

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**POST-HEARING BRIEF
BY
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I. INTRODUCTION

Six months into the state of emergency declared by Ohio Governor DeWine, the coronavirus continues to cause health and economic suffering among Ohioans. Cleveland-area jobs have been lost at historic levels. People can't pay their rent. People can't afford food. Yet now, in a document that no consumer advocate would sign, Dominion Energy and the Staff of the Public Utilities Commission of Ohio ("PUCO") have proposed a Settlement¹ for the PUCO to adopt. Their Settlement would allow Dominion to charge customers more than \$80 million over the next year (about \$46 per residential customer) and about half a billion dollars (\$560 million) more in the following four years (eventually reaching a charge of up to \$90 per year). The PUCO's settlement standard requires parties to prove to the PUCO that, among other things, the Settlement benefits customers and the public interest. This Settlement fails the standard.

For most of its proposal, Dominion wants the PUCO to use alternative ratemaking under a 2011 law instead of using the longstanding traditional ratemaking that is fairer to consumers. But in setting Dominion's profit level that consumers will pay, Dominion and the PUCO Staff want the PUCO to use traditional ratemaking—but from a case decided in 2008 when financial

¹ Joint Exs. 1.0, 2.0, and 3.0 (collectively, the "Settlement").

conditions favored higher utility profit levels. The outdated rate of return in the Settlement would result in a nearly \$100 million windfall² for Dominion over the next five years, all at consumer expense.

OCC respectfully requests that the PUCO reject or modify the Settlement, consistent with our consumer-protection recommendations below. The Settlement imposes substantial costs on consumers that are unjust and unreasonable at a time when the last thing they need is higher utility bills.

II. RECOMMENDATIONS

The Settlement does not pass the PUCO's three-part test for settlements. The Settlement lacks diversity of interests as no consumer advocate (not OCC and not NOPEC) signed it. The PUCO should consider the Settlement's lack of diversity of interests, which is a standard the PUCO sometimes uses. It does not benefit customers or the public interest. It violates regulatory principles. All parties (OCC and NOPEC) in the case that represent customers oppose the Settlement.

A. **The PUCO should reject the Settlement given the lack of diversity of those who signed it and given that the consumer advocates oppose it.**

The Settlement was signed by Dominion and the PUCO Staff only. Dominion represents its own interests (primarily the financial interests of its shareholders). And the Staff *balances* the interests of all parties but does not *represent* any particular interest, other than its own interest as part of the PUCO.³

² See OCC/NOPEC Ex. 2 (Duann) at 8.

³ See Tr. at 50-51 (Dominion witness Friscic acknowledging that the Staff does not speak for anyone other than itself); OCC Ex. 8 (Dominion response to OCC interrogatory wherein Dominion states that the PUCO Staff balances the interests of all parties).

The only other parties to this case are OCC and NOPEC. Both OCC and NOPEC represent the interests of residential consumers who will pay hundreds of millions of dollars in charges under the Settlement. And both OCC and NOPEC oppose the Settlement.

In considering the first prong of the PUCO's three-part test for settlements, the PUCO has at times considered the diversity of the signatory parties. Diversity is not required, and no single party can veto a settlement, but "the diversity of the signatory parties may be a consideration in determining whether a settlement is a product of serious bargaining among capable, knowledgeable parties under the first prong of the Commission's test."⁴

Unfortunately, the PUCO's past application of the diversity principle has been one-sided. In cases where many parties sign a settlement, the PUCO has touted the diversity of the signatory parties as supporting approval of the settlement. For example, in Dayton Power and Light's recent electric security plan case, the PUCO approved a settlement, noting that "it is *helpful* if the signatory parties do represent a variety of interests" and citing the interests of various parties that signed the settlement as supporting approval of the settlement.⁵ In another recent case involving AEP, the PUCO again noted that diversity is not required but it then highlighted the diversity of parties as favoring approval of the settlement.⁶ But when very few parties sign a settlement (sometimes, as in this case, as few as two), the PUCO has shrugged off the lack of diversity as

⁴ *In re Application of Ohio Edison Co., the Cleveland Elec. Illuminating Co., & the Toledo Edison Co. for Approval of their Energy Efficiency & Peak Demand Reduction Program Portfolio Plans*, Case No. 16-743-EL-POR, Opinion & Order ¶ 61 (Nov. 21, 2017).

⁵ Case No. 16-395-EL-SSO, Opinion & Order ¶ 21 (Oct. 20, 2017) (emphasis in original).

⁶ Case No. 09-872-EL-FAC, Order on Global Settlement Stipulation ¶ 107 (Feb. 23, 2017).

irrelevant.⁷ If diversity matters—and the PUCO has said that it does—then it must be applied both ways and consistently.

OCC is not suggesting that any party should have the sole authority to veto a settlement for lack of diversity. There may be cases where a settlement should be approved despite a lack of diversity—just as there will be cases where a settlement should be rejected despite it being signed by many parties. The point, however, is that when a settlement lacks diversity, the PUCO should take a close look at the interests of the parties who signed the settlement and a close look at the interests of the parties who did not sign the settlement.

Oftentimes, the signatory parties to a settlement are predominantly the utility and other parties who do not pay for the costs proposed in the settlement, while consumer representatives—whose constituents *do* pay the costs proposed in the settlement—are on the outside. This matters. When the representatives of those who bear the costs of a settlement oppose the settlement, the PUCO should give those representatives' views substantial weight in considering whether the settlement in fact benefits customers and the public interest, whether the settlement is consistent with regulatory principles, and whether the settlement was the product of serious bargaining.

As explained, the Settlement in this case is supported by only the utility and the PUCO Staff. The utility financially benefits from the Settlement by charging customers hundreds of millions of dollars for CEP investments, including an unreasonably high rate of return. And the

⁷ See, e.g., *In re Application of Duke Energy Ohio, Inc. for an Adjustment to Rider AMRP Rates to Recover Costs Incurred in 2017*, Case No. 17-2318-GA-RDR, Opinion & Order (Apr. 25, 2018) (approving settlement signed by only the utility and the PUCO Staff); *In re Application of Suburban Natural Gas Co. for an Increase in Gas Distribution Rates*, Case No. 18-1205-GA-AIR, Opinion & Order ¶¶ 87-91 (Sept. 26, 2019) (approving settlement signed by only the utility and the PUCO Staff and opposed by consumer representatives OCC and Ohio Partners for Affordable Energy).

PUCO Staff balances the interests of all parties but does not speak for residential or other consumers.

In contrast, OCC has statutory authority to speak for the interests of Dominion's residential consumers.⁸ Likewise, NOPEC's mission involves consumer advocacy on behalf of its governmental members and their constituents, which are NOPEC residential and commercial natural gas customers. OCC and NOPEC are the only parties in this case representing the interests of parties who will pay the costs proposed in the Settlement. As OCC/NOPEC witness Daniel Duann testified, "customers, as represented by OCC and NOPEC, who would end up paying all the CEP charges, clearly are not properly considered and reflected in the Settlement."⁹

Under this scenario, the full boundaries of settlement options were not fully explored, and the settlement result is an outcome that is tethered not far from the utility's litigation position. That result harms customers and violates regulatory principles. The PUCO should not reject the Settlement *solely* because OCC and NOPEC oppose it. There are numerous reasons, as explained below, that the Settlement should be rejected on its merits. But when determining how much weight to give the Settlement, the PUCO should give substantial consideration to OCC's and NOPEC's opposition to it and conclude that it fails the first prong due to lack of diversity.

⁸ R.C. Chapter 4911.

⁹ OCC/NOPEC Ex. 2 (Duann) at 22.

B. The PUCO should reject or modify the Dominion/PUCO Staff Settlement because it does not benefit customers or the public interest.

i. Allowing Dominion to add hundreds of millions of dollars in new charges to customers' bills is unjust and unreasonable and would not benefit customers or the public interest, especially during a pandemic and financial emergency.

The coronavirus pandemic and financial emergency has been devastating for Ohioans. Even before the pandemic, Cleveland-area consumers were suffering. They faced 35% poverty in the City of Cleveland and nearly 19% food insecurity in Cuyahoga County—before the pandemic.¹⁰ Recent pandemic-related data have shown that food insecurity is at 23% statewide, and in Cleveland, food insecurity among families with children under 12 years old is at an alarming 41%.¹¹ In June, more than half a million Ohioans were unable to pay their rent.¹²

The City of Cleveland has been especially hard hit. An August 2020 study out of Cleveland State University showed that in April, Cleveland lost 184,000 jobs directly as a result of the pandemic—more than any other municipality in Ohio.¹³ Recovery has been slow, with just 54,000 of those jobs coming back by July.¹⁴ And those jobs do not appear to be coming back anytime soon. The same Cleveland State study showed that by one metric (job postings), Cleveland was *last in the entire country* for job creation.¹⁵ As OCC/NOPEC witness Adkins explained regarding the need to protect consumers:

¹⁰ OCC/NOPEC Ex. 1 (Adkins Testimony) at 16.

¹¹ OCC/NOPEC Ex. 1 (Adkins Testimony) at 16.

¹² OCC/NOPEC Ex. 1 (Adkins Testimony) at 16.

¹³ Tr. at 129 (Adkins).

¹⁴ Tr. at 129 (Adkins).

¹⁵ Tr. at 129 (Adkins).

[P]eople need protection and people need money now. Imposing a new charge on customers' utility bills is precisely the opposite of what the PUCO should be doing right now. The PUCO should be finding ways to save customers money, not ways to increase their utility bills.¹⁶

But under the Settlement, Dominion would be allowed to immediately begin charging residential customers nearly \$50 each per year,¹⁷ with substantial increases following year after year. In fact, under the Settlement, residential customers could pay more than \$400 million over the next five years under Dominion's Capital Expenditure Program ("CEP") Rider, as summarized in the following table:

Dates	Monthly Residential Charge ¹⁸	Total Annual Charges Paid by Residential Customers ¹⁹
Oct. 1, 2020 – Sept. 30, 2021	\$3.86	\$52.4 million
Oct. 1, 2021 – Sept. 30, 2022	up to \$5.51	up to \$74.7 million
Oct. 1, 2022 – Sept. 30, 2023	up to \$6.31	up to \$85.6 million
Oct. 1, 2023 – Sept. 30, 2024	up to \$6.96	up to \$94.4 million
Oct. 1, 2024 – Sept. 30, 2025	up to \$7.51	up to \$101.8 million

And while it is unknown when the coronavirus pandemic might end, or when the economy will recover to its pre-pandemic state (if ever), the "financial troubles for many affected by the coronavirus and associated protective measures are likely to persist for some time after the emergency resulting from the pandemic is over."²⁰

¹⁶ OCC/NOPEC Ex. 1 (Adkins Testimony) at 17.

¹⁷ See Joint Ex. 2.0 (\$3.86 per month per residential customers, multiplied by 12 months, is \$46.32 per year).

¹⁸ See Joint Ex. 1.0 at 4-5.

¹⁹ Annual charges calculated as monthly charge * 13,558,168 bills. See Tr. at 35 (Dominion witness Friscic confirming that the revenue requirement is calculated as the monthly rate multiplied by the number of bills). See also OCC/NOPEC Ex. 2 at 25 (Dr. Daniel Duann providing the results of these calculations in Table 2, row (5)). While the number of bills in the future is not known precisely, using number of bills as of December 31, 2019 provides a very close calculation of the total charges to consumers, given that the number of residential customers in Dominion's service area does not change substantially from year to year.

²⁰ OCC/NOPEC Ex. 1 (Adkins Testimony) at 17.

In other words, the Settlement's timing could not be worse. It is true that the PUCO has taken steps to protect consumers during the pandemic, including moratoriums on disconnections, limiting door-to-door sales to protect consumers from unnecessary spread of the virus, extending last year's winter reconnect order, and prohibiting utilities from performing non-essential functions that would put customers at risk.²¹ But the PUCO has allowed utilities to end many of these protections for customers. Among other things, disconnections have resumed, and marketers have resumed door-to-door sales.²²

The PUCO has an opportunity to protect consumers by modifying the Settlement so that consumers are not hit with hundreds of millions of dollars in new utility-bill charges, right in the middle of a once-in-a-lifetime pandemic. At a minimum, the PUCO should adopt OCC/NOPEC witness Adkins' recommendation that new charges under Rider CEP be delayed until October 2021 at the earliest.²³ Then, in October 2022, Dominion can include its 2019 CEP investments in the calculation of rider charges, followed by 2020 CEP investments in 2023 and 2021 CEP investments in 2024, after which Dominion would file its next base rate case.²⁴ In that base rate case, any CEP investments that are used and useful on the date certain can be included in rate base, and customers will pay for those investments in accordance with R.C. Chapter 4909.

²¹ See *In re Proper Procedures & Process for the Commission's Operations & Proceedings During the Declared State of Emergency*, Case No. 20-591-AU-UNC, Entry (Mar. 17, 2020) (temporarily suspending door-to-door and in-person marketing activities); Entry (Mar. 20, 2020) (directing utilities to suspend all non-essential functions that might create unnecessary coronavirus risks); *In re Motion of the East Ohio Gas Co. dba Dominion Energy Ohio to Suspend or Modify Certain Procedures & Processes During the COVID-19 State of Emergency*, Finding & Order (June 3, 2020) (suspending disconnections).

²² See *In re Proper Procedures & Process for the Commission's Operations & Proceedings During the Declared State of Emergency*, Case No. 20-591-AU-UNC, Entry (June 3, 2020) (allowing marketers to resume in-store marketing activities); Entry (June 17, 2020) (allowing marketers to resume door-to-door sales); *In re Motion of the East Ohio Gas Co. dba Dominion Energy Ohio to Suspend or Modify Certain Procedures & Processes During the COVID-19 State of Emergency*, Supplemental Finding & Order (July 15, 2020) (allowing Dominion to resume disconnections as of August 3, 2020).

²³ OCC/NOPEC Ex. 1 (Adkins Testimony) at 17.

²⁴ OCC/NOPEC Ex. 1 (Adkins Testimony) at 17-18.

An even better protection for consumers would be to reject the Rider CEP charges altogether and postpone any charges to consumers for Dominion's CEP investments until Dominion's next base rate case.²⁵ This is especially true, given that the proposed rates are based on an unreasonably high rate of return, as explained further below.

Either way, it does not benefit customers to allow Dominion to start charging them hundreds of millions of dollars now as the pandemic and financial fallout continue to devastate Cleveland-area consumers. These new charges under the Settlement would actively harm them at a time when they can least bear these additional costs.

- ii. Requiring customers to pay Dominion 6.50% on its debt, when Dominion's actual weighted cost of debt is merely 2.25%, is contrary to consumers' interest, would be unjust and unreasonable and is otherwise an outrageous example of a failure in a Settlement (if not in Ohio regulation).**

Under the Settlement, Dominion would earn a guaranteed 9.91% pre-tax rate of return on its CEP investments, paid by customers.²⁶ That 9.91% rate of return is based on a 10.38% return on equity (profit) and 6.50% cost of debt.²⁷ In other words, through charges to customers under the CEP Rider, customers would pay for Dominion to make a 10.38% profit on its CEP investments while also paying Dominion 6.50% so that Dominion can service its debt. That return on equity and cost of debt are based on Dominion's most recent base rate case—approved more than a decade ago in 2008.

²⁵ See OCC/NOPEC Ex. 1 (Adkins Testimony) at 13-15 (explaining why single-issue ratemaking harms consumers and eliminates some of the protections they have when a utility is required to seek recovery of its costs through a base rate proceeding instead).

²⁶ Tr. at 21.

²⁷ Tr. at 21.

One problem, however, is that the real interest rate on Dominion's debt is not actually 6.50%. It is substantially lower at just 2.25%²⁸ (or 2.29% after deducting various fees and discount²⁹). This results in an outrageous windfall for Dominion, at consumer expense.

According to OCC's rate of return expert, Dr. Daniel Duann, customers will pay an additional \$9.4 million to Dominion as a result of using the 6.50% cost of debt in the first year of the CEP Rider alone.³⁰ This \$9.4 million goes directly to Dominion's shareholders because Dominion does not need it to pay down its new, lower-cost debt. In effect, it further inflates Dominion's already high 10.38% return on equity, thus making Dominion's CEP investments wildly profitable for Dominion's shareholders, at the expense of consumers. And as Dominion adds more CEP investments and begins charging customers for these new investments in 2021 and beyond, the windfall will only increase, year after year under the CEP Rider.

Dominion's shareholders have already been benefitting from the lower cost of debt. Before refinancing to the current 2.25% cost of debt, Dominion was paying a 4.23% cost of debt.³¹ As a result of refinancing to the 2.25% cost of debt, Dominion is saving \$34.4 million per year as compared to when it was paying the 4.23% interest rate.³² Dominion witness Friscic confirmed that this \$34.4 million in savings goes to Dominion, not customers.³³ Dominion will continue to save this \$34.4 million for at least the next four years, giving Dominion's

²⁸ OCC Ex. 3 at 3 (weighted average interest rate of Dominion's debt of 2.25%).

²⁹ See OCC/NOPEC Ex. 2 (Duann Testimony) at 18 (explaining the derivation of the 2.29% embedded cost of debt).

³⁰ OCC/NOPEC Ex. 2 (Duann Testimony) at 20.

³¹ Tr. at 23 (Friscic). See also *In re Application of the East Ohio Gas CO. d/b/a Dominion Energy Ohio for Consent & Authority to Issue Long-Term Notes*, Case No. 20-175-GA-AIS, Finding & Order ¶ 4 (May 6, 2020).

³² OCC Ex. 3.

³³ Tr. at 23-24 (Friscic).

shareholders an additional \$137.6 million in savings in debt cost (effectively profit). In fact, this does not even capture all of the savings that Dominion receives as a result of its refinancing.

In Dominion's last rate case (decided long ago in 2008), the PUCO approved a 6.50% cost of debt to be paid by consumers. Customers pay that 6.50% cost of debt through their base rates and will continue to pay that cost of debt through base rates until at least 2025.³⁴ Thus, the \$34.4 million in annual savings is far less than the actual savings that Dominion achieves by paying a 2.25% interest rate on its debt while continuing to charge customers 6.50% interest.

In sum, since Dominion's last rate case, its cost of debt has dropped precipitously, allowing Dominion to save and retain tens of millions of dollars per year. Customers have received no benefits from the lower cost of debt because, in the absence of a new rate case, they continue to pay Dominion 6.50% interest through their base rates.

Adding to the problem for consumers is it is no coincidence that it is *Dominion* who controls the lack of a rate case filing since it last filed in 2007. Now, as if that self-arranged windfall were not enough, Dominion is asking the PUCO to authorize *new* charges to consumers, still using the 12-year-old cost of debt that was approved in Dominion's rate case. This is just plain unjust and unreasonable. And wrong. The PUCO cannot conclude that customers paying a non-existent 6.50% interest rate on Dominion's debt is a benefit for customers and the public interest. At a minimum, the PUCO should require Dominion to use its actual cost of debt for any charges to customers under the CEP Rider. Indeed, the law applicable to the rate cases that Dominion chose not to file requires using the "actual" cost of debt (R.C. 4909.15(E)(2)(a)).

³⁴ Tr. at 24 (Friscic).

- iii. **Requiring customers to pay a 10.38% return on equity (profit) is unjust and unreasonable because the 10.38% profit is based on 2008 financial conditions from the last rate case Dominion chose to file, which profit was substantially different (higher) than the lower profit that would result from real ratemaking under current financial conditions.**

As explained, the Settlement would allow Dominion to charge customers a (high) 10.38% return on equity (another name for utility profits). The only basis for the proposed return on equity is that it is the same return on equity that was approved in Dominion’s most recent base rate case—12 years ago in 2008.³⁵

But an approved return on equity is supposed to be based on *current* market conditions. As OCC/NOPEC witness Dr. Duann, a rate of return expert, testified, utility shareholders “should be provided the opportunity (but not a guarantee) to earn a fair (but not excessive) return on their invested capital in comparison to other investments currently available.”³⁶ In other words, as Dr. Duann testified, the utility’s return should be “commensurate with the business and financial risks in making such an investment under *current* financial market conditions.”³⁷ This is consistent with the longstanding regulatory principle established by the United States Supreme Court that a “rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.”³⁸

Current market conditions do not come close to supporting a 10.38% profit on utility capital investments. In the last 12 years, there has been a “drastic and unrelenting drop in the

³⁵ Tr. at 101 (Friscic).

³⁶ OCC/NOPEC Ex. 2 (Duann Testimony) at 6 (emphasis added).

³⁷ OCC/NOPEC Ex. 2 (Duann Testimony) at 7 (emphasis added).

³⁸ See OCC/NOPEC Ex. 2 (Duann Testimony) at 11 (quoting *Bluefield Water Works v. Pub. Serv. Comm’n*, 262 U.S. 679 (1923)).

costs of debt and equity for all businesses, including regulated utilities,” as explained by Dr. Duann.³⁹ In 2008, for example, the average return on equity for gas companies nationwide was 10.39%—nearly identical to the 10.38% return on equity approved for Dominion itself in 2008.⁴⁰ In 2019, the average had dropped to 9.71%, and in the first half of 2020 it dropped further to 9.40%.⁴¹

Adding to the problem for consumers is the lack of coincidence that it is *Dominion* who controls the lack of a rate case filing since it last filed in 2007. In short, today’s market no longer supports a 10.38% return on equity or anything close to it. But under the PUCO Staff/Dominion Settlement, new charges would be imposed on customers requiring them to pay Dominion’s 12-year-old return on equity. That high profit level is from the last rate case that Dominion chose to file when conditions produced a higher return on equity for charging consumers. This result does not benefit customers and it does not benefit the public interest—it benefits Dominion.

iv. No law or policy requires the PUCO to use the same rate of return for single-issue ratemaking as the one that was approved in the utility’s last base rate case.

Dominion argues that the PUCO should use a 10.38% return on equity and 6.50% cost of debt because those numbers were approved in Dominion’s most recent rate case. Dominion’s position seems to be that whenever a utility seeks approval of a rider, the PUCO should automatically use the rate of return from the last rate case, and no further analysis is necessary. This argument fails for several reasons.

First, there is no law requiring the PUCO to use the same rate of return from the utility’s most recent base rate case when approving a single-issue ratemaking charge like the CEP Rider.

³⁹ OCC/NOPEC Ex. 2 (Duann Testimony) at 12.

⁴⁰ OCC/NOPEC Ex. 2 (Duann Testimony) at 12.

⁴¹ OCC/NOPEC Ex. 2 (Duann Testimony) at 12.

The CEP statute (R.C. 4929.111) says nothing at all about the appropriate rate of return, return on equity, or cost of debt to be used for CEP investments.

Second, the PUCO has already rejected, in this very case, Dominion's claim that the rate of return from its most recent rate case is required to be used.⁴² Consistent with its prior ruling, the PUCO should update the rate of return.

More specifically, at the outset of the case, Dominion sought a waiver of the PUCO's standard filing requirements regarding rate of return.⁴³ Dominion argued that there was no need for any rate of return documents in its application because, according to Dominion, the PUCO had already determined that the rate of return from the most recent rate case should be used.⁴⁴

The PUCO denied Dominion's request and required it to comply with the standard filing requirements related to rate of return. The PUCO ordered:

Dominion is directed to file the information required by the [Standard Filing Requirements] in Chapter II, Section C (Operating Income) and D (Rate of Return).⁴⁵

If it were true, as Dominion suggests, that the rate of return from the most recent rate case is required to be used, then there would have been no reason and no need for the PUCO to order Dominion to comply with the rate of return Standard Filing Requirements.

Dominion's alternative regulation application should be treated similar to a rate case application.⁴⁶ In other words, Dominion has the burden to prove its proposed rate of return in this case is just and reasonable. In its revised filings on August 23, 2019, Dominion provided its

⁴² See Entry ¶ 14 (June 19, 2019).

⁴³ See Entry ¶ 14 (June 19, 2019).

⁴⁴ Entry ¶ 14 (June 19, 2019).

⁴⁵ Entry ¶ 14 (June 19, 2019).

⁴⁶ Dominion's proposed rate increase of at least \$80 million in annual revenue requirement increase is actually much larger than many gas and electric base distribution rate cases in recent years per year

updated cost of debt as of December 31, 2018⁴⁷ but chose not to update its cost of common equity. Dominion has failed to demonstrate the use of its decade-old rate of return is just and reasonable.

Third, use of the utility's most recently-approved base rate case rate of return might make sense when the utility's most recent base rate case was in fact recent. But here, Dominion's approved rate of return was approved 12 years ago in a substantially different financial climate. While the path of least resistance might be to simply rubber stamp the utility's 12-year-old rate of return, equity and reasonableness require the PUCO to consider whether charging customers that rate remains justified—and it does not, for all the reasons explained above.

Fourth, Dominion's proposed rate increase for its CEP rider of at least \$80 million per year is considerably larger than many gas base distribution rate cases in recent years. These cases include Vectren (\$22 million),⁴⁸ Suburban Natural Gas (\$1.8 million),⁴⁹ and Northeast Ohio Natural Gas (\$0.16 million).⁵⁰ These other cases required the PUCO to set a new rate of return based on current financial market conditions and current financial and business risks facing the utility. Given that Dominion's proposed single-issue rate increase is substantially larger, there is no valid reason not to do in this case what was done in those cases (*i.e.*, update the rate of return based on current financial conditions and risks).

Finally, and adding to the problem for consumers is it is no coincidence that it is *Dominion* who controls the lack of a rate case filing since it last filed in 2007. Considering that Dominion holds the best cards for ratemaking that favors it, the PUCO should be strict in

⁴⁷ OCC/NOPEC Ex.2 at 17.

⁴⁸ Case No. 18-298-GA-AIR, Opinion & Order (Aug. 28, 2019).

⁴⁹ Case No. 18-1205-GA-AIR, Opinion & Order (Sept. 26, 2019).

⁵⁰ Case No. 18-1720-GA-AIR, Opinion & Order (Sept. 26, 2019).

requiring ratemaking that favors customers and the public interest and that also makes regulatory principles work for consumers. The PUCO should reject the Settlement and adopt the OCC/NOPEC position on fair profits that Dominion would to charge consumers.

- v. **Customers should pay a 7.20% pre-tax rate of return based on a 2.29% cost of debt and 9.36% return on equity instead of the much higher levels proposed in the PUCO Staff/Dominion Settlement.**

The record in this case contains the testimony of one rate of return expert and one rate of return expert only: OCC/NOPEC witness Dr. Daniel Duann.⁵¹ Dominion chose to submit the testimony of a single witness, Vicki Friscic.⁵² Ms. Friscic, by her own admission, is not a rate of return expert:

Q. Are you a rate of return expert?

A (Friscic). I am not a rate of return expert.⁵³

The PUCO Staff did not offer a witness on rate of return or any other issue. And neither Dominion nor the PUCO Staff asked Dr. Duann a single question on cross examination.⁵⁴

Thus, the *only* expert testimony on rate of return comes from Dr. Duann, and neither Dominion nor Staff (the only parties to the Settlement) challenged Dr. Duann's testimony through their own testimony or through cross examination.

In situations like this—where a single expert witness (Dr. Duann) provides uncontroverted testimony—the PUCO lacks the discretion to simply disregard Dr. Duann's expert opinions.

⁵¹ OCC/NOPEC Ex. 2.

⁵² Dominion Ex. 4.0.

⁵³ Tr. at 19 (Friscic).

⁵⁴ Tr. at 148 (counsel for Dominion stating, "Dr. Duann, ... we have no questions for you."; counsel for Staff stating, "No questions.").

As the Supreme Court of Ohio explained in *State v. White*, a trier of fact “is not required to automatically accept expert opinions.”⁵⁵ At the same time, however, the Court stated that an expert opinion “may not be arbitrarily ignored, and some reason must be objectively present for ignoring expert opinion testimony.”⁵⁶ More importantly, the Court stated that a trier of fact “may not disregard credible and uncontradicted expert testimony in favor of either the perceptions of lay witnesses or of the court’s own expectations Doing so shows an arbitrary, unreasonable attitude toward the evidence before the court and constitutes an abuse of discretion.”⁵⁷

The PUCO has previously recognized the substantial weight afforded uncontroverted testimony. In *In re Investigation of Conrail’s Reciprocal Switching Charges and Supplements*, for example, the PUCO stated, “As a rule, ... while the weight given to evidence is largely discretionary with the Commission, the Commission must act reasonably, and cannot make a finding ... contrary to uncontroverted testimony.”⁵⁸ See also *State ex rel. Rogers v. Elbert*, 180 Ohio App. 3d 284 (2008) (Dickinson, concurring) (“Although it has been generally recognized that a trier of fact is free to reject testimony even if that testimony is unrebutted, that is no longer true in civil cases in Ohio.”).

The PUCO, therefore, should give substantial weight to Dr. Duann’s expert opinion in deciding the appropriate rate of return for customers to pay under the CEP Rider.

Dr. Duann testified that a just and reasonable pre-tax rate of return for customers to pay under Rider CEP would be 7.20%—not the 9.91% rate proposed in the Settlement.⁵⁹ First, Dr.

⁵⁵ 118 Ohio St.3d 12, 23 (2008).

⁵⁶ *Id.* (quoting *United States v. Hall*, 583 F.2d 1288, 1294 (5th Cir. 1978)).

⁵⁷ *Id.* at 24.

⁵⁸ Case No. 79-901-RR-SIN, Opinion & Order (Apr. 23, 1980).

⁵⁹ OCC/NOPEC Ex. 2 at 7.

Duann testified that the appropriate cost of debt would be 2.29%.⁶⁰ As Dr. Duann explained, this is Dominion's actual, current cost of debt. It is based on the weighted average interest rate of Dominion's recently refinanced debt (2.25%), which increases slightly to 2.29% when accounting for fees and discount paid to refinance.⁶¹ Dr. Duann concluded that there is "simply no justification for charging customers a 6.50% cost of debt when Dominion's actual cost of debt is just 2.29%."

Dr. Duann testified that in his expert opinion, the appropriate return on equity, based on current market conditions, is 9.36%.⁶² As Dr. Duann explained, "one of the fundamental principles in setting a reasonable ROE for a regulated utility is to set it so that an ordinary investor can earn a return from investing in the regulated utility comparable to the returns he or she would expect to earn from other investments with similar risk."⁶³

Dr. Duann analyzed data on similar gas distribution utilities nationwide from 2019 and 2020 and determined that the average return on equity in rate cases was 9.56%.⁶⁴ Dr. Duann then assessed Dominion's risk profile to see how it compares to a typical utility. Dr. Duann found that (i) Dominion and its parent company have consistently had above-average investment-grade credit ratings, (ii) Dominion's straight fixed variable rate design has significantly reduced its risk, (iii) Dominion's parent company has an \$80 billion market value and is one of the largest energy companies in the United States, and (iv) Dominion's parent company is executing a \$3 billion stock buy-back program.⁶⁵ In Dr. Duann's expert opinion, these factors demonstrate that

⁶⁰ OCC/NOPEC Ex. 2 at 18.

⁶¹ OCC/NOPEC Ex. 2 at 18.

⁶² OCC/NOPEC Ex. 2 at 16.

⁶³ OCC/NOPEC Ex. 2 at 16.

⁶⁴ OCC/NOPEC Ex. 2 at 16.

⁶⁵ OCC/NOPEC Ex. 2 at 14-15.

Dominion faces less risk than the typical natural gas distribution utility. Accordingly, he recommended a 20-basis point downward adjustment to the 9.56% average return on equity to arrive at a recommended 9.36% return on equity for Dominion.⁶⁶

All of this testimony was unrebutted. Dominion and Staff offered no testimony on rate of return. And they declined to challenge Dr. Duann's analysis or conclusions on cross examination. To protect consumers from paying unjust and unreasonable rates, the PUCO should adopt Dr. Duann's unrefuted testimony and proposal.

Using Dominion's 9.91% rate of return would result in substantial overcharges to consumers. If Dr. Duann's more reasonable 7.20% rate of return were adopted, then residential customers would pay \$3.28 per month in the first year of the CEP Rider instead of the Settlement's proposed \$3.86, a 15% reduction.⁶⁷ Over a period of five years, the Settlement's unreasonable 9.91% rate of return would result in a \$97 million windfall for Dominion—all at consumer expense.⁶⁸

This is unjust and unreasonable. It does not benefit customers. The PUCO should modify the Settlement and require Dominion to charge customers a pre-tax rate of return no higher than 7.20%.

vi. The so-called “rate caps” under the Settlement do not adequately protect customers from paying too much to Dominion under Rider CEP.

From 2012 to 2018, Dominion's annual CEP spending increased from \$77.0 million to \$133.1 million—a 73% increase that far outpaces inflation.⁶⁹ The trend toward higher spending

⁶⁶ OCC/NOPEC Ex. 2 at 16.

⁶⁷ OCC/NOPEC Ex. 2 at 24.

⁶⁸ OCC/NOPEC Ex. 2 at 24-25.

⁶⁹ OCC/NOPEC Ex. 1 at 15.

continued in 2019 when Dominion made another \$137.1 million in CEP capital investments.⁷⁰ As OCC/NOPEC witness Adkins explained, this shows that the availability of the CEP has encouraged Dominion to substantially increase its CEP spending, which ultimately results in higher charges for consumers.⁷¹

Under the Settlement, residential customers would initially pay \$3.86 per month under the CEP Rider.⁷² This rate is based on Dominion's CEP investments from 2011 to 2018 and the Settlement's proposed 9.91% pre-tax rate of return.⁷³ Then, starting in 2021, rates could increase to as high as \$5.51 per month as Dominion would be allowed to add its 2019 and 2020 CEP investments to the charges to consumers.⁷⁴ If Dominion's 2019 investments were included in the rider, the residential customer rate would increase by 85 cents to \$4.71.⁷⁵ Thus, Dominion can make investments in 2020 that would result in another 80 cent increase before reaching the \$5.51 cap.⁷⁶

From this, one could reasonably conclude that Dominion could invest nearly as much in 2020 as it did in 2019 (\$137.1 million) without exceeding the \$5.51 cap. The rate cap could increase by another 80 cents based on 2021 investments,⁷⁷ again suggesting that Dominion could charge customers for well over \$100 million in investments made in 2021. The point is, while the rate caps might set the maximum amount that residential customers will pay, they provide ample

⁷⁰ OCC Ex. 6 (\$137,076,944.51 in 2019 Activity).

⁷¹ OCC/NOPEC Ex. 1 at 15.

⁷² Joint Ex. 2.0.

⁷³ Joint Ex. 4.0 at 2.

⁷⁴ Joint Ex. 1.0 at 4.

⁷⁵ Tr. at 39 (Friscic).

⁷⁶ Tr. at 40 (Friscic).

⁷⁷ Joint Ex. 1.0 at 4-5 (\$6.31 rate cap minus \$5.51 rate cap).

room for Dominion to invest hundreds of millions more in CEP over the next few years and to charge customers for those investments.

OCC/NOPEC witness Adkins' testimony explained that customers would be better served with a cap on the amount of capital investment that can be included in the rider rather than a cap on the rate. As Mr. Adkins described, a straightforward cap on the annual investments that can be included in Rider CEP is easier to implement and monitor.⁷⁸ It is also more predictable because it does not depend on all the many variables that ultimately determine the revenue requirement.⁷⁹ Instead, the PUCO would look at a single number (the amount of gross capital CEP investment) and determine whether it was above a certain amount.

Mr. Adkins testified that in his expert opinion, a reasonable annual cap would be \$73 million based on the average CEP investment that Dominion made in the first two full years of the CEP program (2012 and 2013).⁸⁰ Such a cap is reasonable because it is tied to Dominion's actual CEP investments before Dominion started substantially increasing its annual CEP spending, knowing that it would receive cost recovery for that investment on a more expedited basis through single-issue ratemaking.⁸¹ An investment cap⁸² would also be easier for Dominion to manage because it can simply budget its capital investments based on the cap without having to convert its projected capital investments into a rate to stay under the rate cap.

⁷⁸ OCC/NOPEC Ex. 1 (Adkins) at 23.

⁷⁹ OCC/NOPEC Ex. 1 (Adkins) at 23.

⁸⁰ OCC/NOPEC Ex. 1 (Adkins) at 24.

⁸¹ OCC/NOPEC Ex. 1 (Adkins) at 24.

⁸² As OCC/NOPEC witness Adkins explained, an "investment cap" does not mean that Dominion is prohibited from investing. Dominion can invest any amount of its own money that it wants. The investment cap simply determines how much investment can be included in the rider charge to consumers. *See* OCC/NOPEC Ex. 1 (Adkins) at 25.

vii. Consumer protection requires that charges to customers under Rider CEP include a reduction based on Dominion’s operations and maintenance savings resulting from its CEP investments (that consumers will fund).

As OCC/NOPEC witness Adkins explained, Dominion’s CEP investments should result in O&M expense savings for Dominion, and these savings should be passed on to customers.⁸³ Dominion currently charges customers for other capital investments through another rider, the Pipeline Infrastructure Replacement (“PIR”) rider. Under the PIR rider, customers receive a credit for O&M savings resulting from PIR investments.⁸⁴ And because some of the CEP investments are similar to the types of investments made through Dominion’s PIR, the CEP too should result in O&M savings for Dominion that should be passed on to customers.⁸⁵

Mr. Adkins conservatively calculated O&M savings resulting from Dominion’s 2011 to 2018 CEP investments at \$4,067,030 per year.⁸⁶ He arrived at this number by comparing the expected O&M savings under the CEP to the known O&M savings under the PIR. Under Dominion’s PIR, O&M savings have averaged 0.82% of PIR investments over the past three years.⁸⁷ Mr. Adkins applied this 0.82% savings rate to Dominion’s CEP investments to arrive at O&M savings of \$5,422,706.⁸⁸ He then reduced this amount by 25% to acknowledge the fact that CEP investments would not be expected to result in as much O&M savings as PIR investments, thus arriving at his recommended O&M savings of \$4,067,030.⁸⁹ The PUCO should adopt this conservative methodology and require the CEP Rider revenue requirement to be reduced by this

⁸³ OCC/NOPEC Ex. 1 (Adkins) at 25.

⁸⁴ OCC/NOPEC Ex. 1 (Adkins) at 29.

⁸⁵ OCC/NOPEC Ex. 1 (Adkins) at 25-28.

⁸⁶ OCC/NOPEC Ex. 1 (Adkins) at 29.

⁸⁷ OCC/NOPEC Ex. 1 (Adkins) at 29.

⁸⁸ OCC/NOPEC Ex. 1 (Adkins) at 29.

⁸⁹ OCC/NOPEC Ex. 1 (Adkins) at 29.

amount. Mr. Adkins applied the same methodology to future years and therefore recommended an additional \$750,000 in O&M savings for 2019 and beyond.⁹⁰

- C. The PUCO should reject or modify the Settlement because it violates regulatory principles and practices.**
- i. The Settlement harms consumers by violating the longstanding regulatory rate of return principle that shareholders should be entitled an opportunity to earn a profit (and charge it to consumers) that is no higher than what is consistent with current market conditions.**

By adopting Dominion's 12-year-old rate of return from its last rate case, the Settlement violates regulatory principles related to rate of return.

First, it is a fundamental regulatory principle that an approved rate of return gives the utility's shareholders the *opportunity* to achieve that rate of return, but not a guarantee.⁹¹ The Settlement, in contrast, would guarantee Dominion a 9.91% pre-tax rate of return on its CEP investments, paid by customers.

Second, it is a longstanding regulatory principle that a utility's return on investment (*i.e.*, rate of return) should be based on current market conditions, thus allowing the utility's shareholders an opportunity to earn a fair return when compared to the return that they might obtain were they to invest their money elsewhere.⁹² The Settlement violates this regulatory principle because it gives Dominion's shareholders a return on investment that is far greater than they would get in the market when investing in companies with similar risk. As OCC/NOPEC

⁹⁰ OCC/NOPEC Ex. 1 (Adkins) at 30.

⁹¹ See *In re Application of Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Opinion & Order (Aug. 8, 2012) (while the utility "should have the opportunity to earn a reasonable rate of return, there is not a right to a guaranteed rate of return"); *In re Application of Dayton Power & Light Co.*, Case No. 78-92-EL-AIR, Opinion & Order (Mar. 9, 1979) ("It is not the function of this Commission to guarantee a particular rate of return to an applicant utility but merely to afford the company an opportunity to earn a fair rate of return.") (quoting Case No. 76-704-GA-CMR (June 29, 1977)). See also OCC/NOPEC Ex. 2 (Duann) at 2.

⁹² OCC/NOPEC Ex. 2 (Duann) at 6.

witness Dr. Duann explained, financial conditions in 2008 were far different than they are now. Debt was substantially more expensive, and the average utility return on equity was also substantially higher than it is now.⁹³ The Settlement's proposed 9.91% pre-tax rate of return bears no relation whatsoever to the risk that Dominion's shareholders face in 2020. This is the definition of bad regulatory policy.⁹⁴

Third, by allowing Dominion to charge customers a substantially above-market 9.91% pre-tax rate of return, Dominion would be charging customers rates that are not just and reasonable, as required by R.C. 4905.22, nor would Dominion be providing reasonably priced service, as required by R.C. 4929.02(A)(1).⁹⁵

In short, all applicable regulatory rate of return principles support Dr. Daniel Duann's proposed rate of return. In contrast, Dominion's justification for its proposed rate of return is little more than, "that was our rate of return 12 years ago and we like how high it is so please let us keep using it."

The PUCO should find that the Settlement fails the third prong of the PUCO's three-part test. It should modify the Settlement to adopt Dr. Daniel Duann's recommended 7.20% pre-tax rate of return applied to Dominion's charges to consumers under Rider CEP.

ii. The Settlement harms consumers by violating the regulatory principle that ratemaking should be equitable for consumers.

As OCC/NOPEC witness Adkins testified, "good regulatory policy requires the PUCO to consider equity among consumers."⁹⁶ The regulatory principle of equity supports a result that treats customers fairly in the context of the requested rate increase. In the past, the PUCO has

⁹³ OCC/NOPEC Ex. 2 (Duann) at 12-13.

⁹⁴ OCC/NOPEC Ex. 2 (Duann) at 28.

⁹⁵ See OCC/NOPEC Ex. 2 (Duann) at 28.

⁹⁶ OCC/NOPEC Ex. 1 (Adkins) at 38.

expressed a need for fair and equitable treatment of consumers. For example, in establishing certain rules under the Ohio Administrative Code, the PUCO expressed its belief that such rules were needed “so that all customers are treated equitably and with care.”⁹⁷ In another case, the PUCO rejected a utility’s proposal because the utility was trying to maximize profits for shareholders, but the PUCO found it appropriate to “consider the disparate results of the company’s actions on behalf of ratepayers.”⁹⁸

The Settlement violates this principle because it is inequitable to add \$80 million in new charges to customers’ bills during the coronavirus pandemic and financial emergency.⁹⁹ It is inequitable because under the Settlement, customers could be charged an additional \$560 million from 2021 to 2025 when many of the negative health and financial effects of the coronavirus will still be affecting Dominion customers. And the Settlement is inequitable because, as described above, it would require customers to pay a cost of debt that is nearly triple Dominion’s actual cost of debt and a return on equity that is unreasonable in today’s financial markets.

III. APPEAL OF THE RULING ON OCC/NOPEC’S MOTION TO STRIKE

In addition to protecting consumers from the Settlement, the PUCO should reverse the Attorney Examiners’ ruling on OCC/NOPEC’s motion to strike.¹⁰⁰ In the motion to strike, OCC and NOPEC explained that it was improper for Dominion’s testimony to rely on an approved settlement in another case involving Columbia Gas.

⁹⁷ *In re Revision of the Minimum Tel. Serv. Standards*, Case No. 83-869-TP-COI, Finding & Order (Oct. 18, 1988).

⁹⁸ *In re Application of the Cincinnati Gas & Elec. Co. for an Increase in Elec. Rates*, Case No. 91-410-EL-AIR (Opinion & Order) (May 12, 1992). *See also In re Application of the Cleveland Elec. Illuminating Co.*, Case No. 86-456-EL-ATA, Opinion & Order (June 17, 1986) (PUCO Staff recognizing the “Commission’s standards of fairness and equity in rate making”).

⁹⁹ OCC/NOPEC Ex. 1 (Adkins) at 38-39.

¹⁰⁰ Joint Motion to Strike the Testimony of Dominion Energy Ohio (Sept. 8, 2020).

More specifically, in the testimony of Vicki Friscic in support of the Settlement. Dominion witness Friscic relied heavily on the PUCO's approval of a settlement regarding Columbia's CEP. Ms. Friscic compared the terms of the Columbia settlement to the proposed Settlement for Dominion, thereby relying on the Columbia settlement as precedent.¹⁰¹ But as OCC/NOPEC explained in the motion to strike, this is not allowed.

The Columbia settlement included the following language: "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."¹⁰² The PUCO approved the Columbia settlement without modification.¹⁰³ Thus, by PUCO Order, the Columbia settlement "shall not be cited as precedent in any future proceeding for *or against* any Signatory Party."¹⁰⁴ And because OCC was a signatory party to the Columbia settlement, Dominion is prohibited from using it against OCC in this case.

Despite the plain language of the Columbia settlement and the PUCO's approval of that settlement without modification, the Attorney Examiner denied OCC/NOPEC's motion to strike. The Attorney Examiner reasoned that "Dominion was not a party in the Columbia CEP case and, therefore, is not bound by the Stipulation."¹⁰⁵ This ruling was in error.

The fact that Dominion was not a party in the Columbia CEP is irrelevant. The reason that Dominion cannot use the Columbia settlement against OCC is because the *PUCO ruling* in that case prohibits it. The PUCO ruling adopted the Columbia settlement in its entirety and

¹⁰¹ See Dominion Ex. 4.0 (Friscic) at 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 through 16; and page 26, line 21 through 23.

¹⁰² Case No. 17-2202-GA-ALT, Stipulation and Recommendation (Oct. 15, 2018).

¹⁰³ Case No. 17-2202-GA-ALT, Opinion & Order (Nov. 28, 2018).

¹⁰⁴ Case No. 17-2202-GA-ALT, Stipulation and Recommendation (Oct. 15, 2018) (emphasis added).

¹⁰⁵ Tr. at 11.

without modification.¹⁰⁶ This means that the PUCO approved the settlement’s language “shall not be cited as precedent in any future proceeding for or against any Signatory Party.” Notably, this language does not say that signatory parties may not cite the settlement as precedent—it says, without limitation, that the settlement “shall not be cited as precedent in any future proceeding for or against any Signatory Party.”

And there is good policy reason for denying Dominion the ability to use the Columbia settlement against OCC. If parties know that when they sign a settlement, it will be used against them in another case, that would chill settlement negotiations. Parties go into settlement negotiations with an expectation that any settlement is a compromise of issues that are unique to that particular case. They give and take for any number of reasons that are specific to that case. If they know that in another case, individual issues from that settlement will be cherry-picked as precedent in another case, they will be less willing to compromise. This is bad for all parties, as it increases the likelihood of costly litigation and consumes valuable PUCO resources.

Thus, under Ohio Adm. Code 4901-1-15(F), the PUCO should reverse the Attorney Examiner’s ruling and grant OCC/NOPEC’s motion to strike.

IV. CONCLUSION

The Settlement does not pass the PUCO’s three-part test for evaluating settlements as it lacks diversity of interest (by virtue of no consumer advocate signing it). The Settlement does not benefit customers and it disserves the public interest. And the Settlement violates regulatory principles by, among other things, making consumers pay Dominion for excessive profits and by failing to treat customers equitably during a global pandemic and financial crisis.

¹⁰⁶ Case No. 17-2202-GA-ALT, Opinion & Order (Nov. 28, 2018).

The PUCO should protect consumers by rejecting or modifying the Settlement, consistent with OCC's consumer-protection recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Post-Hearing Brief was served on the persons stated below via electronic transmission, this 5th day of October 2020.

/s/ Christopher Healey
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