overall costs charged to customers than OCC’s alternative

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<sup>33</sup> Rule 4901:1-13-13(A), O.A.C. (emphasis added).

<sup>34</sup> *Id.* at (B).

<sup>35</sup> See, e.g., OCC Application for Rehearing at 1.

proposal. OCC has failed to preserve any arguments for the Commission's consideration due to OCC's failure to submit a timely and proper application for rehearing in the case addressing the accounting for the ROW Rider. In any event, the argument raised in the application for rehearing is substantively without merit and should be denied.

Respectfully submitted,

/s/ Matthew R. Pritchard

Matthew R. Pritchard (Reg. No. 0088070)

(Counsel of Record)

Bryce A. McKenney (Reg. No. 0088203)

McNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

Telephone: (614) 719-2842

Telecopier: (614) 469-4653

mpritchard@mcneeslaw.com

bmckenney@mcneeslaw.com

(willing to accept service via email)

**Counsel for Ohio Gas Company**

**CERTIFICATE OF SERVICE**

In accordance with Ohio Adm.Code 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Ohio Gas Company's Memorandum Contra the Application for Rehearing filed by the Office of the Ohio Consumers' Counsel*, was sent via electronic service on January 24, 2022, by, or on behalf of, the undersigned counsel.

/s/ Matthew R. Pritchard  
Matthew R. Pritchard

William J. Michael  
Ambrosia E. Wilson  
William.Michael@occ.ohio.gov  
Ambrosia.Wilson@occ.ohio.gov

**On Behalf of the Office of the Ohio Consumers' Counsel**

Jodi Bair  
Thomas Shepherd  
Jodi.Bair@ohioAGO.gov  
Thomas.Shepherd@ohioAGO.gov

Patricia Schabo  
Patricia.Schabo@puco.ohio.gov

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Summary: Memorandum Contra Application for Rehearing electronically filed by Mr. Matthew R. Pritchard on behalf of Ohio Gas Company