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 Capital Expenditure Program Rider Charges.	)))))	Case No. 21-619-GA-RDR

APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

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March 25, 2022

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The PUCO has issued an Opinion and Order adopting a settlement between Dominion and the PUCO Staff that allows Dominion to charge consumers tens of millions of dollars for capital expenditures.[1] The Settlement benefits Dominion. It does not benefit consumers. It is not in the public interest.

The PUCO once again allowed Dominion to charge consumers for an outdated, too-high 13-year-old rate of return. Dominion's return on equity (profits) is too high. And its cost of long-term debt is too high. In this regard, Dominion's actual cost for supporting its debt is just 2.29%. But the PUCO allowed Dominion to charge consumers for a cost of debt of 6.5%. That higher figure is essentially fictional. But that was OK with the PUCO Staff for a settlement and then OK for the PUCO to approve. This decision had no record support and was contrary to law.

The PUCO by law cannot approve a capital expenditure program and alternative rate plan unless they are "just and reasonable."[2] The PUCO failed to stay within the law.

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[1] Opinion and Order at ¶88 (February 23, 2022) (the "Order").

[2] R.C. 4929.05 (A)(3) and R.C. 4929.111(C).

The PUCO also unreasonably failed to protect consumers from paying too-high rates by permitting Dominion to include employee performance incentives in rates.[3]

The Opinion and Order is unreasonable and unlawful and contrary to the public interest (consumer protection). Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Order.

As explained more fully in the following memorandum in support, the PUCO's Order was unlawful and unreasonable in the following respects:

> ASSIGNMENT OF ERROR NO. 1: The PUCO erred because it did not make any finding that Dominion's 13-year old rate of return (including both return on equity and cost of debt) and financial performance incentives are "just and reasonable." The PUCO thereby violated R.C. 4929.05(A)(3) and R.C. 4929.111(C), resulting in an unreasonable and unlawful decision.
>
> ASSIGNMENT OF ERROR NO. 2: The PUCO erred by using, without record support, Dominion's 13 year-old rate of return (including both return on equity and cost of debt), and including employee performance incentives, in rates charged consumers. The PUCO thereby violated R.C. 4903.09 and binding Ohio Supreme Court precedent in *Tongren* and *Suvon*,[4] resulting in an unreasonable and unlawful decision.
>
> ASSIGNMENT OF ERROR NO. 3: The PUCO erred by approving a settlement that does not benefit ratepayers and the public interest, thereby resulting in an unreasonable and unlawful decision. The only evidence in the record is that the rates the PUCO authorized Dominion to charge consumers under its capital expenditure programs are unjust and unreasonable.
>
> ASSIGNMENT OF ERROR NO. 4: The PUCO erred by approving a settlement that violates important regulatory principles and practices, resulting in an unreasonable and unlawful decision. By authorizing Dominion to charge consumers rates under its capital expenditure program that are unjust and unreasonable, the PUCO violated important regulatory principles and practices in R.C. 4905.22, 4929.05(A)(3), and R.C. 4929.111(C).

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[3] Order at ¶72.

[4] *See Tongren v. PUC*, 85 Ohio St.3d 87, 1999-Ohio-206, 706 N.E.2d 1255 ("*Tongren*"); *See In re Suvon, L.L.C.*, 2021-Ohio-3630 ("*Suvon*").

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The PUCO's order in this case fails consumers. First, R.C. 4903.09 requires that PUCO decisions must be based on *findings of fact* and written opinions setting forth the reasons prompting the decisions arrived at, based upon said *findings of fact*.[5] The PUCO's decision in this case to approve a settlement that allows Dominion to continue using a 13 year-old rate of return (that includes both the return on equity (profits) and cost of long-term debt) is not based on record evidence. It cannot be because there is no record evidence to support it.

Similarly, the PUCO's decision to allow Dominion to include employee performance incentives in rates charged to consumers is not based on record evidence. This is because the PUCO unreasonably and incorrectly determined that Dominion's three employee incentive programs (LIP, LTIP, and AIP)[6] are linked to safety, reliability, etc. This despite the fact that Dominion's testimony clearly states that incentive programs are *strictly* tied to financial

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[5] R.C. 4903.09.

[6] Leadership Incentive Plan ("LIP"); Long-term Incentive Plan ("LTIP"); and Annual Incentive Plan ("AIP").

performance incentives.[7] In other words, they don't benefit Dominion's consumers.

Second, the PUCO failed to find (and could not find based on the record) that using Dominion's 13 year-old rate of return and return on equity rates as part of its capital expenditure program and alternative rate plan is "just and reasonable" as required under R.C. 4929.05(A)(3) and R.C. 4929.111(C).

Third, the PUCO failed to find that the settlement violates the criteria under which settlements are evaluated. This settlement does not benefit consumers or the public interest. It violates important regulatory principles and practices.

The PUCO should grant OCC's Application for Rehearing as further explained below to protect consumers from overpaying for gas utility service.

II. MATTERS FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred because it did not make any finding that Dominion's 13-year old rate of return (including both return on equity and cost of debt) and financial performance incentives are "just and reasonable." The PUCO thereby violated R.C. 4929.05(A)(3) and R.C. 4929.111(C), resulting in an unreasonable and unlawful decision.

The PUCO's decision to approve Dominion's 13 year-old rate of return (including both return on equity and cost of long-term debt) and financial performance incentives is unreasonable and unlawful.[8] The PUCO's Order states that "[i]t is the Commission's practice to utilize the cost of capital and capital structure approved in the utility's last rate case in subsequent alternative rate plan and rider proceedings. The cost of capital components determined in the Company's last base rate case were used to calculate Dominion's last CEP Rider revenue requirement. And this approach is consistent with the

[7] Dominion Ex. 4 (the Direct Testimony of Celia B. Hashlamoun) at 8.

[8] R.C. 4903.10.

Commission's approval of the CEP Rider for Columbia Gas of Ohio, Inc."[9] But the PUCO's past practice is not a substitute for the legal standard under Ohio law, R.C. 4929.05(A)(3) and R.C. 4929.111(C).

Under these statutes, the PUCO must find that capital expenditure programs are "just and reasonable." Using the outdated and inflated rate of return that was set more than 13 years ago, without any supporting evidence, fails to show that it is just and reasonable to use in 2022. (The *only* evidence in the record, was the uncontroverted testimony of OCC Witness Duann that the rates were *un*just and *un*reasonable.)[10] Using an outdated and inflated rate of return in setting rates means that consumers pay more than they should for Dominion's capital expenditures. Dominion gets a windfall and consumers get a higher bill.

The same is true for the inclusion of financial performance incentives (LIP, LTIP, and AIP). In this regard, the PUCO simply stated: "As the Commission has previously found, not all performance incentives must be removed from a CEP rider."[11] Again, the PUCO's past practice is not a substitute for the legal standard under Ohio law, R.C. 4929.05(A)(3) and R.C. 4929.111(C). Under these statutes, the PUCO *must make a finding in this case* that Dominion's capital expenditure program (including the use of financial performance incentives in consumers' rates) is "just and reasonable." It did not do so. Thus, consumers pay more than they otherwise should. Dominion's shareholders benefit, consumers pay. This is neither just nor reasonable.

The PUCO should grant rehearing on Assignment of Error No. 1.

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[9] Order at ¶58.

[10] OCC Ex. 2.

[11] Order at ¶72.

ASSIGNMENT OF ERROR NO. 2: The PUCO erred by using, without record support, Dominion's 13 year-old rate of return (including both return on equity and cost of debt), and including employee performance incentives, in rates charged consumers. The PUCO thereby violated R.C. 4903.09 and binding Ohio Supreme Court precedent in *Tongren* and *Suvon*,[12] resulting in an unreasonable and unlawful decision.

The PUCO's decision authorizing Dominion to use, without record support, its 13 year-old rate of return (including both return on equity and cost of debt), and to include employee performance incentives, in rates charged consumers is unreasonable and unlawful. It violates R.C. 4903.09 and is inconsistent with Ohio Supreme Court ("Court") precedent in *Tongren* and *Suvon*.[13]

Under R.C. 4903.09, PUCO decisions must be based on *findings of fact* and written opinions setting forth the reasons prompting the decisions arrived at, based upon said *findings of fact*.[14] This requirement was confirmed by the Ohio Supreme Court in *Tongren*,[15] and most recently in *Suvon*.[16]

In *Tongren* and *Suvon*, the Court determined that a PUCO order must provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion."[17] The Court also clarified that some factual support for PUCO determinations must exist in the record – an obligation that the

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[12] *See Tongren v. PUC*, 85 Ohio St.3d 87, 1999-Ohio-206, 706 N.E.2d 1255 ("*Tongren*"); *See In re Suvon, L.L.C.*, 2021-Ohio-3630 ("*Suvon*").

[13] *Id.*

[14] *Id.*

[15] *Tongren* at 89-90.

[16] *Suvon* at 2-3, 9-10 (By statute, PUCO must file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at").

[17] *Tongren* at 89-90; *Suvon* at 2-3, 9-10; *see also MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 311, 513 N.E.2d 337, 344; *Allnet Communications Serv., Inc. v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209, 638 N.E.2d 516, 521.

PUCO itself has recognized in its orders.[18] In this case, the PUCO failed to provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning it followed in reaching its conclusion."

The PUCO's decision violates R.C. 4903.09, *Tongren*, and *Suvon* because it approved the settlement without citing to *evidence* in the record that the rates charged consumers under Dominion's capital expenditure program are just and reasonable. (In point of fact, it could not have. The *only* evidence in the record, was the uncontroverted testimony of OCC Witness Dr. Duann that the rates were *un*just and *un*reasonable.)[19] Instead, the PUCO simply adopted Dominion's 13 year-old rate of return in setting the rates charged to consumers.[20] To support this, the PUCO merely states that "is has been the Commission's longstanding practice to utilize the approved rate of return from a utility's last rate case in subsequent alternative regulation and rider proceedings."[21] But the PUCO's declaration that it is doing what it always has done is no substitute for record support (which is what the law requires). The PUCO still has to determine that rates charged to consumers now (in 2022) by using a rate of return set in a rate case 13 years ago (2008) is just and reasonable. Without record support, the PUCO's decision is unreasonable and unlawful.

The PUCO's decision to approve Dominion's CEP charge to consumers to include costs associated with employee performance incentives (the LIP, LTIP, and AIP)

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[18] *See Tongren* at 89-90; *Suvon* at 9-10; *see, e.g., In re Petition of Studer & Numerous Other Subscribers of Neapolis Exchange of ALLTEL Ohio*, PUCO Case No. 88-481-TP-PEX, Entry on Rehearing (September 6, 1990).

[19] OCC Ex. 2.

[20] *Id.* at ¶14.

[21] Order at ¶71.

is without record evidence.[22] The PUCO Order states that "the inclusion of LTIP and AIP costs does not violate any important regulatory principle or practice. As the Commission has previously found, not all performance incentives must be removed from a CEP rider."[23] Although the PUCO did cite to Dominion testimony that "the AIP supports a broad range of goals, including efficiency and safety goals that benefit customers and the public,"[24] the PUCO misinterpreted the testimony. Dominion's Ex. 4 at 10 (the Direct Testimony of Celia B. Hashlamoun), which is cited in the PUCO Order discusses only the AIP:

> A. Yes. In addition to the LTIP and LIP, DEO currently incurs costs related to its Annual Incentive Plan (AIP). There are capitalized costs included in CEP projects for AIP because as previously stated, under GAAP, AIP costs will naturally follow the labor costs supporting CEP. The AIP program reflects the company's application of pay-for-performance principles tied to results that align with the interests of our customers, employees, shareholders and the communities we serve. The AIP program plays an important part in maintaining market-competitive total compensation for all employees and places a portion of compensation at risk through performance goals. The AIP is structured to focus the workforce on goals that align with corporate values and drive toward safe and efficient operations, reliable service for our customers, and the achievement of financial results. The objective is to strive for targeted performance levels in the areas of safety, diversity and inclusion, and environmental benefits; financial performance; and other operating and stewardship targeted performance, by emphasizing teamwork on common goals. The AIP program is focused on ensuring that these goals are achieved within a culture of economic efficiency and cost control."

[22] Order at ¶72.

[23] *Id.*

[24] *Id.*

In contrast, Dominion's testimony admits that the LIP and LTIP *are tied to financial performance* and nothing else.[25] That is why Dominion agreed to remove them.

Q28. Can you briefly explain the LTIP?

A. The LTIP for executives provides focus on long-term performance and strategic goals as well as retention. The LTIP utilizes restricted stock awards with time-based vesting and cash awards based on financial performance metrics.

Q29. Can you briefly explain the LIP?

A. The objective of the LIP is retention of certain key non-officer employees through restricted stock grants.

This testimony says nothing about consumer or public benefit from the LTIP and LIP. In citing to Dominion's Ex. 4 at 10, the PUCO did not cite to record evidence to support permitting the LIP and LTIP financial performance incentives.

The PUCO does not cite to record *evidence* in this case to support its decision. It just cites "past precedent." Past precedent is not sufficient to meet the requirements of R.C. 4903.09, *Tongren,* and *Suvon* for record evidence. And the citation to the record that the PUCO did use does not support its finding. This is particularly the case in this proceeding when the only record evidence is that provided by OCC – that using the rate of return set 13 years in setting rates charged to consumers now is unjust and unreasonable.

The PUCO should grant rehearing on Assignment of Error No. 2.

[25] Dominion Ex. 4 (the Direct Testimony of Celia B. Hashlamoun) at 8.

ASSIGNMENT OF ERROR NO. 3: The PUCO erred by approving a settlement that does not benefit ratepayers and the public interest, thereby resulting in an unreasonable and unlawful decision. The only evidence in the record is that the rates the PUCO authorized Dominion to charge consumers under its capital expenditure programs are unjust and unreasonable.

One of the criteria for evaluating a settlement's reasonableness is whether the settlement benefits ratepayers and the public interest.[26] Here, the PUCO authorized Dominion to use its 13 year-old rate of return (including both return on equity and cost of debt) in its charges on consumers for its capital expenditure program. But the *only* evidence in the record regarding using the 13 year-old rate of return was the uncontroverted testimony of OCC Witness Dr. Duann. He testified that the 13 year-old rates were *un*just and *un*reasonable.[27] Allowing Dominion to charge consumers for rates that are unjust and reasonable does not benefit ratepayers and the public interest.

Neither does authorizing Dominion to charge consumers for financial performance incentives. Dominion's LIP and LTIP are tied to financial performance and nothing else.[28] Dominion's AIP is partially tied to financial performance.[29] Neither ratepayers nor the public interest benefit from authorizing Dominion to charge consumers for financial performance incentives.[30] Consumers just pay more.

The PUCO should grant rehearing on Assignment of Error No. 3.

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[26] *See, e.g.,* Order at ¶32.

[27] OCC Ex. 2.

[28] Dominion Ex. 4 (the Direct Testimony of Celia B. Hashlamoun) at 8.

[29] *Id.* at 10.

[30] *See* Direct Testimony of Mr. Kerry Adkins on Behalf of the Ohio Consumers' Counsel at 4 (September 14, 2021) at 4-19.

ASSIGNMENT OF ERROR NO. 4: The PUCO erred by approving a settlement that violates important regulatory principles and practices, resulting in an unreasonable and unlawful decision. By authorizing Dominion to charge consumers rates under its capital expenditure program that are unjust and unreasonable, the PUCO violated important regulatory principles and practices in R.C. 4905.22, 4929.05(A)(3), and R.C. 4929.111(C).

One of the criteria for evaluating a settlement's reasonableness is whether the settlement violates any important regulatory principles or practices.[31] The settlement here violates important regulatory principles and practices. It should not have been approved.

Ohio law governing this case – R.C. 4905.22, 4929.05(A)(3), and R.C. 4929.111(C) – requires that the rates Dominion charges consumers for its capital expenditure program be just and reasonable. OCC Witness Dr. Duann testified that the 13 year-old rates used in the settlement and authorized by the PUCO are *un*just and *un*reasonable.[32] OCC Witness Duann's testimony was uncontroverted. Thus there can be no doubt but that the settlement violates important regulatory principles and practices.

Further, Dominion's own testimony confirms it will charge consumers for financial performance incentives under the settlement. Dominion's LIP and LTIP are tied to financial performance and nothing else.[33] Dominion's AIP is partially tied to financial performance.[34] Consumers do not benefit from Dominion charging them for financial performance incentives.[35] Consumers just pay more. Authorizing Dominion to

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[31] *See, e.g.,* Order at ¶32.

[32] OCC Ex. 2.

[33] Dominion Ex. 4 (the Direct Testimony of Celia B. Hashlamoun) at 8.

[34] *Id.* at 10.

[35] *See* Direct Testimony of Mr. Kerry Adkins on Behalf of the Ohio Consumers' Counsel at 4 (September 14, 2021) at 4-19.

charge consumers for that which they derive no benefit violates the important regulatory principles and practice stated in R.C. 4905.22, 4929.05(A)(3), and R.C. 4929.111(C) – rates must be just and reasonable.

The PUCO should grant rehearing on Assignment of Error No. 4.

III. CONCLUSION

"[T]he purpose of the PUCO * * * is to protect the customers of public utilities."[36] The PUCO can protect consumers by granting rehearing and rejecting or modifying the settlement and adopting OCC's consumer-protection recommendations.

Respectfully submitted,

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[36] *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 Application for Rehearing was served on the persons stated below via electronic transmission, this 25th day of March 2022.

<u>/s/ William J. Michael</u>
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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