

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The PUCO's Second Entry on Rehearing fails consumers and is unlawful.¹ OCC has demonstrated that it is unreasonable and unlawful to use Dominion's more than 13 year-old capital structure and cost of capital from Dominion's last base rate proceeding in calculating the capital expenditure charge. In response, the PUCO says merely that that has "long been [its] practice."² But it hasn't been. In fact, it had been the PUCO's practice and precedent that where rates were set more than three years ago, a new calculation should be made.³ Because the PUCO departed from this precedent without explanation, the Second Entry on Rehearing is wrong and unlawful.

¹ Second Entry on Rehearing (July 27, 2022).

² *Id.* at para. 28 (citations omitted).

³ *See, e.g.*, Case No. 05-1194-EL-UNC, Finding and Order (December 14, 2005) at paras. 7, 8 ("The Companies propose to include carrying charges on the net under recovery or net over recovery of TCRR revenues using each company's weighted average cost of capital. The Companies propose that the rate of equity to be included in the calculation be the rate established in each company's last rate case. The Commission disagrees. The Commission issued its decision in Columbus Southern's last base rate case proceeding in May 1992, more than thirteen years ago. The Commission finds that the financial landscape has changed greatly since the early 1990s. We find it appropriate to use a more recent review of the cost of capital.") (italics added); Case No. 10-155-EL-RDR, Entry on Rehearing (October 22, 2010) at para. 9; *see also* O.A.C. 4901:1-15-35, Appx. at (B)(7); *see also* Case No. 81-146-ET-AIR, Opinion and Order (March 17, 1982) at para. 104 ("It has always been the Commission's policy in determining the yield component of the return on common equity to use the most recent data available. We do not believe that the use of three year old yields, although weighted against more recent data, complies with our goal of determining a current cost of equity.").

The Second Entry on Rehearing is unlawful and contrary to consumer protection. Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Second Entry. As explained more fully in the following memorandum in support, the PUCO's Second Entry on Rehearing was unlawful in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred in its Second Entry on Rehearing by unlawfully departing from precedent without explanation in using Dominion's 13 year-old rate of return and return on equity rates for developing charges to consumers.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

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

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215-4213
Telephone [Michael]: (614) 466-1291
Telephone [Wilson]: (614) 466-1292
William.Michael@occ.ohio.gov
Ambrosia.Wilson@occ.ohio.gov
(willing to accept service by e-mail)

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

I. INTRODUCTION

OCC demonstrated in its first application for rehearing that 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.⁴ The PUCO's decision in this case to use Dominion's 13 year-old rate of return and return on equity is not based on record evidence, and it cannot be because there is no record evidence to support it. Second, the PUCO failed to find that Dominion's 13 year-old rate of return and return on equity for capital expenditure programs and alternative rate plans are "just and reasonable" as required under R.C. 4929.05(A)(3) and R.C. 4929.111(C).

There is no real dispute on either point. Instead, the PUCO did not adopt them simply because it purportedly followed its precedent, saying "it has long been the [PUCO's] practice to utilize the capital structure and cost of capital from the company's last base rate

⁴ R.C. 4903.09.

proceeding in the calculation of riders and alternative rate plans.”⁵ But the PUCO has gotten its precedent wrong. And in doing so, it has violated Ohio law.

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

II. MATTER FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred in its Second Entry on Rehearing by unlawfully departing from precedent without explanation in using Dominion’s 13 year-old rate of return and return on equity rates for developing charges to consumers.

The PUCO’s decision is unlawfully based on nothing more than its (mistaken) view of its “precedent” to use Dominion’s 13 year-old rate of return and return on equity. By using Dominion’s 13 year-old rate of return and return on equity, the PUCO unlawfully violated binding Ohio Supreme Court precedent in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975) and its progeny. The Second Entry on Rehearing is unlawful.

As the PUCO itself recognized,⁶ the Ohio Supreme Court has instructed the PUCO “to respect its own precedents in its decisions to assure the predictability, which is essential in all areas of law, including administrative law.”⁷ While the PUCO can revisit a particular decision, the PUCO is “bound by certain institutional constraints to justify that change before such order may be changed or modified.”⁸ If the PUCO sees fit to depart

⁵ Second Entry on Rehearing at para. 28.

⁶ *Id.*

⁷ *Cleveland Electric Illuminating Co. v. Pub Util. Comm.*, 42 Ohio St.2d 403, 431 (1975), superseded on other grounds (by statute), as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89 (1979).

⁸ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984).

from a prior order, it “must explain why” and “the new course also must be substantively reasonable and lawful.”⁹

Before the gas utility capital expenditure program cases, it had been the PUCO’s practice and precedent that where rates were set more than three years ago, a new calculation should be made. In *In the Matter of the Application of The Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Component of the Companies’ Standard Service Tariffs to Reflect the Applicable FERC-Approved Charges or Rates Related to Open Access Transmission, Net Congestion and Ancillary Services*,¹⁰ the PUCO explained this succinctly:

The Companies propose to include carrying charges on the net under recovery or net over recovery of TCRP revenues using each company’s weighted average cost of capital. The Companies propose that the rate of equity to be included in the calculation be the rate established in each company’s last rate case. The Commission disagrees. The Commission issued its decision in Columbus Southern’s last base rate case proceeding in May 1992, more than thirteen years ago. The Commission finds that the financial landscape has changed greatly since the early 1990s. We find it appropriate to use a more recent review of the cost of capital.¹¹

When the same issue arose later, the PUCO once again acknowledged that where rates are more than two or three years old, “it may be appropriate to reevaluate the

⁹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶52.

¹⁰ Case No. 05-1194-EL-UNC.

¹¹ *Id.* at Finding and Order (December 14, 2005) at a paras. 7, 8.

reasonableness of using the company's most recently approved" rate (in this case, for carrying charges).¹²

The acknowledgement that consumer protection requires revisiting rates that are more than two or three years old is not limited to a given industry or PUCO decisions. It is also reflected in the PUCO's rules governing water companies. O.A.C. 4901:1-15-35, which deals with infrastructure improvement surcharges, provides:

(7) Schedules 7a and 7b – Rate of Return If the date certain proposed in this proceeding is not later than three years from the date that the company's existing rates and tariffs went into effect, prepare Schedule 7 on the basis of the company's last rate case. If the time exceeds three years, prepare a proposed rate of return summary schedule as of the date certain or the most recent available historic calendar quarter showing the calculation of the weighted average cost of capital as illustrated in Schedule 7, lines 1-4.¹³

The PUCO's practice and precedent for using up-to-date, recent data when setting rates is confirmed in base rate cases themselves. In 1982, the PUCO rejected testimony regarding return on equity based on data that was three years old and adopted testimony based on more recent data. It explained: "It has always been the Commission's policy in determining the yield component of the return on common equity to use the most recent data available. We do not believe that the use of three year old yields, although weighted

¹² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Cost Riders*, Case No. 10-155-EL-RDR, Entry on Rehearing (October 22, 2010) at para. 9; *see also In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan Pursuant to R.C. 4929.05 for an Accelerated Service Line Replacement Program*, Case No. 14-1622-GA-ALT, Opinion and Order (October 26, 2016) at para. 58 ("while this Commission has determined that R.C. 4929.05 does not require a full rate case determination of just and reasonable charges, the time period between the application for an alternative rate plan and the applicant's most recent base rate case may also be considered by the Commission to determine whether the plan is just and reasonable.").

¹³ O.A.C. 4901:1-15-35, Appx. at (B)(7).

against more recent data, complies with our goal of determining a current cost of equity.”¹⁴

When the PUCO began approving gas utility capital expenditure charges, it neither followed this precedent, found that it was in error, nor explained why it departed from it as required by *Cleveland Elec. Illum. Co.* and its progeny.¹⁵ Accordingly, the “precedent” that the PUCO supposedly followed in this case (and the other gas utility capital expenditure program cases) was wrong and unlawful. Each case was the fruit of a poisonous tree that began with *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*.¹⁶

The PUCO’s Second Entry on Rehearing is unlawful. Rehearing should be granted.

¹⁴ *In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Increase its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 81-146-ET-AIR, Opinion and Order (March 17, 1982) at para. 104.

¹⁵ See *In re the Application of The East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 19-468-GA-ALT, Opinion and Order (December 30, 2020) (neither followed precedent for revisiting rates three years old, finding that doing so was in error, or explaining departure from precedent); *In re the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Form of Regulation*, Case No. 19-791-GA-ALT, Opinion and Order (April 21, 2021) (same); *In re the Application of The East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 20-1634-GA-ALT, Opinion and Order (April 20, 2022 (same)); *In re Duke Energy Ohio Inc.’s Application to Adjust its Capital Expenditure Program Rider*, Case No. 21-618-GA-RDR, Opinion and Order (July 27, 2022) (same); and *In re the Application of The East Ohio Gas Company DBA Dominion Energy Ohio*, Case No. 21-619-GA-RDR, Opinion and Order (February 23, 2022) (same).

¹⁶ Case No. 19-468-GA-ALT.

III. CONCLUSION

“[T]he purpose of the PUCO * * * is to protect the customers of public utilities.”¹⁷

The PUCO can protect consumers by granting rehearing and rejecting or modifying the settlement in this case and adopting OCC’s consumer-protection recommendations.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers’ Counsel

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

Office of the Ohio Consumers’ Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215-4213
Telephone [Michael]: (614) 466-1291
Telephone [Wilson]: (614) 466-1292
William.Michael@occ.ohio.gov
Ambrosia.Wilson@occ.ohio.gov
(willing to accept service by e-mail)

¹⁷ *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 26th day of August 2022.

/s/ William J. Michael
William J. Michael
Assistant Consumers' Counsel

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

SERVICE LIST

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

Attorney Examiner:

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

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

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

8/26/2022 3:45:14 PM

in

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

Summary: App for Rehearing Application for Rehearing by Office of the Ohio
Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of
Michael, William J.