

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
THE EAST OHIO GAS COMPANY DBA  
DOMINION ENERGY OHIO FOR  
APPROVAL OF AN ALTERNATIVE FORM OF  
REGULATION TO ESTABLISH A CAPITAL  
EXPENDITURE PROGRAM RIDER  
MECHANISM.

CASE NO. 19-468-GA-ALT

## SECOND ENTRY ON REHEARING

Entered in the Journal on February 23, 2022

### I. SUMMARY

{¶ 1} The Commission grants, in part, and denies, in part, the application for rehearing filed jointly by Ohio Consumers' Counsel and Northeast Ohio Public Energy Council of the Commission's December 30, 2020 Opinion and Order, consistent with this Second Entry on Rehearing. Upon consideration of the arguments raised on rehearing, the Commission finds that The East Ohio Gas Company dba Dominion Energy Ohio should file its next base rate case application by October 2023 rather than October 2024.

### II. DISCUSSION

#### A. *Applicable Law*

{¶ 2} The East Ohio Gas Company dba Dominion Energy Ohio (Dominion or Company) is a natural gas company and a public utility as defined by R.C. 4905.03 and R.C. 4905.02, respectively. As such, Dominion is subject to the jurisdiction of this Commission.

{¶ 3} Under R.C. 4929.05, a natural gas company may seek approval of an alternative rate plan by filing an application under R.C. 4909.18, regardless of whether the application is for an increase in rates. After an investigation, the Commission shall approve the plan if the natural gas company demonstrates, and the Commission finds, that the company is in compliance with R.C. 4905.35, is in substantial compliance with the policies of the state as set forth in R.C. 4929.02, and is expected to continue to be in substantial

compliance with state policy after implementation of the alternative rate plan. The Commission must also find that the alternative rate plan is just and reasonable.

{¶ 4} Pursuant to R.C. 4929.111, a natural gas company may file an application, under R.C. 4909.18, 4929.05, or 4929.11, to implement a capital expenditure program (CEP) for any of the following: any infrastructure expansion, infrastructure improvement, or infrastructure replacement program; any program to install, upgrade, or replace information technology systems; or any program reasonably necessary to comply with any rules, regulations, or orders of the Commission or other governmental entity having jurisdiction. In approving the application, the Commission shall authorize the natural gas company to defer or recover both of the following: a regulatory asset for post-in-service carrying costs (PISCC) on the portion of the assets of the CEP that are placed in service but not reflected in rates as plant in service; and a regulatory asset for the incremental depreciation directly attributable to the CEP and the property tax expense directly attributable to the CEP. A natural gas company shall not request recovery of the PISCC, depreciation, or property tax expense under R.C. 4929.05 or R.C. 4929.11 more than once each calendar year.

{¶ 5} R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days of the entry of the order upon the Commission's journal.

#### **B. Procedural History**

{¶ 6} In Case No. 11-6024-GA-UNC, et al., the Commission modified and approved Dominion's application for authority to implement a CEP for the period of October 1, 2011, through December 31, 2012. *In re The East Ohio Gas Company dba Dominion East Ohio*, Case No. 11-6024-GA-UNC, et al., Finding and Order (Dec. 12, 2012). Subsequently, in Case No. 12-3279-GA-UNC, et al., the Commission modified and approved Dominion's application to implement a CEP for the period of January 1, 2013, through December 31, 2013. *In re The*

*East Ohio Gas Company dba Dominion East Ohio*, Case No. 12-3279-GA-UNC, et al., Finding and Order (Oct. 9, 2013).

{¶ 7} In Case No. 13-2410-GA-UNC, et al., the Commission modified and approved Dominion's application to implement a CEP in 2014 and succeeding years, pursuant to R.C. 4909.18 and 4929.111. The Commission also approved Dominion's request for accounting authority to capitalize PISCC on program investments for assets placed in service but not yet reflected in rates; defer depreciation expense and property tax expense directly attributable to the CEP; and establish a regulatory asset to which PISCC, depreciation expense, and property tax expense are deferred for future recovery in a subsequent proceeding. Dominion was authorized to accrue deferrals under the CEP until the accrued deferrals, if included in rates, would cause the rates charged to the Company's General Sales Service customers to increase by more than \$1.50 per month. Additionally, the Commission noted that the prudence and reasonableness of Dominion's CEP-related regulatory assets and associated capital spending would be considered in any future proceedings seeking cost recovery, at which time the Company would be expected to provide detailed information regarding the expenditures for the Commission's review. *In re The East Ohio Gas Company dba Dominion East Ohio*, Case No. 13-2410-GA-UNC, et al., Finding and Order (July 2, 2014).

{¶ 8} On February 27, 2019, and March 29, 2019, in the above-captioned case, Dominion filed a notice of intent to file an application for approval of an alternative rate plan pursuant to R.C. 4929.05, 4929.111, and 4909.18 for an increase in rates based on a test year of the 12 months ending December 31, 2018, and a date certain of December 31, 2018. In the notice, Dominion stated that the application would request approval to establish a CEP Rider.

{¶ 9} On May 1, 2019, Dominion filed its alternative rate plan application, along with supporting exhibits and testimony, pursuant to R.C. 4909.18, 4929.05, 4929.11, and 4929.111.

{¶ 10} On August 31, 2020, Dominion and Staff filed a stipulation and recommendation (Stipulation), along with testimony in support of the Stipulation. The remaining parties to the case, Ohio Consumers' Counsel (OCC) and Northeast Ohio Public Energy Council (NOPEC), opposed the Stipulation.

{¶ 11} By Opinion and Order issued December 30, 2020, the Commission approved the Stipulation resolving all issues related to Dominion's application for an alternative rate plan to initiate the CEP rate recovery mechanism.

{¶ 12} On January 29, 2021, OCC and NOPEC (collectively, Intervenors) jointly filed an application for rehearing of the Opinion and Order, asserting six grounds for rehearing.

{¶ 13} On February 8, 2021, Dominion filed a memorandum contra the application for rehearing.

{¶ 14} On February 24, 2021, the Commission granted Intervenors' application for rehearing for further consideration of the matters specified in the application for rehearing.

{¶ 15} The Commission has reviewed and considered all the arguments raised in Intervenors' application for rehearing. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

### *C. Consideration of the Application for Rehearing*

{¶ 16} In the first assignment of error, Intervenors argue that, contrary to the evidence, the Commission approved the Stipulation, which does not benefit customers or the public interest and does not satisfy the regulatory principles of ensuring consumer equity or limiting utility charges to a fair and reasonable rate of return. As part of this first assignment of error, Intervenors submit that, pursuant to Dominion's last rate case, the rate of return is 6.5 percent and most recently the Company refinanced its debt at a rate of 2.5 percent. As a result of the reduction in the rate of return, Intervenors contend that Dominion

will receive a \$97 million windfall in profits from the CEP Rider and collect \$400 million in rates. The Commission's acknowledgement of the depreciation offset of \$300 million in the Stipulation is, according to Intervenors, recognition of monies that would have been returned to customers when Dominion filed a rate case. Therefore, Intervenors reason that it is not a benefit to customers that Dominion agreed to the depreciation offset in the Stipulation. Further, Intervenors aver that the \$750,000 the Company contributed to the EnergyShare program pales in comparison to the amount Dominion will collect in CEP rates over the next five years. Intervenors reason that the Commission's adherence to precedent is an abdication of the Commission's responsibility to ensure fairness and balance in the outcome for consumers. Intervenors argue that, to overcome precedent, the Commission is only required to explain, by way of a few simple sentences, why a previous order has been overruled. *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.*, 16 Ohio St.3d 21, 21-22, 475 N.E.2d 786 (1985). Intervenors allege that there are six simple reasons the Commission could have relied on to depart from precedent in this case. While Intervenors argue that the Commission refused to "cherry pick" components of the cost of capital in this case, Intervenors contend that is precisely what Dominion has done since the Company determines when to file an alternative regulation case as well as when to file a rate case. Furthermore, Intervenors state that they presented the only expert testimony on the rate of return which was not challenged with opposing testimony or cross-examination. Intervenors note that they offered testimony on the appropriate cost of debt, cost of equity, and capital structure to be used in this proceeding. Intervenors also note, as mentioned in their brief, that no law, rule, or Commission precedent requires that the Commission apply the rate of return from a utility's most recent base rate case to determine the rider rate. Thus, Intervenors argue that the Commission's use of Dominion's 2008 rate of return, for purposes of this proceeding, was against the manifest weight of the evidence. (Intervenors App. at 8-11.)

{¶ 17} Further, as a part of their first assignment of error, Intervenors argue that the Commission failed to give due regard to the impact of the pandemic on Dominion customers, particularly customers in northeastern Ohio. Intervenors emphasize that Cuyahoga County, in the heart of Dominion's service territory, has had significant job losses caused by the pandemic, leads the state in the number of hospitalizations and deaths from COVID-19, and ranks second in the confirmed number of COVID-19 cases. Intervenors argue that the Commission failed to consider the financial impact of the Stipulation on consumers during the pandemic and the related financial emergency. Intervenors also reason that the depreciation offset is not a benefit of the Stipulation, as it was included in Dominion's application. Intervenors add that the depreciation offset is not a revenue requirement reduction but an offset to rate base and, therefore, does not save customers \$310 million over the course of the five-year CEP. Moreover, Intervenors argue that, if Dominion had elected to file a rate case within the last 12 years, customers would have received the benefit from the more than \$300 million offset to depreciation. Intervenors submit that Dominion should not be rewarded for failing to file a rate case which allows Dominion to retain the excessive rate of return. Intervenors also contend that the \$750,000 customer assistance contribution included in the Stipulation is insufficient in the context of the hardship in Dominion's service area and, in comparison, to the rate increase customers face pursuant to the Stipulation. Finally, as an aspect of the first assignment of error, Intervenors contend that the Commission violated the regulatory principle of consumer equity by imposing new charges on Dominion's customers during a pandemic and financial crisis. (Intervenors App. at 12-16.)

{¶ 18} Dominion proclaims that Intervenors' arguments in the first assignment of error are a compilation of arguments presented in their post-hearing briefs, considered by the Commission, and addressed in the Order. The Commission, according to Dominion, correctly and explicitly found that the Stipulation benefits ratepayers and the public interest. Opinion and Order at ¶ 66. Accordingly, Dominion claims that no new arguments have been raised on rehearing which warrant the issue being revisited. More specifically,

Dominion submits that Intervenor's claims intentionally overlook that the Stipulation recommended approval of the CEP Rider, which is specifically permitted pursuant to the law and was subject to an audit which determined that the investments were prudent, and added significant customer benefits, greater than the benefits in other stipulations which approved the same type of rider. Dominion states that Intervenor's do not dispute that the Stipulation supports Dominion's obligation under R.C. 4905.22; mitigates the bill impacts of the CEP rates by incorporating the depreciation offset; establishes annual residential rate caps; provides for annual review of the lawfulness, used and usefulness, prudence, and reasonableness of CEP assets placed in service; specifies the effect of the residential rate caps on deferral authority; refines Dominion's commitment to the filing of its next base rate application; requires that Dominion file a new CEP application to continue its authority to accrue CEP-related deferrals after the effective date of new base rates and to recover CEP investments placed in service after December 31, 2023; includes Dominion's agreement to evaluate the auditor's recommended adjustments to base rate net plant balances in its next base rate case; and provides for an incremental contribution of shareholder funds to provide additional billing assistance for the Company's lower income residential customers. (Dominion Memo at 2-9.)

{¶ 19} First, the Commission will address Intervenor's arguments regarding the pandemic and its financial impact. As noted in the Opinion and Order, the Commission recognizes that some customers are being adversely impacted by the pandemic financially. Opinion and Order at ¶ 65. Financial assistance is available from various sources for Dominion's lower income customers in addition to lenient payment arrangements offered by Dominion. While it is clear that the Intervenor's disagree, the Commission finds it reasonable and more appropriate to target assistance to Dominion's customers who require some financial support, particularly during the pandemic, rather than to delay the implementation of the CEP Rider, thus increasing the overall cost of the CEP Rider, until the last quarter of 2021, as proposed by OCC, or until some unknown time in the future after the conclusion of the pandemic.

{¶ 20} Regarding the rate of return, the Commission affirms its decision as reflected in the Opinion and Order. As noted in the Opinion and Order, it has long been the Commission's practice to utilize the capital structure and cost of capital from the company's last base rate proceeding in the calculation of riders and alternative rate plans. Opinion and Order at ¶ 68. The Commission is obligated to follow its precedent. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975). The Commission finds that the record evidence supports that the CEP Rider, as reflected in the Stipulation, for CEP investments placed in service from 2011 through 2018 is appropriately reflected at the rate of return approved in Dominion's last rate case. The record demonstrates the reduction in Dominion's cost of debt did not occur until mid-2020, after the application in this proceeding was filed (OCC Ex. 3). *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 20-175-GA-AIS, Finding and Order (May 6, 2020), Report (July 2, 2020). Further, while Dr. Duann's testimony was not challenged on cross-examination, it was nonetheless opposed by Dominion in its witness testimony, as part of the Stipulation, and in the briefs of Dominion and Staff. In the Opinion and Order, the Commission specifically acknowledged the full scope and impact of revising its precedent as Intervenors proposed. Opinion and Order at ¶ 68. A closer reading of the Opinion and Order also reveals, as the Intervenors acknowledge, that the Commission found that additional consideration of this issue is warranted. While the Commission did not adopt Intervenors' cost of capital components from the testimony offered by OCC/NOPEC witness Duann, we found that the issue should be considered in a forum for interested stakeholders to comment and answer questions from the Commission. Opinion and Order at ¶ 69. In that forum, which was held on June 22, 2021, the Commission explored other processes and the associated impacts to determine the financial components to be used in future rider cases and alternative regulation plan proceedings. For these reasons, we find that, with regard to the rate of return, the Opinion and Order is not against the manifest weight of the record evidence and we, therefore, affirm this aspect of the Opinion and Order. Intervenors' first assignment of error is denied.



{¶ 21} In their second assignment of error, Intervenors assert that the Opinion and Order failed to state, in violation of R.C. 4903.09, why the Commission rejected the testimony of Intervenors' witnesses regarding three fundamental principles which, according to Intervenors, the Stipulation violated by adopting the rate of return from Dominion's last rate case. Intervenors contend that the approved rate of return violates the third part of the three-part test used to evaluate stipulations, in addition to the following fundamental regulatory principles: (a) the utility's shareholders are afforded the opportunity to achieve but not guaranteed a fair rate of return; (b) a utility's return on investment (rate of return) should be based on current market conditions such that it would allow Dominion shareholders an opportunity to earn a fair return when compared to the return if the monies were invested elsewhere; and (c) the Stipulation violates R.C. 4905.22, which requires that Dominion charge its customers rates that are just and reasonable, and R.C. 4929.02(A)(1), which requires that Dominion provide reasonably priced service. Intervenors argue that the Commission did not address these principles in the Order in violation of R.C. 4903.09. Further, the Intervenors argue that the Commission should be concerned that the decision will provoke Dominion to invest beyond the need for plant (i.e., gold plating) to reward its shareholders with more profits at customers' expense. Accordingly, Intervenors submit that the Commission should properly consider and determine that the Stipulation violates each of the aforementioned principles and revise the Stipulation to adopt Intervenors' recommended 7.20 percent pre-tax rate of return for the CEP Rider. (Intervenors App. at 16-17.)

{¶ 22} Dominion claims that Intervenors misconstrue R.C. 4903.09 and, therefore, fail to demonstrate any error. Dominion states that the purpose of R.C. 4903.09 is to enable the Ohio Supreme Court to review the decision of the Commission without reading voluminous records in Commission cases. *MCI Telecomms. Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 311, 513 N.E.2d 337, 343 (1987), quoting *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, 156 Ohio St. 360, 102 N.E.2d 842 (1951). Dominion cites case law which reasons that the Commission is not required to specifically and separately address every assertion that

may be contained in a party's brief but to set forth the factual basis and reasoning based thereon in reaching its conclusion. *See, e.g., Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 187, 532 N.E.2d 1307, 1310 (1988); *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 116, 388 N.E.2d 1370 (1979); *Allnet Commc'n Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516, 521-522 (1994). Dominion argues that the Commission's Order includes multiple paragraphs analyzing the cost of capital issues raised and sets forth the reasons prompting its decision, as required by the statute, and the rationale for rejecting Intervenor's positions. Opinion and Order at ¶¶ 68-70, 79. Intervenor, according to Dominion, presented the same points in multiple permutations. Dominion asserts that, while the Order acknowledged all the arguments and engaged them on the substance, the Commission was under no obligation to repetitively set forth the same rationale again and again under different headings. Therefore, Dominion submits that the Commission's reasoning and conclusions are clear and well-supported and, thus, there is no issue with R.C. 4903.09. The Company advocates that the Commission deny Intervenor's second assignment of error. (Dominion Memo at 9-11.)

{¶ 23} The Commission finds that Intervenor overstate the requirements of R.C. 4903.09. R.C. 4903.09 requires that the Commission provide sufficient details to explain how it reached its decision to assist the Supreme Court of Ohio in determining the reasonableness of its order. *Allnet Commc'n Serv., Inc. v. Pub. Util. Comm.*, 70 Ohio St.3d 202, 209, 638 N.E.2d 516 (1994). The Opinion and Order thoroughly addresses the evidence and the rationale followed by the Commission to reach its decision on the issues raised. Accordingly, we deny Intervenor's second assignment of error in their application for rehearing.

{¶ 24} In their third assignment of error, Intervenor contend that the \$750,000 contribution in shareholder funds to the EnergyShare program for bill payment assistance will likely provide assistance to less than 2,800 Dominion customers. Intervenor reason that the contribution is insufficient in comparison to the amount customers will pay and the profits Dominion will receive with the approval of the CEP Rider under the Stipulation. Intervenor calculate that the rate of return reflected in the Stipulation will yield Dominion

profits of \$45.5 million in the first year of rates, and \$97 million over five years. Therefore, Intervenor argue that the contribution for bill payment assistance and debt relief should be \$5 million and the Commission should modify the Stipulation accordingly on rehearing. (Intervenors App. at 18-19.)

{¶ 25} Dominion notes that neither OCC nor NOPEC presented this recommendation prior to the Commission's Opinion and Order and, therefore, it is not clear how the Order could be unreasonable or unlawful for failing to adopt a proposal that was not made. Dominion notes that Intervenor neither offer any explanation for why their witnesses or their briefs fail to raise the request made on rehearing nor contend that the contribution is not a benefit of the Stipulation. Regardless, Dominion reasons that this assignment of error is procedurally deficient and, for that reason, should be rejected by the Commission. Further, even if the assignment of error were properly presented, Dominion contends that it lacks merit. The Company notes that the CEP Rider provides recovery for many years of investments, which enable Dominion to provide service to customers and were found to be prudent and reasonable. Dominion emphasizes that the \$750,000 shareholder contribution to EnergyShare was provided with no strings attached, prior to and irrespective of the approval of the Stipulation. Dominion notes that no other settlement for a CEP Rider has included such a commitment. Dominion declares that, while Intervenor argue that the contribution was not enough, that does not constitute an argument on rehearing or a demonstration that the December 30, 2020 Opinion and Order was unreasonable or unlawful. (Dominion Memo at 11-12.)

{¶ 26} Intervenor request, in their opinion, a more reasonable and commensurate shareholder contribution of \$5 million be made to EnergyShare. In addition, Intervenor ask that the Commission direct Dominion to work with Intervenor on the elements of the additional assistance funding. The Commission is not persuaded that such a substantial increase in the shareholder contribution to EnergyShare is necessary for the Stipulation to meet the three-part test. The Commission finds that there is no evidence in the record which supports Intervenor's allegation that the Stipulation requires a \$5 million shareholder

contribution to, as a package, benefit ratepayers and the public interest, as the benefits of the Stipulation were enumerated in the Opinion and Order at Paragraph 66. Contrary to Intervenor's assertion, the benefits of the Stipulation encompass more than the potential profits which may accrue to Dominion. The Commission also notes that Intervenor did not propose a modification of the Stipulation in this manner to meet the three-part test for the Commission's consideration in written testimony, at the hearing, or in their briefs. As noted in the Order, OCC proposed several modifications to the Stipulation in its brief and testimony. Opinion and Order at ¶ 51. While making a passing reference to the amount of the shareholder contribution as insufficient, OCC did not propose an adjustment to the contribution to EnergyShare. NOPEC, in its initial brief, advocated only that the Commission reject the Stipulation and direct Dominion to file a base rate application. NOPEC did not propose modifications to the Stipulation to make the agreement reasonable, in NOPEC's view, under the three-part test. Opinion and Order at ¶ 47. Accordingly, Intervenor failed to directly raise an objection to the amount of the shareholder contribution prior to filing their application for rehearing, denying the Commission the opportunity to address the issue as a part of its consideration of the Stipulation and thereby waiving any objection by Intervenor as to the amount of the shareholder contribution. *Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 712 N.E.2d 724, 727 (1999). For these reasons, Intervenor's third assignment of error is denied.

{¶ 27} Intervenor, in their fourth assignment of error, argue that the Commission did not properly consider diversity as a component of the first prong of the three-part test used to evaluate the Stipulation. Intervenor aver that the Commission does not consistently consider the diversity of the signatory parties in its evaluation of stipulations. The Commission, according to the Intervenor, only considers the diversity of the signatory parties when a stipulation is executed by many of the parties to the case. However, Intervenor state that, when very few parties sign a stipulation, the Commission finds the lack of diversity irrelevant. *See, e.g., In re Duke Energy Ohio, Inc.*, Case No. 17-2318-GA-RDR, Opinion and Order (Apr. 25, 2018) (approving settlement signed by only the utility and

Staff); *In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, et al., Opinion and Order (Sept. 26, 2019) at ¶¶ 87-91 (approving settlement signed by only the utility and Staff and opposed by consumer representatives OCC and Ohio Partners for Affordable Energy). Intervenors note that the Stipulation was signed only by Staff and Dominion and plead that the Commission's adoption of the Stipulation is yet another demonstration that consumer advocates are not indispensable for Commission settlements. Further, Intervenors argue that OCC is vested with the statutory authority to speak on behalf of Dominion's residential consumers. Similarly, NOPEC's mission is to advocate on behalf of its residential and commercial natural gas customers. Intervenors emphasize that these are the parties that will be responsible for paying the costs of the Stipulation. For these reasons, Intervenors request that, on rehearing, the Commission modify its Order and reject the Stipulation or adopt Intervenors' recommendations to revise the Stipulation. (Intervenors App. at 19-20.)

{¶ 28} Dominion responds that the Commission has frequently stressed that the three-part test utilized by the Commission, and recognized by the Ohio Supreme Court, does not incorporate a diversity of interest component, and rejected this argument. *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order (Mar. 31, 2016) at 52; *In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, et al., Opinion and Order (Sept. 26, 2019) at ¶ 90; *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, Second Entry on Rehearing (Feb. 1, 2017) at ¶ 14; *In re Ohio Edison Co.*, Case No. 12-1230-EL-SSO, Second Entry on Rehearing (Jan. 30, 2013) at 9. The Company states that Intervenors' allegations as to indispensability are merely another way of arguing that they should have the authority to veto a stipulation. Dominion notes that this argument has also been repeatedly rejected by the Commission. *In re Columbia Gas of Ohio, Inc.*, Case No. 07-478-GA-UNC, Opinion and Order (Apr. 9, 2008) at 32 ("No one possesses a veto over stipulations, as this Commission has noted many times."); *see also In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, et al., Opinion and Order (Sept. 26, 2019) at ¶ 90; *In re Ohio Power Co.*, Case No. 14-1158-EL-ATA, Second Entry on Rehearing (Feb. 1, 2017) at ¶ 14; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opinion and Order (Feb. 19, 2014) at 10; *In re Vectren Energy*

*Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, et al., Opinion and Order (Apr. 13, 2005) at 9. Further, Dominion adds that, while Intervenors suggest that customers' interests were not adequately represented, Intervenors overlook that Staff represents the interests of customers. For these reasons, Dominion advocates that the Commission deny Intervenors' fourth assignment of error. (Dominion Memo at 12-15.)

{¶ 29} On rehearing, Intervenors argue that the Commission inconsistently considers the diversity of interests among signatory parties. The Commission disagrees. Rather, the Commission has, at times, underscored diversity in proceedings where a large number of parties were able to achieve a settlement agreement that reflects a broad coalition of competing interests, as one indicator that serious bargaining occurred. Intervenors also repeat the request of OCC that the Commission reject the Stipulation on the basis that it lacks a diversity of interest among the signatories as no consumer advocate signed the Stipulation. The Intervenors, the only other parties, and non-signatories to the Stipulation, raise no new arguments on rehearing that were not presented for the Commission's consideration and denied. Opinion and Order at ¶¶ 43-44. Intervenors have not raised any new arguments or perspective which persuades the Commission to reverse its position on this aspect of the Opinion and Order.

{¶ 30} Further, the Commission finds that incorporating a mandatory diversity of interest component for signatory parties, as proposed by Intervenors, to be infeasible and incompatible with the three-part test recognized by the Ohio Supreme Court. Imposing such a requirement overlooks Staff's obligation, as the Intervenors recognize, to balance the interests of all parties, including the interests of consumers. In addition, a mandatory diversity component would essentially grant an advocate for a faction of customers, like OCC or NOPEC, the ability for a single party to essentially nullify or veto a stipulation. The Commission has found that there is no requirement that any particular party must join a stipulation in order to comply with the first part of the three-part test. *In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR, et al., Opinion and Order (Sept. 26, 2019) at ¶ 90; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, et al., Opinion and Order

(Apr. 13, 2005) at 9. It is for these reasons that the Commission denies Intervenor's fourth assignment of error.

{¶ 31} In the fifth assignment of error, NOPEC states that the Commission's approval of the Stipulation results in unreasonable and unlawful charges for consumers.<sup>1</sup> NOPEC submits that, if the Commission believes that the rate of return can only be set in a base rate proceeding, the remedy under R.C. 4929.05 is to deny Dominion's CEP application, on the basis that the applied rate of return results in unjust and unreasonable rider rates in violation of R.C. 4929.02, 4929.05, and 4905.22. Then, NOPEC advocates that the Commission direct Dominion to file a base rate case pursuant to R.C. 4909.18. NOPEC contends that Dominion's commitment in an unrelated case to file a base rate case by no later than October 2024 is not an impediment, as the Commission directed that Dominion should file an application to establish new base distribution rates by October 2024, unless otherwise ordered by the Commission. NOPEC argues that conditions warrant the Commission ordering Dominion to file a base rate case by the end of 2021 and rejecting Dominion's CEP application. (Intervenors App. at 21-23.)

{¶ 32} Dominion notes that the law affords Dominion the option to recover its CEP investments through alternative regulation, as NOPEC acknowledged in its brief. Dominion states that NOPEC nonetheless argues that the Commission should deny Dominion this option, which the Commission specifically recognizes is available under R.C. 4929.111(D). Opinion and Order at ¶ 67. The Company submits that the Commission is a creature of statute and has no authority to act beyond its statutory powers. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51. Following the law, according to Dominion, cannot possibly be construed as grounds on which the Opinion and Order is unreasonable or unlawful. The Company posits that the Commission evaluated the rate of return applied under the Stipulation and found that the Stipulation met the requirements of R.C. 4905.22 and 4929.02 and is just and reasonable. Opinion and

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<sup>1</sup> OCC does not join in the fifth assignment of error (Intervenors App. at 4, fn. 4).

Order at ¶¶ 79-80. Accordingly, Dominion submits that, as a matter of law, the point is moot. Dominion notes that NOPEC continues to request that the Commission require Dominion to file a base rate case prior to 2024. Dominion notes that the Commission approved the stipulation filed in the Company's Tax Cuts and Jobs Act (TCJA) case, filed just a year prior, where Dominion agreed to file a rate case no later than October 2024. *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 18-1908-GA-UNC, et al. (TCJA Case), Finding and Order (Dec. 4, 2019) at ¶ 31. Furthermore, Dominion notes that the Stipulation in this case further refines the Company's commitment to file a rate case. Accordingly, Dominion advances that NOPEC has not demonstrated that the Commission should revisit its prior decision on the timing of the Company's next base rate case and, therefore, the fifth assignment of error should be denied. (Dominion Memo at 15-17.)

{¶ 33} R.C. 4929.05 clearly permits a natural gas company to recover capital investment costs, as Dominion sought in this case. We also recognize that, pursuant to the stipulation in the TCJA Case, Dominion committed to file its next application to adjust its base rates, no later than October of 2024, which, pursuant to the TCJA agreement, is considered to be the date Dominion files its notice of intent to file an application for an increase in rates. TCJA Case, Finding and Order (Dec. 4, 2019) at ¶¶ 25, 31. In this case, Dominion agreed to further refinement of the base rate case filing requirements, without any change to the due date. Opinion and Order at ¶ 39. Upon further consideration, the Commission finds that the circumstances have evolved such that it is necessary and appropriate for the Commission to modify the Stipulation to direct Dominion to file a base rate case by no later than October 2023, as opposed to October 2024. We note that, in the Finding and Order approving the TCJA stipulation, executed by Dominion, Staff, and OCC, the Commission specifically recognized that, "in order to ensure proper calibration with market conditions and other factors, \* \* \* Dominion should file an application to establish new base distribution rates by October 2024, unless otherwise ordered by the Commission." TCJA Case, Finding and Order (Dec. 4, 2019) at ¶ 31. In the pending case, Intervenor argued, and Dominion cannot deny, that, since the approval of its last base rate case in 2008, the



Company's cost of debt initially dropped from 6.50 percent to 4.23 percent and, currently, its cost of debt is 2.25 percent (OCC/NOPEC Ex. 2 at 10, footnote 18; OCC Ex. 3; Tr. at 23). *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 20-175-GA-AIS, Finding and Order (May 6, 2020), Report (July 2, 2020). As previously noted in the Opinion and Order, it has been the Commission's long-standing practice to utilize the cost of capital and capital structure approved in the utility's last base rate case in subsequent alternative rate plan and rider cases. However, in consideration of the significant decrease in the Company's current cost of debt rate since its last rate case, and considering that Dominion refinanced all of its long-term outstanding debt at the current lower rate, as well as that the agreed upon date for Dominion to file its next base rate case is nearly three years away, the Commission finds that a more expedient alignment of the Company's cost of capital and capital structure with market conditions is appropriate and necessary. This is particularly so given that it has been more than a decade since the Company's last base rate case. Accordingly, upon further consideration of the issues raised by Intervenors regarding the cost of capital, rate of return, and capital structure, the Commission finds that the Stipulation should be modified to require Dominion to file its next base rate case application by October 2023; however, all the other refinements adopted in the Stipulation regarding the process of the rate case filing shall remain in place.

{¶ 34} Intervenors, in their sixth assignment of error, contend that, to the extent that communications were made between the Staff and Commissioners, the Commission erred in its approval of the Stipulation in violation of R.C. 4903.081 and/or Ohio Adm.Code 4901-1-09. Intervenors note that, during the December 30, 2020 Commission meeting, certain Commissioners acknowledged members of Staff and thanked Staff for its assistance on this case. In support of their argument, Intervenors cite an article which asserts that when the staff of a commission enters into a stipulation which is not unanimous, the commission may unconsciously shift the burden of proof to the opponents of the settlement rather than require the utility to affirmatively demonstrate that the proposed rates are just and reasonable. Intervenors request that, considering the Commissioners' remarks, it should be

explained on rehearing to what extent the merits of the case were part of the communications referenced and whether Staff is subject to R.C. 4903.081 and Ohio Adm.Code 4901-1-09. (Intervenors App. at 23-24.)

{¶ 35} Dominion argues that Intervenors' argument, on its face, is fatally flawed. R.C. 4903.081 prohibits a Commissioner from discussing "the merits of the case" with any "party" to the proceeding unless all other parties are given notice. The Company argues that, even assuming Staff is a party for purposes of these provisions, Intervenors fail to demonstrate or even allege that an improper communication occurred in violation of the statute. Dominion contends that one cannot claim a reversible error to the extent that some hypothetical event may have occurred. (Dominion Memo at 17-19.)

{¶ 36} R.C. 4903.081 and Ohio Adm.Code 4901-1-09 direct that, after a case has been assigned a formal docket number, neither a Commissioner nor an attorney examiner associated with the case shall discuss the merits of the case with any party or intervenor to the proceeding, unless all parties and intervenors have been notified and given the opportunity of being present or a full disclosure of the communication insofar as it pertains to the subject matter of the case has been made.

{¶ 37} Intervenors have misapplied and overstated the requirements of R.C. 4903.081 and Ohio Adm.Code 4901-1-09. The Commission notes that, pursuant to Ohio Adm.Code 4901-1-10(C), Staff is specifically excluded as a party to a case, except for defined purposes, which do not include Ohio Adm.Code 4901-1-09. Furthermore, Commissioners are not prohibited from utilizing the expertise of Staff. As the Ohio Supreme Court has recognized, the cases which come before the Commission often involve complex technical issues. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 56 Ohio St.2d 220, 224, 383 N.E.2d 593 (1978) (noting that utility ratemaking "is a necessarily complex proceeding"). The Staff of the Commission consists of more than 300 persons, including various trained professionals such as accountants, engineers, lawyers, and analysts, many with years of industry experience and institutional knowledge. R.C. 4901.19. The Commission benefits from Staff's technical

understanding of complex utility matters, and Commissioners may request information from Staff regarding any number of issues without discussing the merits of a particular pending case. *See, e.g., In re The Toledo Edison Co. and The Cleveland Electric Illuminating Co.*, Case No. 92-708-EL-FOR, et al., Opinion and Order (Feb. 17, 1993) at 12 (noting Staff's role as advisor to the Commission); *In re Water and Sewer LLC*, Case No. 03-318-WS-AIR, Entry on Rehearing (Dec. 1, 2004) at 6 (stating that the Commission may rely on Staff's experience and general expertise). To foreclose Commissioners from accessing the expertise of all members of Staff, would severely limit Commissioners' access to agency expertise. Indeed, nothing in the statute or rule prohibits a Commissioner from requesting the technical assistance of Staff to facilitate the Commissioner's evaluation and analysis of a matter before the Commission. Additionally, we note that the statute and rule establish special disclosure procedures for *discussions only as to the merits of the case* and only where those discussions occur between Commissioners and parties. Intervenor fail to present any evidence of a violation of R.C. 4903.081 or Ohio Adm.Code 4901-1-09 but assert the mere potential of communications in violation. Intervenor cite the Acting Chair's remarks to Staff. The Acting Chair stated:

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.<sup>2</sup>

This is nothing more than a statement of appreciation for Staff's efforts to assist Commissioners with understanding the background of the issues in the case. Absent evidence to the contrary, public officers like the Commissioners are presumed to be acting within the limits of the agency's jurisdiction and properly performing their duties. *State ex*

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<sup>2</sup> See transcription of the Commission's December 30, 2020 Agenda Meeting, prepared by the Intervenor, which was provided as Attachment A to their joint application for rehearing. See also [https://www.youtube.com/watch?v=d\\_ozIp9-4tQ](https://www.youtube.com/watch?v=d_ozIp9-4tQ) beginning at minute 17:42.

*rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590, 113 N.E.2d 14, 19 (1953); *In re Am. Transm. Sys., Inc.*, 125 Ohio St.3d 333, 2010-Ohio-1841, 928 N.E.2d 427, ¶ 23.

{¶ 38} In addition, the Commission notes that Intervenor's imply, through the article cited in this assignment of error, that, where Staff enters into a stipulation which is not unanimous, the Commission may unconsciously shift the burden of proof to the opponents of the settlement rather than require the utility to affirmatively demonstrate that the proposed rates are just and reasonable. Intervenor's failed to introduce the article into the record or raise any concerns related to Staff's agreement to join the Stipulation in their written testimony or briefs. By waiting until their application for rehearing to make this allegation, Intervenor's deprived the Commission of an opportunity to address any alleged shift in the burden of proof. *Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 712 N.E.2d 724, 727 (1999). Intervenor's have also improperly relied on non-record evidence. Aside from these procedural deficiencies, as to Intervenor's sixth assignment of error, we reiterate the rationale set forth in the Opinion and Order, as supplemented in this Second Entry on Rehearing, which justifies the Commission's determination that the rates reflected in the Stipulation are just and reasonable. Opinion and Order at ¶¶ 66-73. For all these reasons, we deny Intervenor's sixth assignment of error.

### III. ORDER

{¶ 39} It is, therefore,

{¶ 40} ORDERED, That Intervenor's application for rehearing be granted, in part, and denied, in part, consistent with this Second Entry on Rehearing. It is, further,

{¶ 41} ORDERED, That the Stipulation be modified consistent with this Second Entry on Rehearing. It is, further,

{¶ 42} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

*Approving:*

Jenifer French, Chair

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

GNS/hac

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

Summary: Entry on Rehearing granting, in part, and denying, in part, the application for rehearing filed jointly by Ohio Consumers' Counsel and Northeast Ohio Public Energy Council of the Commission's December 30, 2020 Opinion and Order, consistent with this Second Entry on Rehearing. Upon consideration of the arguments raised on rehearing, the Commission finds that The East Ohio Gas Company dba Dominion Energy Ohio should file its next base rate case application by October 2023 rather than October 2024. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio