

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF OHIO VALLEY GAS )  
CORPORATION AND OHIO VALLEY GAS, INC., )  
FOR MODIFICATION OF THE INDIANA UTILITY )  
REGULATORY COMMISSION'S JULY 28, 2021 ) CAUSE NO. 45932  
ORDER IN CAUSE NO. 45538 AUTHORIZING THE )  
ISSUANCE OF LONG-TERM DEBT TO INCREASE )  
THE AUTHORIZED INTEREST RATE. )

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR'S PROPOSED ORDER

Comes now, the Indiana Office of Utility Consumer Counselor ("OUCC"), by counsel,  
and submits its Proposed Order to the Commission for its approval.

November 17, 2023

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Senior Deputy Consumer Counselor

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AND OHIO VALLEY GAS, INC., FOR )  
MODIFICATION OF THE INDIANA UTILITY ) CAUSE NO. 45932  
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**ORDER OF THE COMMISSION**

**Presiding Officers:  
Sarah E. Freeman, Commissioner  
Kehinde Akinro, Administrative Law Judge**

On August 7, 2023, Ohio Valley Gas Corporation (“OVGC”) and Ohio Valley Gas, Inc. (“OVGI”) (together, “Joint Petitioners” or “OVG”), filed their Verified Petition with the Indiana Utility Regulatory Commission (“Commission”) requesting the Commission modify its July 28, 2021 Order in Cause No. 45538 (the “45538 Order”) to increase the authorized not-to-exceed interest rate on OVG’s long-term debt from 3.75% to 4.50%. Per Joint Petitioners, the requested interest rate increase was negotiated to eliminate the Excess Cash Flow (“ECF”) recapture payment term from OVG’s credit agreement. In the alternative, Joint Petitioners request the Commission approve a new Financing Program for the debt approved in the 45538 Order, with the same terms as in Cause No. 45538, except the interest rate will increase to not to exceed 4.50% so OVG may eliminate the ECF recapture payment term its management included when securing this long-term debt. To support their request, Joint Petitioners filed the testimony and attachments of Gregory P. Roach, OVG’s Chief Financial and Regulatory Officer.

On September 29, 2023, the Indiana Office of Utility Consumer Counselor (“OUCC”) prefiled the testimony of Leja D. Courter, Chief Technical Advisor of the OUCC’s Natural Gas Division.

On October 13, 2023, Joint Petitioners filed Mr. Roach’s rebuttal testimony, including an attachment.

On October 20, 2023, a docket entry was issued requesting additional information from Joint Petitioners. OVG’s response was filed on October 20, 2023. On October 30, 2023, a second docket entry was issued requesting additional information from Joint Petitioners, with OVG’s response filed on October 31, 2023. On November 1, 2023, a third docket entry was issued in which further information was requested from Joint Petitioners. OVG’s response was provided at

the evidentiary hearing on November 2, 2023.<sup>1</sup>

On October 31, 2023, Joint Petitioners filed a stipulation and admission of documents indicating Joint Petitioners and the OUCC were stipulating to the admission of certain OVG Responses to OUCC Data Requests, thereby eliminating cross-examination.

The Commission held an evidentiary hearing in this Cause on November 2, 2023 at 10:30 a.m. in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana. The testimony and attachments of Joint Petitioners and the OUCC were admitted into the record without objection.

Based on the applicable law and the evidence presented, the Commission now finds:

**1. Notice and Jurisdiction.** Notice of the hearing was published as required by law. Joint Petitioners are public utilities as defined in Ind. Code § 8-1-2-1(a). Under Indiana Code §§ 8-1-2-72, 8-1-2-76 through 8-1-2-81, and 8-1-2-83 the Commission has jurisdiction over a public utility's issuance of bonds, notes, or other evidences of indebtedness payable at periods of more than one year; therefore, the Commission has jurisdiction over Joint Petitioners and the subject matter of this proceeding.

**2. Joint Petitioners' Characteristics.** Joint Petitioners are affiliated public utility corporations organized and existing under the laws of the State of Indiana and have their principal office at 111 Energy Park Drive, Winchester, Indiana. They are engaged in rendering gas utility service within Indiana and own, operate, manage, and control, among other things, plant and equipment used for the distribution and furnishing of such service to the public. Joint Petitioners' Ex. 1, Petition ¶1.

**3. Relief Requested.** Joint Petitioners request the Commission amend the 45538 Order financing authorization to increase the approved not-to-exceed 3.75% interest rate on OVG's long-term debt to 4.50%. Joint Petitioners anticipate all the other relief granted in Cause No. 45538 will remain the same. Alternatively, if the Commission chooses to not amend the 45538 Order, Joint Petitioners request the Commission approve a Financing Program with the same terms as approved in Cause No. 45538 but a higher not to exceed interest rate of 4.50%. *Id.* at ¶3.

**4. Background.** In Cause No. 45538, Joint Petitioners requested authority for OVGC to borrow up to \$6 million from a commercial bank ("Bank"), to be repaid within five years at an interest rate of up to 3.75%. 45538 Order ¶3. In the 45538 Order, at page 4, the Commission approved the following:

1. Joint Petitioners are authorized to issue long-term debt in an amount not to exceed \$6 million, to be paid off within five years at an interest rate of up to 3.75%.

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<sup>1</sup> As discussed at the evidentiary hearing and directed by the Presiding Officers, a supplemental response was filed on November 2, 2023, by Joint Petitioners. The supplemental response indicates the included attachments are the same information provided at the evidentiary hearing, but with a change to the presentation.

2. Joint Petitioners are authorized to pledge as collateral for the long-term debt approved in this Order their utility assets including plant, equipment, and accounts receivable and to enter into negative covenants intended to preserve the viability of the collateral.
3. Within 30 days of closing on the loan, Joint Petitioners shall make a filing under this Cause describing the final terms of the long-term debt, including the amount, maturity period, interest rate, any premiums or discounts paid, issuance expenses, a description of the collateral, and repayment terms.
4. Any financing authority granted in this Order that has not been used by December 31, 2023 shall lapse.
5. This Order is the sole evidence of the Commission's approval and shall constitute a certificate of authority granted to Joint Petitioners as provided in Ind. Code § 8-1-2-80.
6. This Order shall be effective on and after the date of its approval.

In compliance with ordering paragraph 3 of the 45538 Order, Joint Petitioners filed the Post-Closing Report on Financing Terms ("Post-Closing Report") on September 1, 2021. Jt. Pet. Ex. 2, Attachment GPR-3. The Post-Closing Report included the term loan note, the first amendment to credit agreement, and confirmed the final interest rate was 3.25%. *Id.* On September 1, 2021, the Post-Closing Report was also served on the OUCC. *Id.*

Joint Petitioners now report the change in interest rate being requested in this Cause was negotiated to eliminate the ECF recapture payment term in the existing financing agreement between Joint Petitioners and the Bank (the "Modification"). The ECF payment was due on July 31, 2023; however, the Bank agreed to delay and eliminate that payment in accordance with an amended agreement if a higher interest rate of 4.50% becomes applicable to the long-term debt or, alternatively, new financing terms with the higher interest rate are approved by the Commission. Jt. Pet. Ex. 1, Petition ¶3.

## **5. Evidence of the Parties.**

**A. Joint Petitioners' Case-in-Chief.** Mr. Roach described the requested relief, the necessity to amend the Cause No. 45538 interest rate, and the alternative request for new financing authority. Jt. Pet. Ex. 2 at 3-14. He stated OVG seeks an increase of 0.75% to the not-to-exceed interest rate the Commission authorized in the 45538 Order, which, among other things, authorized the issuance of up to \$6,000,000 in long-term debt at an interest rate of up to 3.75%. In the alternative and to the extent necessary, OVG requests Commission approval of new financing authority. OVG negotiated the increased interest rate with the Bank in return for the Bank eliminating the ECF recapture term included in the original financing terms (the Modification). *Id.* at 5. He stated that approximately \$1.2 million of the authority granted under Cause 45538 remains unissued. *Id.* at 6.

Mr. Roach described the ECF recapture payment, which is found on Attachment GPR-2 to his Direct Testimony. Jt. Pet. Ex. 2 at 6-7. He explained that as shown on Attachment GPR-2, p. 6, the agreement defines "Excess Cash Flow" as:

For any fiscal year of Borrower determined on a consolidated basis, the sum of (a) [Earnings Before Income Taxes, Depreciation, and Amortization (“EBITDA”)], minus (b) cash interest expense, minus (c) cash taxes paid, minus (d) mandatory principal payments paid in respect of long-term Indebtedness, minus (e) voluntary principal prepayments of the Term Loan, minus (f) Unfunded Capital Expenditures, minus (g) extraordinary and non-recurring gains, minus (h) non-cash gains.

He stated the agreement further requires (p. 8):

Mandatory Prepayments. In addition to the principal payments required pursuant to this Agreement, and without limiting the other provisions of the Loan Documents, commencing with the fiscal year ending July 31, 2023 and for each fiscal year thereafter until the Term Loan is paid in full, Borrower shall make additional principal payments to be applied as mandatory prepayments of the Term Loan on or before the following July 31st, in an amount equal to fifty percent (50%) of Excess Cash Flow for such applicable fiscal year and applied to installments in inverse order of maturity. Each Excess Cash Flow prepayment shall be accompanied by a certificate signed by the chief financial officer certifying the manner in which Excess Cash Flow and the resulting prepayment were calculated, which certificate shall be in form and substance satisfactory to Bank.

*Id.* Mr. Roach testified the ECF recapture term came to his attention after the Silicon Valley Bank and Signature Bank collapses in early March of 2023 when he directed the OVG finance group to review all of OVG’s financial agreements to identify early call provisions to which OVG was a party. Mr. Roach explained that his concern was, and remains, that a source of additional short-term bank cash reserves is to call commercial loans that include early call provisions when faced with deposit cash shrinkage. He testified it was during this 2023 investigation that he discovered the ECF provision. Mr. Roach stated that now aware of the ECF provision, he immediately began negotiation with the lender to remove the ECF provision. *Id.* at 7.

Mr. Roach explained that having to make such a payment would put a strain on cash flow for OVG and stated it is a real possibility a short-term line of credit would be needed to make this payment. As a result, OVG determined it was prudent to prepare to delay the payment and approach the Bank about removing this term. *Id.* He explained that through discussions and negotiations with the Bank, OVG was able to agree to a modification of the financing terms whereby the ECF recapture term will be removed in exchange for an increased interest rate of 4.50%. He presented Attachment GPR-4 which are the proposed changes to the fixed term loan provisions. *Id.* at 7-8. Mr. Roach testified that he believes this modification to the financing terms is in the best interests of OVG and its customers, and thus, OVG is seeking Commission approval to change the financing authority granted in 45538 Order to allow for an increased interest rate. He also presented Attachment GPR-5 which is the OVG Board’s approval. *Id.* at 8.

Mr. Roach further described why the proposed modification is in the best interests of OVG and its customers. *Id.* at 8-9. He explained that he concluded the Modification is the preferred solution to a short-term financing strategy that could serve as a bridge for funding the ECF

payments going forward *Id.* at 8. Mr. Roach described the detailed analysis he performed, advising this illustrates that by agreeing to the Modification, OVG will be executing revised financing that is in the best interest of its customers for several reasons. *Id.* at 8-9.

Mr. Roach described OVG's method for estimating the magnitude of the mandatory prepayments resulting from the ECF provision in the existing fixed term loan agreement, which in summary, relied on the definition of "Excess Cash Flow" in the agreement. *Jt. Pet. Ex 2* at 9-10, Attachment GPR-2, p. 6. He presented a comparative analysis of the costs associated with a short-term financing strategy versus accepting the Modification. Mr. Roach explained the presumptions made in the analysis of executing on the Modification versus continuing the existing long-term financing while making ECF payments through short-term financing in order to support cash flow and continued improvements to the OVG distribution system. *Id.* at pp. 10-11, Table GPR-1 and Table GPR-2. He stated the first presumption is that the Commission approves the Modification. The second presumption is that the ECF will result in a \$2M ECF payment in September 2023 and again in September 2024. The third presumption is that the ECF will result in a \$1.5M ECF payment in September 2023 and again in September 2024. He stated by executing the Modification, OVG will save customers between ~\$68,000 and \$7,000 depending on the eventual amount of the ECF payout, while maintaining long-term financing stability over the 2023 to 2026 timeframe. *Id.* Mr. Roach further explained that he analyzed two financing alternatives to the Modification, which are defined by ECF payments in 2023 and 2024 of \$2M and \$1.5M, respectively, funded by line-of-credit ("LOC") draws of varying sizes in the 2023-2025 time frame. In each instance, OVG employs LOC draws to fund the ECF payments and eventually finances the resulting LOC principal as a new fixed rate long-term financing in 2025 or 2026. *Id.* at 11, Table GPR-2.

Mr. Roach explained that higher cost of the ECF payment via short-term financing aside, the strategy of continuing with the existing terms of OVG's fixed long-term financing and making successive ECF payments poses four major financial and operating risks. First, such a strategy presumes OVG will be able to secure and renew its existing LOC (at similar terms and principal amounts) for successive 12-15 month terms in 2023 through 2026. Second, if unable to secure LOC financing in 2023 through 2026, OVG will be limited to making ECF payments via funds generated from on-going operations, limiting OVG's capability to improve the reliability and safety of the system. *Id.* at 11. Third, by relying on LOC financing in 2023 through 2026, OVG will be exposed to monthly interest rate changes driven by national financial and economic conditions, giving OVG limited visibility and insulation from what could be significant interest rate changes. *Id.* at 11-12. Lastly, if OVG employs a strategy that relies on LOC financing until a new fixed term loan is executed in 2025, there is no guarantee that a 4.50% interest rate will be available at that time. Rather, if current conditions do not change, Mr. Roach stated he anticipates OVG will face interest rates in excess of the proposed 4.50%. As compared to executing the Modification, a future financing strategy based on ECF payments via LOC funding through 2026 exposes OVG to significant financial and resulting operating risk that is not in the best interest of OVG or its customers. *Id.* at 12.

Mr. Roach detailed his analysis of the impact on OVG's weighted average cost of capital ("WACC") resulting from executing the Modification and reliance on payment of the ECF with LOC financing. *Id.* at pp. 12-13. He presented OVG's WACC at May 31, 2023, OVG's WACC presuming execution of the Modification in September 2023, and OVG's WACC at December 31,

2025, presuming ECF payments via reliance upon LOC financing. *Id.* at p. 12, and Attachment GPR-7. He stated the strategy of continuing with the existing terms of OVG's fixed long-term financing and making successive ECF payments via LOC financing, will increase OVG's WACC from a current 8.66% to 9.00%, holding all non-long-term debt ("LTD") WACC components steady, an increase of 0.34%. *Id.* at p. 12. Conversely, by executing the Modification, OVG's WACC will increase from a current 8.66% to 8.74%, holding all non-LTD WACC components steady, an increase of 0.08%. *Id.* at pp. 12-13. Thus, executing the Modification results in real financing cost savings to the customer as opposed to moving forward without the Modification. *Id.* at p. 13. Mr. Roach also presented Attachment GPR-8, which shows the estimated rate impact from eliminating the ECF provision in exchange for increasing the fixed term debt rate to 4.50% is approximately \$0.0061 per dekatherm. *Id.*

Mr. Roach testified that given the elimination of the ECF recapture, the increased interest rate included in the Modification is in the public interest and the proposed Modification is reasonably necessary in the operation and management of the utility's business so that OVG may provide adequate service and facilities *Id.* at 13. He further testified the Modification is in the public interest for the same reasons set forth in OVG's case-in-chief testimony in Cause No. 45538, which he sponsored as Attachment GPR-2, and as detailed in his testimony in this Cause. He stated that first, approval of the Modification ensures continued long-term financing at a fixed rate and cost to customers. Second, approval of the Modification results in lower interest costs (2023-2026) and a lower WACC (2025) to customers as compared to ECF payment via LOC financing. Third, approval of the Modification eliminates OVG's risk exposure to four successive annual LOC reauthorizations at similar terms and principal amounts to those currently approved. *Id.* at p. 13. Fourth, approval of the Modification insulates OVG from future short-term interest rate risk and associated interest costs in what has been a rising interest rate environment since mid-2022. *Id.* at pp. 13-14. Lastly, executing the Modification locks in a fixed rate of 4.5% for the life of the existing term loan through 2026. Such a rate may not be available to OVG in 2025 when ECF payments funded by LOC financing would be converted to long-term financing. *Id.* at p. 14.

Mr. Roach detailed Joint Petitioners' alternative request and stated that in the alternative, OVG requests authority for a Financing Program extending through December 31, 2023, which includes the issuance of up to \$6,000,000 in long-term debt at an interest rate of 4.50% as shown in Attachment GPR-4. OVG further requests authorization to pledge as collateral for such long-term debt their utility assets including plant, equipment, and accounts receivable and to enter into negative covenants intended to preserve the viability of the collateral. *Id.*, Attachment GPR-2 and Attachment GPR-8, and Jt. Pet. Ex 1, Petition Appendix A.

**B. OUC's Case-in-Chief.** Mr. Courter stated the purpose of his testimony is to address OVG's request for approval to increase the long-term debt interest rate the Commission authorized in the 45538 Order. He testified that OVG violated the terms of the 45538 Order when OVG entered into a financially detrimental transaction that was contrary to the Order's expressed purpose and included terms not presented to or approved by the Commission. Per Mr. Courter, in this Cause Joint Petitioners are asking the Commission to force customers to pay for a financial calamity of OVG's own making. Instead, he urged the Commission to hold Joint Petitioners accountable and protect OVG's customers. Public's Ex. 1 at pp. 1-2.

In discussing OVG's requested relief, Mr. Courter testified OVG requested authority in Cause No. 45538 to issue long-term debt to support a buy-back of OVGC stock from its parent company, Beynon Farm Products ("Beynon"). *Id.* at p. 3. OVG sold 49,700 shares to Beynon on December 18, 2020, at \$153.66 per share for a gross amount of \$7,636,902. *Id.* at p. 4. None of the loan proceeds the Commission approved were, however, used to buy back this stock. *Id.* at p. 5. Additionally, Mr. Courter testified the Excess Cash Flow and Mandatory Prepayment terms contained in OVG's loan agreement that OVG now wants extricated from were not discussed in OVG's testimony in Cause No. 45538. *Id.*

Mr. Courter testified the inclusion of Excess Cash Flow and Mandatory Prepayment terms constitutes information the OUCC would have wanted to know before making its recommendation in Cause No. 45538. *Id.* at p. 7. He testified these terms were also information that should have been presented to the Commission *before* the 45538 Order. *Id.* Their inclusion in the loan documentation was without Commission consideration or approval. The Excess Cash Flow and Mandatory Prepayment terms did not surface as loan terms until September 1, 2021, --months after approval of the 45538 Order--when Joint Petitioners filed the Post-Closing Report. *Id.* Notably, the Post-Closing Report contained a summary of the financing terms that does not mention the Excess Cash Flow and Mandatory Prepayment terms. These terms are, though, found within the Post-Closing Report on pages 6 and 8. *Id.* At p. 9.

Mr. Courter testified the First Amendment to Credit Agreement ("First Amendment") was filed with the Post-Closing Report; however, the Credit Agreement dated July 13, 2021, was not filed with the Post-Closing Report, requiring the OUCC to request a copy of the Credit Agreement through discovery. *Id.* at p. 10. Consistent with the purpose for this debt that OVG identified in Cause No. 45538, the First Amendment, Section 2.5(b) states: "Term Loan. Subject to the provisions of this Agreement, the proceeds of the Term Loan *shall be used to finance the repurchase of certain of Borrower's capital stock* that was sold during the 2020 calendar year." *Id.* at p. 11, emphasis added; Jt. Pet. Ex. 1, Attachment GPR-3, p. 8.

Mr. Courter testified that when OVG learned the Excess Cash Flow and Mandatory Prepayment terms were being added to the loan agreement, OVG could – and should – have immediately sought to amend the authority the Commission approved. *Id.* at p. 12. Likewise, when OVG knew it was no longer going to use the loan proceeds to buy back common stock from Beynon, OVG should have apprised the Commission and sought to amend the loan authority the Commission approved for that purpose. *Id.*

Mr. Courter testified Mr. Roach became OVGC's Chief Financial and Regulatory Officer on April 4, 2022, and signed the Second Amendment to Credit Agreement ("Second Amendment") on August 17, 2022. Mr. Roach also executed the Third Amendment to Credit Agreement on September 6, 2022. *Id.* at p. 13. On September 25, 2023, OVG provided a supplemental response to OUCC DR 2-3 that states, in part: "OVG would note that as shown in the amendment documents, the Second and Third Amendments pertain only to the line of credit within OVG credit facilities and do not pertain to the term loan at issue in this cause." *Id.*; Attachment LDC-5, pp. 12-13. Given the text discrepancies, Mr. Courter testified the implication from OVG's supplemental response is that Mr. Roach, as OVG's Chief Financial and Regulatory Officer, signed the Second and then the Third Amendment to the Credit Agreement *without* reviewing the First Amendment to that same Credit Agreement. *Id.* at pp. 13-14.



Mr. Courter did not agree the Modification is in the best interests of OVG's customers. He testified the Modification is in the best interests of OVG and its shareholders, that OVG is, effectively, asking the Commission to relieve OVG of the financial burden its management took on two years ago when the Term Loan, Credit Agreement, and in particular, the First Amendment were executed with terms the Commission did not approve. He stated that while OVG characterizes the requested relief in this Cause as a benefit to OVG's customers, that characterization is not accurate. *Id.* at p. 15.

Mr. Courter testified OVG is requesting its long-term debt rate be increased from 3.25% to 4.50%. This 1.25% increase in OVG's long-term debt rate is not a benefit to OVG's customers. It is to relieve OVG's management from a transaction entered into two years ago with financially detrimental terms that are outside OVG's testimony in Cause No. 45538, the OUCC's testimony, and without Commission approval. Additionally, OVG failed to use the loan proceeds to buy back its stock from its parent company as represented to the Commission in Cause No. 45538 and required in the Term Loan Note. *Id.*

Mr. Courter testified OVG's customers should not be responsible for the financially detrimental Excess Cash Flow and Mandatory Prepayment terms of the long-term debt agreement OVG's management signed on August 3, 2021. That responsibility rests with OVG's management who are responsible to OVG's Board of Directors and its shareholders for their decisions and OVG's financial stability. OVG's shareholders, not OVG's customers, should be responsible prospectively for any long-term debt interest over 3.25% in OVG's capital structure. *Id.* at p. 16. Mr. Courter disagreed with Mr. Roach that the Modification results in *real financing cost savings to the customer* – because OVG's customers should not have to pay for OVG management entering into a credit agreement with Excess Cash Flow and Mandatory Prepayment terms. *Id.*

Based upon Mr. Roach's testimony, Mr. Courter indicated the weighted average cost of capital ("WACC") with a long-term interest rate of 4.50% results in a \$64,638 increase in OVG's revenue requirement that OVG is proposing be paid by OVG's customers. *Id.* at p. 17. However, Mr. Courter testified these calculations do not reflect the full financial impact to OVG's customers of increasing the long-term debt interest rate approved in the 45538 Order from 3.25% to 4.50%. *Id.*

Mr. Courter testified OVG's rate base continues to increase with each transmission, distribution, and storage system improvement charge ("TDSIC") tracker filing; therefore, OVG's revenue requirement – i.e., the cost OVG's customers pay – also increases. Also, Attachment GPR-8 indicates an *annual* increase in the revenue requirement of \$64,638. *Id.*

Mr. Courter testified that even "assuming" OVG's rate base does not increase in the next year, OVG's customers will pay an additional \$64,638 in the second year and another \$64,638 in the third year. Under OVG's proposal - and assuming no increase in OVG's rate base - after three years, OVG's customers will pay \$193,194 (\$64,638 x 3) of additional revenue requirement in a three-year period. Each year, OVG's customers will pay additional revenue until OVG's next base rate case. *Id.* at pp. 17-18.

Mr. Courter testified that if OVG's long-term debt interest rate is increased to 4.50%, as proposed, and the long-term debt is included in OVG's next base rate case, OVG's customers'

base rates will include the additional *annual* revenue requirement (difference between 3.25% and 4.50% interest rate) until the subsequent rate case order. For example, if OVG files a rate case in 2024 and new base rates go into effect at the beginning of 2025, OVG's customers will continue to pay the additional *annual* revenue requirement (between 3.25% and 4.50%) until OVG's subsequent base rate case order. *Id.* at p. 18.

Mr. Courter testified the effect on OVG's capital structure of OVG's management not following the course presented in Cause No. 45538 by buying back the stock from Beynon is that OVG's common equity now comprises a larger portion of its capital structure, at 10% cost rate, and therefore, increases the overall WACC to 8.657%. *Id.* at p. 19. Mr. Courter testified if OVG had fulfilled its testimonial commitment and used the long-term loan proceeds (\$5,010,766) to buy back the Beynon stock, the resulting reduction in common stock would have reduced the WACC from 8.657% to 8.571%. *Id.* at pp. 19-20.

Mr. Courter sponsored Attachment LDC-6. Columns 4 through 6 of Attachment LDC-6 demonstrate that if OVG had bought back approximately \$5 million of its stock from Beynon and reduced its common equity, OVG's customers would have experienced a \$130,586 *decrease* in the revenue requirement. Instead, OVG is requesting a \$64,638 *increase* in the revenue requirement because of imprudent action its management took. *Id.* at p. 20.

Mr. Courter testified he is not proposing OVG's capital structure reflect a \$5 million reduction in common equity. Rather, his example shows what OVG's capital structure could look like and the beneficial impact it would have had to OVG's customers if OVG had bought back the stock it sold to Beynon as OVG represented it was going to do when the Commission approved the 45538 Order. *Id.* at p. 21.

Mr. Courter testified if the Commission authorizes an increase in OVG's long-term interest rate to 4.50%, OVG's shareholders should be responsible for the 1.25% difference (4.50% - 3.25%) in the interest rate. *Id.* He provided an example demonstrating annual simple interest on a \$5,000,000 loan at 4.50% equals \$225,000 ( $\$5,000,000 \times 4.50\%$ ). OVG's customers should continue to pay rates sufficient to recover 3.25% interest, or \$162,500 ( $\$5,000,000 \times 3.25\%$ ). OVG's shareholders should be responsible for the remaining 1.25%, or \$62,500 in this example ( $\$5,000,000 \times 1.25\%$ ), with this amount not available as dividends. *Id.*

Mr. Courter recommended the capital structure be as depicted on Petitioner's Exhibit No. 1, Attachment GPR-7, page 1 – with one exception, the exception being that the long-term debt amount be updated to reflect the current balance. However, the interest rate should remain at 3.25%. This capital structure reflects OVG's actual common equity amount, not the reduced amount that should have occurred, since OVG did not buy back any stock from Beynon. *Id.* at p. 22.

Mr. Courter testified he is not recommending a hypothetical capital structure. The 3.25% long-term debt interest rate complies with the not to exceed interest rate of 3.75% the Commission approved in the 45538 Order, but the Commission did not authorize the Excess Cash Flow and Mandatory Prepayment terms that are causing OVG to now propose an increased interest rate to 4.50%. OVG's customers should only be responsible for OVG's 3.25% long-term debt interest rate authorized by the 45538 Order. *Id.*

Mr. Courter testified that affordability is an important consideration under Indiana's policy to protect utility service affordability. *Id.* He stated OVG's proposal in this case would make OVG's rates less affordable for its customers and *increase* the annual revenue requirement to OVG's customers by at least \$64,638. *Id.* at p. 23. Conversely, if OVG had complied with the 45538 Order and bought back the common stock from Beynon, thereby reducing OVG's equity amount, the annual revenue requirement paid by OVG's customers would have *decreased* by \$130,586. *Id.*

Mr. Courter recommended the Commission:

- Deny amending the 45538 Order because there was no evidence in Cause No. 45538, nor any request, supporting the increased interest rate OVG now seeks. OVG's acceptance of adverse loan terms after the 45538 Order that were not shared or approved in Cause No. 45538 does not change that record.
- Grant OVG's request to increase its authorized long-term debt interest rate to 4.50% in this Cause, provided OVG's customers shall only be responsible for paying a 3.25% long-term debt interest rate in OVG's capital structure.
- Approve the capital structure depicted in Table 1 which includes OVG's current equity amount, with a 3.25% long-term debt interest rate and the current long-term debt amount.
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C. **Joint Petitioners' Rebuttal.** Mr. Roach responded to Mr. Courter's testimony and explained why he believes OVG's actions after the 45538 Order were reasonable, in compliance with the Order, and, importantly, in compliance with Ind. Code § 8-1-2-78. He explained that he and OVG decided the ECF recapture and prepayment terms were a potential risk shortly after the Silicon Valley Bank and Signature Bank collapse in March 2023 and asserted that Mr. Courter is evaluating OVG's current request with hindsight, which is not appropriate in evaluating reasonableness or prudence. Further, he contended Mr. Courter's criticisms are ill-timed because the OUCC had access to the loan terms in the Post-Closing Report. Jt. Pet. Ex. 3 at p. 1. Finally, he discussed why the use of a hypothetical capital structure as Mr. Courter proposed has been rejected in Indiana and is inappropriate. *Id.* at pp. 1-2.

In responding to Mr. Courter's claims that OVG violated the terms of the 45538 Order, Mr. Roach explained that the Commission's Order in Cause No. 45538 is not as narrow as Mr. Courter implies, and at the time of entering into the transaction, OVG had no reason to think the ECF recapture or the mandatory pre-payment term posed the risk they now do. Jt. Pet. Ex. 3 at p.2. He also responded to Mr. Courter's testimony that in approving long-term debt financing under Ind. Code §§ 8-1-2-76 through -81, information regarding Excess Cash Flow and Mandatory Prepayment terms is "relevant information" for the Commission to consider before issuing the 45538 Order. *Id.* at pp. 2-4. Mr. Roach contended the Commission did not approve the loan agreement, was not required to approve the loan agreement, and there is no statutory requirement for the agreement to be final before the Commission approves a utility's requested financing authority. *Id.* at p. 3. He stated that in fact, the Commission's routine practice in financing authority proceedings is to authorize future issuances up to a maximum amount for a defined period of years,

well in advance of when documents are executed. Mr. Roach stated this practice affords the utility flexibility to take advantage of optimal market conditions, rather than delay each potential financing transaction for the receipt of an order. *Id.* at p. 4. He further explained that while the Commission has the power to, and often does, condition a utility's financing authority on certain terms and conditions being described in the evidence (such as the amount to be financed and sometimes a not-to-exceed interest rate), it rarely if ever establishes the precise language of any particular debt instrument. *Id.* at p. 4.

Mr. Roach asserted that OVG did not need to amend the 45538 Order in response to Mr. Courter's concerns that OVG did not use the proceeds of the long-term debt to buy back the stock as was represented in Cause No. 45538. He testified that while the stock buy-back was one of the intended uses of these proceeds, OVG specifically stated there were others, including the funding of capital projects. He said the 45538 Order acknowledges this, and he provided citations supporting his position. *Id.* At pp. 5-6. He testified that OVG has used the proceeds to fund capital projects. OVG's capital project needs were more than anticipated at the time of the Cause No. 45538 filing, and that filing provided flexibility by including the potential need to fund such projects with the loan proceeds. He stated OVG could have immediately proceeded with the stock buy-back, but there would have then been an equity infusion to obtain the capital needed for the capital projects. He stated the capital structure would not have been materially different than it is today. *Id.* at p. 6.

Mr. Roach explained that Mr. Courter mischaracterizes what happened when he claims OVG's management entered into a transaction two years ago with financially detrimental terms. Jt. Pet. Ex. 3 at pp. 6-7. Mr. Roach stated that OVG's use of the proceeds to fund capital projects is not contrary to the evidence and authorization granted in Cause No. 45538. It was expressly contemplated, but the presence or the absence of the ECF and Mandatory Prepayment provisions was not. Per Mr. Roach, that is expected because until recent events, it is unlikely those terms would be considered to carry significant risk for the borrower. When OVG approached First Merchants Bank about lending money, the Bank provided an agreement containing proposed terms. Mr. Roach stated OVG at the time had no reason to think the terms the Bank proposed were not typical. Indeed, there is no evidence those terms were not standard market terms at the time they were proposed. Mr. Roach testified it is the application of those terms in light of recent events that has made OVG reassess the risk posed against the other terms of the loan, including the available interest rate. It can be assumed that the Bank viewed the terms holistically, and pushing back on the inclusion of ECF and Mandatory Prepayment terms at the time could have affected other terms of the agreement, including the interest rate. Moreover, he stated one could reasonably assume if there was a reason to be worried, the OUCC would have brought this up upon OVG filing the Post-C Report. If they had done so at that time, OVG might have been able to negotiate an interest rate lower than 4.50%, maybe even within the not-to-exceed 3.75% authorized in Cause No. 45538, to be rid of these terms. *Id.* at p. 7.

Mr. Roach explained that while he disagrees with Mr. Courter about the relative risk of the ECF and mandatory prepayment terms at the time the agreement was first executed, if Mr. Courter and the OUCC felt so strongly these terms were risky they could have raised those concerns at the time of the Post-Closing Report. Jt. Pet. Ex. 3 at pp. 7-8. The OUCC specifically requested the final terms be included in that report. *See* OUCC response to OVG DR 1.2, Jt. Pet. Ex. 3, Attachment GPR-1R. He stated these terms were in the Post-Closing Report which was served on

the OUCC. The OUCC analyst who testified in Cause No. 45538 is no longer with the OUCC, and the OUCC cannot produce records of another OUCC employee, including Mr. Courter, having reviewed the Post-Closing Report. *See* OUCC response to OVG DR 1.4 through 1.6, Jt. Pet. Ex. 3, Attachment GPR-1R and Jt. Pet. Ex. 3 at p. 8. Mr. Roach further explained that in light of Mr. Courter's testimony (pp. 1, 22) that the presence of those provisions was not authorized by the Commission's 45538 Order, he would have expected the OUCC to raise an objection if the OUCC felt OVG was not in compliance with the Order, particularly if those terms were the source of a "financial calamity." He stated the failure of the OUCC to do so suggests Mr. Courter is applying hindsight to ascribe to these provisions a greater significance within the context of the 45538 Order's grant of financing authority in order to advocate for a punitive order in this case. Jt. Pet. Ex. 3 at 9.

Mr. Roach further explained what he meant by hindsight analysis and punitive order. *Id.* At pp. 10-11. He said the Cause No. 45538 Order establishes a maximum interest rate for the debt that it authorized. OVG is seeking new borrowing authority so as to increase that maximum long-term debt interest rate so that OVG may negotiate to remove these ECF and Mandatory Prepayment terms. This is because, based on current circumstances and recent events, the relative risk posed by these terms has grown. He said as he explained in direct testimony (p. 7), the Silicon Valley Bank and Signature Bank collapses in early March of this year raised concerns that banks will turn to early call provisions with respect to commercial loans as a source of additional short-term bank cash reserves. He said these circumstances are unusual. If OVG could have known these terms would present the risk they do today, OVG could have sought a modification sooner and perhaps secured a more favorable interest rate. Additionally, if the OUCC had raised the concerns it raises today upon the receipt of the Post-Closing Report, OVG could have pursued that course of action. The reality is neither party recognized these terms as particularly risky until recent events highlighted the potential for them to be invoked. *Id.* at p. 10. He also explained that Mr. Courter is recommending the Commission authorize OVG to increase the authorized long-term debt interest rate to 4.50%, but only allow a 3.25% interest rate to be included in OVG's capital structure. This is not only punitive – having the effect of arbitrarily lowering OVG's authorized return for ratemaking purposes—but it also employs a hypothetical capital structure, which has long been prohibited in Indiana. *Id.* at pp. 10-11.

Mr. Roach explained that Mr. Courter, by his own words, is proposing the Commission approve something other than OVG's actual capital structure: "*With one exception*, I am recommending the same capital structure as depicted on Petitioner's Exhibit No. 1, Attachment GPR-7, page 1, which is the same capital structure as Table 1. The exception being the long-term debt amount should be updated to reflect the current balance. However, the interest rate remains at 3.25%. This capital structure reflects OVG's actual common equity amount, and not the reduced amount that should have occurred - since OVG did not buy back any of the stock it sold to Beynon." Jt. Pet. Ex. 3 at 11 (quoting Pub. Ex. 1 at 22 (emphasis added)). Mr. Roach further explained that Mr. Courter's reason for defending his recommendation as not invoking a hypothetical capital structure is that the increase in the long-term debt interest rate to 4.50% is the result of "unauthorized terms." This misstates what was approved in Cause No. 45538 and OVG seeks in this proceeding. OVG seeks authority to increase its long-term debt interest rate to 4.50% in exchange for removing the ECF and Mandatory Repayment terms. Regardless of whether one accepts Mr. Courter's "unauthorized terms" characterization, if the Commission authorizes a 4.50% long-term debt interest rate, that is what must be reflected in OVG's capital structure for

ratemaking purposes. If the Commission does not authorize it, OVG will withdraw the request to modify the loan agreement and what will apply are the terms as they exist today. If the Bank calls the loan, OVG's capitalization will return to 100% equity. It is OVG's position this presents a risk that will be more detrimental to customers than the proposed increased interest rate, with that, ultimately, for the Commission to decide. *Jt. Pet. Ex. 3* at p. 12.

**6. Commission Discussion and Findings.** Pursuant to Ind. Code §§ 8-1-2-76 through -80, the Commission has authority to investigate and approve or disapprove a public utility's issuance of bonds, notes, or other evidence of indebtedness payable more than one year from the execution. The Commission is charged with determining whether the proposed issue is in the public interest and must find the proposed issue is reasonably necessary in the operation and management of the utility's business in order for the utility to provide adequate service and facilities. The Commission made all the requisite findings in the 45538 Order.

Based on the evidence presented, the Commission is not persuaded that OVG's request to now amend Ordering Paragraph 1 of the 45538 Order—more than two years after its approval— to approve OVG issuing long-term debt at 4.50% is appropriate. Such an amendment is prompted by OVG accepting loan terms that were neither presented to nor approved by the Commission in Cause No. 45538. But, the Commission finds OVG's alternative request to approve an increased interest rate in this Cause upon the \$6,000,000 in long-term debt authorized in the 45538 Order to not-to-exceed 4.50% should be approved, provided all ECF recapture payment terms are eliminated in the new loan documentation and ratepayers shall not be financially responsible for interest costs on such debt that exceed 3.75%. In so finding, the Commission is mindful that OVG secured an interest rate of 3.25% for the long-term debt approved Cause No. 45538, but the approved interest rate was not-to-exceed 3.75%. We did not, however, sanction an interest rate greater than 3.75%; therefore, recovery of the associated interest costs from ratepayers shall be limited.

As a result of our decision, the Commission need not address whether: the OUCC's proposed capital structure is a hypothetical capital structure; the OUCC used hindsight review in evaluating the financing documents; the Excess Cash Flow and Mandatory Prepayment terms violated the 45538 Order; and whether OVG acted contrary to the 45538 Order by not buying back stock from Beynon. The Commission notes that neither OVG nor the OUCC contend the ECF and Mandatory Prepayment Terms were presented to or approved by the Commission in Cause No. 45538; consequently, the Commission finds the risk of their inclusion rests with OVG, not its ratepayers, and the higher interest rate we approve is a fruit of that risk, not properly borne by ratepayers.

The Commission's review of the evidence further indicates the following:

- On July 13, 2021, OVG signed a Credit Agreement, which does not contain Excess Cash Flow or Mandatory Prepayment terms. *Pub. Ex. 1, Attachment LDC-4* at pp. 1-72.
- August 3, 2021 – Term Loan Note between Ohio Valley Gas Corporation and First Merchants Bank is signed. *Jt. Pet. Ex. 1, Attachment GPR-3* at 4-5. The Term Loan Note contains prepayment penalties if principal amounts are prepaid in the first three years of the loan. *Id.* at p. 4.

- August 3, 2021 – First Amendment to Credit Agreement (“First Amendment”) is signed. *Id.* at pp. 6-11. The First Amendment added the following definitions: Excess Cash Flow, Term Loan, Term Loan Maturity Date, Term Loan Note, and Unfunded Capital Expenditures. *Id.* at 6-7, Sec. 1.1. The First Amendment established the principal amount at \$6 million and the interest rate at 3.25%. *Id.* at 7, Sec. 2.1(b) and (d).

The First Amendment added a new Section 2.4(d) titled Mandatory Prepayments. *Id.* at 8. The new Section 2.4(d) included the following language:

...commencing with the fiscal year ending July 31, 2023 and for each fiscal year thereafter until the Term Loan is paid in full, Borrower shall make additional principal payments to be applied as mandatory prepayments of the Term Loan on or before the following July 31<sup>st</sup>, in an amount equal to fifty percent (50%) of Excess Cash Flow for such applicable fiscal year...”  
*Id.*

The First Amendment also amended and restated in its entirety Section 2.5 of the Credit Agreement – Use of Proceeds. The new Section 2.5(b) stated: “Term Loan. Subject to the provisions of this Agreement, the proceeds of the Term Loan *shall be used to finance the repurchase of certain of Borrower’s capital stock that was sold during the 2020 calendar year.*” *Id.*, emphasis added.

Between July 13, 2021, and August 3, 2021, the Excess Cash Flow and Mandatory Prepayment terms were added and included in the First Amendment. OVG offered no evidence regarding why these terms were added.

The OUCC attempted twice to ascertain why these terms were added after the initial Credit Agreement was signed. The OUCC requested all correspondence between OVG and the Bank discussing the Term Loan, Credit Agreement, or Amendments from January 1, 2021, to August 7, 2023. Pub. Ex. 1, Attachment LDC-1 at p. 6. OVG responded with email correspondence dated April 25-26, 2023. *Id.* at pp. 7-16. The OUCC then requested all correspondence between OVG and the Bank specifically for July 13, 2021, to August 3, 2021. This time OVG responded with correspondence dated April 11 to May 12, 2023. Pub. Ex. 1, Attachment LDC-5 at pp. 1-10.

OVG offered no evidence regarding the time period when the Excess Cash Flow and Mandatory Prepayment terms were negotiated. However, OVG suggested in its rebuttal testimony, “It can be assumed that the Bank viewed the terms holistically, and pushing back on the inclusion of ECF and Mandatory Prepayment terms at the time would have affected other terms of the agreement, including but not limited to the interest rate.” Jt. Pet. Ex. 3 at p. 7. The Commission declines to assume how the Bank or OVG viewed the agreement terms.

The evidence also indicates the following:

- February 24, 2022 – OVG Board of Directors’ Meeting. Jt. Pet. Ex. 1, at pp. 15-18. The Board of Directors accepted the resignation of Ronald P. Salkie from his

position as Chief Financial and Information Officer effective February 14, 2022. *Id.* at p. 16. Mr. Salkie was appointed Director of Regulatory Affairs. *Id.* The Board of Directors also accepted Mr. Salkie's resignation from his role as Vice President and Assistant Treasurer of OVG, and his removal as a check signer. *Id.*

Mr. Salkie was the OVG representative who signed the Credit Agreement, Term Loan, and First Amendment. Pub. Ex. 1, Attachment LDC-4, pp. 2-50; Jt. Pet. Ex. 1, Attachment GPR-3, pp. 4-11.

- April 4, 2022 – Mr. Roach began his position as OVG's Chief Financial and Regulatory Officer. Jt. Pet. Ex. 1 at p. 1.

The time period when OVG and Mr. Roach became aware of the Excess Cash Flow and Mandatory Prepayment terms is fuzzy according to OVG's testimony. The Commission finds OVG in August 2021 should have been aware of the Excess Cash Flow and Mandatory Prepayment terms accepted in executing its loan documentation.

Mr. Roach testified: "After the Silicon Valley Bank and Signature Bank collapses in early March of this year, I directed the OVG finance group to review all of the OVG's financial agreements to identify early call provisions to which OVG was a party...It was during this investigation that our team *discovered the ECF provision.*" Jt. Pet. Ex. 1 at p. 7, emphasis added.

However, the evidence indicates Mr. Roach, OVG's Board of Directors, and members of OVG's management knew, or should have been aware of the Excess Cash Flow and Mandatory Prepayment terms no later than May 23, 2022.

- May 20, 2022 – BKD Independent Auditor's Report ("Auditor's Report") and Consolidated Financial Statements for years ended December 31, 2021 and 2020. The Auditor's Report is addressed to OVG's Board of Directors. Jt. Ex. 1 at pp. 45-71. Note 9 of the Auditor's Report – Long-term Debt states:

Note payable to bank due in monthly installments of principal and interest of \$58,919. In addition, *mandatory prepayments will be due each year, beginning in 2023, based on the Companies' excess cash flow, as defined.* The note matures in August 2026 and interest is fixed at 3.25%. The note is collateralized by substantially all assets of the Companies. The note is *subject to prepayment penalties during the first three years of the loan term.* *Id.* at 63, emphasis added.

- May 23, 2022 – OVG Board of Directors' Meeting. Jt. Ex. 1 at pp. 19-22. Directors present included John D. Beynon, Scott A. Williams, and Thomas D. Williams. Guests present included Gregory P. Roach and Joseph E. Heim. *Id.* at p. 19. Mr. Heim, Managing Director of BKD, LLP, provided a recap of his firm's completed audit of the Company's 2021 financial statements. *Id.*



Based on the foregoing evidence, the Commission finds Mr. Roach, having been present at the May 2022 Board meeting, was or should have been aware of the Excess Cash Flow and Mandatory Prepayment terms before March 2023. Mr. Roach has been OVG's Chief Financial Officer since April 4, 2022. The internal auditor's report is dated May 20, 2022, and specifically references the Excess Cash Flow and Mandatory Prepayment terms.

OVG argued in its rebuttal testimony "...at the time of entering into the transaction OVG had no reason to think the ECF recapture or the mandatory prepayment term posed the risk they now do. Jt. Pet. Ex. 3 at p. 2. OVG also contended, "OVG at the time had no reason to think the terms First Merchants Bank proposed were not typical. Indeed, there remains no evidence that those terms were not standard market terms at the time they were proposed." *Id.* at p. 7. OVG provided no evidence regarding the three week time when the Excess Cash Flow and Mandatory Prepayment terms were negotiated or how the terms were negotiated. There is also no evidence from which the Commission is comfortable concluding that these the terms *were* standard market terms at the time or could not have been removed before the loan documents were executed.

OVG also argued in its rebuttal testimony that if the OUCC had brought up a concern about the Excess Cash Flow and Mandatory Prepayment terms when the Post-Closing Report was filed, OVG might have been able to negotiate an interest rate lower than 4.50%, maybe even within the not-to-exceed 3.75% authorized in Cause No. 45538, to be rid of these terms. Pet. Ex. 3 at p. 7. The Commission finds that with or without such OUCC interaction, some members of OVG's management were aware or reasonably should have been aware of the Excess Cash Flow and Mandatory Prepayment terms in August 2021 when procuring this loan. As indicated above, Mr. Roach was made aware of these terms no later than May 23, 2022, only nine months after the financing documents were signed, yet OVG waited almost 15 months to file its petition in this Cause.

Notwithstanding whether OVG had reason to think the ECF recapture or mandatory prepayment term posed a risk, the fact remains that OVG's management executed the loan documents with those provisions.

Based on the evidence in this Cause, as discussed above, the Commission concludes OVG's request to amend Ordering Paragraph 1 of the 45538 Order to issue long-term debt at an interest rate of 4.50% is denied. The Commission concludes OVG's alternative request to increase the interest rate upon its \$6,000,000 in long-term debt approved in the 45538 Order to an interest rate not-to-exceed 4.50% is granted, provided the ECF recapture and mandatory prepayment terms are eliminated in the loan documents executed in connection with any increased interest rate and OVG's ratepayers shall not be financially responsible for interest costs greater than 3.75%.

**IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:**

1. OVG's request to amend Ordering Paragraph 1 of the 45538 Order to issue long-term debt at an interest rate of 4.50% is denied.
2. OVG's alternative request for approval to increase the interest rate associated with the \$6,000,000 in long-term debt approved in the 45538 Order to an interest rate of not-to-exceed 4.50% is approved, subject to the conditions set forth above, including the prohibition upon OVG's

ratepayers being responsible for interest costs exceeding 3.75%. Such new loan documentation shall otherwise be as approved in the 45538 Order,

3. This Order shall be effective on and after the date of its approval.

**HUSTON, BENNETT, FREEMAN, VELETA, AND ZIEGNER CONCUR:**

**APPROVED:**

I hereby certify that the above is a true  
and correct copy of the Order as approved.

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Dana Kosco  
Secretary to the Commission

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served upon the following parties of record in the captioned proceeding by electronic service on November 17, 2023.

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