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 to Continue Its Pipeline Infrastructure Replacement Program	)))))	Case No. 20-1634-GA-ALT

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

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

Dated: October 3, 2022

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's (OCC) third Application for Rehearing addresses an issue—the rate of return applicable to the Pipeline Infrastructure Replacement Program (PIR Program) of The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO)—that the Commission has twice resolved in thorough, well-reasoned rulings in this docket. This is in addition to numerous other dockets where OCC has challenged the same issue. Rather than accept the Commission's lawful, well-reasoned, and consistent resolution of this issue, OCC now attempts to characterize these decisions as somehow *inconsistent* with precedent.

OCC's third Application for Rehearing must be denied. First, it is procedurally barred—this is an identical issue to the one already decided, and all of the arguments it raises now either were already raised and rejected, or could have been raised earlier. Further, even if it were appropriate to reach the merits, OCC's arguments should be denied because the authorities OCC cites as purported precedent arise under entirely different laws and are inapplicable to this case, a natural gas alternative rate plan proceeding.

OCC's continued litigation of a settled issue, and the associated waste of Commission and DEO's resources, should not be rewarded. OCC's third Application for Rehearing should be denied.

II. PROCEDURAL BACKGROUND

On April 20, 2022, the Commission issued an Opinion and Order adopting the stipulation (Stipulation) resolving DEO's Application to continue its previously approved PIR Program for an additional five-year period, for investments made starting in 2022 through 2026. Case No. 20-1634-GA-ALT, Opin. & Order (Apr. 20, 2022) ¶¶ 22, 73–74.

Among the issues resolved in the Opinion and Order was the rate of return applicable to the Company's PIR Program cost recovery rider. OCC had argued that the Commission should

reject the rate of return proposed in the Stipulation, which, consistent with the Commission's longstanding practice and the requirements of the alternative rate plan statutes that govern DEO's PIR Program and associated cost recovery rider, was the rate of return set in the Company's last base rate case. *Id.* ¶¶ 54, 61. Based on detailed findings and numerous recent Commission decisions addressing the same issue (and identical OCC arguments), the Commission declined to adopt the adjustment to the rate of return advocated by OCC. *Id*. Additionally, the Commission noted that it had "recently ordered that Dominion file a base rate case by October 2023, a year earlier than previously required, to provide a more expedient alignment of the Company's cost of capital and capital structure with market conditions." *Id.* ¶ 54.

On May 20, 2022, OCC filed its first Application for Rehearing, asserting, among other things, that the Commission erred in approving and adopting the Stipulation without making the adjustments to rate of return that OCC had recommended. (Case No. 20-1634-GA-ALT, App. Reh'g (May 20, 2022) at 1–2.) On June 15, 2022, the Commission granted OCC's first rehearing application for the purpose of further consideration of the matters specified therein. Case No. 20-1634-GA-ALT, Entry on Reh'g (Jun. 15, 2022).

On July 15, 2022, OCC filed a second Application for Rehearing, asserting that the Commission's Entry on Rehearing was erroneous because it had failed to substantively address the arguments in OCC's first Application for Rehearing. (Case No. 20-1634-GA-ALT, App. Reh'g (Jul. 15, 2022) at 1–2.)

On August 24, 2022, the Commission issued its Second Entry on Rehearing. In that entry, the Commission again rejected OCC's arguments and affirmed its decision in the April 20, 2022

Opinion and Order regarding the rate of return applicable to DEO's PIR Program cost recovery rider. Case No. 20-1634-GA-ALT, Second Entry on Reh'g (Aug. 24, 2022) ¶ 31.

The Commission made a number of detailed findings in support of this conclusion, noting that "it has long been the Commission's practice to utilize the capital structure and cost of capital from the company's last base rate proceeding in the calculation of riders and alternative rate plans" and that "the record evidence supports utilization of the rate of return approved in Dominion's last rate case." *Id.* The Commission noted that OCC's proposal to deviate from that consistent precedent had been rejected "after considering all of the impacts of revising [the Commission's longstanding] precedent." *Id.* The Commission further found that "although OCC asserts the opposite, we explicitly found the Stipulation [continuing the PIR Program] to be just and reasonable" and that the Commission had "reviewed the specific facts and policy positions in the record and reached a reasoned, well-supported conclusion consistent with prior decisions." *Id; see also id.* ¶ 34 ("The Opinion and Order thoroughly addresses the evidence and the rationale followed by the Commission to reach its decision on the issues raised. For example, the Commission addressed the drawbacks of modifying the long-term debt rate in the case, noted the benefits for customers provided in the Stipulation, and stated that the Commission is obligated to follow its precedent of using the rate of return from a utility's last rate case in subsequent alternative regulation and rider proceedings.")

On September 23, 2022, OCC filed its *third* Application for Rehearing, once again attacking the Commission's rulings regarding rate of return. Ignoring the detailed findings to the contrary in the Opinion and Order and Second Entry on Rehearing, OCC claimed that it had "demonstrated that it is unreasonable and unlawful to use Dominion's more than 13-year-old capital structure and cost of capital from Dominion's last base rate proceeding in calculating the

rate of return for its alternative rate plan." (Case No. 20-1634-GA-ALT, App. Reh'g (Sep. 23, 2022) (Third Reh'g App.) at 1.)

III. ARGUMENT

A. OCC's Third Application for Rehearing is procedurally barred.

1. A party is not entitled to multiple "bites at the apple" on a decided issue, and cannot later make new arguments on that issue that it could have made in an earlier rehearing application.

When faced with serial applications for rehearing on an identical and already decided issue, the Commission has "repeatedly concluded that it does not allow persons who enter appearances to have 'two bites at the apple' or to file rehearing upon rehearing of the same issue." *In re Dayton Power & Light Co*., Case No. 16-395-EL-SSO, Fourth Entry on Reh'g (Nov. 7, 2018) ¶ 17; *see also In re Dayton Power & Light Co.*, Case No. 18-1875-EL-GRD (Dec. 1, 2021); *In re the Complaint of Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co*., Case No. 05-1057-EL-CSS, Second Entry on Reh'g (Sept. 13, 2006) at 3–4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co*., Case No. 05-1421-GA-PIP, Second Entry on Reh'g (May 3, 2006) at 3); *In the Matter of Protocols for the Measurement & Verification of Energy Efficiency & Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC (Jul. 31, 2013); *In re Ohio Power Co. and Columbus S. Power Co*., Case No. 10-2929-EL-UNC, Entry on Reh'g (Jan. 30, 2013) at 4–5.

This procedural bar applies to new arguments on the same issue that could, and should, have been raised in an earlier application for rehearing. *In the Matter of Protocols for the Measurement & Verification of Energy Efficiency & Peak Demand Reduction Measures*, Case No. 09-512-GE-UNC (Jul. 31, 2013) ¶ 22 ("IEU-Ohio's claimed error did not arise for the first time in the entry on rehearing, but rather relates back to the finding and order. Therefore, IEU-Ohio's first assignment of error should be denied as procedurally improper.")

These authorities apply here. OCC's arguments in its third Application for Rehearing apply to the same issue already addressed in the original order and the second entry on rehearing—the rate of return applicable to DEO's PIR Program cost recovery rider. Indeed, OCC makes several identical arguments that were considered and expressly rejected in the Opinion and Order and Second Entry on Rehearing. For example, OCC argues that the Commission's decision on the rate of return issue "is not based on record evidence" and that "[t]he only evidence in the record, was the uncontroverted testimony of OCC Witness Duann that the rates were unjust and unreasonable." (Third Reh'g App. Mem. at 1-2.) In its Second Entry on Rehearing, however, the Commission expressly found "that the record evidence supports utilization of the rate of return approved in Dominion's last rate case" and noted that "while Dr. Duann's testimony was not challenged on cross-examination, it was nonetheless opposed in the briefs of Dominion and Staff." Second Entry on Reh'g ¶ 31.

And although OCC cites some new authorities in its rehearing application, these arguments are procedurally barred since they could have been raised as part of OCC's first, or even second, applications for rehearing. None of the authorities that OCC now cites as purported "precedent" are new, indeed most of them are quite old, like a 1982 base rate case (Third Reh'g App., Mem. at 4), and a 2005 case involving electric transmission costs (*id.* at 3). There is no reason that OCC could not have cited these authorities in its earlier rehearing applications, or, for that matter, in the various gas utility alternative rate plan dockets now dating back *years* that address OCC's rate of return arguments. *See* Opin. & Order ¶ 61 (listing cases).

The logic behind this procedural bar is sound. Both the Commission and the parties to a proceeding should not be subjected to the burden and delay associated with serial rehearing applications that address settled issues, whether they make identical arguments, trickle out

arguments that could have been made all at once, or both. This bar clearly applies here, and for that reason alone, OCC's third Rehearing Application should be denied.

B. Even if the Commission were to consider OCC's Third Application for Rehearing, it should be denied on the merits.

1. All of the authority cited by OCC is distinguishable, in contrast with the actually applicable precedent the Commission considered in the Orders.

Even if the Commission were to consider the arguments in OCC's third Application for Rehearing, it should be denied because none of the authorities OCC cites as purported precedent apply here. OCC makes no effort to establish why these authorities involving different statutes and different issues should control. They should all be disregarded. Each is addressed in turn below, and none of them account for the laws governing this case.

The definition of an alternative rate plan is found in R.C. 4929.01(A). As defined therein, and alternative rate plan is "a method, *alternate to the method of section 4909.15 of the Revised Code*, for establishing rates and charges." R.C. 4929.01(A) (emphasis added). As the Commission is well aware, R.C. 4909.15 establishes the requirements applicable to the traditional rate setting approach used in base rate cases. Among other things, it requires the Commission, when it sets rates in those cases, to "determine . . . [a] fair and reasonable rate of return." R.C. 4909.15(A)(2). When the alternative ratemaking law was first enacted, the Commission could not approve an alternative rate plan unless it first determined rates under the traditional rate formula. OH B. An., 2011 H.B. 95 ("Former law required that a determination of just and reasonable rates and charges be made pursuant to the law governing rate cases, before an alternative rate plan could be implemented.") In 2011, however, the legislature removed that requirement, and as the legislative history correctly summarized, alternative ratemaking is now "a method for establishing rates and charges . . . *that does not rely on the law governing rate cases*." *Id*. (emphasis added). In other words, alternative rate plans, like DEO's PIR Program and

its associated cost recovery rider, are *expressly permitted by law* to depart from traditional rate-setting requirements, including the requirement to newly determine a rate of return.

OCC pays no heed to what the governing law actually requires, but insists that the Commission impose legal requirements that do not apply. The cases cited by OCC simply confirm its unwillingness to accept the law as given.

First, OCC cites an electric case from 2005, *In re Application of Ohio Power Company to Adjust the Transmission Component of the Companies' Standard Service Tariffs*, Case No. 05-1194-EL-UNC, Finding and Order (Dec. 14, 2005). (Third Reh'g App at 1; *id*. Mem. at 3–4.) Needless to say, this electric-utility case did not arise under the alternative rate plan statutes that govern natural gas companies generally and DEO's PIR Program specifically. As just explained, the text and historical development of those statutes specifically make clear that the legislature did not intend to require the Commission to update the rate of return in approving alternative rate plans. Because these alternative rate plan laws did not apply to it, this case did not involve the backdrop of long-standing and consistent Commission precedent, relied on by the industry in making investments, that approved use of the rate-case rate of return in alternative rate plans.

Indeed, this case did not even involve the issue of return on capital investment, but instead an electric company's proposal for setting carrying charges on over- and under-recoveries. DEO has never taken the position that the last authorized rate of return must be used to set carrying charges, and indeed has stipulated to different calculations in other mechanisms. *See, e.g*., Case No. 15-1712-GA-AAM, Opin. & Order (Nov. 3, 2016) at 5 (approving stipulated annual carrying-charge rate of 3%). But what may be appropriate for calculating carrying charges sheds little light on the proper return on capital investment. In short, this decision is not on point but clearly distinguishable from this case and the actual precedent governing it. *See,*

e.g., Opin. & Order ¶ 61 (listing cases). The same reasoning applies to the other electric rider case OCC cites, which similarly does not involve the statutes at issue here, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Cost Riders*, Case No. 10-155-EL-RDR, Entry on Reh'g (October 22, 2010). (Third Reh'g App. at 1; *id*. Mem. at 4.)

Equally irrelevant are two base rate cases, *In re Application of The Cleveland Electric Illuminating Company for Authority to Increase its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 81-146-ET-AIR, Opinion and Order (March 17, 1982), and *Babbit v. Pub. Util. Comm*., 59 Ohio St.2d 81, 391 N.E.2d 1376 (1979). (Third Reh'g App. at 1; *id*. Mem. at 5, 8.) These were traditional rate cases, and it should go without saying that the traditional rate-case laws apply in such cases. But the alternative rate laws specifically exempt the application of those laws to DEO's PIR Program, and OCC's reliance on these cases further demonstrates OCC's unwillingness to accept the governing law.

OCC inexplicably cites a Commission rule governing infrastructure surcharge filings by water and wastewater utilities, O.A.C. 4901:1-15-35, Appx. at (B)(7). (Third Reh'g App. Mem. at 4–5.) This rule is irrelevant on its face—it is a regulation promulgated by the Commission that establishes technical filing requirements and certain procedures applicable to water utility filings. In other words, it governs the conduct of *water utilities*, and does not actually require the *Commission* to do anything. And unlike the alternative rate plan laws, the statute that this rule implements, R.C. 4909.127, directly requires the contemporaneous determination of rate of return on the affected plant. *See* R.C. 4909.127(B)(2) (requiring as a condition of approval the determination of "a fair and reasonable rate of return on the filing date valuation of that particular infrastructure plant").

OCC also cites the U.S. Supreme Court's 1923 opinion in *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm. of W. Va.*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176, for the proposition that a utility is entitled to rates enabling it to earn a return "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." (Third Reh'g App. Mem. at 7.) *Bluefield* prohibited confiscatory rates of return, and does not otherwise impose requirements on the application of Ohio's alternative regulation statutes enacted nearly a century later. *Bluefield* no more requires a reduction in the rate of return than the various other cases OCC cites.

Finally, OCC does cite one case that actually involves a gas utility, *In re Duke Energy Ohio*, Case No. 14-1622-GA-ALT, Opin. & Order (Oct. 26, 2016), which it quotes for the following language: "while this Commission has determined that R.C. 4929.05 does not require a full rate case determination of just and reasonable charges, the time period between the application for an alternative rate plan and the applicant's most recent base rate case may also be considered by the Commission to determine whether the plan is just and reasonable." *Id.* ¶ 58. OCC fails to explain how this case supports its arguments, and indeed it supports DEO's position. As reflected in that quote, consistent with the analysis above, "R.C. 4929.05 does not require a full rate case determination of just and reasonable charges." That is, the Commission was expressly *not required* to do what OCC insists it must do. And in fact, the Commission did consider the length of time that had passed since DEO's last rate case when it granted one of OCC's requests and ordered the acceleration of DEO's next base rate case. Opin. & Order ¶ 54.

In sum, the Commission's orders were lawful, reasonable, and consistent with applicable precedent. None of the purported "precedent" cited by OCC applies here, and the Commission should reaffirm the decision in its Finding and Order.

IV. CONCLUSION

For all these reasons, the Commission should deny OCC's third Application for Rehearing.

Dated: October 3, 2022

Respectfully submitted,

/s/ Christopher T. Kennedy
Christopher T. Kennedy (0075228)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3912
kennedy@whitt-sturtevant.com

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

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

(All counsel willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on October 3, 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:
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

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