

**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. 22-619-GA-RDR  
Capital Expenditure Program Rider                    )  
Charges.    )

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**REPLY BRIEF  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

Dominion<sup>1</sup> seeks to charge consumers a 9.91% pre-tax rate of return<sup>2</sup> set 13 years ago in its last base rate case.<sup>3</sup> Using this outdated rate will allow Dominion to charge 1.4 million residential consumers \$6.16 per month or \$87 million.<sup>4</sup> Consumers will be overcharged for Dominion's excessive profits.<sup>5</sup>

Dominion's CEP application does not meet Ohio's standards for approval. R.C. 4929.05(A)(3) and R.C. 4929.111(C) which require the PUCO to find capital expenditure programs and alternative rate plans to be "just and reasonable." Also, R.C. 4905.22 provides the PUCO must require Dominion to provide necessary and adequate services for just and reasonable charges. Dominion's CEP is unjust and unreasonable because it is

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<sup>1</sup> East Ohio Gas Company d/b/a/ Dominion Energy Ohio.

<sup>2</sup> *In the Matter of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Authority to Adjust Its Capital Expenditure Program Rider Charges*, Case No. 22-619-GA-RDR, Application of Dominion (April 1, 2022) ("Application") at Attachment A, Schedule 2.

<sup>3</sup> See Case No. 07-829-GA-RDR.

<sup>4</sup> Application at Attachment A, Schedule 1.

<sup>5</sup> Direct Testimony of Dr. Daniel Duann on Behalf of the Ohio Consumers' Counsel at 13 (August 31, 2022) ("Dr. Duann Direct").

based on an outdated rate of return. This rate is too high, and using it benefits only Dominion's shareholders at the expense of consumers.

The PUCO should reject or modify Dominion's CEP to prevent Dominion from charging consumers unjust and unreasonable rates.

## II. REPLY

### A. **The Capital Expenditure Program Rider charge is unjust and unreasonable because it requires consumers to pay \$21 million more for gas service.**

Dominion and PUCO Staff claim Dominion's CEP benefits consumers and the public interest. They are wrong.

Dominion makes several non-persuasive arguments that its CEP benefits consumers. These "benefits" are illusory.

One consumer benefit Dominion claims is that its CEP adopts the Blue Ridge's Audit Report (minimal) adjustments and recommendations.<sup>6</sup> But, given the PUCO Staff supported these recommendations, the PUCO would likely have adopted them anyway. Dominion has given nothing to consumers by doing this.

Second, Dominion asserts its CEP continues to support necessary investment in its system, which benefits Ohio consumers.<sup>7</sup> Again, this is not a concession to consumers. Ohio law *requires* Dominion to furnish necessary and adequate service.<sup>8</sup> Consumers should benefit—*by law*—regardless of whether facilities are funded in base rates or the CEP charge. The only difference is that consumers will pay *more* if these system

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<sup>6</sup> Initial Brief of Dominion Energy Ohio ("Dominion Brief"), at 7.

<sup>7</sup> Dominion Brief at 7.

<sup>8</sup> R.C. 4905.22.

investment charges are included in the CEP charge instead of base rates. This is because of the CEP application's grossly inflated rate of return. Importantly, consumers will get the same purported benefits of the CEP charge at a more accurate (reflecting the current cost of capital) and lower price if the PUCO adopts OCC's recommendation to update Dominion's rate of return.

Finally, Dominion's prospective agreement to remove \$100,145 of costs associated with two fitness centers should not be counted as a benefit as it merely reflects compliance with law. re.<sup>9</sup> As OCC expert witness Kerry Adkins testified fitness centers "are not related to Dominion's obligation to provide natural gas service to consumers" and do not provide a direct and primary benefit to consumers in Dominion's natural gas service area."<sup>10</sup> Dominion is merely conceding something it should have never charged consumers for in the first place.

Meanwhile, Dominion made no concessions on the major point of contention in this case—its outdated and inflated rate of return. This is where the real savings for consumers are. Dominion's CEP inflicts harm on consumers that is substantially greater than its trivial "concessions."

Dominion's proposed rate is unjust and unreasonable for two reasons. First, Dominion's proposed pre-tax rate of return requires consumers to pay substantially more than the current cost of capital, upon which rates to consumers should be based. Compared to Dr. Duann's recommended pretax rate of return of 7.03%, adopting the 9.91% pre-tax rate of return would increase CEP charges to consumers by approximately

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<sup>9</sup> Dominion Brief at 7.

<sup>10</sup> Direct Testimony of Kerry Adkins on Behalf of the Ohio Consumer' Counsel at 9 (August 31, 2022).

\$21.4 million (\$21,375,399) for the twelve-month period under review in this case.<sup>11</sup> That is a substantial burden on Ohio consumers.

Second, this rate hike is unwarranted. Financial market conditions and the business and financial risks facing Dominion have improved significantly since its last rate case.<sup>12</sup> There has been “significant decline in the cost of debt and cost of equity since 2008.”<sup>13</sup> As a result, Dominion’s current cost of debt is just 2.29%—merely a third of the 6.5% debt rate that Dominion wants to charge consumers.<sup>14</sup> Further, Dominion’s CEP uses a 10.38% return on equity that far exceeds the recent trend in lower equity returns for gas utilities comparable to Dominion.<sup>15</sup> Consumers get no benefit in exchange for their extra dollars. Dominion shareholders get an undeserved windfall; all consumers get is a higher bill.

Neither the PUCO Staff nor Dominion disputed that Dominion’s CEP rate of return includes the 6.5% debt rate, even though its actual debt rate is 2.29%. Neither do they dispute that its current 10.38% return on equity no longer reflects Dominion’s current business climate or risk. Dr. Duann demonstrated—without challenge—that Dominion’s updated rate of return should not exceed 7.03%.<sup>16</sup> It is neither just nor reasonable for Dominion to charge consumers a higher rate set 13 years ago.

The PUCO should reject or modify the CEP – as recommended by OCC—to protect consumers against overpaying to increase Dominion’s profits.

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<sup>11</sup> Dr. Duann Direct at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 5-6, 10.

<sup>16</sup> *Id.* at 5.

**B. The Capital Expenditure Program Rider charge contradicts still-valid PUCO precedent prohibiting use of rates that are more than three years old.**

Dominion claims that public policy demands the PUCO use its last base rate case rate of return in its CEP.<sup>17</sup> Dominion argues that lowering its long-term debt rate without updating other cost of capital components would ignore potential cost increases it incurred since its last base rate case.<sup>18</sup> This emphasizes, rather than undermines, the need for updated rates. Relying on outdated base rate cases requires the PUCO to ignore changed circumstances. As usual, consumers are stuck with the bill.

Dominion additionally argues there is no reason to update its debt rate in this proceeding because the PUCO is already scheduled to do so next year in Dominion's rate case.<sup>19</sup> This approach conveniently gives Dominion another year to charge 1.4 million residential consumers \$6.16 per month – again, \$87 million, in total.<sup>20</sup> A significant portion of the CEP rate is the 9.91% rate of return, which is unjust and unreasonable. The PUCO should not allow consumers to pay millions in inflated profits for another year when it could instead act now. Justice delayed is justice denied. And in this case justice delayed will cost consumers another \$87 million.

Lastly, Dominion argues the PUCO should employ the 13-year-old rate of return because it has used a utility's last base rate case rate before.<sup>21</sup> This does nothing to

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<sup>17</sup> Dominion Brief at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 9.

<sup>20</sup> Application at Attachment A, Schedule 1.

<sup>21</sup> Dominion Brief at 7.

address OCC's argument, which is that – pursuant to binding Supreme Court of Ohio precedent – these cases were wrongly decided.

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.”<sup>22</sup> 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.”<sup>23</sup> If the PUCO sees fit to depart from a prior order, it “must explain why” and “the new course also must be substantively reasonable and lawful.”<sup>24</sup>

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*,<sup>25</sup> the PUCO explained this succinctly:

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

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<sup>22</sup> *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).

<sup>23</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51 (1984).

<sup>24</sup> *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶52.

<sup>25</sup> Case No. 05-1194-EL-UNC.

landscape has changed greatly since the early 1990s. We find it appropriate to use a more recent review of the cost of capital.<sup>26</sup>

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 reasonableness of using the company's most recently approved” rate (in this case, for carrying charges).<sup>27</sup>

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.<sup>28</sup> Accordingly, the “precedent” that the PUCO supposedly followed in subsequent cases (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*

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<sup>26</sup> *Id.* at Finding and Order (December 14, 2005) at a paras. 7, 8.

<sup>27</sup> *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.”).

<sup>28</sup> *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).

*Regulation to Establish a Capital Expenditure Program Rider Mechanism.*<sup>29</sup> It should not be followed here.

In incorporating its 13-year-old, inflated rate of return and return on equity into its CEP, Dominion violates still-valid PUCO precedent against using rates that are more than three years old. The PUCO should not allow Dominion to do so, especially at great cost to consumers.

### **III. CONCLUSION**

The PUCO should deny Dominion's request to charge consumers outdated, inflated rates. The PUCO should update Dominion's rate of return as well as the recommendations of the independent auditor, its Staff and OCC.

Respectfully submitted,

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<sup>29</sup> Case No. 19-468-GA-ALT.

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic transmission, this 5th day of October 2022.

/s/ William J. Michael  
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