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 Authority to Adjust Its Capital Expenditure Program Rider Charges	))))	Case No. 22-0619-GA-RDR

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

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I. INTRODUCTION

In its initial brief, The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO) established that the Commission should approve the adjustment of DEO's Capital Expenditure Program (CEP) Rider to account for 2021 investment. Only one party (the Office of the Ohio Consumers' Counsel or OCC) opposes DEO's application. And while DEO and the Commission Staff disagree on the recovery of one cost item, DEO has accepted its removal in this proceeding.

The only issue OCC raises in opposing the Application, the use of the rate of return authorized in DEO's last base rate case, is one the Commission has resolved numerous times in DEO's favor in the last 21 months, in thorough, well-reasoned opinions, over OCC's identical objections. OCC points to no new evidence, or change in law, to justify its insistence that the Commission reverse itself on decades of consistent precedent. Nor does OCC address, much less rebut, evidence that establishes that DEO is not overearning.

Additionally, in one of the orders issued earlier this year rejecting OCC's rate-of-return arguments, the Commission accelerated the timing of DEO's next rate case, requiring the application to be filed no later than October 2023. In that upcoming base rate case, all components of DEO's cost of capital will be evaluated, in contrast to the narrow "cherry picking" approach reflected in OCC's opposition in this docket, which the Commission has consistently rejected.

Staff, for its part, recommends that the Commission approve DEO's Application, subject to certain recommendations that DEO has accepted. In particular, DEO agreed to remove from the CEP Rider certain costs associated with an employee fitness center. Staff maintains, however, that DEO should *also* be precluded in its future base-rate proceeding from seeking to recover those costs. But determination of whether these costs are recoverable in base rates is beyond the scope of this proceeding, which is limited to updating and reconciling the CEP Rider.

Accordingly, the Commission's order in this proceeding need not and should not address the recoverability of fitness center costs.

In sum, none of the issues raised in this case provide any basis for disapproving or modifying DEO's application in any way.

II. ARGUMENT

A. OCC has not rebutted DEO's and Staff's showing that DEO's Application should be approved as modified by the Staff CEP recommendations without delay.

As established by DEO's and Staff's initial briefs, the record shows that the requested CEP revenue requirement is justified, and DEO's Application should be approved without delay. As both DEO and Staff explained, the Commission's independent auditor Blue Ridge Consulting Services (Blue Ridge) and Staff undertook thorough audits of DEO's Application, including review and analysis of the documentation supporting the Application, issuing data requests, and conducting investigative interviews. (DEO Br. at 4–5; Staff Br. at 1.) Based on its investigation, Staff recommended approval of the Company's Application subject to a number of recommendations that DEO did not challenge. (DEO Br. at 5.) Additionally, Staff also performed a review of DEO's profitability, which provided a "high-level look at financial results" and "a means of comparing results among local and national LDC peers." (Staff Ex. 1.0 at 6.) Based on this profitability review, Staff found "that DEO has not significantly over-earned or under-earned." (*Id.*)

OCC does not even address, much less rebut, this evidence in its Initial Brief.[1] The only argument OCC raises in opposition to the Application in its Initial Brief is one the Commission

[1] OCC's initial brief devotes some space to recommending that the Commission adopt several of the Blue Ridge and Staff Report recommendations. (OCC Br. at 8–9.) This recommendation is moot since, as noted above, the Company has already agreed to their adoption.

has consistently rejected: that using the rate of return set in DEO's last rate case is inappropriate. The Commission should reject this argument once again.

B. The Commission should reject OCC's rate of return arguments once again.

1. None of the authorities OCC cites as purported precedent for its rate of return arguments apply here.

OCC cites various authorities as purported precedent on the rate of return issue, arguing that the Commission has "neither followed this precedent, found that it was in error, nor explained why it departed from it." (OCC Br. at 5.) But OCC fails to establish why these authorities involving different statutes and different issues should control. They should all be disregarded as irrelevant. 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, an 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 CEP 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). (OCC Br. at 3.) 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 CEP 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, Opinion and 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.,* Case No. 21-619-GA-RDR, Opin. & Order (Feb. 23, 2022) ¶ 71 (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). (OCC Br. at 3–4.)

Equally irrelevant is an electric company base rate case, *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). (OCC Br. at 4–5.) This was a traditional rate case, 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 the CEP Rider, and OCC's reliance on this case 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). (OCC Br. at 4.) 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." (OCC Br. at 6.) *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. Moreover, the evidence in the record confirms that DEO is not overearning, so to the extent *Bluefield* applies, it 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." *Id.* That is, the Commission was expressly *not required* to do what OCC insists it must do. And in fact, consistent with the language quoted above, the Commission considered 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. (DEO Ex. 2.0 at 4.)

2. <u>OCC's arguments regarding the rate of return are inconsistent with long-standing Commission precedent and recent Commission rulings issued over OCC's identical objections.</u>

OCC's arguments regarding the rate of return ignore decades of consistent Commission precedent and raise identical issues using identical arguments that the Commission has carefully considered and resolved in DEO's favor numerous times in the last 20 months in other DEO capital infrastructure rider proceedings. *See* Case No. 21-619-GA-RDR, Second Entry on Reh'g (Jul. 27, 2022) ¶¶ 28, 31, 34; Case No. 20-1634-GA-ALT, Opin. & Order (Apr. 20, 2022) (*DEO PIR Order*) ¶¶ 54, 61; Case No. 21-619-GA-RDR, Opin. & Order (Feb. 23, 2022) (*CEP Update Order*) ¶¶ 58–60, 71; Case No. 19-468-GA-ALT, Second Entry on Reh'g (Feb. 23, 2022) ¶ 20; Case No. 19-468-GA-ALT, Opin. & Order (Dec. 30, 2020) (*DEO CEP Order*) ¶¶ 68–70, 79; *see also In re Duke Energy Ohio, Inc.*, Case No. 19-791-GA-ALT, Opin. & Order (April 21, 2021) ¶ 61, 68.

The Commission has cited a number of factors supporting these decisions, all of which continue to apply here. For example, in opinions authorizing DEO's CEP Rider, updating DEO's CEP Rider, and reauthorizing DEO's PIR Program, the Commission made the following findings:

- "OCC has argued 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. The Commission disagrees with OCC's assertion, and notes that it is the Commission's long-standing practice to utilize the cost of capital and capital structure approved in the utility's last rate case in subsequent alternative rate plan and rider proceedings." *DEO PIR Order* ¶ 54; *DEO CEP Order* ¶ 68.
- "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." *DEO PIR Order* ¶ 54; *DEO CEP Order* ¶ 68.
- "[T]he Company'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. Modifying the long-term debt rate in this cost recovery case, which is just one of the cost of capital

components, would necessarily involve 'cherry picking,' while ignoring any cost increases that have occurred since Dominion's last rate case." *CEP Update Order* ¶ 58.

- "Blue Ridge concluded that the Company's CEP, with a few exceptions, was consistent with the Commission-approved process, prudent, and reasonable, which includes the cost of capital. We believe 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." *CEP Update Order* ¶ 60.
- "Furthermore, 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." *DEO PIR Order* ¶ 54; *DEO CEP Order* ¶ 70; *CEP Update Order* ¶ 60.
- "[W]e find it important to emphasize here that using the rate of 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." *DEO PIR Order* ¶ 61.

OCC fails to heed the Commission's guidance in these decisions, and ironically engages in exactly the kind of incomplete analysis the Commission in those orders has expressed concerns about.

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 alternative rate proceedings involving other utilities. *See In re Duke Energy Ohio, Inc.*, Case No. 21-0618-GA-RDR, Opin. & Order (Jul. 27, 2022) ¶¶ 96–97; *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 argues that DEO has failed to demonstrate that using the rate of return from DEO's last rate case is just and reasonable. (OCC Br. at 6.) But given the Commission's

rejection of OCC's identical arguments numerous times over the last 20 months, it is OCC that has failed to justify its wasteful relitigation of a settled issue.

3. The proper context in which to address rate of return issues is a base rate case, like the one DEO will file next year.

The Commission has expressly found that by accelerating DEO's rate case, it "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." *DEO PIR Order* ¶ 54. OCC fails to even acknowledge this significant fact in its brief. In the absence of any evidence that DEO is overearning (Staff Ex. 1.0 at 6) there is no reason that OCC's rate of return concerns should not be addressed in the appropriate forum – the base rate case DEO will file next year, instead of this rider update proceeding.

Further, 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 the Commission has repeatedly recognized. *See DEO PIR Order* ¶ 54 ("Furthermore, 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."); *DEO CEP Order* ¶ 70 (same). 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. *DEO CEP Order* ¶ 68.

4. <u>OCC's reliance on incomplete analysis confirms why the rate of return should not be adjusted in every rider filing.</u>

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 7.03% pre-tax rate of return based on the testimony of its witness, Dr. Duann. (OCC Br. at 7.) But Dr. Duann's proposed pre-tax rate of return reflects a selective, limited, and incomplete analysis. For example, Dr. Duann does not develop any economic models to support his proposed return on equity, and basis his analysis on a "hypothetical capital structure of 50% debt and 50% equity." (OCC Ex. 2.0 at 10.).

As it did in the DEO CEP and DEO PIR reauthorization proceedings, 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—a problem the Commission has recognized when rejecting OCC's prior arguments on this issue. *See DEO CEP Order* ¶ 68. As a result, OCC's proposal lacks the comprehensive expert assessment that would be used to determine cost of capital in a rate case. *See id.* (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 "cherry picking" concerns the Commission has repeatedly stated in rejecting proposals to update the rate of return for every rider and alternative rate program. *DEO PIR Order* ¶ 54; *DEO CEP Order* ¶ 68.

OCC also suggests that DEO's business and financial risk is lower than at the time of the last rate case. (*See* OCC Ex. 2.0 at 10 ("I did not expect that Dominion or its parent company would have any difficulty in obtaining capital at reasonable terms").) But that conclusion 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.

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. Fitness center costs may be addressed in a future base rate proceeding.

This leaves only the issue between DEO and Staff, an issue that does not affect the CEP Rider. As explained in DEO's Initial Brief, DEO does not oppose Staff's recommendation that fitness area renovation costs be removed from the CEP Rider rate. Nor is DEO taking the position that the Commission *should* determine, in this proceeding, that fitness center costs are recoverable in base rates. DEO's position is simply that this issue—whether fitness center are recoverable in base rates— is beyond the scope of this proceeding.

The scope of CEP Rider update proceedings is set by the terms of the alternative rate plan approved by the Commission. As proposed in the original CEP Rider case, the scope of the annual update proceeding is "to capture deferrals and investment in the prior year and any reconciliation adjustments." Case No. 19-468-GA-ALT, Alt. Rate Plan Exhibits at 5 (May 1, 2019). The Stipulation filed in that case did not modify this scope, but confirmed that the focus of the annual update is the reasonableness of the investments that flow through the mechanism. 19-468 Stipulation at 3 ("review of DEO's annual application to update the CEP Rider rates" shall "determine the lawfulness, used and usefulness, prudence, and reasonableness *of the CEP assets placed in service and the related CEP regulatory asset* included in the proposed updated CEP Rider revenue requirement") (emphasis added).

The approved scope does *not* include future determination of legal qualification for recovery in a base-rate proceeding, which is the only part of Staff's recommendation that DEO does not accept. Since that issue is beyond the scope of this update, the Commission should not reach the issue of base-rate recoverability. *See e.g., Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm*., 2006-Ohio-1386, 113 Ohio St.3d 180, 192, 863 N.E.2d 599, 611 (noting that management fees were included in base rates and thus beyond the scope of a gas-cost-recovery proceeding); *In re Dayton Power & Light Co*., Case No. 18-374-EL-RDR, Finding & Order ¶ 10 (Apr. 25, 2018) (rejecting OCC comments and recommendations that were beyond the limited scope of the proceeding).

Staff argues that "[a]ll CEP assets will become part of base rates and therefore, all adjustments adopted in each of the CEP annual rider reviews should be reflected in the Company's general ledger and included in plant balances as of date certain in the next base rate case filing. Plant adjustments that have been fully audited and adopted by the Commission in

annual rider proceeding should not be subject to re-negotiation in a base rate case proceeding." (Staff Br. at 5.) DEO acknowledges that some adjustments to the CEP Rider may well require adjustments to base rates. For example, if given costs were determined to be imprudent or excessive during the CEP audit, they would not later become prudent or reasonable in a base rate case. But although Blue Ridge specifically reviewed the fitness center renovation work orders at issue, the auditor did not make any determination that supports exclusion, such as to determine that the costs were imprudent or excessive. (Staff Ex. 1.0 at 4 n.16; Staff Ex. 2.0, App'x B, Data Request Nos. 109 and 110.)

Without such a determination, there is no basis to require DEO to remove the fitness center costs in a future proceeding. DEO agreed to remove the costs from the CEP Rider, but different legal standards apply to the CEP Rider than to base rates. So the mere fact DEO agreed to exclude costs from CEP does not require DEO to concede they are unrecoverable in base rates. It is entirely consistent with the law that an investment could qualify for base-rate recovery but not CEP recovery.

Staff also asserts that "the used and useful criterion is dispositive of this issue because the fitness centers are not the type of investment necessary or directly related to providing electric service and must be excluded from rate base," citing a 1977 electric utility case, *In re Dayton Power and Light Company*, Case No. 76-823-EL-AIR (July 22, 1977). Whether or not this decision would be correct as applied to DEO, it arose in a base rate proceeding, and this is not a base rate case. Thus, if anything, that case stands for the proposition that the proper forum in which to consider recovery of fitness area renovation costs is the base rate case DEO will file next year. Again, DEO is not asking the Commission to agree the costs are recoverable, only that base-rate recoverability should be determined in a base rate case.

Accordingly, the Commission's order in this proceeding need not and should not address the recoverability of fitness center costs.

D. DEO's Application should be approved without delay.

As established above, OCC provides no meritorious basis for denying DEO's Application. It should be approved promptly because delaying the effective date of new CEP rates would have the effect of increasing subsequent rates charged to customers. Specifically, delay would increase the deferrals on 2021 CEP investments, including post-in-service carrying costs, which continue to accumulate until the rates are effective. (DEO Ex. 2.0 at 5.) Delaying the effective date of new CEP rates also potentially increases the amount of the revenue reconciliation in the next CEP update. (*Id*.)

III. CONCLUSION

For all these reasons, and those set forth in DEO's Initial Brief, the Commission should approve DEO's Application, as modified by Staff's recommendations and subject to DEO's reservation of rights to address base-rate recoverability of fitness-center costs in the next base rate case.

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Respectfully submitted,

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I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on October 5, 2022:

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