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

THE EAST OHIO GAS COMPANY D/B/A DOMINION ENERGY OHIO'S MEMORANDUM CONTRA APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Mark A. Whitt (0067996)
Christopher T. Kennedy (0075228)
Lucas A. Fykes (0098471)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3912
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Andrew J. Campbell (0081485)
DOMINION ENERGY, INC.
88 East Broad Street, Suite 1303
Columbus, Ohio 43215
Telephone: 614.601.1777
andrew.j.campbell@dominionenergy.com

(All counsel are willing to accept service by email)

ATTORNEYS FOR THE EAST OHIO COMPANY D/B/A DOMINION ENERGY OHIO

Dated: May 31, 2022

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I. INTRODUCTION

In a series of recent decisions, the Commission has held repeatedly and consistently that the revenue requirement for alternative rate plan riders may be determined using the rate of return authorized in the utility's last base rate case. *See In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 21-619-GA-RDR, Opin. & Order (Feb. 23, 2022) ¶¶ 58-60, 71; *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 19-468-GA-ALT, 2d Entry on Reh'g (Feb. 23, 2022) ¶¶ 20, 33; *In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT, Opin. & Order (Apr. 21, 2021) ¶¶ 66-69, 79-81; Case No. 19-468-GA-ALT, Opin. & Order (Dec. 30, 2020) ¶¶ 68-70, 79. These decisions include the Order in this case, in which the Commission approved the October 12, 2021 Stipulation between The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO), Industrial Energy Users-Ohio, Ohio Partners for Affordable Energy, and the Commission's Staff. This Stipulation recommended continuing DEO's Pipeline Infrastructure Replacement Program (PIR Program) and associated cost recovery charge.

Only one party, the Office of the Ohio Consumers' Counsel (OCC), opposed the Stipulation. Continuing to disregard the Commission's consistent and clear precedent, OCC argues that the Stipulation should be modified to lower the rate of return for the PIR Program revenue requirement.

OCC's arguments in its Application for Rehearing reveal what it is really doing. OCC does not marshal new evidence, cite some changed law, or make compelling new arguments that would justify rehearing. Rather, OCC attacks *the law itself*. Ohio law plainly and expressly authorizes alternative regulation, *see, e.g.*, R.C. 4929.05, yet OCC asserts that "[a]lternative regulation is, by its very nature, cherry picking in Dominion's favor." (Reh'g App. Mem. at 9.) Needless to say, the Commission, as an agency created by law, is not entitled to disregard the

law. *See, e.g., Disc. Cellular, Inc. v. Pub. Util. Comm'n*, 2007-Ohio-53, ¶ 51, 112 Ohio St.3d 360, 373 ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers").

In sum, OCC's Application for Rehearing rejects Ohio law and Commission precedent, and subjects DEO and the Commission to continued litigation on a settled issue, all motivated by OCC's fundamental aversion to Ohio's alternative regulation laws and related Commission decisions. And in doing so, it repackages the same set of arguments that the Commission has already carefully considered and rejected multiple times, in this Order and in many proceedings. OCC's Application should be denied.

II. ARGUMENT

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).

Each of OCC's four assignments of error fails to demonstrate that the Commission unlawfully or unreasonably erred in adopting the joint Stipulation resolving DEO's application to continue its PIR program. Instead, OCC's Application for Rehearing merely recapitulates or repackages policy positions and arguments that the Commission has already carefully considered and rejected multiple times.

A. The Commission did not violate R.C. 4905.22, R.C. 4929.05(A)(3) or R.C. 4909.18 in approving the Stipulation (Response to Assignment of Error No. 1).

1. Contrary to OCC's arguments, the Commission expressly found that the Stipulation, and DEO's alternative rate plan as modified by the Stipulation, are just and reasonable.

In its first assignment of error, OCC argues that the Commission's supposed failure to find DEO's plan to continue the PIR program "just and reasonable" violates R.C. 4905.22, R.C. 4929.05(A)(3) and R.C. 4909.18. (Reh'g App. Mem. at 2.) As elsewhere in its application, OCC's arguments here merely repackage the same arguments that the Commission considered, and expressly rejected, in the Order.

OCC's arguments also ignore, inexplicably, that the Commission expressly found in the Order that "the Stipulation is just and reasonable," that the "alternative rate plan, as modified by the Stipulation, is just and reasonable," and that "Dominion's alternative rate plan, as modified by the Stipulation, meets the requirements of R.C. 4929.05(A)." Order ¶¶ 61, 71.

2. The Commission carefully considered the rate of return issue and expressly rejected OCC's arguments and evidence as unpersuasive and meritless.

OCC insists that the Commission was required to specifically find that the use of the rate of return from DEO's last base rate case is just and reasonable. (Reh'g App. Mem. at 3.) But there is no requirement that the Commission specifically find that each aspect of an alternative rate plan, like the use of a particular rate of return, is "just and reasonable." Rather, the Commission is only required to make that finding as to the entire alternative rate plan. *See* R.C. 4929.05(A)(3) (requiring the Commission to find that the "*alternative rate plan* is just and reasonable") (emphasis added). As noted above, that is precisely what the Commission did in the Order.

Conversely, OCC also argues that the Commission violated R.C. 4905.22, R.C. 4929.05(A)(3), and R.C. 4909.18 because it failed to find that using the rate of return from

DEO's most recent base rate case is *un*just and *un*reasonable. Here, OCC argues that the evidence in the record did not support the Commission's rejection of OCC's proposed rate of return adjustment and adoption of the Stipulation, and asserts that the Commission merely relied on its "past practices" regarding the rate of return issue and "failed to provide any explanation whatsoever" for doing so. (Reh'g App. Mem. at 3-5.)

This is clearly untrue. The Commission made numerous express findings in declining to modify or reject the Stipulation with respect to the rate of return issue, as recommended by OCC, including the following:

- "While adjusting certain elements of the rate of return calculation could decrease the rate charged to consumers in this proceeding, those elements may just as quickly increase, which would result in an adverse impact to consumers' bills." Order ¶ 54.
- "Modifying only certain elements in the rate of return calculation would necessarily involve "cherry picking," while ignoring any cost increases since the rate case." *Id.*
- "Adopting OCC's position with regard to the rate of return may lead to the loss of many other substantial benefits for customers that the Stipulation provides, including an interim review of the PIR program, the exclusion of capitalized financial incentives, as well as other well-recognized benefits that the PIR program offers, such as increased safety and reliability." *Id.*
- "[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." *Id.*

This is precisely the same approach that the Commission utilized to reach the same exact result in Case No. 19-468-GA-ALT, when the Commission twice rejected OCC's virtually identical arguments and objections to the rate of return utilized for DEO's CEP Rider. Case No. 19-468-GA-ALT, 2nd Entry on Reh'g (Feb. 23, 2022) ¶¶ 20, 33; Opin. & Order (Dec. 30, 2020) ¶¶ 68-70, 79.

Moreover, in its Order, the Commission summarized the findings of the Staff Report and Staff's arguments in briefing, noting that "Staff asserts that the Stipulation benefits ratepayers and the public interest in a variety of ways . . . Staff states that the benefits from the Stipulation are substantial. Staff adds that using the rate of return from the last base rate case is a benefit because it leads to less rate volatility. Furthermore, Staff states that adjusting only certain elements in the rate of return formula would necessarily involve cherry picking, which the Commission recently refused to do." Order ¶ 52.

Far from ignoring OCC's arguments regarding rate of return, or reflexively relying on its past precedent as OCC contends, the Commission specifically addressed OCC's arguments and purported evidence, concluding that "they do not have merit," Order ¶ 53, and that the "Commission does not find [OCC's] arguments persuasive." *Id.* ¶ 61. With respect to the rate of return issue, specifically, the Commission "disagrees with OCC's assertion" that "the rate of return proposed in the Stipulation is too high to benefit the public interest and that the Commission should instead adopt a lower rate of return proposed by OCC." *Id.* ¶ 54.

In reality, the Commission did more than was necessary here. The Commission is obligated by law to be consistent in its decision-making and not depart from its own relevant precedent without good reason. *See Cleveland Elec. Illum. Co*., 42 Ohio St.2d 403, 431 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm'n*, 59 Ohio St.2d 81, 89 (1979) (instructing the Commission to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law"); *see also Office of Consumers' Counsel v. Pub. Util. Comm'n*, 10 Ohio St.3d 49, 50–51 (1984) ("When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified."). It justifiably could have

simply relied on its precedent (much of it very recent) once it determined the precedent applied, and peremptorily denied OCC's arguments on that basis. But the Commission clearly and carefully considered OCC's arguments on this issue, and OCC's position now that it failed to do so must be denied.

3. OCC's arguments regarding rate of return were not unopposed, as OCC implies.

Here, and throughout its application, OCC repeatedly argues that its purported evidence on the rate of return issue was uncontroverted. Specifically, OCC asserts that "no party challenged OCC's expert witness Dr. Daniel Duann's testimony" on the rate of return issue (Reh'g App. Mem. at 3), which was supposedly "uncontroverted," (*id.* at 5).

Dr. Duann's opinions were in no way unopposed. The Company challenged his opinions that components of the last authorized rate of return should be modified on the grounds that they are inconsistent with the Commission's consistent, longstanding practice of using the base rate case rate of return in alternative rate plan proceedings. *See* Order ¶ 51 ("Dominion emphasizes that litigating the rate of return in every alternative rate plan authorization and update proceeding for every utility would hamstring the Commission's ability to provide efficient regulation. Dominion states that it opposes Dr. Duann's testimony and does not believe that OCC presented any new facts that would support relitigating the rate of return issue."). DEO also explained in detail in its reply brief the shortcomings of Dr. Duann's incomplete and selective rate of return analysis, including how Dr. Duann's analysis illustrates why a base rate case is the appropriate proceeding in which to set a utility's overall rate of return, rather than an alternative rate proceeding to continue an existing program. (DEO Rep. Br. at 7-13); *see also* Order ¶ 51 ("Dominion also emphasizes that Dr. Duann's testimony reflects a selective, limited, and incomplete analysis").

And as discussed above, the Commission thoroughly addressed the rate of return issue in the Order, including analysis of OCC's arguments based on Dr. Duann's testimony, which arguments and evidence the Commission found unpersuasive and without merit. *See supra* Section II.A.2.

Thus, while neither DEO nor Staff offered witness testimony on how to establish a new rate of return, that is because such testimony was not required. This was not a base rate case, and the Commission had recently confirmed in multiple alternative rate proceedings that a rate-of-return update was neither necessary nor appropriate. Indeed, the Commission confirmed yet again in this case 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." Order ¶ 54. A contrary conclusion, 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 that the alternative regulation laws seek to avoid. *See, e.g.*, R.C. 4929.01(A) ("alternative rate plan" means, *inter alia*, methods that "minimize the costs and time expended in the regulatory process").

For these reasons, the Commission should reject OCC's Assignment of Error No. 1.

B. The Commission's rejection of OCC's modified rate of return was supported by the record and the Commission's reasoning was sufficiently set forth in the Order (Response to Assignment of Error No. 2).

In its second assignment of error, OCC argues that the Commission's Order violates R.C. 4903.09, again claiming that the Commission did not cite evidence in the record to support its decision and only relied on past precedent. (Reh'g App. Mem. at 5-7.) As with the first assignment of error, OCC misrepresents the record, repackages identical arguments, and fails to demonstrate that the Order is unlawful or unreasonable in any respect.

1. The Commission is only required to set forth "some factual basis" and reasoning based thereon in reaching its conclusions. .

The purpose of R.C. 4903.09 is "'to enable [courts] 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).

2. The Order clearly complied with that statutory requirement by providing factual findings and reasoning supporting the Commission's conclusions.

The Commission clearly complied with these requirements in this case. In response to OCC's [first] assignment of error, DEO has already provided detail on many of the findings and explanations contained in the Commission's Order specifically analyzing the appropriate rate of return. (*See supra* at 4.) It is needless to present the same quotations again, but they clearly demonstrate that the Order 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. As explained above, the Commission did not just cite to past

precedent and ignore the record; the Commission applied the specific facts in the record to reach a reasoned, well-supported conclusion consistent with its prior decisions.

The Order demonstrates that the Commission provided a considered, reasonable basis for rejecting OCC's policy positions and proposed ratemaking adjustments. OCC's arguments to the contrary lack any merit and its second assignment of error should be rejected.

C. The Commission correctly recognized—and OCC disregards—many substantial ratepayer benefits that the Stipulation and the Order provide (Response to Assignment of Error No. 3).

The third assignment of error contains a hodgepodge of different OCC arguments. Many arguments represent yet another repackaging of arguments from the first two assignments. For example, OCC contends that "the PUCO erred in affirming its practice of utilizing the rate of return from the last rate case for subsequent alternative rate plan and rider proceedings as being in the public interest." (Reh'g App. Mem. at 8.) And OCC again claims that the Commission did not rely on record evidence and failed to address purportedly "uncontroverted" OCC evidence. (*Id.* at 8-11.) These arguments fail for the reasons set forth above in Sections II.A.2 and II.A.3. Any new arguments presented by OCC also lack merit and should be rejected.

1. <u>OCC ignores numerous benefits of the Stipulation that the Commission recognized in the Order.</u>

First, OCC claims that the Stipulation "does not benefit consumers and the public interest" (Reh'g App. Mem. at 8.), but this ignores the actual benefits that the Stipulation provides (and that the Commission recognized). The Commission identified numerous ways in which "the Stipulation benefits the public interest":

- "by enabling the accelerated replacement of corrosion-prone pipelines and associated infrastructure to ensure safe and reliable gas delivery";
- "protecting ratepayers by capping the cost recovery charge;
- "continuing to incorporate the O&M expense savings mechanism";

- "providing for an interim review of the PIR program"; and
- "excluding capitalized financial incentives."

Order ¶ 53. The Commission further noted that "although safety is not the sole basis for approval of an application under R.C. 4929.05, it is an important consideration, as demonstrated by the Commission's initial approval of Dominion's PIR program and the adoption of accelerated mainline replacement programs for the other large gas utilities in the state." *Id.*

2. Any material modification to the Stipulation could result in loss of the benefits for customers that the Stipulation provides.

OCC claims that "there is no record evidence for the PUCO's assertion that adopting an adjusted rate of return may lead to loss of benefits for customers that the Settlement provides." (Reh'g App. Mem. at 11.) But the reason for the Commission's statement is obvious: the Stipulation was a negotiated resolution of the issues in this proceeding. Modification of the Stipulation, for example to the rate of return, could lead to renegotiation of other aspects of the Stipulation, or withdrawal by any Signatory Party, and any change to the resolution of one issue could lead to a rejection of many other concessions and compromises. This is stated on the face of the Stipulation, which is clearly part of the record. (*See e.g.*, Stipulation, Joint Ex. 1.0 ¶ 9 ("This Stipulation is expressly conditioned upon adoption in its entirety by the Commission without material modification by the Commission"), ¶ 10 ("If the Commission rejects or materially modifies all or part of this Stipulation, any Signatory Party shall have the right, within 30 days of issuance of the Commission's Order, to apply for rehearing. If, upon rehearing, the Commission does not adopt the Stipulation without material modification, or if the Commission makes a material modification to any Order adopting the Stipulation pursuant to any reversal, vacation and/or remand by the Supreme Court of Ohio, then within 30 days of the Commission's Entry on Rehearing or Order on Remand any Signatory Party may withdraw from the Stipulation

by filing a notice with the Commission in this proceeding (Notice of Withdrawal), and serving said Notice of Withdrawal upon all Signatory Parties").) Thus, a change to the Stipulation could result in loss of the benefits for customers that the Stipulation provides.

3. Contrary to OCC's claims regarding excessive profits, the Commission expressly found that the Stipulation balances the PIR Program's costs and benefits; OCC also ignores that this is not a cost recovery case, and that Staff has found DEO is not over-earning in other proceedings.

OCC also asserts that any purported benefits of the Stipulation are diminished by the supposedly "excessive profits consumers are required to pay to Dominion under this Settlement." (Reh'g App. Mem. at 11.) But to the contrary, the Commission expressly found that "[t]he Stipulation balances the costs and benefits by continuing the PIR program while also providing financial benefits to consumers, including rate caps, an O&M savings offset, and the exclusion of capitalized financial incentives." Order ¶ 55.

OCC also ignores that this is not a cost recovery case. As stated in the Stipulation, "the appropriate forum to review the prudence or recoverability of any of the 2022-2026 PIR investment is the annual PIR cost recovery proceeding, *i.e.*, a continuation of the current process of auditing annual costs in the annual update cases." (Stipulation, Joint Ex. 1.0 ¶ 3.b.)

And while not part of the record in this proceeding, OCC is surely aware that Staff review in other cost recovery proceedings has established that DEO is not earning excess profits. *See, e.g., In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 21-619-GA-RDR, Opin. & Order (Feb. 23, 2022) ¶ 60 (rejecting the same arguments by OCC regarding rate of return and noting that "Staff reviewed Dominion's profitability and found that it has not significantly over-earned or under-earned").

4. OCC unreasonably dismisses the benefits to ratepayers of the Commission's acceleration of DEO's next base rate case.

OCC's arguments also unfairly distort an additional benefit that ratepayers realized when, both in Case No. 21-619-GA-RDR and Case No. 19-468-GA-ALT, the Commission required DEO to file its next base rate case one year earlier than what the Commission had previously approved. On this issue, OCC asserts that there is "no guarantee about the timing or the outcome of the yet-to-be-filed base rate case," and argues that the Commission's decision to accelerate DEO's next rate case "is a further indication of the need to update the rate of return sooner rather than later." (Reh'g App. Mem. at 11.) This argument fails to acknowledge, much less rebut, the Commission's careful reasoning in ordering the acceleration.

As an initial matter, with respect to timing, OCC is wrong. Barring a future order from the Commission, DEO will file a base rate case no later than October 2023 as ordered. And with respect to outcome, OCC misses the mark because there are no outcome guarantees in *any* proceeding. What matters is that a base rate case is the proper proceeding in which to evaluate rate of return issues. As the Commission explained in the Order, an alternative rate plan proceeding is not the appropriate forum in which to address rate of return issues, and the acceleration of DEO's next base rate case will provide "a more expedient alignment of the Company's cost of capital and capital structure with market conditions," *i.e.*, the very outcome OCC claims to seek by relitigating rate of return in every alternative rate proceeding. Order ¶ 54. The Commission further explained that its ruling reflected a careful balancing of considerations, which OCC disregards. "This determination preserved the Commission's long-standing practice of utilizing the rate of return from the last rate case for subsequent alternative rate plan and rider proceedings while also recognizing that the Company's cost of debt rate has significantly decreased since its last rate case." *Id.*

5. <u>OCC misstates the law; the Commission is bound by its precedent.</u>

Finally, OCC claims that "[n]o law, rule, or PUCO's precedent requires that the PUCO apply the rate of return from a utility's most recent base rate case to determine a rider rate." (Reh'g App. Mem. at 12.) This is simply incorrect as a factual matter. OCC ignores the decades of precedent cited above, in which the PUCO has consistently held that "the cost of capital and capital structure approved in the utility's last rate case" should be used "in subsequent alternative rate plan and rider proceedings." Order ¶ 54. Contrary to OCC's assertion, Commission is bound to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law." *Cleveland Elec. Illum. Co.*, 42 Ohio St.2d 403, 431 (1975), *superseded on other grounds by statute as recognized in Babbit v. Public Util. Comm'n*, 59 Ohio St.2d 81, 89 (1979).

For these reasons, the Commission should reject OCC's Assignment of Error No. 3.

D. The Commission's approval of the Stipulation did not violate any important regulatory principles and practices (Response to Assignment of Error No. 4).

OCC's fourth assignment of error is more of the same, and offers no new arguments or evidence that the Commission has not already considered.

OCC attacks the Commission's finding that "using the rate or return from the most recent base rate case does not violate any important regulatory principle or practice. The Commission has found as such time and time again by upholding the use of the most recent rate case's rate of return in alternative rate plan and rider proceedings." Order ¶ 61. Here again, OCC claims that "no law, rule, or PUCO precedent requires that the PUCO apply the rate of return from a utility's most recent base rate case to determine a rider rate." (Reh'g App. Mem. at 13.) But as set forth above, that is exactly what the Commission's precedent requires, and the Commission may not depart from that precent without good reason.

OCC also complains again that the Commission ignored OCC's "uncontroverted" testimony that demonstrated that the stipulated rates were unjust and unreasonable, thereby violating "important regulatory principles and practices." (Reh'g App. Mem. at 14.) As explained above, DEO challenged OCC's testimony and the Commission declined to make OCC's proposed adjustments, based on the facts and policy positions in the record.

Finally, OCC argues that under Ohio law, the PUCO has an affirmative responsibility to review and make a finding on the justness and reasonableness of Dominion's application. (*Id.* at 13.) But as discussed above, that is exactly what the PUCO did in the Order, in which it expressly found based on the evidence in the record that "the Stipulation is just and reasonable" and that "Dominion's alternative rate plan, as modified by the Stipulation, meets the requirements of R.C. 4929.05(A)" Order ¶¶ 61, 71.

In sum, the Commission properly found that the Stipulation did not violate any regulatory principle or practice. Order ¶ 61. OCC has not demonstrated that the Order's findings in this regard were unlawful or unreasonable, and the Commission should reject OCC's Assignment of Error No. 4.

III. CONCLUSION

OCC has not demonstrated that that the Commission's Order is unreasonable or unlawful. For these reasons, the Commission should deny OCC's application for rehearing.

Dated: May 31, 2022

Respectfully submitted,

/s/ Christopher T. Kennedy
Mark A. Whitt (0067996)
Christopher T. Kennedy (0075228)
Lucas A. Fykes (0098471)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street

Columbus, Ohio 43215
Telephone: (614) 224-3912
whitt@whitt-sturtevant.com
kennedy@whitt-sturtevant.com
fykes@whitt-sturtevant.com

Andrew J. Campbell (0081485)
DOMINION ENERGY, INC.
88 East Broad Street, Suite 1303
Columbus, Ohio 43215
Telephone: (614) 601-1777
andrew.j.campbell@dominionenergy.com

(All counsel are willing to accept service by email)

ATTORNEYS FOR THE EAST
OHIO GAS COMPANY D/B/A DOMINION
ENERGY OHIO

CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on May 31, 2022:

Jodi.Bair@OhioAGO.gov
Kyle.Kern@OhioAGO.gov
RDove@keglerbrown.com
amy.botschner.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
MPritchard@mcneeslaw.com
BMcKenney@mcneeslaw.com

Attorney Examiners:
sarah.parrot@puco.ohio.gov
jacqueline.st.john@puco.ohio.gov

/s/ Christopher T. Kennedy
One of the Attorneys for The East Ohio Gas Company d/b/a Dominion Energy Ohio

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in

Case No(s). 20-1634-GA-ALT

Summary: Memorandum Memorandum Contra Application for Rehearing 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