

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of The)	
East Ohio Gas Company d/b/a)	Case No. 21-1095-GA-RDR
Dominion Energy Ohio to Adjust its)	
Pipeline Infrastructure Cost Recovery)	
Charge and Related Matters.)	

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

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I. INTRODUCTION

Dominion Energy Ohio (“Dominion”) proposes to increase the rates consumers pay to fund its pipeline infrastructure replacement (“PIR”) program (that has been ongoing for fourteen years).¹ Dominion seeks approval to increase the monthly charge to its 1.2 million residential customers by more than 12% to \$16.81² (a total charge of \$201 per year to each of its residential consumers) for program spending for calendar year 2021.

But Dominion's increase is based on earning excessive profits on its investment – relying on a thirteen-year-old pre-tax rate of return (9.91%).³ It is neither just nor reasonable to require Dominions' consumers to pay rates that are based on an excessive 9.91% pre-tax rate of return.⁴

¹ DEO Ex. 1.0, Application to Adjust the Pipeline Infrastructure Replacement Cost Recovery Charge (“Application”) at 2 (February 25, 2022).

² DEO Ex. 1.0, Attachment B.

³ See, OCC Ex. 2.0, Consumer Protection Comments by Office of the Ohio Consumers' Counsel (March 23, 2022).

⁴ OCC. Ex. 1.0, Testimony of Daniel J. Duann at 4-5 (March 31, 2022).

This stale and unreasonable pre-tax rate of return will result in consumers overpaying (approximately \$45.8 million over a 12-month period).⁵ It also allows Dominion to earn profits that are too high for current financial market conditions. If the application were approved as filed (which it should not be), Dominion will unreasonably collect a cost of debt from consumers (6.50%) that is nearly three times its actual cost of debt (2.29%).⁶

Overcharging consumers for utility services violates Ohio law which requires that all utility rates be just and reasonable.⁷ Dominion's use of an outdated and inflated rate of return that requires consumers to pay more than is just and reasonable to enrich the utility is troublesome at any time. But it is especially unconscionable during a pandemic, a period of rising gas prices, and a time of the highest rate of inflation in forty years.

Dominion's filed application, requesting to continue charging consumers an outdated and inflated rate of return, should be denied, or in the alternative, modified. The PUCO reasonably could protect consumers by adjusting Dominion's rate of return in this proceeding. To protect consumers, the PUCO should adopt Office of the Ohio Consumers' Counsel's ("OCC") recommendation for a reasonable pre-tax rate of return of no higher than 7.20% for Dominion's pipeline infrastructure replacement program. Adopting a just and reasonable pre-tax rate of return of 7.20% will protect consumers at this challenging time while still allowing Dominion to continue its previously-approved pipeline infrastructure replacement program.

⁵ OCC Ex. 1.0 (Duann Testimony) at 6.

⁶ OCC Ex. 1.0 (Duann Testimony) at 6, Footnote 4.

⁷ See R.C. 4905.22; R.C. 4929.05(A)(3).

II. RECOMMENDATIONS

A. To protect consumers, the PUCO should find that utilizing Dominion's proposed rate of return as set in its last base rate case thirteen years ago is unjust and unreasonable and should not be adopted.

1. Dominion has the burden of proof and has failed to demonstrate its proposed pre-tax rate of return of 9.91% is just and reasonable in setting consumer charges.

Dominion proposes to use the rate of return that was set 13 years ago in Case No. 07-829-GA-AIR in charging customers for the pipeline investments in this application. Dominion filed this case under Revised Code 4929.05 governing approval of natural gas company alternative rate plans. Revised Code 4929.05(A)(3) expressly provides that alternative rate plans must be just and reasonable. And Revised Code 4929.05(B) provides that the utility has the burden of proof.

Dominion did not sustain this burden of proof. Neither Dominion's application, the testimony of Dominion's witness,⁸ or the testimony of the PUCO Staff witness⁹ provide any factual support for using the pre-tax rate of return of 9.91%. PUCO Staff failed to take any corrective actions regarding the unjust and unreasonable rate of return used in setting the pipeline infrastructure charges.¹⁰ Dominion and the PUCO Staff have provided no rate of return expert witness or any testimony (or comments) regarding Dominion's current actual cost of long-term debt and estimated cost of equity.¹¹

⁸ DEO Ex. 2.0, Supplemental Direct Testimony of Lori S. Parker on Behalf of the East Ohio Gas Company d/b/a Dominion Energy Ohio (March 31, 2022).

⁹ Staff Ex. 1.0, Prefiled Testimony of Jonathan J. Borer on Behalf of the Staff of the Public Utilities Commission of Ohio Rates and Analysis Department (March 31, 2022). (The Staff witness does not opine in any way on the rate of return issue).

¹⁰ Staff Ex. 2.0, Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (March 23, 2022).

¹¹ OCC Ex. 1.0 (Duann Testimony) at 8.

OCC is the only party in this case to address and quantify issues related to a proper pre-tax rate of return applicable to Dominion’s pipeline infrastructure replacement program.¹² OCC’s testimony is undisputed. Specifically, OCC demonstrated that a reasonable pre-tax rate of return for Dominion should be no higher than 7.20% based on Dominion’s actual cost of debt of 2.29% and cost of equity of 9.36%.¹³ More importantly, the PUCO has also concluded that “the Company’s current cost of debt rate has significantly decreased since its last rate case “¹⁴ and that the cost of capital has recently fallen.¹⁵

2. The PUCO is not required to use the rate of return set 13 years ago in Dominion’s last rate case and the PUCO’s past practice cannot justify unreasonable and unjust rates that harm consumers.

Dominion asserts that the PUCO should use the cost of capital and capital structure approved in the utility’s last base rate case because that is the PUCO’s long-standing practice.¹⁶ In recent cases, the PUCO did rely on past “practice” in setting the pre-tax rate of return used for certain rider cases. But the PUCO is not required to do this. The PUCO is not required to use the rate of return decided in the last rate case for subsequent rider cases or any other proceedings that involve a return on rate base.¹⁷ Even

¹² See, OCC Ex. 1.0 (Duann Testimony).

¹³ OCC Ex. 1.0 (Duann Testimony) at 10.

¹⁴ PUCO Case No. 21-619-GA-RDR, Opinion and Order at 28 (February 23, 2022). See also, the PUCO’s Opinion and Order in Case No. 19-468-GA-ALT at 41, where the PUCO recognized Dominion’s “decrease in the cost of debt and the resultant impact on the [rider] revenue requirement” (December 30, 2020).

¹⁵ PUCO Case No. 21-619-GA-RDR, Opinion and Order at 21.

¹⁶ DEO Ex. 2.0 at 3.

¹⁷ OCC Ex. 1.0 (Duann Testimony) at 8. See, *In re Complaint of Suburban Natural Gas Company*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425; *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 and *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 21, 21–22, 16 OBR 371, 475 N.E.2d 786 (1985).

if the so-called past practice can be considered, the reliance on past practice is mainly for regulatory efficiency and consistency. But reliance on past practice is not a substitute for exercising sound policy and regulatory judgment.

No law, rule, or PUCO precedent requires that the PUCO apply the rate of return from a utility's most recent base rate case to determine a rider rate. Instead, the proper policy and regulatory standards for the PUCO in ratemaking should always be:

- The statutory requirements (that is, an alternative rate plan such as Dominion's infrastructure replacement program must be just and reasonable.)¹⁸
- The public interest (such as utility consumers, especially those at-risk population, should have adequate and affordable utility services)¹⁹
- Established case law and regulatory principles (such as the rate of return should be based on current market conditions and returns available to other entities with comparable risks).²⁰

Adherence to PUCO past practice should not be used as an excuse for ignoring important legal and regulatory requirements and responsibility in ratemaking. Especially when applying past practice will obviously lead to unjust and unreasonable outcomes for

¹⁸ R.C. 49229.05(A)(3), expressly providing that alternative rate plans must be just and reasonable.

¹⁹ R.C. 4905.22.

²⁰ *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923): "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *See also, In re Application of Dayton Power & Light Co.*, Case No. 78-92-EL-AIR, Opinion & Order (March 9, 1979) ("It is not the function of this Commission to guarantee a particular rate of return to an applicant utility but merely to afford the company an opportunity to earn a fair rate of return.") (quoting Case No. 76-704-GA-CMR (June 29, 1977)). *See also*, OCC Ex. 1.0 (Duann Testimony) at 7-8.

consumers. As demonstrated by OCC in several recent cases, a rate of return of 9.91% based on cost of capital components set 13 years ago under vastly different market conditions is outdated and unreasonable.²¹

Use of the utility's most recently-approved base rate case rate of return might make sense when the utility's most recent base rate case was in fact recent. But here, Dominion's approved rate of return was approved 13 years ago in a substantially different financial climate. While the path of least resistance might be to simply rubber stamp the utility's 13-year-old rate of return, equity and reasonableness require the PUCO to consider whether charging customers that rate remains justified—and it does not, for all the reasons explained herein.

The PUCO's "precedent," in its role as judge, should change with the times to provide justice, and the legal standard involving precedent allows for that. An assessment of this point of law recently was provided by the Ohio Supreme Court in *In re Complaint of Suburban Gas Company*,²² in which the Court stated:

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

²¹ *See, e.g.*, PUCO Case Nos. 19-468-GA-ALT and 20-1634-GA-ALT.

²² 162 Ohio St.3d 162, 169, 2020-Ohio-5221 ¶ 29, 164 N.E.3d 425 (2020) (internal citations omitted).

The PUCO clearly has the authority to depart from past precedent as long as it explains its reasoning.²³ That is part of the PUCO's role in administering justice. In this case, the reasoning is simple: (1) Dominion's existing 6.5% cost of debt used for ratemaking purposes is 13 years old, (2) Dominion's current cost of debt is 2.29%, (3) Dominion still is charging its customers 6.5% for the cost of debt through base rates, and (4) by doing so, Dominion is enriched by windfall profits and debt costs that far exceed current obligations.

Dominion has had many opportunities over the last two years in several rider cases to propose and demonstrate a just and reasonable rate of return applicable in setting its rider charges.²⁴ Dominion refused to do so. Dominion should have recognized that any reasonable rate of return under current market conditions will be much lower than the 9.91% it currently charges. Dominion chose to earn more unwarranted profits at the expense of its customers, including its 1.2 million residential consumers. The PUCO should not allow or help Dominion to continue this.

²³ See, *In re Complaint of Suburban Natural Gas Company*, 162 Ohio St.3d 162, 2020-Ohio-5221, 164 N.E.3d 425; *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 and *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 21, 21-22, 16 OBR 371, 475 N.E.2d 786 (1985).

²⁴ See, e.g., PUCO Case Nos. 19-468-GA-ALT and 20-1634-GA-ALT.

3. The rate case filing requirement ordered by the PUCO does not eliminate the need to adopt a just and reasonable rate of return for use in setting consumer charges.

In its Opinion and Order in Case No. 21-619-GA-RDR, the PUCO directed Dominion to file a base rate case no later than October 2023, a year earlier than previously determined.²⁵ This modification might bring some relief to Dominion's 1.2 million residential consumers. But there is no guarantee about the timing or the outcome of the yet-to-be-filed base rate case. Even under the most optimistic assumptions about the filing and decision of the rate case, an updated rate of return will not materialize until the end of 2024. The flow-through of this updated rate of return to the pipeline infrastructure replacement charges may be further delayed. In other words, the PUCO's objective of "a more expedient alignment of the Company's cost of capital and capital structure with the market conditions"²⁶ will not be achieved for approximately three more years.

There is no reason to ask the residential consumers served by Dominion to continue to pay this excessive and unreasonable pre-tax rate of return of 9.91%. The PUCO's modification of the timing of the filing of the Utility's next base rate case is a further indication of the need to update the rate of return sooner rather than later. Consumers continue to overpay while the PUCO waits until Dominion's next rate case to consider the rate of return embedded in the PIR revenue requirement, as its witness proposes.²⁷

²⁵ PUCO Case No. 21-619-GA-RDR, Opinion and Order at 28 (February 23, 2022).

²⁶ *Id.*

²⁷ DEO Ex. 2.0 at 3 (March 31, 2022).

B. The PUCO should adopt an updated rate of return of 7.20%, as recommended by OCC, to protect consumers.

1. OCC is the only party to address and quantify a just and reasonable rate of return and its recommended rate of return of 7.20% should be adopted for use in setting consumer charges.

As discussed earlier, both Dominion and the PUCO Staff chose to ignore OCC's recommendation for a reasonable pre-tax rate of return under current financial market conditions and Dominion's current business and financial risks. OCC is the only party to demonstrate that the return on equity component of Dominion's rate of return no longer reflects Dominion's current financial risks and is far higher than recent returns on equity for comparable utilities. OCC's witness testified that Dominion's return on equity should be no higher than 9.36% instead of the 10.38% embedded in Dominion's proposed rate of return.²⁸ Similarly, OCC's witness showed that Dominion's outdated rate of return includes an embedded cost of debt component of 6.50%, since its actual cost of debt is only 2.29%, as shown in DEO's own filing with the PUCO.²⁹ Taken together (updated return on equity and current cost of debt), the OCC expert showed conclusively (and exclusively) that Dominion's updated pre-tax rate of return should be no more than 7.2%.³⁰

2. Adopting a 7.20% pre-tax rate return will save consumers approximately \$45.8 million annually.

OCC also demonstrated that the use of the 9.91% pre-tax rate of return proposed by Dominion (vs. the 7.20% pre-tax rate of return OCC recommends) would increase the

²⁸ OCC Ex. 1.0 (Duann Testimony) at 9-10.

²⁹ *Id.* at 9.

³⁰ *Id.* at 10.

PIR Rider charges to consumers by approximately \$45.8 million for the twelve-month period under review in this case.³¹ Conversely, adopting the 7.20% pre-tax rate of return, as recommended by OCC, will save Dominion's customers \$45.8 million over the next twelve months. For Dominion's 1.2 million residential consumers, this will translate into a monthly saving of \$2.82.³² There is no justification, when many Ohioans are struggling to pay their monthly bills, for Dominion to keep approximately \$45.8 million in excessive profits million simply because the PUCO refuses to adopt an updated rate of return.

3. Adopting a reasonable 7.20% pre-tax rate of return will not disrupt Dominion's pipeline infrastructure program and will still allow Dominion to earn reasonable profits and cover its actual cost of debt.

The PUCO's adoption of an updated and reasonable rate of return will not jeopardize Dominion's pipeline infrastructure replacement program. There is no evidence presented in any of Dominion's rider proceedings that the utility cannot continue its pipeline infrastructure replacement program if a lower rate of return, such as the 7.20% recommended by OCC, were adopted.

The pre-tax rate of return of 7.20%, as demonstrated by OCC, is just and reasonable. It will allow Dominion to cover its actual cost of debt of 2.29%. It will also allow Dominion to earn a return of 9.36% on equity investment that is comparable to the

³¹ *Id.* at 10-11.

³² *Id.* at 11.

return earned on equity investments with comparable risk. This proposed rate of return of 7.20% recommended by OCC is consistent with sound regulatory principles.³³

III. CONCLUSION

Dominion's filed application, requesting to continue charging consumers an outdated and inflated rate of return through single issue ratemaking, should be denied or modified. Single issue ratemaking, coupled with base distribution rates that have not been reviewed in thirteen years, is not good public policy. OCC recommends that the PUCO adopt a reasonable pre-tax rate of return of no higher than 7.20% (as supported by the only witness testifying on rate of return in this proceeding) in updating Dominion's Rider PIR revenue requirement.

The PUCO should find in this case that Dominion's use of an outdated and inflated rate of return set 13 years ago is neither just nor reasonable. The PUCO should take the opportunity presented in this annual rider update to also update of the rate of return embedded in the PIR revenue requirement. Equity and reasonableness require the PUCO to consider whether charging consumers a rate of return set 13 years ago remains justified—and it does not, for the reasons explained above.

³³ *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923). See, *In re Application of Columbus S. Power Co.*, Case No. 11-346-EL-SSO, Opinion & Order (August 8, 2012) (while the utility “should have the opportunity to earn a reasonable rate of return, there is not a right to a guaranteed rate of return”); *In re Application of Dayton Power & Light Co.*, Case No. 78-92-EL-AIR, Opinion & Order (March 9, 1979) (“It is not the function of this Commission to guarantee a particular rate of return to an applicant utility but merely to afford the company an opportunity to earn a fair rate of return.”) (quoting Case No. 76-704-GA-CMR (June 29, 1977)). See also, OCC Ex. 1.0 (Duann Testimony) at 7.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief for Consumer Protection was served on the persons stated below via electronic transmission, this 20th day of April 2022.

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