

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Application)
of the East Ohio Gas Company d/b/a)
Dominion Energy Ohio for an) Case No. 22-619-GA-RDR
Adjustment to the Capital Expenditure)
Program Rider Rate.)

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

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December 2, 2022

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The PUCO violated Ohio law by approving¹ Dominion's² plan to charge its 1.4 million residential consumers \$6.16 per month³ for capital expenditures. The PUCO again allowed Dominion to base charges to consumers on an inflated, out-of-date 9.91% pre-tax rate of return.⁴ The cost of debt and equity have fallen since the PUCO first authorized this rate of return over 13 years ago.⁵ Since market conditions have changed, this rate is no longer just and reasonable as it does not reflect the cost of capital likely to be in effect when the rates are charged to consumers. Using an outdated cost of capital allows Dominion to earn profits that are too high, at consumer expense.

The PUCO by law cannot approve a capital expenditure program and alternative rate plan unless they are "just and reasonable."⁶ It is unjust and unreasonable to charge

¹ Opinion and Order (November 2, 2022).

² East Ohio Gas Company d/b/a Dominion Energy Ohio ("Dominion").

³ See Application, Attachment A, Schedule 1.

⁴ See Application, Attachment A, Schedule 2.

⁵ Direct Testimony of Dr. Daniel Duann on behalf of the Ohio Consumers' Counsel at 3 (August 31, 2022) ("Duann Testimony").

⁶ R.C. 4929.05 (A)(3) and R.C. 4929.111(C).

consumers rates that do not incorporate the current costs of debt and equity. Doing so gives Dominion a windfall and consumers an unjustifiably higher bill. That the PUCO has used a utility's 13-year-old base rate case rate of return in subsequent capital expenditure program proceedings before does not make doing so again just and reasonable. The PUCO failed to stay within the law.

Further, R.C. 4903.09 provides 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." The record does not support the PUCO's findings. Neither Dominion nor PUCO Staff provided testimony that a 9.91% rate of return is just and reasonable. And OCC's expert witness Dr. Daniel Duann testified that, based on current costs of debt and equity, Dominion's rate of return should be 7.03%⁷. Neither Dominion nor PUCO Staff provided testimony challenging his analysis. So, the PUCO's use of a 9.91% rate of return is not based on this case's record evidence. That violates R.C. 4903.09.

The Opinion and Order is unjust and unreasonable, making it unlawful.

Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Order.

The PUCO's Order was unlawful and unreasonable in the following respects:

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by authorizing Dominion to charge consumers rates under its capital expenditure program that are unjust and unreasonable, thereby violating R.C. 4905.22, R.C. 4929.05(A)(3) and R.C. 4929.111(C).

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), in rates charged to consumers. 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. The PUCO thereby

⁷ Duann Testimony at 5.

violated R.C. 4903.09 and binding Ohio Supreme Court precedent in *Tongren* and *Suvon*,⁸ resulting in an unreasonable and unlawful decision.

The PUCO should grant rehearing and abrogate or modify its November 2, 2022 Opinion and Order to protect consumers from being charged unjust and unreasonable charges by Dominion under its capital expenditure program.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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⁸ 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 is unlawful and fails consumers. First, using Dominion's 13-year-old rate of return is not "just and reasonable" as R.C. 49022.05, R.C. 4929.05(A)(3), and R.C. 4929.111(C) require. This rate incorporates costs of debt and equity that are not just and reasonable because they do not reflect the cost of capital expected to be in effect when rates are charged to consumers in this case. , Second, 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.⁹ The PUCO's decision in this case to approve a settlement that allows Dominion to continue using a 13-year-old rate of return is not based on record evidence. It cannot be because there is no record evidence – testimony or otherwise – to support it.

The PUCO should grant OCC's Application for Rehearing as further explained below to protect consumers from unjust and unreasonable rates.

⁹ R.C. 4903.09.

II. MATTERS FOR CONSIDERATION

ASSIGNMENT OF ERROR NO. 1: The PUCO erred by authorizing Dominion to charge consumers rates under its capital expenditure program that are unjust and unreasonable, thereby violating R.C. 4905.22, R.C. 4929.05(A)(3) and R.C. 4929.111(C).

The PUCO's decision to approve Dominion's 13-year-old rate of return is unreasonable and unlawful. The PUCO's Order states that "[i]t is the Commission's long-standing 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."¹⁰ But the PUCO's past practice is not a substitute for the legal standard R.C. 4905.22, R.C. 4929.05(A)(3) and R.C. 4929.111(C) mandate.

These statutes require the PUCO to find Dominion's 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 *unjust* and *unreasonable*.)¹¹ 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. This is neither just nor reasonable.

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

¹⁰ Order at ¶32.

¹¹ OCC Ex. 2.

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), in rates charged to consumers. 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. 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 record does not include findings of fact that support PUCO’s decision authorizing Dominion to use its 13-year-old rate of return. This violates Ohio law and Ohio Supreme Court precedent.¹³ R.C. 4903.09 states 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 PUCO itself has recognized in its orders.¹⁸ In this case, the PUCO failed to provide “in

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.

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).

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. It could not have. The only evidence in the record about rate of return calculation was the uncontroverted testimony of OCC Witness Dr. Duann that the proposed rates were *unjust* and *unreasonable*.¹⁹ Instead, the PUCO simply adopted the rate of return it set in Dominion’s last base rate case.²⁰ But precedent is no substitute for record support, which the law requires. The PUCO has to determine – based on the facts in the record before it – that rates charged to consumers are just and reasonable. The PUCO does not cite to facts in evidence to support its decision. Without record support, the PUCO’s decision is unreasonable and unlawful.

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

III. CONCLUSION

“[T]he purpose of the PUCO * * * is to protect the customers of public utilities.”²¹
The PUCO can protect consumers by granting rehearing and rejecting or modifying Dominion’s application to adjust its Capital Expenditure Program to include a 7.08% pre-tax rate of return in accordance with OCC Witness Duann’s recommendation.

¹⁹ OCC Ex. 2.

²⁰ Order at ¶32.

²¹ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 372 (2009) (Pfeifer, J. dissenting).

Respectfully submitted,

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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 2nd day of December 2022.

/s/ William J. Michael _____
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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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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.