**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/a Dominion Energy Ohio for Authority to Adjust Its Capital Expenditure Program Rider Charges. | ))))) | Case No. 22-619-GA-RDR |

**INITIAL BRIEF FOR CONSUMER PROTECTION**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ William J. Michael*

William J. Michael (0070921)

Counsel of Record

Amy Botschner O’Brien (0074423)

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone [Michael]: (614) 466-1291

Telephone [Botschner O’Brien]: (614) 466 9575

william.michael@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

September 21, 2022 (willing to accept service by e-mail)

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# INTRODUCTION

The PUCO should protect consumers by rejecting or modifying the application Dominion Energy Ohio (“Dominion”) filed regarding its Capital Expenditure Program (“CEP”).[[1]](#footnote-3) Dominion Energy Ohio (“Dominion”) seeks to charge residential consumers more than $87 million per year or $6.16 per month for each of its 1.4 million residential consumers under its Capital Expenditure Program.[[2]](#footnote-4) Dominion bases these charges on a proposed 9.91% pre-tax rate of return.[[3]](#footnote-5) This rate of return – set 13 years ago – is too high, as the cost of debt and equity have significantly fallen since it was authorized.[[4]](#footnote-6) Using this rate will allow Dominion to earn profits that are too high for current financial market conditions, at consumer expense.[[5]](#footnote-7) As a result, Dominion’s proposal is neither just nor reasonable, as R.C. 4929.111(C) requires.

The PUCO should prevent Dominion from charging unreasonable and unjust rates by rejecting or modifying Dominion’s CEP proposal. The PUCO should also adopt OCC’s additional recommendations for consumer protection.

# arguments

## A. Dominion’s use of a 13-year-old 9.91% pre-tax rate of return in its capital expenditure program is unlawful, thereby hurting consumers.

Dominion’s use of the outdated rate of return and return on equity set in its last base rate case violates PUCO precedent preventing using rates that were established more than three years ago. Allowing Dominion to use a 13-year-old rate of return and return on equity to establish rates to be charged to consumers would violate binding Ohio Supreme Court precedent in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975) and its progeny.

As the PUCO itself has recognized,[[6]](#footnote-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.”[[7]](#footnote-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.”[[8]](#footnote-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.”[[9]](#footnote-11)

Before the gas utility capital expenditure program 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 or Rates Related to Open Access Transmission, Net Congestion and Ancillary Services*,[[10]](#footnote-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.[[11]](#footnote-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).[[12]](#footnote-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:

(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.[[13]](#footnote-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.”[[14]](#footnote-16)

When the PUCO began approving gas utility capital expenditure charges, it neither followed this precedent, found that it was in error, nor explained why it departed from it as required by *Cleveland Elec. Illum. Co.* and its progeny.[[15]](#footnote-17) Accordingly, the “precedent” that the PUCO supposedly followed in subsequent cases (and the other gas utility capital expenditure program cases) was wrong and unlawful. Each case 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.*[[16]](#footnote-18) It should not be followed here.

In incorporating its 13-year-old rate of return and return on equity into its capital expenditure program, Dominion violates valid PUCO precedent against using rates that are more than three years old. The PUCO should not allow Dominion to do so.

## B. To protect consumers, the PUCO should reject Dominion’s Proposed Pre-Tax Rate of Return of 9.91% as unjust and unreasonable and adopt an updated rate of return.

The regulatory principles in setting a reasonable rate of return for a regulated utility, including the cost of equity (“return on equity” or “allowed profits”) and cost of debt, are well-established.[[17]](#footnote-19) The fundamental regulatory principles regarding rate of return are best exemplified in the case of *Bluefield Water Works v. Public Service Comm'n,* 262 U.S. 679 (1923).[[18]](#footnote-20) In that case, the U.S Supreme Court ruled that:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public 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; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

Accordingly, for the purpose of this proceeding, the returns on the net rate base (net plant investment and deferrals) included in the CEP Rider charges should be commensurate with the current business and financial risks facing Dominion and current financial market conditions.[[19]](#footnote-21) Dominion’s proposal is not.

Dominion thus has not met its burden of proving that its proposal is just and reasonable.[[20]](#footnote-22) An OCC expert witness demonstrated conclusively that the 9.91% pre-tax rate of return set in Case No. 07-829-GA-AIR is outdated and too high. The OCC witness, Dr. Daniel J. Duann, testified that there has been “significant decline in the cost of debt and cost of equity since 2008.”[[21]](#footnote-23) As a result, “use of the return on equity and cost of debt set” in Dominion’s last base rate case (as Dominion has proposed) would yield “excessive and unreasonable profits for Dominion and unreasonably high CEP charges for consumers.”[[22]](#footnote-24) Dr. Duann showed that Dominion’s proposed cost of debt – 6.50% – should be no higher than 2.29%.[[23]](#footnote-25) Similarly, Dr. Duann testified that Dominion’s proposed 10.38% return on equity should be no higher than 9.30%.[[24]](#footnote-26) Taken together, Dr. Duann testified that Dominion’s updated pre-tax rate of return should be no more than 7.03%.[[25]](#footnote-27)

By failing to update its rate of return for decreased costs of debt and equity, Dominion proposes to overcharge consumers. Based on Dr. Duann’s calculation, the use of the 9.91% pre-tax rate of return (vs. the 7.03% pre-tax rate of return OCC recommends) would increase the CEP Rider charges by approximately $21.4 million ($21,375,399) for the twelve-month period under review in this case.[[26]](#footnote-28) This calculation is based on the adjusted net rate base and operating expenses, and reconciliation adjustment proposed in Table 9 and Table 10 of the Audit Report.[[27]](#footnote-29) The difference ($0.99) in monthly residential rates is calculated by the share (63.34%) allocated to residential consumers and the number of annual total bills of 13,680,064 proposed by Dominion in Attachment A, Schedule 1 of its Application.[[28]](#footnote-30)

To protect consumers, the PUCO should reject Dominion’s proposal as unjust and unreasonable and adopt an updated rate of return.

## C. To protect consumers, the PUCO should adopt several Blue Ridge’s and the PUCO Staff’s findings and recommendations.

To ensure Dominion charges consumers just and reasonable rates, the PUCO should adopt several recommendations by Blue Ridge’s independent audit of Dominion’s proposal[[29]](#footnote-31) as well as PUCO Staff’s findings and recommendations.[[30]](#footnote-32)

First, the PUCO should remove from Dominion’s CEP revenue requirement $100,145 in costs associated with renovation of two fitness centers. As PUCO Staff found, the “costs associated with these fitness centers do not fall within the categories set forth in R.C. 4929.111 or the Company’s obligation to furnish necessary and adequate services and facilities.”[[31]](#footnote-33) As OCC expert witness Kerry Adkins further testified, fitness centers “are not related to Dominion’s obligation to provide natural gas service to consumers” and “do not provide a direct and primary benefit to consumers in Dominion’s natural gas service area.”[[32]](#footnote-34) Consequently, Dominion’s inclusion of these costs in its CEP application was unjust and unreasonable, and the PUCO should remove them.

Second, the PUCO should monitor and review capital expenditure program projects Blue Ridge identified as having potential to generate incremental revenue in future cases. As Kerry Adkins testified, “any incremental revenue generated should offset capital expenditure program costs charged to consumers or be removed from the CEP for collection from consumers.”[[33]](#footnote-35) To ensure this occurs, the PUCO should monitor and review in future CEP audits the costs Blue Ridge identified as having potential to generate incremental revenue.

Lastly, the PUCO should not adopt Dominion’s proposed change to the capital expenditure program formula. Dominion argues that failure to include ADIT attributable to the depreciation offset in the revenue requirement would result in an IRS tax normalization violation.[[34]](#footnote-36) However, Kerry Adkins testified that Dominion has not shown – through private letter ruling (PLR) from the Internal Revenue Service (IRS) or otherwise – that the CEP formula is a normalization violation.[[35]](#footnote-37) As a result, the PUCO should reject Dominion’s proposed change to the formula.

# Conclusion

To protect consumers, the PUCO should deny Dominion’s request to continue charging consumers an unjust and unreasonable rate of return. The PUCO should adopt an updated rate of return as well as the recommendations of the independent auditor, its Staff, and OCC.

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ William J. Michael*

William J. Michael (0070921)

Counsel of Record

Amy Botschner O’Brien (0074423)

Assistant Consumers’ Counsel

**Office of the Ohio Consumers’ Counsel**

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone [Michael]: (614) 466-1291

Telephone [Botschner O’Brien]: (614) 466 9575

william.michael@occ.ohio.gov

amy.botschner.obrien@occ.ohio.gov

(willing to accept service by e-mail)

**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Initial Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 21st day of September 2022.

 */s/ William J. Michael*

 William J. Michael

 Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

**SERVICE LIST**

|  |  |
| --- | --- |
| jodi.bair@ohioago.govsarah.feldkamp@ohioago.govAttorney Examiner:jacqueline.st.john@puco.ohio.gov  | kennedy@whitt-sturtevant.comandrew.j.campbell@dominionenergy.com |

1. *In the Matter of the East Ohio Gas Company d/b/a/ Dominion Energy Ohio for Authority to Adjust Its Capital Expenditure Program Rider Charges,* Case No. 22-619-GA-RDR, Application of Dominion (April 1, 2022). (“Application”). [↑](#footnote-ref-3)
2. *See* Application, Attachment A, Schedule 1. [↑](#footnote-ref-4)
3. *See* Application, Attachment A, Schedule 2. [↑](#footnote-ref-5)
4. Direct Testimony of Dr. Daniel Duann on Behalf of the Ohio Consumers’ Counsel at 4 (August 31, 2022) (“Dr. Duann Direct”). [↑](#footnote-ref-6)
5. *Id.* at 13. [↑](#footnote-ref-7)
6. *Id.* [↑](#footnote-ref-8)
7. *Cleveland Electric Illuminating Co. v. Pub Util. Comm.*, 42 Ohio St.2d 403, 431 (1975), superseded on other grounds (by statute), as recognized in *Babbit v. Pub. Util. Comm*., 59 Ohio St.2d 81, 89 (1979). [↑](#footnote-ref-9)
8. *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 10 Ohio St.3d 49, 50-51 (1984). [↑](#footnote-ref-10)
9. *In re Application of Columbus S. Power Co*., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52. [↑](#footnote-ref-11)
10. Case No. 05-1194-EL-UNC. [↑](#footnote-ref-12)
11. *Id.* at Finding and Order (December 14, 2005) at a ¶¶ 7, 8. [↑](#footnote-ref-13)
12. *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.”). [↑](#footnote-ref-14)
13. O.A.C. 4901:1-15-35, Appx. at (B)(7). [↑](#footnote-ref-15)
14. *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. [↑](#footnote-ref-16)
15. *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 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). [↑](#footnote-ref-17)
16. Case No. 19-468-GA-ALT. [↑](#footnote-ref-18)
17. Duann Testimony at 6. [↑](#footnote-ref-19)
18. *Id.* at 5-6. [↑](#footnote-ref-20)
19. *Id.* [↑](#footnote-ref-21)
20. *See* R.C. 4929.05(A)3, R.C. 4929.05(B); *see also* Revised Code 4929.02(A)(1) (natural gas service must be “reasonably priced.”). [↑](#footnote-ref-22)
21. Duann Testimony at 4. [↑](#footnote-ref-23)
22. *Id.* at 13. [↑](#footnote-ref-24)
23. *Id.* at 5. [↑](#footnote-ref-25)
24. *Id.*  [↑](#footnote-ref-26)
25. *Id.*  [↑](#footnote-ref-27)
26. *Id.* at 11. [↑](#footnote-ref-28)
27. Audit Report by Blue Ridge Consulting Services, Inc. (July 15, 2022). [↑](#footnote-ref-29)
28. Duann Testimony at 11. [↑](#footnote-ref-30)
29. Case No. 22-619, Blue Ridge Audit Report (July 15, 2022). [↑](#footnote-ref-31)
30. Case No. 22-619, PUCO Staff Report (July 28, 2022). [↑](#footnote-ref-32)
31. Staff Report at 4. [↑](#footnote-ref-33)
32. Direct Testimony of Kerry Adkins on Behalf of the Ohio Consumers’ Counsel at 9 (August 31, 2022) (“Adkins Direct”). [↑](#footnote-ref-34)
33. Adkins Direct at 9. [↑](#footnote-ref-35)
34. *Id.* at 11. [↑](#footnote-ref-36)
35. *Id.*  [↑](#footnote-ref-37)