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 an Alternative Form of Regulation.	)))	Case No. 19-468-GA-ALT

JOINT APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL

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This matter is another case where the employees of the PUCO settled with the utility (Dominion Energy) instead of with consumer advocates. Utilities seem to be an indispensable party for PUCO settlements, though there is no "rule" to that effect. Still, there virtually is *never* a PUCO settlement that lacks inclusion of the utility in the case. Conversely, this case is another demonstration that consumer advocates are not indispensable for PUCO settlements. The Settlement in this case that included the utility, Dominion, resulted in a PUCO Order where not a single recommendation of the Consumer Parties – OCC and NOPEC – was adopted. Between them, OCC and NOPEC represent well more than a million Dominion Energy residential and small business natural gas customers.

In Dominion's service area, which includes the poorest big city (Cleveland) in the country,[1] the PUCO's Order will make consumers pay, among other things, to enrich Dominion for $97 million of windfall profits and debt costs that far exceed current obligations. Though he did not write a separate opinion for that Order, Commissioner Conway did express concern,

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[1] The Center for Community Solutions, "Cleveland is now the poorest big city in the country" (Sept. 21, 2020), https://www.communitysolutions.com/cleveland-now-poorest-big-city-country/

during the PUCO's public meeting, about making consumers pay for the rate of return (Dominion's profits and debt) that the Consumer Parties opposed:

> I have great sympathy for and frankly, I was on kind of a fine line with this case with regard to the stipulation and voting in favor of it. On the one hand, we have a stipulation which provides a lot of benefits .... On the other hand we have a utility that not unlike some other utilities hasn't been in for a rate case in quite a while so our policy of referring back to cost of capital values that were established in the most recent prior base rate case means that we refer back quite a distance in time, and during that period, as the record in this case and OCC and NOPEC have pointed out, there have been macro changes with regard to capital costs that have undoubtedly caused the cost of capital to decline in a material way. And yet here we are faced with a stipulation ... that provides a great deal of benefit. And my balance of the plusses and minuses is that the stipulation has got more than enough value to outweigh the concern I have about continuing down the track of relying upon cost of capital values that at this point are probably 13 years old and by the time the next rate case occurs close to 17 years old. ... I think in a perfect world what we would do is have a rate case which would reconcile costs with revenues for the entire cost of service of the company, including both riders and base rate expenses, but we don't have that option in this case. So the question becomes, is there anything we can do going forward to perhaps change the way the playing field is constructed. My preference is to do what we can so ensure that there isn't a misalignment that occurs."[2]

To Commissioner Conway's question we would answer, for one thing, with the hope that he would memorialize his concern in a separate opinion (in the time-honored American judicial tradition of advancing the progress of justice). Another answer is for the PUCO to reconsider its process where just two parties can create a settlement that qualifies for the protection of being considered a "package" that the PUCO then does not consider on the merits of its component parts. The PUCO's package approach means the Consumer Parties – and a million consumers – will lose to the utility. Should OCC and NOPEC have entered their own settlement to obtain the benefit of the PUCO's package approach for reviewing settlements?

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[2] *Available at* https://www.youtube.com/watch?v=d_ozIp9-4tQ (starting at 13:58).

And so the PUCO has conceded to a ratemaking process of Dominion's choosing, one that is tilted in Dominion's favor. Instead, the PUCO should have asserted its control to balance the scales of the justice that it administers for Ohioans who rely on their state government for protection from utility monopolies. By 2023, residential consumers could be paying Dominion $100 million per year as a result of the PUCO/Dominion Settlement, including windfall profits for the rate of return.

Accordingly, the PUCO should now reach a fair and just result for a million Dominion consumers and their families. Many of them, including in the country's poorest big city (Cleveland), are suffering from the health and financial crisis with increased risks for health, energy insecurity, food insecurity, and homelessness. The PUCO should grant this Application for Rehearing.

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, the Office of the Ohio Consumers' Counsel and Northeast Ohio Public Energy Council (collectively, the "Consumer Parties"), jointly and individually[3] request rehearing of the Opinion and Order ("Order") issued in this proceeding on December 30, 2020. The Consumer Parties submit that the PUCO's Order is unlawful, unjust, unreasonable, and unwarranted based on the following grounds:

Assignment of Error No. 1: The PUCO erred by approving the Settlement that, contrary to evidence, could cost customers as much as $400 million during and after a global pandemic and provides Dominion with $97 million in windfall profits at consumer expense, without benefiting customers and the public interest and without satisfying regulatory principles such as consumer equity and limiting utility charges to a fair and reasonable rate of return (including for utility profits and actual debt costs).

Assignment of Error No. 2: The PUCO erred by approving a Settlement that included an unfair and unreasonable rate of return for Dominion consumers to pay, where the PUCO failed in violation of R.C. 4903.09 to "file…findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

[3] By filing this Application for Rehearing jointly OCC and NOPEC retain all rights to take any further action independent of the other.

Assignment of Error No. 3: The PUCO erred by approving the Settlement without modifying it to increase Dominion's shareholder contribution to consumers in need, from $750,000 in the Settlement to $5 million for providing at-risk customers with utility bill-payment assistance and debt relief. The PUCO should further require that Dominion work with OCC and NOPEC on the elements of the consumer assistance program for the additional funding.

Assignment of Error 4: The PUCO erred by approving the Settlement with a conclusion that the Settlement satisfied the first prong of its settlement test (which should be construed to include diversity), even though the settlement was signed without diversity by only Dominion and the employees of the PUCO and lacking agreement with the Consumer Parties. Diversity for settlements affecting Ohioans from all walks of life should matter to the PUCO, just as diversity matters in society for our state and country.

Assignment of Error No. 5: The PUCO erred in approving the Settlement in this case because it results in unreasonable and unlawful charges to consumers. If rates are not reduced in this proceeding as described above, the PUCO must require DEO to file an application to change base rates pursuant to R.C. 4909.18 by the end of this year. [4]

Assignment of Error No. 6: The PUCO erred in approving a Settlement between the PUCO Staff and Dominion to the extent that communications were held between the PUCO Staff and PUCO Commissioners, as referenced during the PUCO's public meeting for approving the Order, potentially in violation of R.C. 4903.081 and/or O.A.C. 4901-1-09.[5]

[4] OCC does not join in Assignment of Error No. 5.

[5] See transcription of the PUCO's December 30, 2020 Agenda Meeting, Attachment A hereto. See, also, https://www.youtube.com/watch?v=d_ozIp9-4tQ beginning at minute 17:42 (emphasis added).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Opinion and Order of the Public Utilities Commission of Ohio ("PUCO"), issued in this proceeding on December 30, 2020 (the "Order"), failed to protect consumers. The PUCO significantly increased consumers' rates in the midst of the worst global pandemic (still surging) in over a century. The rate increase exacerbates hardships to consumers who already are struggling with job, food, energy, and housing insecurity.

A particular injustice is that the PUCO provided Dominion Energy Ohio ("Dominion" or "DEO") with an excessive, outdated rate of return at consumer expense. The PUCO's Order permits Dominion to charge consumers an exorbitant, 12-year-old, 6.5% cost of debt for the next five years. The PUCO allowed it even though Dominion recently refinanced its debt at the rate of 2.25%. That's a difference of $97 million, in the favor of Dominion. Dominion gets to keep the windfall without sharing a cent with its customers, courtesy of the PUCO/Dominion Settlement and the Order.

Commissioner Conway expressed concerns at the PUCO's public meeting. But he believed the PUCO lacked an option other than to approve Dominion's Settlement.[6]

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[6] *See* https://www.youtube.com/watch?v=d_ozIp9-4tQ (minute 16:08), where Commissioner Conway stated, "I think, in a perfect world, what we would do is, we would have a rate case which would reconcile costs with revenues for the entire cost of service of the company by including both riders and base rate expenses, but we don't have that option in this case."

However, the record supports that the PUCO reasonably could protect consumers by adjusting Dominion's rate of return in this alternative regulation proceeding or, alternatively, by ordering Dominion to file a base rate proceeding to make its proposed rate changes by the end of this year.

II. STANDARD OF REVIEW

After an order is entered, parties to a PUCO proceeding have a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."[7] An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[8]

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the PUCO may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."[9]

The Order is unlawful, unreasonable, unjust, and unwarranted under R.C. 4903.10. The PUCO should grant this application for rehearing. It should abrogate or modify the Order, consistent with the recommendations in this application for rehearing.

III. GROUNDS FOR REHEARING

Assignment of Error No. 1: The PUCO erred by approving the Settlement that, contrary to evidence, could cost customers as much as $400 million during and after a global pandemic and provides Dominion with $97 million in windfall profits at consumer expense, without benefiting customers and the public interest and without satisfying regulatory principles such as consumer equity and limiting utility charges to a fair and reasonable rate of return (including for utility profits and actual debt costs).

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[7] R.C. 4903.10.

[8] R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

[9] R.C. 4903.10(B).

A. The PUCO erred by failing to adopt OCC/NOPEC witness Dr. Duann's undisputed testimony, which failure was against the manifest weight of the evidence and led to an unfair and unreasonable rate of return that provided unconscionable windfall profits to Dominion.

The PUCO,[10] and particularly Commissioner Conway,[11] are troubled that the Order permits Dominion to retain $97 million in windfall profits from the CEP rider,[12] none of which is being shared with consumers. As explained in OCC's and NOPEC's initial briefs, the windfall results from Dominion's refinancing of its debt for a dramatic reduction from 6.5% to 2.25%.. Although DEO has refinanced its debt, the Settlement will permit it to continue to charge its customers 6.5%.[13] It is unconscionable for Dominion to be permitted to continue to charge its customers a cost of debt of 6.5%. A reference to R.C. 4909.15 shows that the balance between utilities and consumers is found in a fair and reasonable rate of return (including profit level) and the actual cost of debt.

The PUCO attempts to justify Dominion's ability to reap this windfall by claiming that the depreciation offset provides a substantial benefit to consumers.[14] But the monies being returned to customers through the offset would have been returned long ago had Dominion filed a base rate proceeding during the past 12 years. Customers will receive the benefit of the depreciation offset at some point no matter what. They should have received it already if Dominion had filed a rate case. So Dominion offering to provide the depreciation offset now in this case is not a benefit to customers—it is simply recognition of something customers should *already* have received. Again, Dominion is controlling the process by controlling when it files its

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[10] Order at ¶ 69.

[11] See Attachment A hereto.

[12] This amount is on top of $172 million in windfall DEO already is receiving through base rates as a result of its refinancing).

[13] NOPEC Initial Brief at 5; OCC Initial Brief at 9-11.

[14] Order at ¶ 66.

rate cases. And the PUCO is allowing that utility control to dictate a bad outcome for consumers. That is an error.

Likewise, the $750,000 that Dominion will contribute to the Energy Saver Program pales in comparison to the $400 million Dominion will collect in rates. And add to that the $97 million windfall resulting from the unreasonably high cost of debt charged to customers.

But unlike some things, Dominion's 2008 cost of debt is not improving with age for consumers. The real reason the PUCO permitted Dominion to use its aged 2008 cost of debt is because it had permitted other utilities to use the cost of debt from their prior base rate cases when determining rider rates.[15] The PUCO claims it is obligated to follow its precedent.[16]

This mistaken excuse is an abdication of the PUCO's responsibility for fairness and balance (and justice) in outcomes for consumers. What has evolved (devolved) over the years is that utilities are selecting from an increased menu of ratemaking options that serve their interests to the detriment of consumer interests. The PUCO's "precedent," in its role as judge, should change with the times to provide justice, and the legal standard involving precedent allows for that.

A more accurate assessment of this point of law recently was provided by the Ohio Supreme Court in *In re Complaint of Suburban Gas Company*,[17] in which the Court stated:

> We have instructed the commission to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law." If the commission departs from precedent, it must explain why, though the explanatory hurdle is not particularly high. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 [quoting *Office of Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 21, 21–22, 16 OBR 371, 475 N.E.2d 786 ("'A few simple sentences in

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[15] Order at ¶¶ 69, 79.

[16] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975).

[17] ___ Ohio St.3d ___, 2020-Ohio-5221 ¶ 29, ___ N.E.3d ___, 2020 WL 6600063 (internal citations omitted)

the commission's order in this case would have sufficed' to explain why a previous order had been overruled")].

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. In this case, the reasoning is simple: (1) Dominion's existing 6.5% cost of debt used for ratemaking purposes is 12 years old, (2) Dominion has continuously taken advantage of favorable market conditions to refinance its cost of debt, (3) Dominion has elected not to file a base rate case for 12 years because these favorable market conditions would decrease the cost of debt and the overall rate of return it could charge, (4) Dominion's current cost of debt is 2.25%, (5) Dominion still is charging its customers 6.5% for the cost of debt through base rates, and (6) by doing so, Dominion will reap windfall profits of at least $97 million over the next five years under the Settlement.

The PUCO recognized that a decrease in the cost of debt would benefit consumers if applied to CEP Rider rates. However, it refused to provide consumers relief, rationalizing that it would have to increase the CEP Rider rate in the future if the cost of capital were to rise.[18] The PUCO ignores that Dominion has control of when to seek a rate increase. If the cost of debt and or equity increases, Dominion is free to seek a base rate increase regardless of whether the PUCO reduces the cost of debt in this proceeding.

For consumers it is heads you win, tails I lose. When the cost of equity or debt decreases, Dominion can avoid rate cases to reap a windfall by refinancing. When the cost of equity or debt increases, Dominion can file a rate case to increase charges to account for the higher costs. Ohioans need the PUCO to step in as the judge and establish fairness.

The PUCO also attempts to justify its refusal to adjust the cost of debt in this proceeding because it is just one component of the cost of capital. The PUCO does not wish to engage in

[18] Order ¶ 68.

"cherry picking" and ignore other cost components that may have increased since Dominion's last rate case.[19] It is a twist that the PUCO believes it needs to protect the utility (not consumers) from cherry picking in this alternative regulation case that Dominion itself selected. Alternative regulation is, by its very nature, cherry picking in Dominion's favor.

Cherry picking is exactly what the PUCO is permitting Dominion to do in the Settlement. Dominion gets the rate increase it wants with no assessment of mitigating issues, like the cost of debt, to offset some of that rate increase. Again, this is because customers have not had an opportunity for 12 years to examine Dominion's books in a base rate case. And that is because Dominion chose to not file a rate case. In this alternative regulation case, Dominion is cherry picking its higher 2008 cost of debt – against the interests of its consumers who pay.

Moreover, the Consumer Parties have not proposed that the PUCO adjust only Dominion's cost of debt. They presented the only expert rate of return witness in this proceeding, whose testimony was not challenged by opposing testimony or cross-examination. OCC/NOPEC witness Dr. Duann presented detailed testimony as to the appropriate cost of debt, cost of equity and capital structure. But the PUCO failed even to address it.[20] No law, rule, or the PUCO's precedent requires that the PUCO apply the rate of return from a utility's most recent base rate case to determine a rider rate.[21] Considering that OCC/NOPEC witness Dr. Duann's testimony is undisputed, the PUCO's use of Dominion's 2008 rate of return for purposes of this proceeding was against the manifest weight of the evidence.

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[19] *Id.*

[20] OCC/NOPEC Exhibit 2.

[21] The Commission even required the Dominion to place its rate of return at issue by rejecting Dominion's waiver request and requiring it to file the appropriate Standard Filing Requirements. *See* OCC Initial Brief at 14.

B. The PUCO erred by disregarding the effects of the global pandemic on Dominion's customers in this proceeding when considering whether the Stipulation, as a package, benefited ratepayers and the public interest.

The Consumer Parties went to great lengths in their initial briefs to inform the PUCO of the devastating effects the global pandemic is wreaking on Ohioans, and particularly Dominion's customers in Northeastern Ohio. Dominion's customers have faced dramatic job losses and are suffering staggering food and housing insecurity.[22] At the time initial briefs were filed, data showed that food insecurity was at 23% statewide, and in Cleveland, food insecurity among families with children under 12 years old is at an alarming 41%.[23] In June, more than half a million Ohioans were unable to pay their rent.[24] 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.[25] As already stated, Cleveland has been ranked as the poorest big city in the country.

In its initial brief, NOPEC warned of an impending surge in COVID-19 infections as Ohioans headed indoors for the Fall and Winter months.[26] Unfortunately, the warning came true. The following table shows the increase of COVID-19 infections, hospitalizations and deaths in Ohio between October 15, 2020 and January 26, 2021 according to Ohio's Coronavirus Dashboard:[27]

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[22] NOPEC Initial Brief at 4-5; OCC Initial Brief at

[23] OCC/NOPEC Ex. 1 (Adkins Testimony) at 16.

[24] OCC/NOPEC Ex. 1 (Adkins Testimony) at 16.

[25] Tr. at 129 (Adkins).

[26] NOPEC Initial Brief at 4.

[27] https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/overview

	October 15, 2020[28]	January 26, 2021
Cases	175,843	872,918
Hospitalizations	16,824	45,276
Deaths	5,038	10,856

Tragically, Cuyahoga County, the heart of Dominion's service territory, leads the state significantly in hospitalizations (5,351) and deaths (1,154), and ranks second in the number of confirmed cases (86,893).

In its Order, the PUCO sympathized with the plight of consumers, but nevertheless denied them reasonable relief in this proceeding.[29] Instead, it required Dominion's customers to pay up to an additional $400 million over five years under the Capital Expenditure Program ("CEP") Rider.[30] On top of that, it allowed Dominion to retain $97 million in windfall profits. In denying consumers relief, the PUCO noted the actions it had taken in the past to address the effects of the pandemic.[31] But the PUCO has allowed utilities to end many of these protections for customers. Among other things, disconnections have resumed (over OCC's objections), and

[28] https://fox8.com/news/coronavirus/ohios-coronavirus-spread-has-doubled-in-less-than-a-month/ (displaying Ohio's Coronavirus Dashboard.

[29] Order at ¶ 65.

[30] See OCC Initial Brief at 7-8, which summarizes the effect of the Stipulation's proposed CEP charges:

Dates	Monthly Residential Charge	Total Annual Charges Paid by Residential Customers
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**

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[31] Order at ¶ 65.

marketers have resumed door-to-door sales (again over OCC and others' objections).[32] Ignoring consumers' pandemic plight in his proceeding, the PUCO stated only that it would direct other measures to assist consumers in the future, "if necessary."[33] It is necessary now in this case.

Against this backdrop, it is unreasonable and unwarranted for the PUCO to disregard the pandemic-related misery of Dominion's customers by imposing the additional hardship of this rate increase on them. The standard for approving settlements requires that the settlement, as a package, benefit customers and the public interest.[34] The PUCO erred by not considering as part of the package offered in this Settlement the effect on consumers of being required to pay an additional $400 million to Dominion during the pandemic and related financial emergency.

The PUCO further erred in concluding that the Settlement benefits customers because of a $310 million depreciation offset and a contribution to Dominion's Energy Savers program of $750,000.

First, the depreciation offset is not a benefit of the Settlement because it was already included as a part of Dominion's application.[35] And while the $310 million offset might appear, at first glance, to offset a considerable portion of the $400 million in CEP charges, this is not true. The $310 million offset is a rate base reduction, not a revenue reduction. So it does not save

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[32] 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).

[33] Order at ¶ 65.

[34] The standard includes the following three prongs:

> (1) Is the settlement a product of serious bargaining among capable knowledgeable parties (including whether the stipulation's signatory parties represent a diversity of interests)?
>
> (2) Does the settlement, as a package, benefit customers and the public interest?
>
> 3) Does the settlement package violate any important regulatory principle or practice?

[35] OCC Reply Brief at 5-6.

customers anywhere near $310 million over the course of the five-year CEP during which they could pay up to $400 million in bill surcharges. Moreover, had Dominion filed a base rate proceeding within the last 12 years, *which it controls*, customers would already have benefited from the offset.[36] Dominion should not be rewarded for its strategy of not filing a base rate proceeding, particularly when its failure to file a rate case has allowed it to retain its outdated and excessive rate of return to the detriment of consumers.

Dominion's customer-assistance contribution of $750,000 is also insufficient in the context of the consumer pain in its service area and in comparison to the significant benefits of the favorable Settlement and Order that the PUCO bestowed upon Dominion. The depreciation offset and contribution, while better than nothing, do little to offset the massive $400 rate increase that customers will face under the Settlement.

C. The PUCO erred by violating the regulatory principle of equity for consumers by imposing substantial new charges on them during a pandemic and requiring them to pay a massive $97 million windfall to Dominion's shareholders based on Dominion's outdated, 13-year-old cost of debt.

As the PUCO recently recognized in a case involving Verde Energy's consumers, in arriving at its decisions it should consider "a basic standard of equity."[37] (Unfortunately, in the Verde case cited the PUCO actually used the equity principle to defend a marketer from OCC's consumer protection.)

Here, basic standards of equity overwhelmingly favor consumers. It is inequitable to add up to $400 million in new charges to customers' bills during a global pandemic and financial

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[36] *Id.*

[37] *In re Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Service Supplier*, Case No. 11-5886-EL-CRS, Finding & Order ¶ 50 (Dec. 30, 2020) (ruling in favor of one party because, in the PUCO's view, such ruling was consistent with "a basic standard of equity").

crisis. It is inequitable to make customers pay a $97 million windfall to Dominion in profits to Dominion rather than paying Dominion's actual cost of debt.

The PUCO should grant the Consumer Parties' rehearing request.

Assignment of Error No. 2: The PUCO erred by approving a Settlement that included an unfair and unreasonable rate of return for Dominion consumers to pay, where the PUCO failed in violation of R.C. 4903.09 to "file…findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

R.C. 4903.09 requires the PUCO to make decisions based upon findings of fact established by the record and to explain its decisions. But the PUCO did not fulfill this requirement in ruling on the Consumer Parties' objection to an unfair and unreasonable rate of return (including profit and actual cost of debt) for consumers to pay. What follows are the Consumer Parties' proposals which the PUCO failed to address under R.C. 4903.09.

In his direct testimony, OCC/NOPEC witness Dr. Duann described in detail how the Stipulation violated the third prong of the PUCO's standard for reviewing partial stipulations. Dr. Duann testified that by adopting Dominion's 12-year-old rate of return from its last rate case, the Settlement violates at least three regulatory principles related to rate of return. These principles were summarized on brief, as follows:

> 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. The Settlement, in contrast, would guarantee Dominion a 9.91% pre-tax rate of return on its CEP investments, paid by customers.[38]
>
> 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. 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 witness Dr. Duann explained, financial conditions in 2008 were far different than they are

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[38] OCC Initial Brief at 23 (internal citations omitted).

> now. Debt was substantially more expensive, and the average utility return on equity was also substantially higher than it is now. 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.[39]
>
> 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).[40]

The application of Dominion's 2008 rate of return to the CEP Rider violates these regulatory principles and, thus, the third prong of the PUCO's standard for approving partial stipulations. However, the PUCO never addressed these principles in its Order, violating R.C. 4903.09.

The PUCO should also be concerned that it is inviting the Averch-Johnson effect, to the detriment of consumers. The Averch-Johnson effect is the tendency of regulated entities to engage in excessive amounts of investment in order to expand their profits.[41] This regulatory principle is well documented and is exacerbated by the PUCO's decision that authorizes a rate of return substantially above market rates. The ruling can provoke a Dominion response for investing beyond the need for plant (*i.e.*, gold-plating) to reward its shareholders with more profits at its customers' expense.

On rehearing, the PUCO should properly consider these principles and find that the Settlement violates each of them. It should modify the Settlement to adopt Dr. Duann's recommended 7.20% pre-tax rate of return applied to Dominion's charges to consumers under Rider CEP.

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[39] OCC Initial Brief at 23-24 (internal citations omitted).

[40] OCC Initial Brief at 24 (internal citations omitted).

[41] Averch, Harvey and Johnson, Leland L., Behavior of the Firm Under Regulatory Constraint (1962).

<u>Assignment of Error No. 3:</u> The PUCO erred by approving the Settlement without modifying it to increase Dominion's shareholder contribution to consumers in need, from $750,000 in the Settlement to $5 million for providing at-risk customers with utility bill-payment assistance and debt relief. The PUCO should further require that Dominion work with OCC and NOPEC on the elements of the consumer assistance program for the additional funding.

Under its Settlement, Dominion agreed to provide $750,000 of shareholder funds for its EnergyShare program, which provides bill payment assistance to Dominion customers.[42] The Consumer Parties appreciate this effort to help consumers during the coronavirus pandemic and financial emergency. Unfortunately, it is not nearly enough to undo the consumer harm of the Settlement that the PUCO approved. Nor is it nearly enough to help consumers in need. And it is not commensurate with the benefits that Dominion reaped from the Settlement with the PUCO Staff and the Order from the PUCO. Dominion's one-time $750,000 payment is likely to help fewer than 2,800 Dominion customers.[43]

Under the Settlement, residential customers could pay more than *$400 million* dollars over the next five years.[44] The $750,000 amount pales in comparison to the profits that Dominion will reap from the Settlement. In the first year alone, Dominion's rate of return will yield $45.5 million for Dominion.[45] Most of this is profit. There is the excessive 10.38% return on equity. Plus, there is all the extra money customers will pay as a result of an exorbitant and fictional 6.50% cost of debt, while Dominion's actual cost of debt is a mere *2.25%*. Moreover, as OCC/NOPEC witness Duann testified, Dominion's inflated rate of return could provide

[42] Order at 23.

[43] *See* OCC Ex. 10 (average payment of $273.13 per customers), with $750,000 / 273.13 = 2,746 customers helped.

[44] OCC Initial Brief at 7.

[45] Joint Ex. 2.0.

Dominion with a $97 million shareholder windfall over the course of five years, all paid by customers.[46]

A more reasonable contribution for consumer bill payment assistance and debt relief would be $5 million. On rehearing, the PUCO should modify the Settlement to increase Dominion's shareholder contribution from $750,000 to $5 million.

Assignment of Error 4: The PUCO erred by approving the Settlement with a conclusion that the Settlement satisfied the first prong of its settlement test (which should be construed to include diversity), even though the settlement was signed without diversity by only Dominion and the employees of the PUCO and lacking agreement with the Consumer Parties. Diversity for settlements affecting Ohioans from all walks of life should matter to the PUCO, just as diversity matters in society for our state and country.

The Settlement was signed only by Dominion and the PUCO Staff. 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. Unfortunately, the PUCO does not typically require diversity on settlements. 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 PUCO's test."[47] It seems that diversity of parties to a settlement should matter a lot to the PUCO, just as diversity matters in our state and country.

If diversity matters – and on occasion the PUCO has said that it does – then it must be applied both ways and consistently. Unfortunately, the PUCO's 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.[48] But when

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[46] OCC/NOPEC Ex. 2.0 (Duann) at 8.

[47] *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).

[48] Case No. 16-395-EL-SSO, Opinion & Order ¶ 21 (Oct. 20, 2017) (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

very few parties sign a settlement, the PUCO has shrugged off the lack of diversity as irrelevant.[49]

Here, the Settlement was signed by just two parties: the utility and the employees of the PUCO (the Staff). It lacks diversity. But the PUCO failed to give credence to the issue.

OCC argued on brief that diversity must be applied both ways. The PUCO should not use diversity as the basis for approving settlements when it finds that the parties are diverse but then ignore lack of diversity in approving settlements signed by just two parties.[50]

OCC, unlike the PUCO Staff, has statutory authority to speak for the interests of Dominion's residential consumers.[51] 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."[52]

On rehearing, the PUCO should modify its Order by rejecting the Settlement. Or the PUCO should adopt the Consumer Parties' recommendations.

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as supporting approval of the settlement) (emphasis in original); Case No. 09-872-EL-FAC, Order on Global Settlement Stipulation ¶ 107 (Feb. 23, 2017) (noting that diversity is not required but it then highlighted the diversity of parties as favoring approval of the settlement).

[49] *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).

[50] *See* Order ¶ 44.

[51] R.C. Chapter 4911.

[52] OCC/NOPEC Ex. 2 (Duann) at 22.

<u>Assignment of Error No. 5</u>: The PUCO erred in approving the Settlement in this case because it results in unreasonable and unlawful charges to consumers. If rates are not reduced in this proceeding as described above, the PUCO must require DEO to file an application to change base rates pursuant to R.C. 4909.18 by the end of this year. [53]

Dominion cannot hide from the fact that its current cost of debt and overall rate of return is unjust and unreasonable and violates R.C. 4929.02, 4929.05 and 4905.22. The PUCO has the choice to adjust the rate of return in this proceeding, as recommended above.

If the PUCO believes that rates of return can only be set in base rate proceedings, the remedy under 4929.05 is to deny this application and require DEO to file its long-overdue base rate case. A rate case filing would allow the PUCO and intervenors to review DEO's outdated rate base, expenses and rate of return for the first time in over 12 years. A base rate case review will benefit customers, and is in the public interest, because for the first time in over 12 years customers would have some assurance that the rates they are paying are justified by the Company's current expenses, especially its much-reduced cost of debt.

Commissioner Conway in comments made at the December 30, 2020, Agenda Meeting, seems to concur with NOPEC. He stated:

> I think, in a perfect world, what we would do is, we would have a rate case which would reconcile costs with revenues for the entire cost of service of the company by including both riders and base rate expenses, but we don't have that option in this case. [See Attachment A hereto.]

With all due respect, the rate case option is available if the PUCO finds, as it should, that Dominion's rate of return applied to the CEP Rider is unjust and unreasonable and violates R.C. 4929.02, 4929.05 and 4905.22. If the PUCO believes it must honor its precedent and not adjust an exorbitant rate of return in a rider proceeding, it must reject this Stipulation as unreasonable

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[53] OCC does not join this Assignment of Error.

and unlawful. In that event, a rate base proceeding is the appropriate vehicle to resolve the recovery of the CEP expenditures and at an appropriate rate of return.

Dominion's commitment in an unrelated proceeding to file a base rate case "***no later*** than October 2024"[54] is not an impediment. Specifically, the PUCO ordered that "[Dominion should file an application to establish new base distribution rates by October 2024, unless otherwise ordered by the Commission."[55] Conditions do warrant an earlier filing. Indeed, Dominion witness Friscic agreed with NOPEC's position, testifying:

> …we believe a rate case which we've now committed to is the right place to determine the appropriate return components and capital structure. [56]

Moreover, Ms. Friscic agreed that such a rate case could be filed at any time before October 2024,[57] and that the PUCO could require DEO to make an earlier filing.[58]

The PUCO misunderstands NOPEC's position on this issue. It stated that Ohio statutes clearly permit a natural gas company to pursue recovery for capital investments in either a base rate case, pursuant to R.C. 4909.18, or under the alternative rate regulations, pursuant to R.C. 4929.05.[59] It found that it will not deny Dominion's CEP application where the law permits a utility to pursue the alternative regulation path.[60] The difficulty with this position is that Dominion has chosen a path that provides it an unjust and unreasonable windfall at the expense of its consumers. It is for that reason that the application should be denied. The PUCO then must

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[54] *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Finding and Order, Case No. 18-1908-GA-UNC (December 4, 2019) ("TCJA Order") at 12.

[55] *Id.*

[56] Tr. at 27 (Friscic Cross).

[57] *Id.* at 88 (Friscic Cross).

[58] *Id.*, at 92-93 (Friscic Cross).

[59] Order at ¶ 67.

[60] Order at ¶ 73.

select the other path available under the law and require DEO to file an application to change base rates pursuant to R.C. 4909.18 by the end of this year.

Assignment of Error No. 6: The PUCO erred in approving a Settlement between the PUCO Staff and Dominion to the extent that communications were made between the PUCO Staff and PUCO Commissioners, as referenced during the PUCO's public meeting for approving the Order, in violation of R.C. 4903.081 and/or O.A.C. 4901-1-09.

At the PUCO's December 30, 2020 meeting, during which it approved the Settlement in this case, the PUCO's Acting Chair made the following remarks:

> I just want to give a big shout out to … Director of Rates and Analysis, and her staff because without her and their help, this case probably would've taken even longer, and I just want to really thank her for her attentiveness and working with commissioners and better understanding everything in the case and how it came about, so thank you ….[61]

Another Commissioner concurred, stating, "And I would just echo your comments 100% Madame Acting Chair."[62]

It is an unusual system at the PUCO, in a judicial sense, where fellow employees or even supervisees of a PUCO decision-maker (Commissioner or Chair) are among the litigants in multi-party cases before them. Having said that, there are standards for communications in legal proceedings, such as R.C. 4903.081 and O.A.C. 4901-1-09.

An article in the Yale Journal on Regulation by Professor Stefan Krieger neatly summarizes a concern for consumer groups and other parties when a regulatory commission's staff is involved in negotiations:

> Participation of the commission staff in the nonunanimous agreement may accentuate the power imbalance. The staff, as an arm of the commission, wields significant power. Indeed, if the staff allies itself with the utility, a bandwagon effect may be created, swaying other parties to join the agreement, albeit

[61] See transcription of the PUCO's December 30, 2020 Agenda Meeting, prepared by the Consumer Parties, Remarks of Acting Chair Trombold, Attachment A hereto. See, also, https://www.youtube.com/watch?v=d_ozIp9-4tQ beginning at minute 17:42 (emphasis added).

[62] *Id.*, https://www.youtube.com/watch?v=d_ozIp9-4tQ beginning at minute 18:15, Remark of Commissioner Conway.

reluctantly. As one court that recognizes the concept of nonunanimous settlements has noted:

"[Nonunanimous agreements create] the possibility of an unintentional shift of the burden of proof from the utility to the opponents of the stipulation. There is a danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement, rather than require the utility to prove affirmatively that the proposed rates are just and reasonable. This danger is increased when the Commission staff is a signatory party and is in the position of advocating the stipulation."

The vast majority of nonunanimous settlements includes the utility and commission staff but exclude consumer groups. ... [T]his coalition-building phenomenon raises serious distributional justice questions.[63]

Given the above-referenced PUCO Commissioner remarks upon the signing of the Order, it should be explained on rehearing to what extent, if at all, the merits of this case were part of the communications referenced in the Commissioners' remarks when the Order was signed. And it should be addressed on rehearing whether the PUCO staff is subject to the above law and rule (and any judicial protocols for such communications) and under what circumstances.

III. CONCLUSION

In the interest of a fair and just result for a million Dominion consumers and their families – many of whom are suffering from the health and financial crisis with increased risks for health, energy insecurity, food insecurity, and homelessness – the PUCO should grant this Application for Rehearing. The PUCO has conceded to a ratemaking process of Dominion's choosing, that is tilted in Dominion's favor. Instead, the PUCO should have asserted its control to balance the scales of the justice that it is supposed to administer for Ohioans who rely on their state government for protection from utility monopolies. Unfortunately, the monopolies are winning; consumers are losing.

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[63] Stefan H. Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases* (1995) (quoting *City of Abilene v. PUC*, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993), *available at* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1421&context=yjreg.

Respectfully submitted,

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ATTACHMENT A

December 30, 2020, PUCO Agenda Meeting
Transcription of Remarks Regarding Case No. 19-468-GA-ALT
https://www.youtube.com/watch?v=d_ozIp9-4tQ

13:58 CONWAY: Again, Madame Vice Chair, I mentioned that I would have a comment or two about periodic rate cases, and this is the case that I've been thinking about. I have great sympathy for and I was on a fine line in this case in regards to the stipulation, and voting in favor of it. On the one hand, we have a stipulation which provides a lot of benefits, including the $310,000,000 depreciation off-set, and there are other important benefits that are outlined in the order, monetary and otherwise. On the other hand, we have a utility that are not unlike some of our other utilities. It hasn't been in for a rate case for quite a while, so our policy of referring back to the cost of capital values that were established in the most recent prior-rate based case, means that we refer back to quite a distance in time. And during that period as the record in this case, OCC and NOPEC have pointed out that there have been macro changes in regard to capital costs have undoubtedly caused the cost of capital to decline in a material way, and here we are faced with a stipulation, adopting a stipulation or not, that provides a great deal of benefit, and my balance of the pluses and minuses is that the stipulation has more than enough value to outweigh the concern I have of continuing down the track of relying upon capital values that are at this point probably 13 years old, and by the time the next rate case occurs will be close to 17 years or more old. So, the question is what to do about it. I think in this case, the answer to go ahead and approve the stipulation and move forward. I think, in a perfect world, what we would do is, we would have a rate case which would reconcile costs with revenues for the entire cost of service of the company by including both riders and base rate expenses, but we don't have that option in this case. So, the question becomes, is there anything we can do going forward to change the way the playing field is constructed, and I would just indicate that my preference is that we do what we can to ensure that there isn't a misalignment that occurs between cost expenses, which is exasperated by the rider environment which we have come to both enjoy and have concerns about. So anyway, sorry for the longwinded explanation. That was a tough case for me, and I have indicated the reason I come down at all on the side of approving the stipulation. I think my balance is the way to go, and I would hope that we could look forward and take steps to ensure we don't get put into a position where we're choosing between alternatives which may not be optimal. So thanks.

17: 42 TROMBOLD: Thank you Commissioner, you've raised some really good points. We'll probably be talking about this some more in 2021, and I just want to give a shout out to Tammy Turkenton, Director of Rates and Analysis, and her staff because without her and their help, this case would've probably taken even longer, and I just want to really thank her for her attentiveness and working with commissioners and better understanding everything in the case and how it came about, so thank you Tammy.

18:15 CONWAY: And I just want to echo your comments 100% Madame Acting Chair.

TROMBOLD: Any other comments on this case? [silence] Okay, hearing none, all those in favor say aye. [All ayes. No opposition] The case is approved.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 29th day of January 2021.

*/s/ Dane Stinson*________
Dane Stinson

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Case No(s). 19-0468-GA-ALT

Summary: Text Joint Application for Rehearing by The Office of The Ohio Consumers' Counsel and Northeast Ohio Public Energy Council electronically filed by Ms. Megan Zemke on behalf of Krassen, Glenn S