

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the East)
Ohio Gas Company d/b/a Dominion)
Energy Ohio for Authority to Adjust Its) Case No. 21-619-GA-RDR
Capital Expenditure Program Rider)
Charges.)

**REPLY BRIEF
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Dominion¹ and the PUCO Staff have signed a Settlement² that benefits only Dominion. It is not in consumers' nor the public's interest. Consumers should not be required to pay the excessive, 13 year-old 9.91% pre-tax rate of return contained in the Settlement.³ That is neither just nor reasonable.⁴ Additionally, consumers are harmed by paying financial incentives that only benefit Dominion's shareholders. Requiring consumers to pay for financial incentives, as the Settlement does, is neither just nor reasonable.

The Office of the Ohio Consumers' Counsel ("OCC"), the statutory consumer advocate for Dominion's 1.1 million residential gas utility consumers, asks the PUCO to reject or modify the Settlement and instead adopt the consumer protections⁵ that OCC recommends.

¹ East Ohio Gas Company d/b/a Dominion Energy Ohio.

² Stipulation and Recommendation (September 7, 2021) (the "Settlement").

³ Initial Brief for Consumer Protection by the Office of the Ohio Consumers' Counsel at 1 (October 12, 2021) ("OCC Brief").

⁴ R.C. 4929.111 (C) (emphasis added).

⁵ Initial Brief for Consumer Protection by the Office of the Ohio Consumers' Counsel (February 24, 2021) ("OCC Brief").

II. REPLY

- A. The Settlement, as a package, does *not* benefit consumers and is *not* in the public interest because the harm to consumers (paying \$18.6 million more for their gas service)⁶ under the Settlement is substantially greater than the trivial concessions that Dominion made.**

Dominion and PUCO Staff claim that the Settlement, as a package, benefits consumers, and the public interest.⁷ They are wrong.

Under Ohio law, R.C. 4929.05 (A)(3) and R.C. 4929.111(C), the PUCO **must find** that capital expenditure programs (“CEPs”) and alternative rate plans are “just and reasonable” (emphasis added). The PUCO also has a duty under R.C. 4905.22 to require Dominion, a regulated utility, to provide necessary and adequate services for just and reasonable charges. Consumers should not be made to pay more for CEP investments solely due to the continued use of an out of date and inflated rate of return and financial performance incentives that only benefit Dominion’s shareholders.⁸

The Settlement calls for continued use of Dominion’s rate of return that was set more than 13 years ago and includes an embedded debt rate of 6.5%.⁹ This is despite the fact that Dominion’s current debt rate is only 2.29%.¹⁰ And it uses a 10.38% return on equity that far exceeds the recent trend in lower equity returns for gas utilities comparable to Dominion. Using the outdated rate of return, which includes a cost of debt that is nearly three times Dominion’s actual current cost of debt and that no longer reflects Dominion’s current business climate and risk, results in consumers paying an inflated rate of return and much more than they should for

⁶ \$18,620,427. See OCC Brief at 7.

⁷ Dominion Brief at 8 (October 12, 2021); PUCO Staff Brief at 5-6.

⁸ OCC Brief at 6-15.

⁹ *Id.* at 2-3.

¹⁰ *Id.*

the CEP. This violates the fundamental regulatory principles regarding rate of return exemplified in the U.S. Supreme Court's decision in *Bluefield*.¹¹

In Case No. 19-468-GA-ALT, neither the PUCO Staff nor Dominion dispute that Dominion's CEP rate of return includes the 6.5% debt rate, even though its actual debt rate is 2.29%. Neither do they dispute that its current return on equity no longer reflects Dominion's current business climate or risk.¹² PUCO Staff and Dominion did not challenge OCC witness Dr. Daniel Duann's testimony through cross examination and they did not offer witnesses disputing Dr. Duann's assertions and calculations. Dr. Duann demonstrated—without challenge—that Dominion's rate of return set in its last rate case more than 13 years ago (Case No. 07-829-GA-AIR) includes an embedded 6.5% cost of debt and an out of date and inflated 10.38% return on equity.¹³ He also demonstrated that Dominion's updated rate of return should not exceed 7.20%.¹⁴ It is neither just nor reasonable for Dominion to use the rate of return set more than 13 years ago to charge consumers for current CEP charges.

Dominion makes several non-persuasive arguments that the Settlement benefits consumers.¹⁵ First, Dominion argues that its agreement to prospectively exclude capitalized costs associated with its Long-Term Incentive Program ("LTIP") and its Leadership Incentive Plan ("LIP") are benefits of the Settlement.¹⁶ Dominion's agreement to exclude LTIP and LIP is good. But Dominion has not agreed to exclude the financial performance incentives built into its Annual Incentive Plan ("AIP"). OCC's expert Mr. Kerry Adkins explained in his testimony that

¹¹ See *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923); see also OCC Brief at 7.

¹² OCC Brief at 8.

¹³ OCC Brief at 22.

¹⁴ *Id.* at 5-8.

¹⁵ Dominion Brief at 9.

¹⁶ *Id.*

it is unconscionable for the PUCO to knowingly permit the financial performance incentives included in the AIP to remain in the CEP charges to consumers. The financial performance incentives provide no benefit to consumers. They only benefit Dominion's shareholders.¹⁷

Dominion lists several other "benefits" of the Settlement. But these "benefits" would occur regardless of the Settlement.¹⁸ First, Dominion claims that a purported benefit of the Settlement is that it adopts Blue Ridge's Audit Report adjustments and recommendations. But given that the PUCO Staff supported these recommendations, the PUCO would likely adopt them. This is not actually a concession or benefit as Dominion claims.

Second, Dominion asserts that the Settlement continues to reflect bill-mitigation benefits recognized in the PUCO's approval of the CEP charge.¹⁹ Dominion points to the CEP rate caps approved by the PUCO and the fact that the CEP includes a depreciation offset.²⁰ But the rate caps (to the extent that they are benefits) arise from the Settlement in the 19-468-GA-ALT case. Thus, they are not the product of the Settlement in this case.

Regarding the depreciation offset, OCC demonstrated in the 19-468 case that the depreciation offset merely reflects what would have happened if Dominion had filed to collect the CEP capital investments in a base rate case rather than through the CEP charge. Not making the offset would have violated important regulatory principles and would have resulted in yet another undeserved windfall for Dominion. Again, however, to the extent that the depreciation offset is viewed as a benefit (seeing how it would have happened anyway in a rate case), it is not a benefit arising from the Settlement in this case. Complying with rate caps approved by the

¹⁷ OCC Brief at 19.

¹⁸ Dominion Brief at 8-15.

¹⁹ *Id.* at 13.

²⁰ *Id.*

PUCO in another case cannot be legitimately claimed as a benefit in this case because Dominion was already required by a PUCO Opinion and Order to adhere to the rate caps. Complying with a PUCO Order is not a benefit of the Settlement.

Third, Dominion asserts that the Settlement continues to support necessary investment in its system, which benefits Ohio consumers.²¹ But again, this is not a benefit of the Settlement. Dominion is *required* under Ohio law to furnish necessary and adequate facilities.²² And consumers would benefit—*under law*—regardless of whether they are funded in base rates or the CEP charge. The only difference is that consumers will pay *more* if these system investment charges are included in the CEP charge instead of base rates. This is because of the Settlement’s grossly inflated rate of return and the financial performance incentives.

Importantly, consumers would get the same purported benefits of the CEP charge if the PUCO adopts OCC’s recommendations at a better price. OCC recommends requiring Dominion to use a rate of return that reflects Dominion’s actual 2.29% cost of debt to set the CEP charge and reset Dominion’s ROE to reflect its current business risk.²³ OCC recommends removing the financial performances incentives from the CEP charge.²⁴ Consumers will get the purported benefits of the CEP charge at a just and reasonable price.

Finally, Dominion asserts that the result of the parties’ bargaining—the Settlement—is a compromise materially different from Dominion’s application and is thus a benefit.²⁵ This is illusory at best. Dominion’s agreement to prospectively give up on the LIP and LTIP financial

²¹ Dominion Brief at 14.

²² *See, e.g.*, R.C. 4905.22.

²³ OCC Brief at 8.

²⁴ *Id.*

²⁵ Dominion Brief at 15.

performance incentives is merely a concession for something it should have never been charging consumers in the first place. Further, Dominion is keeping the AIP financial performance incentives despite the fact that it recently agreed to give them up in the Settlement for Case No. 20-1634-GA-ALT (Dominion’s case to extend its PIR Program).²⁶ And as explained above, Dominion agreeing to Blue Ridge’s findings and recommendations isn’t really a concession. Blue Ridge’s findings were correct, supported by PUCO Staff, and likely would have been adopted by the PUCO anyway. Dominion made no concessions on the major point of contention in this case—its outdated and inflated rate of return, which is where the real savings are.

The harm to consumers under the Settlement is substantially greater than the trivial “concessions” that Dominion made. Therefore, the Settlement, as a package, does *not* benefit consumers and is *not* in the public interest.

The PUCO should reject or modify the Settlement—as recommended by OCC—to protect consumers against overpaying for CEP charges.

B. Contrary to claims by Dominion, the Settlement violates important regulatory principles and practices to consumers’ detriment.

Dominion asserts that the Settlement does not violate any important regulatory principles or practices.²⁷ But as OCC explained in its brief, the Settlement violates several regulatory principles explained in OCC witnesses Duann’s and Adkins’ testimonies.²⁸

²⁶ *Id.* at 11.

²⁷ *Id.* at 15.

²⁸ OCC Brief at 21.

It violates perhaps the most fundamental regulatory principle—the regulatory compact.²⁹ If Dominion’s captive utility consumers are going to be asked to pay more for their utility service they already receive, then they should get more. And under the CEP consumers are being asked to pay more—a lot more. Residential consumers currently pay a CEP charge of \$3.86 per month. But if the PUCO approves the Settlement, this charge will rise to \$5.50 per month. And under a similar Settlement in Case No. 19-468-GA-ALT, by 2024, residential consumers can be paying as much as \$7.51 per month (or more than \$90.00 per year).

A significant portion of the CEP rate is the inflated and outdated 9.91% rate of return, which causes Dominion’s captive utility customers to pay substantially more than they should be paying.³⁰ As OCC explained in its brief, the 9.91% pre-tax rate of return proposed by Dominion is unreasonable for two reasons.³¹

First, the use of this vastly inflated pre-tax rate of return will result in much higher than justified charges for consumers and is thus unreasonable.³² Compared to Dr. Duann’s recommended pretax rate of return of 7.20%, adopting the 9.91% pre-tax rate of return would increase the CEP charges to consumers by approximately \$18.6 million (\$18,620,427) in this proceeding assuming a rate base of \$687,100,619 as recommended in the Audit Report.³³

²⁹ See Kenneth Rose, Ph.D., *An Economic and Legal Perspective on Electric Utility Transition Costs* at 6, National Regulatory Research Institute (July 1996) (“the careful balance between compensatory rates and confiscation of utility property that allows a utility an opportunity to earn a reasonable return on investment in exchange for providing safe and reliable power at reasonable cost to all customers who request service. This is checked by the “used-and-useful” and “prudent-investment” tests, as well as from competition from government ownership, fuel substitutes, and self-generation. The regulatory compact was, by design, intended to protect ratepayers from monopoly abuse, not protect the utility from competition forever”).

³⁰ OCC Brief at 9.

³¹ *Id.*

³² *Id.*

³³ *Id.*

Second, the financial market conditions and the business and financial risks facing Dominion have improved significantly since 2008.³⁴ The Settlement's use of a rate of return decided in the last rate case over 13 years ago as a proxy for the current rate of return for Dominion violates important regulatory principles³⁵ and state policies³⁶—and thus is unreasonable. Specifically, Dominion's current cost of debt is 2.29%—merely a third of the debt rate that Dominion wants to charge consumers.³⁷ And consumers get nothing of value in exchange for their extra dollars. Dominion shareholders get an undeserved windfall, and all consumers get in return is a higher bill. This breaks the regulatory compact.

The PUCO Staff failed to address the rate of return issue in its brief, despite OCC's expert Dr. Daniel Duann's compelling and unopposed testimony on the matter. But Dominion asserts that the rate of return agreed to in the Settlement is consistent with the PUCO's authorization of the CEP charge.³⁸ The rate of return in this case is consistent with the PUCO's Order in Case No. 19-468-GA-ALT. But that Order is subject to rehearing.

The legal standard applicable here is “just and reasonable” as established by R.C. 4929.05 (A)(3) and 4929.111. And using the outdated and inflated rate of return that was set more than 13 years ago is clearly unjust and unreasonable. Consumers pay more than they should for the CEP, and they get nothing of value in return. Dominion gets a windfall and consumers get a higher bill. The same is true for the AIP financial performance incentives. Consumers pay more than they otherwise should, but they get nothing of value in return. Dominion's

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Dominion Brief at 17.

shareholders benefit, but consumers get nothing but a higher bill. This is neither just nor reasonable.

The PUCO should reject the Settlement or modify it based on OCC's consumer protection recommendations.

III. CONCLUSION

"[T]he purpose of the PUCO * * * is to protect the customers of public utilities."³⁹ The PUCO cannot change the bad CEP law. But it can mitigate its harmful effects by rejecting or modifying the Settlement and adopting OCC's consumer-protection recommendations. The PUCO should require Dominion to use its current cost of debt and deny its \$18,620,427 rate of return increase to consumers. The PUCO should fulfill its purpose here by rejecting or modifying the Settlement and adopting OCC's recommendations for protection of Dominion's 1.1 million residential gas utility consumers.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Ambrosia E. Wilson
William J. Michael (0070921)
Counsel of Record
Ambrosia E. Wilson (0096598)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213
Telephone [Michael]: (614) 466-1291
Telephone [Wilson]: (614) 466-1292
william.michael@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
(willing to accept service by email)

³⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 372 (2009) (Pfeifer, J. dissenting).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic transmission, this 26th day of October 2021.

/s/ Ambrosia E. Wilson
Ambrosia E. Wilson
Assistant Consumers' Counsel

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

SERVICE LIST

werner.margard@OhioAGO.gov
kyle.kern@OhioAGO.gov

Attorney Examiner:

sarah.parrot@puco.ohio.gov
Jacqueline.St.John@puco.ohio.gov

kennedy@whitt-sturtevant.com
fykes@whitt-sturtevant.com
whitt@whitt-sturtevant.com
andrew.j.campbell@dominionenergy.com
michael.nugent@igs.com
bethany.allen@igs.com
evan.betterton@igs.com
joe.oliker@igs.com

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

10/26/2021 9:14:26 AM

in

Case No(s). 21-0619-GA-RDR

Summary: Brief Reply Brief by Office of the Ohio Consumers' Counsel
electronically filed by Mrs. Tracy J. Greene on behalf of Wilson, Ambrosia E.