

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The East Ohio Gas	)	
Company d/b/a Dominion Energy Ohio for	)	Case No. 19-468-GA-ALT
Approval of an Alternative Form of	)	
Regulation.	)	

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**AMENDED  
JOINT MOTION TO STRIKE  
THE TESTIMONY OF DOMINION ENERGY OHIO  
AND REQUEST FOR EXPEDITED RULING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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The Office of the Ohio Consumers' Counsel ("OCC") and the Northeast Ohio Public Energy Council ("NOPEC") move to strike<sup>1</sup> portions of the testimony improperly filed by Dominion Energy Ohio ("Dominion"). It is long standing Public Utilities Commission of Ohio ("PUCO") policy and precedent that settlements not be used against parties signing them (so as to avoid discouraging future settlements). PUCO precedent dictates that a settlement agreement must be evaluated on the basis of evidence presented at the hearing and independent of evidence presented at other hearings involving other utilities. But Dominion is seeking to bolster its case by using a settlement filed in a separate case involving the rates of Columbia Gas of Ohio, Inc. ("Columbia"). It is improper. The fact that OCC or any other party settled a case with Columbia is not pertinent to this proceeding.

On August 31, 2020, Dominion filed the direct testimony of Vicki Friscic in support of its settlement with the PUCO Staff. That testimony relies on another settlement involving OCC,

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<sup>1</sup> Ohio Adm. Code 4901-1-12.

Columbia, PUCO Staff and six other parties in another unrelated proceeding. Dominion's testimony violates the plain language of that settlement, stating that the settlement cannot be used against or for the signatory parties in a future proceeding, which the PUCO adopted. Also using a settlement agreement reached in one proceeding as precedent against parties in another proceeding violates PUCO precedent.

Accordingly, the PUCO should grant this joint motion (as amended) and strike the portions of the Dominion Testimony that rely on the Columbia-related settlement. More specifically, the motion to strike is for testimony beginning on Page 11, line 22 through Page 12, line 6; Page 12, line 19 through Page 14, line 20; Page 16, lines 10 through 18; Page 24, lines 11 (beginning with the word "And") through 16; and Page 26, lines 21 (beginning with the word "In") through 23.

Further, given the abbreviated period of time before the evidentiary hearing, movants request that the joint motion be granted on an expedited basis under Ohio Adm. Code 4901-1-12(C). Movants cannot certify that no party to this proceeding objects to an expedited ruling. This joint motion (as amended) should be granted, as explained in more detail in the attached memorandum in support.

Respectfully submitted,

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settlement in that proceeding that OCC did sign.”<sup>4</sup> The testimony also states that in the Columbia CEP Case, OCC determined that depreciation offset to the CEP Investment was a financial benefit to ratepayers as a result of the settlement agreement.<sup>5</sup>

Dominion however was not a party to the Columbia CEP Case, was not privy to the underpinnings of the settlement, was not part of the confidential settlement discussions, was not privy to concessions that the parties made that resulted in the settlement, and was not knowledgeable of the reasons that OCC supported the settlement under the circumstances at the time. Simply, Dominion had no involvement in the Columbia CEP Case, which is a wholly distinct proceeding, but yet Dominion relies upon and uses the Columbia CEP Settlement Agreement as the basis for PUCO approval of its own settlement in this proceeding contrary to PUCO precedent.

## **II. ARGUMENT**

### **A. To protect consumers, the PUCO should strike portions of the Dominion Testimony because it improperly relies on a settlement in a distinct and unrelated proceeding involving different parties, and a different utility.**

When the PUCO reviews each settlement, “it will evaluate the terms of the stipulation as they appear on their face.”<sup>6</sup> The PUCO has previously explained that it “is tasked with evaluating the reasonableness of *any stipulation presented by its signatory parties* and applies a three-part test to that end.”<sup>7</sup> Also, the PUCO has stated that “[it] is well established

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<sup>4</sup> *Id.* at 26.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *In Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order at 12 (September 2, 2003).

<sup>7</sup> *In the Matter of the Application of The Dayton Power & Light Company for Approval of its Electric Security Plan*, Case No. 16-0395-EL-SSO, Third Entry on Rehearing at ¶ 45 (September 19, 2018) (emphasis added).

that a stipulation *entered into by the parties* is a recommendation made to the Commission and is in no sense legally binding upon the Commission. The Commission may take the stipulation into consideration, but must determine what is just and reasonable *from the evidence presented at the hearing.*<sup>8</sup> Consequently, the PUCO must evaluate the cases independently based on the facts, circumstances, and record evidence in each individual case regarding each utility. As such, any reliance on the Columbia CEP Settlement Agreement entered into evidence in a separate and distinct case is misguided and improper. For those reasons, the Dominion testimony that relies upon the Columbia settlement should be stricken.

**B. The PUCO should strike portions of the Dominion Testimony because it conflicts with the plain language of the Columbia CEP Settlement Agreement, does not benefit customers, and is contrary to the public interest.**

On October 25, 2018, Columbia and other signatory parties, including OCC, entered into a settlement agreement regarding the Columbia CEP Case, which the PUCO subsequently adopted in its entirety.<sup>9</sup> Included in the Columbia CEP Settlement Agreement is the following provision:

This Stipulation is entered into as an overall compromise and resolution of all of the issues presented *in this proceeding*. This Stipulation does not necessarily represent the position any Signatory Party would have taken absent the execution of this Stipulation. *This Stipulation shall not be cited as precedent in any future proceeding for or against any Signatory Party*, if the Commission approves the Stipulation without material modification.<sup>10</sup>

A clear reading of the Columbia CEP Settlement Agreement shows that signatory parties intended that the settlement it reached in that case not be used as evidence in other proceedings

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<sup>8</sup> *In the Matter of the Application of The Dayton Power & Light Company for Approval of its Electric Security Plan*, Case No. 16-0395-EL-SSO, Third Entry on Rehearing at ¶ 45 (September 19, 2018) (citing *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367,379, 384 N.E.2d 264 (1978); FirstEnergy ESP IV Case, Eighth Entry on Rehearing at ¶ 51 (Aug. 16, 2017)).

<sup>9</sup> Columbia CEP Case, Opinion and Order at ¶ 1 (November 28, 2020).

<sup>10</sup> Columbia CEP Settlement Agreement at ¶ 27 (emphasis added).

for or against the signatory parties. The language is unambiguous and the PUCO adopted the settlement agreement without modification. That agreement therefore cannot be used by Dominion to as support for the approval of its own settlement. As previously explained, the PUCO evaluates the terms of settlements “as they appear on their face.”<sup>11</sup> Further, the Supreme Court of Ohio has consistently held that contracts are to be interpreted based on the plain meaning of the terms as to best give effect to the parties’ intent.<sup>12</sup>

Allowing Dominion to cite to, rely upon, and use the Columbia CEP Settlement Agreement as evidence in this proceeding would violate the explicit terms of the Columbia CEP Settlement Agreement and be inconsistent with both the PUCO order adopting the agreement and the Supreme Court of Ohio precedent on contract interpretation. Accordingly, the PUCO should grant the joint motion and strike the improper Dominion Testimony.

**C. To protect consumers, the PUCO should grant the joint motion because allowing the improper Dominion Testimony to stand would undermine the PUCO’s settlement process.**

Ohio Adm. Code 4901-1-30 authorizes parties to PUCO proceedings to enter into a settlement. This settlement process may facilitate mutually beneficial resolutions for parties in proceedings before the PUCO without the expense of additional private or public resources on evidentiary hearings. Although not binding on the PUCO, the terms of such an agreement are

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<sup>11</sup> *In Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, Opinion and Order at 12 (September 2, 2003).

<sup>12</sup> *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37 (2011) (quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d. 1256, ¶11) (“When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. We will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. In addition, we will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning”); *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22; *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130, 509 N.E.2d 411 (1987).

accorded substantial weight.<sup>13</sup> The ultimate issue for the PUCO's consideration is whether a settlement agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a settlement, the PUCO has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?<sup>14</sup>

The Supreme Court of Ohio has endorsed the PUCO's analysis using these criteria to resolve issues in a manner economical to consumers and public utilities.<sup>15</sup>

A critical feature of the settlement process is allowing parties to negotiate their own terms and then seek PUCO approval of those terms. Without the assurance that the PUCO will enforce provisions that it approves, parties would have significantly less incentive to negotiate and settle cases. Additionally, allowing a prior settlement negotiated by parties in a separate and distinct proceeding to be used against them in a separate, unrelated proceeding regarding different utilities and under different facts and circumstances would undermine parties' ability and willingness to enter into settlements.

In the interest of upholding the efficiency and sanctity of the settlement process, the PUCO should enforce the terms of the Columbia CEP Settlement Agreement and strike the identified portions of the Dominion Testimony.

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<sup>13</sup> *Consumers' Counsel v. Pub. Util Comm.*, 64 Ohio St.3d 123, 125 (1992) (citing *Akron v. Pub. Util Comm.*, 55 Ohio St.2d 155 (1978)).

<sup>14</sup> *Id.* at 126.

<sup>15</sup> *Id.*



### III. CONCLUSION

Dominion attempts to put forth improper testimony before the PUCO that relies heavily on a settlement agreement that has little to do with this proceeding and involves different parties. In doing so, Dominion is effectively asking that the PUCO ignore the plain language of the Columbia CEP Settlement Agreement, which it approved, and Supreme Court of Ohio precedent that holds contracts are to be interpreted by their terms' plain meaning to best ascertain the intent of the parties.

Further, it is bad public policy for the PUCO to undermine the settlement process by allowing unrelated parties to use the terms of the settlement against parties who settled an unrelated case. For these reasons, the joint motion to strike the identified portions of the Dominion Testimony (as amended) should be granted on an expedited basis, prior to the start of the evidentiary hearing.

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Amended Joint Motion to Strike and Request for Expedited Ruling was served on the persons stated below *via* electronic transmission, this 8th day of September 2020.

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Summary: Motion Amended Joint Motion to Strike the Testimony of Dominion Energy Ohio and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel and The Northeast Ohio Public Energy Council electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Consumers' Counsel and The Northeast Ohio Public Energy Council