

In the Matter of the Application of the)
 East Ohio Gas Company d/b/a Dominion)
 Energy Ohio for Approval of an) Case No. 20-1634-GA-ALT
 Alternative Form of Regulation to)
 Continue Its Pipeline Infrastructure)
 Replacement Program.)

The PUCO’s Second Entry on Rehearing fails consumers and is unlawful.¹ OCC has 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. In response, the PUCO says that that has “long been [its] practice”² to do so. But it hasn’t been.

In fact, it had been the PUCO's practice and precedent that where rates were set more than three years ago, a new calculation should be made.³ Because the PUCO

¹ Case No. 20-1634-GA-ALT, Second Entry on Rehearing (August 24, 2022).

² *Id.* ¶ 31, at 6 (citations omitted).

³ See, e.g., Case No. 05-1194-EL-UNC, Finding and Order (December 14, 2005) at ¶¶ 7, 8 (“The Companies propose to include carrying charges on the net under recovery or net over recovery of TCRR revenues using each company’s weighted average cost of capital. The Companies propose that the rate of equity to be included in the calculation be the rate established in each company’s last rate case. The Commission disagrees. The Commission issued its decision in Columbus Southern’s last base rate case proceeding in May 1992, more than thirteen years ago. The Commission finds that the financial landscape has changed greatly since the early 1990s. We find it appropriate to use a more recent review of the cost of capital.”); Case No. 10-155-EL-RDR, Entry on Rehearing (October 22, 2010) at ¶ 9; *see also* O.A.C. 4901:1-15-35, Appx. at (B)(7); *see also* Case No. 81-146-ET-AIR, Opinion and Order (March 17, 1982) at ¶ 104 (“It has always been the Commission’s policy in determining the yield component of the return on common equity to use the most recent data available. We do not believe that the use of three-year-old yields, although weighted against more recent data, complies with our goal of determining a current cost of equity.”).

departed from this precedent without explanation, the Second Entry on Rehearing is wrong and unlawful.

The Second Entry on Rehearing is unlawful and contrary to consumer protection. Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Second Entry. As explained more fully in the following memorandum in support, the PUCO's Second Entry on Rehearing was unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by unlawfully departing from precedent without explanation by using Dominion's 13-year-old rate of return and return on equity rates for developing charges to consumers.

Respectfully submitted,

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**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)	Case No. 20-1634-GA-ALT
an Alternative Form of Regulation to)	
Continue Its Pipeline Infrastructure)	
Replacement Program.)	

**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

OCC demonstrated in its first Application for Rehearing that the PUCO's order in this case fails consumers. First, R.C. 4903.09 requires that PUCO decisions must be based on findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.⁴ The PUCO's decision in this case to use Dominion's 13-year-old rate of return and return on equity is not based on record evidence, and it cannot be because there is no record evidence to support it. Second, the PUCO failed to find that Dominion's 13-year-old rate of return and return on equity for the pipeline infrastructure replacement program and alternative rate plan is "just and reasonable" as required under R.C. 4929.05(A)(3) and R.C. 4909.18.

There is no real dispute on either point. Instead, the PUCO did not adopt them simply because it purportedly followed its precedent, saying "it has long been the [PUCO's] practice to utilize the capital structure and cost of capital from the company's last base rate

⁴ R.C. 4903.09.

proceeding in the calculation of riders and alternative rate plans.”⁵ But the PUCO has gotten its precedent wrong. And in doing so, it has violated Ohio law.

The PUCO should grant OCC’s Application for Rehearing as further explained below to protect consumers from overpaying for gas utility service.

II. MATTER FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by unlawfully departing from precedent without explanation by using Dominion’s 13-year-old rate of return and return on equity rates for developing charges to consumers.

Using the outdated and inflated rate of return that was set more than 13 years ago, without any supporting evidence, fails to show that it is just and reasonable to use in 2022. (The *only* evidence in the record, was the uncontroverted testimony of OCC Witness Duann that the rates were *unjust* and *unreasonable*.)⁶ No party other than OCC sponsored any rate of return witnesses of their own in this case to challenge Dr. Duann’s recommendations. No party was able to support using a rate of return set more than 13 years ago in Dominion’s base rate case (Case No. 07-829-GA-AIR). And yet, the PUCO adopted the Settlement’s rate of return from that rate case that includes a cost of debt that is nearly three times higher than Dominions’ actual cost of debt. And authorized a 10.38% return on equity that is much higher than the return on equity earned by comparable utilities and no longer reflects Dominion’s business risk.⁷

⁵ Second Entry on Rehearing at ¶ 31, at 6.

⁶ OCC Ex. 1.0 (Testimony Recommending Consumer Protection from the Settlement by Daniel J. Duann, Ph.D. filed October 25, 2021).

⁷ And neither Staff nor Dominion (or anyone else) challenged Dr. Duann when he made the same recommendation and took the witness stand in Case No. 19-468-GA-ALT concerning Dominion’s Capital Expenditure Program—a very similar proceeding. In that proceeding nobody asked Dr. Duann any questions at all regarding his recommendations.

The PUCO's decision is unlawfully based on nothing more than its (mistaken) view of its "precedent" to use Dominion's 13-year-old rate of return and return on equity. By using Dominion's 13-year-old rate of return and return on equity, the PUCO unlawfully violated binding Ohio Supreme Court precedent in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975) and its progeny. The Second Entry on Rehearing is unlawful.

As the PUCO itself recognized,⁸ the Ohio Supreme Court has instructed the PUCO "to respect its own precedents in its decisions to assure the predictability, which is essential in all areas of law, including administrative law."⁹ While the PUCO can revisit a particular decision, the PUCO is "bound by certain institutional constraints to justify that change before such order may be changed or modified."¹⁰ If the PUCO sees fit to depart from a prior order, it "must explain why" and "the new course also must be substantively reasonable and lawful."¹¹

Before the gas utility alternative rate plan cases, it had been the PUCO's practice and precedent that where rates were set more than three years ago, a new calculation should be made. In *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Component of the Companies' Standard Service Tariffs to Reflect the Applicable FERC-Approved Charges*

⁸ *Id.*

⁹ *Cleveland Electric Illuminating Co. v. Pub Util. Comm.*, 42 Ohio St.2d 403, 431 (1975), superseded on other grounds (by statute), as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89 (1979).

¹⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984).

¹¹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52.

or Rates Related to Open Access Transmission, Net Congestion and Ancillary Services,¹²

the PUCO explained this succinctly:

The Companies propose to include carrying charges on the net under recovery or net over recovery of TCRR revenues using each company's weighted average cost of capital. The Companies propose that the rate of equity to be included in the calculation be the rate established in each company's last rate case. The Commission disagrees. The Commission issued its decision in Columbus Southern's last base rate case proceeding in May 1992, more than thirteen years ago. The Commission finds that the financial landscape has changed greatly since the early 1990s. We find it appropriate to use a more recent review of the cost of capital.¹³

When the same issue arose later, the PUCO once again acknowledged that where rates are more than two or three years old, "it may be appropriate to reevaluate the reasonableness of using the company's most recently approved" rate (in this case, for carrying charges).¹⁴

The acknowledgement that consumer protection requires revisiting rates that are more than two or three years old is not limited to a given industry or PUCO decisions. It is also reflected in the PUCO's rules governing water companies. O.A.C. 4901:1-15-35, which deals with infrastructure improvement surcharges, provides:

¹² Case No. 05-1194-EL-UNC.

¹³ *Id.* at Finding and Order (December 14, 2005) at ¶¶ 7, 8.

¹⁴ *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 Rehearing (October 22, 2010) at ¶ 9; *see also In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan Pursuant to R.C. 4929.05 for an Accelerated Service Line Replacement Program*, Case No. 14-1622-GA-ALT, Opinion and Order (October 26, 2016) at ¶ 58 ("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.").

(7) Schedules 7a and 7b – Rate of Return If the date certain proposed in this proceeding is not later than three years from the date that the company's existing rates and tariffs went into effect, prepare Schedule 7 on the basis of the company's last rate case. If the time exceeds three years, prepare a proposed rate of return summary schedule as of the date certain or the most recent available historic calendar quarter showing the calculation of the weighted average cost of capital as illustrated in Schedule 7, lines 1-4.¹⁵

The PUCO's practice and precedent for using up-to-date, recent data when setting rates is confirmed in base rate cases themselves. In 1982, the PUCO rejected testimony regarding return on equity based on data that was three years old and adopted testimony based on more recent data. It explained: "It has always been the Commission's policy in determining the yield component of the return on common equity to use the most recent data available. We do not believe that the use of three-year-old yields, although weighted against more recent data, complies with our goal of determining a current cost of equity."¹⁶

When the PUCO began approving gas utility alternative rate plan charges, it did not follow this precedent. Nor did it find that the precedent was in error. And it failed to explain why it departed from prior precedent, despite the fact that it is required to do so

¹⁵ O.A.C. 4901:1-15-35, Appx. at (B)(7).

¹⁶ *In the Matter of the 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) at ¶ 104.

by *Cleveland Elec. Illum. Co.* and its progeny.¹⁷ Accordingly, the “precedent” that the PUCO supposedly followed in this case (and the other gas utility capital expenditure program cases) was not really precedent but was a misinterpretation of precedent. Each case that followed was the fruit of a poisonous tree that began with *In the Matter of the Application of the East Ohio Gas Company DBA Dominion Energy Ohio for Approval of An Alternative Form of Regulation to Establish a Capital Expenditure Program Rider Mechanism*.¹⁸

When filed, gas utility alternative rate plans, like Dominion’s Pipeline Infrastructure Replacement Program, may depart from traditional rate-setting requirements, including the requirement to newly determine a rate of return.¹⁹ However, the PUCO should not abandon fairness and logic and refuse to update the plan’s rate of return at the time the rate program is authorized or continued. To the contrary, approving alternative rate plan charges with a rate of return based on thirteen-year-old data is clearly unreasonable.

Even if the PUCO appears to have a recent precedent of using the rate of return from a utility’s last rate case to set the rate of return for a single-issue cost rider, good

¹⁷ See *In re the Application of the East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 19-468-GA-ALT, Opinion and Order (December 30, 2020) (neither followed precedent for revisiting rates three years old, finding that doing so was in error, or explaining departure from precedent); *In re the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation*, Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021) (same); *In re the Application of the East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 20-1634-GA-ALT, Opinion and Order (April 20, 2022) (same); *In re the Application of the East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 21-1095-GA-RDR, Opinion and Order (June 1, 2022) (same); *In re Duke Energy Ohio Inc.’s Application to Adjust its Capital Expenditure Program Rider*, Case No. 21-618-GA-RDR, Opinion and Order (July 27, 2022) (same); and *In re the Application of the East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 21-619-GA-RDR, Opinion and Order (February 23, 2022) (same).

¹⁸ Case No. 19-468-GA-ALT.

¹⁹ R.C. 4929.01(A).

cause exists for the PUCO to not follow that recent precedent here. Utility rates must be just and reasonable, whether established through a base rate case or an alternative regulation plan.²⁰ Under certain circumstances, the PUCO may act reasonably by using the rate of return from a prior rate case to set the rate of return for a single-issue rider. That is, when the rate of return from the prior rate case roughly reflects current market conditions, and was determined within the last three years, using the rate of return from the prior rate case will fall within a zone of reasonableness. This practice is unreasonable, however, when utility investment returns plummet to historic lows during a global pandemic and economic challenges and the rate of return is stale.

The PUCO cannot use a rate of return from a prior rate case when that rate of return is significantly different—established by the only witness record testimony analyzing rate of return²¹-- from one calculated under current market conditions. This falls outside the zone of reasonableness and violates the principle that utility rates must reflect investment returns “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.” *Bluefield Water Works. v. Public Service Comm.*, 262 U.S. 679, 692-693, 43 S. Ct. 675, 679, 67 L.Ed. 1176 (1923).

The utility company chooses when to file a new rate case or a new alternative regulation plan. Consumers have no input on the timing for these filings. It is only fair that the utility’s rate of return for its new investments must roughly reflect current market conditions – when the utility chooses to file its case. The Ohio Supreme Court noted in

²⁰ R.C. 4905.22; R.C. 4909.18; R.C. 4929.02(A)(1); R.C. 4929.05(A)(3).

²¹ See, OCC Ex. 1.0 (Testimony Recommending Consumer Protection from the Settlement by Daniel J. Duann, Ph.D. filed October 25, 2021).

Babbit v. Pub. Util. Comm., 59 Ohio St.2d 81, 391 N.E.2d 1376 (1979) “*the need for basing rate of return calculations on current data*” because utility rates are prospective in nature. *Id.* at 93, 391 N.E.2d at 1383 (emphasis added).

Here, the PUCO ignored *Babbit* and *Bluefield Water Works* by approving a rate of return not based on current data and therefore outside the zone of reasonableness, and by refusing to set a new rate of return based on misapplied precedent.

The PUCO’s Second Entry on Rehearing is unlawful. Rehearing should be granted.

III. CONCLUSION

“[T]he purpose of the PUCO * * * is to protect the customers of public utilities.”²²
The PUCO can protect consumers by granting rehearing and rejecting or modifying the settlement in this case and adopting OCC’s consumer-protection recommendations.

Respectfully submitted,

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²² *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 372 (2009) (Pfeifer, J. dissenting).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 23rd day of September 2022.

/s/ Amy Botschner O'Brien
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Summary: App for Rehearing Application for Rehearing by Office of the Ohio
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