

**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 Approval of An             ) Case No. 20-1634-GA-ALT  
Alternative Form of Regulation to             )  
Continue Its Pipeline Infrastructure             )  
Replacement Program.                         )

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**REPLY BRIEF FOR CONSUMER PROTECTION  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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## **TABLE OF CONTENTS**

	<b>PAGE</b>
I. INTRODUCTION .....	1
II. REPLY .....	3
A. The PUCO should modify the Settlement’s outdated and inflated rate of return for the continuation of Dominion’s PIR program because as currently structured this alternative rate plan violates Ohio law in that it is neither just nor reasonable. ....	3
B. The Settlement’s use of Dominion’s outdated and inflated rate of return harms consumers and is not in the public interest, thus failing the PUCO’s second prong of its three-part test. The PUCO should adjust Dominion’s rate of return, an especially important action given the harms to consumers facing the pandemic and expected rising gas prices.....	6
C. Contrary to claims by Dominion and the PUCO Staff, the Settlement violates important regulatory and state principles and practices to consumers’ detriment...	8
III. CONCLUSION.....	12

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**I. INTRODUCTION**

Dominion's application for an alternative rate plan seeks to continue its pipeline infrastructure replacement (PIR) program and charge consumers for the program's costs. The statutes governing alternative rate plans provide that the PUCO shall approve a program filed under the plan only if it finds the program to be *just and reasonable*.<sup>1</sup> But the Settlement<sup>2</sup> which resolves Dominion's application is not just and reasonable, especially because of its use of Dominion's inflated and outdated rate of return (for profits and debt). That outdated rate of return harms consumers by making them pay too much, a result that is neither just nor reasonable in violation of Ohio law. The PUCO should protect residential consumers by rejecting or modifying the Settlement as recommended by OCC in our initial brief.<sup>3</sup>

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<sup>1</sup> R.C. 4929.05(A)(3) (emphasis added).

<sup>2</sup> *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. 20-1634-GA-ALT, Joint Ex. 1.0, Stipulation and Recommendation ("Settlement") (October 12, 2021).

<sup>3</sup> Case No. 20-1634, Initial Brief for Consumer Protection by Office of the Ohio Consumers' Counsel (November 22, 2021).

The PUCO should modify the Settlement and adopt a lower and more reasonable pre-tax rate of return of 7.20% as recommended in the unchallenged testimony of OCC witness Dr. Daniel J. Duann.<sup>4</sup> By adopting this lower pre-tax rate of return, consumers will be protected from paying unjust and unreasonable PIR charges, and Dominion will have the opportunity to earn a return (profits) comparable to that available of other similarly situated gas utilities.

It is neither just nor reasonable to force Dominion's 1.1 million residential consumers to continue to pay charges for the PIR program based on a 13-year-old and excessive 9.91% pre-tax rate of return included in the Settlement.<sup>5</sup> The stale rate of return will result in consumers overpaying and Dominion earning profits that are too high for current financial market conditions. Under the Settlement the Utility will collect a cost of debt from customers that is nearly three times its actual cost of debt.

The initial briefs filed by Dominion and the PUCO Staff fail to demonstrate that the proposed pre-tax rate of return of 9.91% is just and reasonable. Overcharging consumers is not just and reasonable. Knowingly requiring consumers to pay more to provide a utility windfall where the consumers receive nothing of value in exchange is unconscionable. And it comes at an especially troublesome time -- during a pandemic and a period of rising gas prices. In addition, requiring consumers to pay profits to the utility that are excessive violates the basic regulatory compact between consumers and utilities, where consumers should only pay a fair and reasonable rate of return for monopoly services.

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<sup>4</sup> OCC Ex. 1.0, Direct Testimony of Daniel J. Duann, Ph.D. Recommending Consumer Protection From the Settlement on Behalf of Office of the Ohio Consumers' Counsel with Attachments DJD-01-DJD-04 (October 25, 2021) ("Duann Direct") at 11-12; see, OCC Initial Brief at 5-7.

<sup>5</sup> OCC Initial Brief; *see also*, OCC Ex. 1.0 (Duann Direct) at 4-5.

## II. REPLY

**A. The PUCO should modify the Settlement's outdated and inflated rate of return for the continuation of Dominion's PIR program because as currently structured this alternative rate plan violates Ohio law in that it is neither just nor reasonable.**

The initial briefs of Dominion<sup>6</sup> and the PUCO Staff<sup>7</sup> try to demonstrate that the Settlement meets the three-part test for approving stipulations. But nowhere in their briefs do they address the statutory requirement found in R.C. 4929.05(A)(3). Dominion's pipeline infrastructure replacement Application in this case was filed as an alternative rate plan. Under Ohio law (R.C. 4929.05 (A)(3)), the PUCO must find an alternative rate plan is just and reasonable in order to approve it.

The PUCO cannot approve the Settlement based on the three-part test without also considering the underlying Ohio law. Because the PUCO is required by statute to address the just and reasonable standard, it must be considered separate and apart from the Settlement.<sup>8</sup> And when a settlement violates a law, the part of the settlement that is unlawful cannot be approved, regardless of the three-part test.<sup>9</sup>

In order to approve Dominion's PIR Program for a new five-year period, the PUCO must find that the Program is just and reasonable according to R.C. 4929.05(A)(3). And it must make

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<sup>6</sup> Case No. 20-1634, Initial Brief of the East Ohio Gas Company d/b/a Dominion Energy Ohio (November 22, 2021).

<sup>7</sup> Case No. 20-1634, Initial Brief submitted by the Staff of the Public Utilities Commission of Ohio (November 22, 2021).

<sup>8</sup> See *In re Ohio Edison Co.*, 2020-Ohio-5450, ¶¶ 62-64 (rejecting utility's argument that statutory issues must be addressed in the context of the PUCO's three-part settlement test).

<sup>9</sup> See *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, 162 Ohio St.3d 651, 2020-Ohio-5450, ¶¶ 62-64 (rejecting utility's claim that a party must couch its opposition to an unlawful settlement in terms of the PUCO's three-part test).

this finding based on the record in this case.<sup>10</sup> If the PUCO is going to approve the PIR for a new five-year period with its more than 13-year-old rate of return (getting older and more outdated each year) then it must determine <sup>11</sup> that the outdated and inflated rate of return is just and reasonable. It is not, and there is no record support for such a finding.

There is no dispute that Dominion's rate of return—set more than 13 years ago in Case No. 07-829-GA-AIR—is outdated and inflated.<sup>12</sup> No party challenged OCC's expert witness Dr. Daniel Duann's testimony that the rate of return includes a 6.5% cost of debt component when Dominion's current actual cost of debt is 2.9%.<sup>13</sup> Similarly, no party challenged or disputed Dr. Duann's testimony that the proposed PIR rate of return includes a 10.38% return on equity<sup>14</sup> that no longer reflects Dominion's current business risk or return on equities attained by utilities comparable to Dominion in today's business climate<sup>15</sup> (as required by the U.S. Supreme Court's *Bluefield*<sup>16</sup> decision). And nobody challenged Dr. Duann's conclusion that Dominion's rate of return in this case should be no higher than 7.2% based on Dominion's current actual cost of debt and current business risk and business climate.<sup>17</sup>

The parties waived cross-examination in this case. No party other than OCC sponsored any rate of return witnesses of their own in this case to challenge Dr. Duann's recommendations. No party is able to support using a rate of return set more than 13 years ago in Dominion's base

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<sup>10</sup> See, *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89-91, 706 N.E.2d 1255 (1999); *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker Pas& Aggregator*, Slip Opinion No. 2021-Ohio-3630.

<sup>11</sup> *Id.*

<sup>12</sup> OCC Ex. 1.0 (Duann Direct) at 6-12; OCC Initial Brief at 4-8.

<sup>13</sup> *Id.*; see OCC Ex. 1.0 (Duann Direct) at 7-8.

<sup>14</sup> *Id.*; see OCC Ex. 1.0 (Duann Direct) at 6-8.

<sup>15</sup> OCC Initial Brief at 5-8, 10; see also OCC Ex. 1.0 (Duann Direct) at 6-8, 11-12.

<sup>16</sup> *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679, 692 (1923).

<sup>17</sup> OCC Initial Brief at 6-8; OCC Ex. 1.0 (Duann Direct) at 11-12.

rate case (Case No. 07-829-GA-AIR). And yet, the Settlement's rate of return includes a cost of debt that is nearly three times higher than Dominions' actual cost of debt and a 10.38% return on equity that is much higher than the return on equity earned by comparable utilities and no longer reflects Dominion's business risk.<sup>18</sup>

Dominion briefly notes the PUCO's "practice" of utilizing the cost of capital and capital structure approved in the utility's last rate case in subsequent alternative rate plan and rider proceedings.<sup>19</sup> (The PUCO Staff's brief avoids this rate of return topic entirely.) But the PUCO is not required to use the rate of return decided in the last rate case in a subsequent proceeding, especially one set 13 years ago, and especially when using such a stale rate of return leads to excessive charges to consumers, thus violating Ohio law.<sup>20</sup> Past practice should not be followed where the rate plan that the return is pulled from is more than ten years old and where the current financial conditions surrounding the cost of capital have changed dramatically.

Under Ohio law (R.C. 4929.05 (A)(3)), the PUCO must find that an alternative rate plan is "just and reasonable" before approving it. 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 PIR investments solely due to the continued use of an out of date and inflated rate of return that only benefits Dominion's shareholders.

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<sup>18</sup> And neither Staff nor Dominion (or anyone else) challenged Dr. Duann when he made the same recommendation and took the witness stand in Case No. 19-468-GA-ALT concerning Dominion's Capital Expenditure Program—a very similar proceeding. In that proceeding nobody asked Dr. Duann any questions at all regarding his recommendations.

<sup>19</sup> Dominion Initial Brief at 13.

<sup>20</sup> Revised Code 4929.05(A)(3); 4905.22; 4929.02(A)(1).

Ohio law requires all utility rates to be just and reasonable.<sup>21</sup> The proposed Settlement is contrary to the policy of the state in Revised Code 4929.02(A)(1) for natural gas service to be reasonably priced.<sup>22</sup> And, specifically, R.C. 4929.05(A)(3) provides that the PUCO should approve an alternative rate plan, like Dominion's PIR program, only if the utility has shown and the PUCO finds that the alternative rate plan is just and reasonable.<sup>23</sup> The Settlement's use of an outdated and inflated pre-tax rate of return leads to rates that are unjust and unreasonable for consumers, thus violating Ohio law.

**B. The Settlement's use of Dominion's outdated and inflated rate of return harms consumers and is not in the public interest, thus failing the PUCO's second prong of its three-part test. The PUCO should adjust Dominion's rate of return, an especially important action given the harms to consumers facing the pandemic and expected rising gas prices.**

Dominion and the PUCO Staff claim that the Settlement includes all kinds of customer benefits.<sup>24</sup> But any purported benefits are diminished by the excessive profits consumers pay to Dominion under this Settlement. As pointed out in testimony and in OCC's initial brief,<sup>25</sup> customers will still get all of these purported benefits if the PUCO were to adjust Dominion's rate of return as recommended by OCC.

There is no question that consumers in Dominion's service area *will* be harmed substantially by the excessively high and unreasonable pre-tax rate of return of 9.91% included in the Settlement.<sup>26</sup> OCC calculated that, "the harm to consumers from adopting the 9.91% pre-tax rate of return will be even greater than what OCC calculated for Dominion's CEP program

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<sup>21</sup> See R.C. 4905.22.

<sup>22</sup> OCC Initial Brief at 10-12; OCC Ex. 1.0 (Duann Direct) at 18-20.

<sup>23</sup> *Id.*

<sup>24</sup> Dominion Initial Brief at 7-12; Staff Brief at 6-7.

<sup>25</sup> OCC Ex. 1.0 (Duann Direct) at 16; OCC Initial Brief at 5-6.

<sup>26</sup> OCC Ex. 1.0 (Duann Direct) at 9-11, 15, 17, 21; OCC Initial Brief at 4-6, 8-9.



(approximately \$18.6 million) in Case No. 21-619-GA-RDR.”<sup>27</sup> Dominion and the PUCO Staff did not dispute or challenge Dr. Duann’s calculation in that case (CEP Program) or in this case (PIR Program). Moreover, this unreasonably high rate of return is likely to provide an added incentive for Dominion to make even greater capital investments to generate an even higher profits at the expense of its gas consumers.<sup>28</sup>

The harms to consumers and the public interest of adopting the Settlement is further compounded by the recent and rapid rise in energy costs, especially the prices of natural gas in the Midwest region; occurring during a pandemic with arising variants and no end in sight.<sup>29</sup> As OCC explained in Dr. Duann’s testimony,<sup>30</sup> the U.S. Energy Information Administration recently warned:

We expect that the nearly half of U.S. households that heat primarily with natural gas will spend 30% more than they spent last winter on average—50% more if the winter is 10% colder-than-average and 22% more if the winter is 10% warmer-than-average. For the Midwest Region (where Ohio is located), the increase in natural gas expenditure is expected to be even higher at 48.6%, from \$551 to \$818. The unit price (\$/Mcf) of natural gas in the Midwest Region is forecasted to increase by 44.7% from \$7.80 to \$11.28.<sup>31</sup>

The PUCO may have little control over the gas commodity prices as they are largely determined in the marketplace. But the PUCO does have the power (and the responsibility) to set reasonable profits (authorized return on equity) and debt costs for Dominion’s PIR program to protect consumers from paying unreasonable rates, especially important during these challenging

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<sup>27</sup> *Id.*; see also PUCO Case No. 21-619-GA-RDR, Testimony of Daniel J. Duann, Ph.D. at 13 (September 14, 2021).

<sup>28</sup> This tendency of regulated companies to engage in overinvestment in order to increase profits is referred as the Averch-Johnson Effect, or gold plating.

<sup>29</sup> OCC Initial Brief at 8-9.

<sup>30</sup> OCC Ex. 1.0 (Duann Direct) at 9-10.

<sup>31</sup> *Id.*; see, OCC Initial Brief at 8-9 citing U.S. Energy Information Administration, Winter Fuels Outlook (Oct. 2021) [https://www.eia.gov/outlooks/steo/special/winter/2021\\_Winter\\_Fuels.pdf](https://www.eia.gov/outlooks/steo/special/winter/2021_Winter_Fuels.pdf). Attachment DJD-3.

times. The PUCO should redouble its efforts to lower the costs of gas services, including the PIR charge, to protect consumers, especially those at-risk population.<sup>32</sup>

The Settlement harms customers and is not in the public interest in violation of the PUCO's test to evaluate settlements. Therefore, the PUCO should reject or modify the Settlement by implementing Dr. Duann's recommended rate of return of 7.20% to protect consumers.

**C. Contrary to claims by Dominion and the PUCO Staff, the Settlement violates important regulatory and state principles and practices to consumers' detriment.**

Dominion asserts that the Settlement does not violate any important regulatory principles or practices.<sup>33</sup> But as OCC explained in its brief, the Settlement violates important regulatory and state principles identified in OCC witness Duann's testimony.<sup>34</sup> 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 is not just and reasonable, does not comport with the important regulatory principles established in *Bluefield*<sup>35</sup> and state policies,<sup>36</sup> and thus necessarily violates the third prong of the PUCO's three-part test for considering settlements.

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<sup>32</sup> *Id.*; OCC Initial Brief at 21.

<sup>33</sup> Dominion Initial Brief at 12-13.

<sup>34</sup> OCC Initial Brief at 9-12; *see* OCC Ex. 1.0 (Duann Direct) at 17-20.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

First, the Settlement violates the fundamental regulatory principle of the regulatory compact between consumers and utilities, where consumers should only pay a fair and reasonable rate of return for monopoly services.<sup>37</sup> As discussed by OCC witness Dr. Daniel J. Duann, Dominion's residential consumers are being asked to pay more – a lot more in PIR charges if the proposed Settlement is approved. Dominion's current PIR Rider rate for residential consumers is \$14.98 per month (\$179.76 per year).

Under the Settlement, the charges go up. Residential consumers could be paying as much as \$20.27 per month (\$243.24 per year) for the PIR in 2025 by the time that new base distribution rates using an updated rate of return will take effect from the base rate case that Dominion has committed to file in October 2024.<sup>38</sup> This represents almost four years of unreasonable charges until the time when that rate case is decided in late 2025. The additional burden to consumers from using an outdated and inflated pre-tax rate of return is more alarming now with the very rapid rise in natural gas and other energy costs in recent months and potentially over an extended time into the future.<sup>39</sup>

Dominion's insistence of continuing to use an unreasonably high rate of return as applied to the very high upcoming PIR charges in light of this challenging economic environment is unconscionable. The PUCO should stop this. The PUCO should not permit Dominion to add

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<sup>37</sup> 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”).

<sup>38</sup> OCC Initial Brief 8-9; OCC Ex. 1.0 (Duann Direct) at 11.

<sup>39</sup> *Id.*, OCC Ex. 1.0 (Duann Direct) at 9-10.

substantial new charges, that are unjust and unreasonable, to consumers' bills given the challenging economic time experienced by many Ohioans.

Dominion has other pending charges to consumers using the inflated rate of return. Dominion's residential consumers currently pay a CEP rate of \$3.86 per month. But if the PUCO approves the Settlement in that case, this rate will rise to \$5.50 per month.<sup>40</sup> 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).

Like Dominion's other riders, a significant portion of the PIR rider 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 and thus violating the regulatory compact.<sup>41</sup>

Second, as OCC has explained, the 9.91% pre-tax rate of return proposed by Dominion is not just and reasonable.<sup>42</sup> It clearly violates the regulatory principle established in the U.S. Supreme Court's *Bluefield* decision; that is the rate of return set of a regulated utility must be based on the current market conditions and the current return earned by businesses with comparable financial and risks.<sup>43</sup> Here, the financial market conditions and the business and financial risks facing Dominion have improved significantly since Dominion's last rate case in 2008.<sup>44</sup> Dominion's current cost of debt is 2.29%--merely a third of the debt rate that was established 13 years ago that Dominion wants to charge consumers.<sup>45</sup> Under the Settlement,

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<sup>40</sup> See, Case No. 21-0619-GA-RDR, Stipulation and Recommendation (September 7, 2021).

<sup>41</sup> OCC Initial Brief at 11-12.

<sup>42</sup> OCC Initial Brief at 5-6; 7-10.

<sup>43</sup> *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679, 692 (1923).

<sup>44</sup> OCC Ex. 1.0 (Duann Direct) at 6-8, 17; OCC Initial Brief at 6-7.

<sup>45</sup> *Id.*

Dominion shareholders get an undeserved windfall, and consumers get in return a much higher bill.

The proposed Settlement violates important regulatory principles and practices by using an outdated and inflated pre-tax rate of return that will increase the revenue requirement for the PIR program and lead to rates that are unjust and unreasonable (and too high) for consumers.<sup>46</sup> This violates the fundamental regulatory principle that all rates for monopoly utility services should be just and reasonable for consumers.<sup>47</sup>

Ohio law also requires all utility rates to be just and reasonable.<sup>48</sup> And, specifically, R.C. 4929.05(A)(3) provides that the PUCO may only approve an alternative rate plan if the utility has shown and the PUCO finds that the alternative rate plan is just and reasonable.<sup>49</sup> The Settlement's use of an outdated and inflated pre-tax rate of return leads to rates that are unjust and unreasonable for consumers, thus violating Ohio law and thus failing the third prong of the PUCO's settlement test. In addition, the proposed Settlement is contrary to the policy of the state in Revised Code 4929.02(A)(1) for natural gas service to be reasonably priced.<sup>50</sup>

The PUCO Staff failed to address the rate of return issue in its brief, despite OCC's expert witness Dr. Daniel Duann's compelling and unopposed testimony on the matter. Dominion's assertion that the rate of return agreed to in the Settlement is consistent with the

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<sup>46</sup> OCC Ex. 1.0 (Duann Direct) at 17; OCC Initial Brief at 11-12.

<sup>47</sup> This regulatory principle is also referred as cost-based regulation. In other words, the rates of utility services that consumers pay should be based on the prudently-incurred costs of providing these utility services to consumers, which includes a reasonable and fair rate of return on the capital invested. *See*, for example, James C. Bonbright, *Principles of Public Utility Rates*, Columbia University Press, New York (1961) at 240-241.

<sup>48</sup> *See* R.C. 4905.22.

<sup>49</sup> *See* R.C. 4929.05(A)(3).

<sup>50</sup> OCC Initial Brief at 11-12; *see also*, OCC Ex. 1.0 (Duann Direct) at 19-20.

PUCO's "practice"<sup>51</sup> is not persuasive. Past practice should not be followed where the rate plan that the return is pulled from is more than ten years old and where the current financial conditions surrounding the cost of capital have changed dramatically.<sup>52</sup>

The legal standard applicable here is "just and reasonable" as established by R.C. 4929.05(A)(3). And using the outdated and inflated rate of return that was set more than 13 years ago is clearly unjust and unreasonable. Consumers unnecessarily pay more than they should for the PIR program. Dominion gets a windfall and consumers get a higher bill.

As the Settlement is inconsistent with well-established regulatory principles and state policies, it violates the third prong of the PUCO's settlement standard and should therefore be rejected or modified based on OCC's consumer protection recommendations.

### **III. CONCLUSION**

The PUCO's approval of Dominion's Application to continue the PIR program for a new five-year period must hinge on whether the PUCO finds the program's charges to be just and reasonable. But Dominion's proposal to continue to use the outdated and inflated rate of return set more than 13 years ago, as proposed in the Settlement, is neither just nor reasonable. The Settlement violates the PUCO's settlement standard and should, therefore, be rejected or modified to protect consumers. As OCC recommends, the Settlement should be modified by adopting a fair and reasonable pre-tax rate of return of 7.20%, instead of the 13-year-old 9.91% rate, for PIR charges to consumers.

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<sup>51</sup> Dominion Initial Brief at 13.

<sup>52</sup> The rate of return in Case No. 19-468-GA-ALT, cited by Dominion, is subject to rehearing.

Respectfully submitted,

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