**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of The East Ohio Gas Company d/b/aDominion Energy Ohio to Adjust its Pipeline Infrastructure Cost Recovery Charge and Related Matters. | ))))) | Case No. 21-1095-GA-RDR |

**REPLY BRIEF FOR CONSUMER PROTECTION**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# INTRODUCTION

Dominion Energy Ohio’s (“Dominion”) proposed increase for its pipeline infrastructure replacement (“PIR”) program is based on earning excessive profits on its investment; relying on a thirteen-year-old pre-tax rate of return (9.91%).[[1]](#footnote-2) Dominion’s application does not meet the legal requirements under either the specific alternate rate plan statute (R.C. 4929.05) or the general utility rate statutes (R.C. 4905.22 and R.C. 4909.18). It should be rejected or modified.

Dominion’s application to adjust its PIR charge to consumers was filed under R.C. 4909.18,[[2]](#footnote-3) which requires the utility to show “that the proposals in the application are just and reasonable.” But it is neither just nor reasonable to require Dominion’s consumers to pay rates that are based on an outdated and excessive 9.91% pre-tax rate of return.[[3]](#footnote-4)

As the Office of the Ohio Consumers’ Counsel (“OCC”) explained in our initial brief, this stale and unreasonable pre-tax rate of return will result in consumers overpaying (approximately $45.8 million over a 12-month period).[[4]](#footnote-5) It also allows Dominion to earn profits that are too high for current financial market conditions. If the application were approved as filed (which it should not be), Dominion will, among other things, unreasonably collect a cost of debt from consumers (6.50%) that is nearly three times its actual cost of debt (2.29%).[[5]](#footnote-6)

Overcharging consumers for utility services violates Ohio law which requires that all utility rates be just and reasonable.[[6]](#footnote-7) OCC demonstrated that the use of the 9.91% pre-tax rate of return proposed by Dominion (vs. the 7.20% pre-tax rate of return OCC recommends) would increase the PIR Rider charges to consumers by approximately $45.8 million for the twelve-month period under review in this case.[[7]](#footnote-8)

Conversely, adopting the 7.20% pre-tax rate of return, as recommended by OCC, will save Dominion’s customers $45.8 million over the next twelve months. For Dominion’s 1.2 million residential consumers, this will translate into a monthly saving of $2.82.[[8]](#footnote-9) There is no justification, when many Ohioans are struggling to pay their monthly bills, for Dominion to keep approximately $45.8 million in excessive profits simply because the PUCO refuses to adopt an updated rate of return.

Contrary to Dominion’s arguments,[[9]](#footnote-10) the PUCO is not required to rely on its past practice of not adjusting the rate of return applied to riders like the pipeline infrastructure replacement program. As demonstrated in OCC’s initial brief, the PUCO clearly has the authority to depart from past precedent as long as it explains its reasoning. That is part of the PUCO’s role in administering justice.[[10]](#footnote-11) In administering justice, the PUCO should not continue to use a rate of return set 13 years ago under vastly different conditions.

Nor does adjusting the outdated, inflated rate of return represent “cherry picking.”[[11]](#footnote-12) In fact, it is Dominion doing the “cherry picking” because, under its proposal, the PIR charge is calculated by updating every component of the program (the amounts of PIR investments, the O&M expenses, and taxes) --except the stale and unreasonably high rate of return.

# REPLY

## To protect consumers, the PUCO should abandon its past practice of using a rate of return set in a utility’s last rate case. This practice is not a substitute for the legal standard under Ohio law, R.C. 4905.22, R.C. 4929.05(A)(3) and R.C. 4909.18.

Dominion cites to recent PUCO orders where the PUCO has utilized the cost of capital and capital structure approved in the utility’s last rate case in subsequent alternative rate plan and rider proceedings. But there is no law or rule requiring the PUCO to do this. And past practice should not outweigh the standards under Ohio law.

Under R.C. 4909.18, the proposals in any application for establishment of change in rate must be shown by the public utility to be just and reasonable. Under R.C. 4905.22 a “public utility must furnish necessary and adequate service…that in all respects is just and reasonable.” Under R.C. 4929.05(A)(3), alternative rate plans must be shown to be just and reasonable. And R.C. 4929.05(B) provides that the utility has the burden of proof.

Taken together, under these statutes, the PUCO must find that all aspects of the pipeline infrastructure program are “just and reasonable.” The PUCO’s past practice of using a utility’s rate of return from its last rate case is not a substitute for the legal standard under Ohio law.[[12]](#footnote-13) This is particularly true when the “last rate case” rate of return is now 13 years old, compared to a just and reasonable rate of return based on current market conditions. 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 regarding use (or improper use) of the 13-year-old rate of return is the uncontroverted testimony of OCC Witness Duann.[[13]](#footnote-14) He testified that the 13-year-old rates were unjust and unreasonable.[[14]](#footnote-15) Dominion should not be permitted to charge consumers for rates that are unjust and unreasonable because doing so violates Ohio law.

Adherence to PUCO past practice should not be used as an excuse for ignoring important legal and regulatory requirements and responsibility in ratemaking. Especially when applying past practice will obviously lead to unjust and unreasonable outcomes for consumers. As demonstrated by OCC in several recent cases, a rate of return of 9.91% based on cost of capital components set 13 years ago under vastly different market conditions is outdated and unreasonable.[[15]](#footnote-16)

The PUCO’s “past practice” or “precedent,” in its role as judge, should follow the law to provide justice. Under applicable laws in this case,[[16]](#footnote-17) the PUCO has an affirmative responsibility to review and make a finding on the justness and reasonableness of Dominion’s application. The PUCO must determine if its past policy and precedent is still just and still reasonable today in this case based on the evidence presented in this case. An assessment of this point of law was recently provided by the Ohio Supreme Court in *In re Complaint of Suburban Gas Company.[[17]](#footnote-18)*

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. Especially when to do so contravenes Ohio law. Nothing in the arguments provided in Dominion’s initial brief have demonstrated that the PUCO cannot set a new and reasonable rate of return for calculating the PIR charge. This is a choice, and the right choice for the PUCO to make to protect Dominion’s natural gas consumers.

## B. To protect consumers, the PUCO should set a new and reasonable rate of return for Dominion’s pipeline infrastructure program to avoid the “cherry-picking” advocated by Dominion.

Contrary to Dominion’s argument,[[18]](#footnote-19) OCC witness Duann presented complete testimony on rate of return.[[19]](#footnote-20) He did not just “focus on the long-term debt rate” nor was he “cherry picking” in his arguments.[[20]](#footnote-21) OCC’s witness did not recommend that the PUCO only modify Dominion’s cost of debt. Record support exists for the PUCO to modify the entire rate of return calculation.

Instead, it is Dominion that is “cherry picking.” In updating its PIR charge, Dominion wants to update every component of its PIR program except the stale and inflated rate of return of 9.91%. The PIR charge is calculated by using the updated amount of PIR capital investments, the updated operating and maintenance expenses, the updated depreciation expenses, and the updated tax expenses. Only the rate of return is not updated. This is “cherry picking,” and it is done by Dominion.

OCC has proposed that the PUCO adjust Dominion’s entire cost of capital.[[21]](#footnote-22) OCC presented the only expert rate of return witness in this proceeding, whose testimony was not challenged by opposing testimony or cross-examination. OCC witness Dr. Duann presented detailed testimony as to the appropriate cost of debt,[[22]](#footnote-23) cost of equity[[23]](#footnote-24) and capital structure.[[24]](#footnote-25)

OCC is the only party to demonstrate that the return on equity component of Dominion’s rate of return no longer reflects Dominion’s current financial risks and is far higher than recent returns on equity for comparable natural gas utilities. Dr. Duann testified that Dominion’s return on equity should be no higher than 9.36% instead of the 10.38% embedded in Dominion’s proposed rate of return.[[25]](#footnote-26) Similarly, Dr. Duann showed that Dominion’s outdated rate of return includes an embedded cost of debt component of 6.50%, since its actual cost of debt is only 2.29%, as shown in DEO’s own filing with the PUCO.[[26]](#footnote-27) Taken together (updated return on equity and current cost of debt), OCC’s expert showed conclusively (and exclusively) that Dominion’s updated pre-tax rate of return should be no more than 7.2%.[[27]](#footnote-28)

It is not “cherry picking” to recommend that the PUCO adjust the rate of return component of a utility’s filing when market conditions demand this review. Especially when the recommendation is supported by undisputed witness testimony.

The PUCO’s direction that Dominion file a base rate case no later than October 2023, a year earlier than previously determined,[[28]](#footnote-29) might bring some relief to Dominion’s 1.2 million residential consumers. But there is no guarantee about the timing or the outcome of the yet-to-be-filed base rate case. The PUCO’s objective of “a more expedient alignment of the Company’s cost of capital and capital structure with the market conditions”[[29]](#footnote-30) will not be achieved for approximately three more years.

There is no reason to ask Dominion’s residential consumers to continue to pay this excessive and unreasonable pre-tax rate of return of 9.91%. The PUCO’s modification of the timing of the filing of the utility’s next base rate case is a further indication of the need to update the rate of return sooner rather than later. Consumers continue to overpay while the PUCO waits until Dominion’s next rate case to consider the rate of return embedded in the PIR revenue requirement, as its witness proposes.[[30]](#footnote-31)

# III. CONCLUSION

No law, rule or the PUCO’s precedent requires that the PUCO apply the excessive rate of return from a utility’s most recent base rate case to determine a rider rate. It is particularly egregious to do so here, where the utility’s last rate case was 13 years ago. Dominion's filed application, requesting to continue charging consumers an outdated and inflated rate of return, should be modified as recommended in OCC’s testimony and explained in OCC’s briefs.

The PUCO should protect consumers by adjusting Dominion’s rate of return for the utility’s pipeline infrastructure replacement program to a more reasonable pre-tax rate of return of no higher than 7.20% (as supported by OCC’s witness, the only witness testifying on rate of return in this proceeding). Adopting a just and reasonable pre-tax rate of return of 7.20% will protect consumers at this challenging time while still allowing Dominion to continue its previously approved pipeline infrastructure replacement program.

 Respectfully submitted,

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 **CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Reply Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 4th day of May 2022.

 */s/ Amy Botschner O’Brien*

 Amy Botschner O’Brien

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1. *See*, OCC Ex. 2.0, Consumer Protection Comments by Office of the Ohio Consumers’ Counsel (March 23, 2022); OCC Ex. 1.0, Testimony of Daniel J. Duann (Duann Testimony) (March 31, 2022); Initial Brief for Consumer Protection by Office of the Ohio Consumers’ Counsel (“OCC Brief”) (April 20, 2022). [↑](#footnote-ref-2)
2. DEO Ex. 1.0, Application at 2 (February 25, 2022). [↑](#footnote-ref-3)
3. OCC Initial Brief; OCC. Ex. 1.0, Testimony of Daniel J. Duann at 4-5. [↑](#footnote-ref-4)
4. OCC Initial Brief; OCC Ex. 1.0 (Duann Testimony) at 6. [↑](#footnote-ref-5)
5. OCC Ex. 1.0 (Duann Testimony) at 6, 9-10; OCC Initial Brief. [↑](#footnote-ref-6)
6. R.C. 4905.22; R.C. 4929.05(A)(3). *See*, OCC Initial Brief at 2-3. [↑](#footnote-ref-7)
7. OCC Ex. 1.0 (Duann Testimony) at 10-11; *See* OCC Initial Brief at 2-3. [↑](#footnote-ref-8)
8. *Id*. at 11; OCC Initial Brief at 9-10. [↑](#footnote-ref-9)
9. Initial Brief of the East Ohio Gas Company d/b/a/ Dominion Energy Ohio (“Dominion Brief”) at 5-8 (April 20, 2022). PUCO Staff also submitted a brief but did not address rate of return issues. (Initial Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (April 20, 2022)). [↑](#footnote-ref-10)
10. OCC Brief at 6-7. [↑](#footnote-ref-11)
11. DEO Brief at 6. [↑](#footnote-ref-12)
12. R.C. 4905.22, R.C. 4929.05(A)(3) and R.C. 4909.18. [↑](#footnote-ref-13)
13. *See*, OCC Ex. 1.0 (Duann Testimony). [↑](#footnote-ref-14)
14. *Id*. [↑](#footnote-ref-15)
15. *See, e.g*., PUCO Case Nos. 19-468-GA-ALT and 20-1634-GA-ALT; OCC Ex. 1.0 (Duann Testimony) at 4-5; OCC Initial Brief at 6. [↑](#footnote-ref-16)
16. R.C. 4909.18; R.C. 4929.05(A)(3). [↑](#footnote-ref-17)
17. *See*, OCC Brief at 6 quoting *In re Complaint of Suburban Gas Company*, “A few simple sentences in the commission’s order in this case would have sufficed to explain why a previous order had been overruled,” 162 Ohio St.3d 162, 169, 2020-Ohio-5221 ¶ 29, 164 N.E.3d 425 (2020). [↑](#footnote-ref-18)
18. Dominion Brief at 6-7. [↑](#footnote-ref-19)
19. *See*, OCC Ex. 1.0 (Duann Testimony) at 6. [↑](#footnote-ref-20)
20. Dominion Brief at 6-7. [↑](#footnote-ref-21)
21. OCC Ex. 1.0 (Duann Testimony) at 6, 9-13. [↑](#footnote-ref-22)
22. OCC Ex. 1.0 (Duann Testimony) at 9-10. [↑](#footnote-ref-23)
23. *Id*. [↑](#footnote-ref-24)
24. OCC Ex. 1.0 (Duann Testimony) at 6, 9-12. [↑](#footnote-ref-25)
25. OCC Ex. 1.0 (Duann Testimony) at 9-10. [↑](#footnote-ref-26)
26. *Id*. at 9; *See,* DEO Ex. 1.0, Attachment A, Schedule 12. [↑](#footnote-ref-27)
27. OCC Ex. 1.0 (Duann Testimony) at 10; OCC Brief at 9-11. [↑](#footnote-ref-28)
28. PUCO Case No. 21-619-GA-RDR, Opinion and Order at 28 (February 23, 2022). [↑](#footnote-ref-29)
29. *Id*. [↑](#footnote-ref-30)
30. DEO Ex. 2.0 at 3 (March 31, 2022). [↑](#footnote-ref-31)