

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Aqua Ohio,)	
Inc. for Authority to Assess a System)	
Improvement Charge in the Lake / Masury /)	Case No. 18-0337-WW-SIC
Prior American / Prior Mohawk / Prior)	
Tomahawk Properties.)	

**POST HEARING BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. RECOMMENDATIONS	3
A. The proposed Settlement should be found to violate the diversity of interest consideration under the first prong.	3
B. Aqua customers should be protected from the Settlement’s unwarranted system improvement charges which would be collected from consumers. The PUCO should adopt the recommendations of OCC and the recommendations contained in the PUCO Staff’s earlier Comments for consumer protection that were consistent with R.C. 4909.172(C)(1) and with the PUCO’s standard for requiring settlements to benefit customers and the public interest.	3
C. The proposed Settlement violates important regulatory principles and practices.	8
D. The recommendation of OCC to protect customers from paying certain charges (and the PUCO Staff’s earlier recommendation in this case) are supported by the Supreme Court of Ohio.	11
IV. CONCLUSION.....	13

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I. INTRODUCTION

The Settlement reached between Aqua Ohio, Inc. (“Aqua”) and the Staff of the Public Utilities Commission of Ohio (“PUCO”) would allow Aqua to charge its customers for system improvement costs that are not authorized by Ohio law, R.C. 4909.172. And the Settlement is not in accordance with the precedent of the PUCO.

The Office of the Ohio Consumers' Counsel (“OCC”), the representative of Aqua’s residential customers, files this post hearing brief to recommend consumer protection from the Settlement. OCC’s position is supported, in effect, by the Comments of the PUCO Staff filed July 11, 2018,¹ which represented the position of the PUCO Staff before it changed positions in the Settlement. The recommendations contained

¹ *In the Matter of the Application of Aqua Ohio, Inc. for Authority to Assess a System Improvement Charge in the Lake / Masury / Prior Mohawk / Prior Tomahawk Properties*, Case. No. 18-0337-WW-SIC, Comments on Behalf of the Staff of the Public Utilities Commission of Ohio, July 11, 2018 (“Staff Comments”).

in the PUCO Staff's Comments are consistent with Ohio law,² and PUCO regulatory practice and principles.³

II. STANDARD OF REVIEW

The standard of review for consideration of a stipulation has been discussed in a number of PUCO cases and by the Ohio Supreme Court. The Ohio Supreme Court stated in *Duff v Pub. Util. Comm.*:

A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration but must determine what is just and reasonable from the evidence presented at the hearing.⁴

The Court in *Consumers' Counsel v. Pub. Util. Comm.* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?
2. Does the settlement, as a package, benefit customers and the public interest?
3. Does the settlement package violate any important regulatory principle or practice?⁵

² See, R.C. 4909.172.

³ See, *In the Matter of the Application of Aqua Ohio, Inc. for Authority to Assess a System Improvement Charge in the Lake / Masury / Prior American Properties*, Case No. 15-0863-WW-SIC, Staff Comments, August 14, 2015.

⁴ *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 384 N.E.2d 264 (1978).

⁵ *Office of Ohio Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123 at 126, 592 N.E.2d 1370 at 1373 (1992).

Also, regarding the first prong of the standards, the PUCO has considered whether a settlement has an adequate diversity of interests supporting it.⁶ The Commission should find that the Settlement in this case harms consumers, is not in the public interest and violates important regulatory principles and practices.

III. RECOMMENDATIONS

A. The proposed Settlement should be found to violate the diversity of interest consideration under the first prong.

Regarding the first prong of the settlement standards, the PUCO has considered whether a settlement has an adequate diversity of interests supporting it.⁷ This settlement is strictly between Aqua and the Staff and lacks the necessary diversity of interests because there are no customers' representative such as OCC signed onto it. The PUCO has considered this an important factor in the criteria used for evaluating settlements.⁸ It should be considered an important criteria in this case, and should be a basis for finding the Settlement does not pass the first prong of the Settlement standards.

B. Aqua customers should be protected from the Settlement's unwarranted system improvement charges which would be collected from consumers. The PUCO should adopt the recommendations of OCC and the recommendations contained in the PUCO Staff's earlier Comments for consumer protection that were consistent with R.C. 4909.172(C)(1) and with the PUCO's standard for requiring settlements to benefit customers and the public interest.

On March 1, 2018, Aqua filed an application to collect an infrastructure improvement surcharge of 3.97% from water customers in its Lake Erie Division,

⁶ See, e.g., *In re FirstEnergy's 2008 ESP Case*, Case No. 08-0935-EL-SSO, Second Opinion and Order, Opinion of Commissioner Cheryl L. Roberto Concurring in Part and Dissenting in Part (Mar. 25, 2009) at 1-2.

⁷ *Id.*

⁸ *Id.*

Masury Division, and service areas formerly served by Ohio American Water Company, Mohawk Utilities, Inc., and Tomahawk Utilities, Inc.⁹ The Attorney Examiner's Entry of April 11, 2018 established a deadline for filing comments of July 11, 2018.

The PUCO Staff's Comments filed on July 11, 2018 correctly applied the conditions in R.C. 4909.172 to Aqua's request to charge consumers for certain specific costs associated with plant improvements through an infrastructure improvement surcharge, commonly known as a system improvement charge ("SIC"). Staff wrote:

Effective 2004 the Ohio General Assembly enacted Section 4909.172 of the Revised Code (R.C.), which authorized water and wastewater companies to recover certain costs associated with plant improvements through an infrastructure improvement surcharge, commonly known as a system improvement charge or SIC. At that time, such infrastructure consisted of service lines for, and hydrants, mains and valves installed as part of, a replacement project for an existing facility. The SIC was not to exceed three percent of the Company's tarified rates. The Commission adopted and approved the mechanism in Case No. 03-2266-WS-SIC.¹⁰

The Staff went on to explain that effective in 2013, the General Assembly amended R.C. 4909.172, increasing the maximum water SIC from 3.00% to 4.25%. Amended R.C. 4909.172 expanded the enumerated list of capital improvements appropriate for inclusion in calculating the SIC.

The revised language added the following to eligible water capital improvements: replacement of existing plant including chemical feed systems, filter, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves, main extensions that eliminate dead ends to resolve documented water supply problems

⁹ Aqua's filing was then amended on June 21, 2018 to include current, clean, and redlined tariff sheets.

¹⁰ Staff Comments at 1, citing *In the Matter of the Information Requirement for System Infrastructure Improvement Surcharge*, Case No. 03-2266-WS-SIC, February 11, 2004.

presenting significant health or safety issues to then existing customers; and main cleaning or relining.¹¹

The legislative history describing the change to R.C. 4909.172 supports the PUCO Staff's application of the statute and the result reached – preventing customers from paying unwarranted charges not for system improvements included under the enumerated list.¹² Staff explained that it “does not believe that the revised legislation allows for the recovery of all plant replacement through a SIC; limits on the items that can be recovered through a SIC still exist.”¹³ Staff explained that:

[S]uch ineligible items include but are not limited to: structural repairs such as tuck pointing, brick restoration, lead abatement, miscellaneous plant concrete structure; renovations to the water treatment plant, including wire, electrical and electric service upgrades; replacement of railings; settling tanks; *tank roof*; fences; retaining walls; catwalks and SCADA equipment.¹⁴ (emphasis added)

“Conversely,” according to the Staff, Aqua “included all accounts and projects that are related to water capital improvements in this application. Staff finds that these items are not recoverable in a SIC case, but the Applicant may request recovery in a base rate case application. As such, the Staff recommends the removal of \$2,207,369 of plant additions and the accompanying retirements of \$201,909 from its SIC calculation.”¹⁵

¹¹ Staff Comments at 2; *see also* Ohio Legislative Service Commission Final Analysis Sub. H.B. 379; O.R.C. 4909.172.

¹² *Id.*

¹³ Staff Comments at 4.

¹⁴ *Id.*

¹⁵ *Id.*

The PUCO Staff's Comments, in effect, support OCC's recommendations for consumer protection. The PUCO Staff's Comments are consistent with how Staff has analyzed previous SIC cases including under R.C. 4909.172 that became effective in 2013.¹⁶

The result reached in the Staff's Comments (preventing consumers from paying unwarranted charges) is required by law. The statutory language of 4909.172(C)(1) is very clear on what system improvement costs may be collected from consumers under the law. R.C. 4909.172(C)(1) describes the capital improvements that may comprise infrastructure plant recoverable through a SIC:

In the case of a waterworks company, replacement of existing plant including chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves, main extensions that eliminate dead ends to resolve documented water supply problems presenting significant health or safety issues to then existing customers, and main cleaning or relining.

Traditionally, if an item for which a utility sought recovery was not on the list in the statute, Staff appropriately excluded it. Aqua and Staff cannot now expand the list through Settlement and charge consumers for plant not on that list. Aqua and Staff cannot achieve in this case through the PUCO settlement process what cannot be authorized legislatively.¹⁷

Several months after Staff filed its Comments, Aqua and Staff proposed a Settlement. The proposed settlement harms customers and is not in the public interest because it expands the eligible list of capital plant projects that may be included under

¹⁶ See, *In the Matter of the Application of Aqua Ohio, Inc. for Authority to Assess a System Improvement Charge in the Lake / Masury / Prior American Properties*, Case No. 15-0863-WW-SIC, Staff Comments, August 14, 2015.

¹⁷ See, e.g., *Elyria Tel. Co. v. PUCO*, 158 Ohio St. 441, 448 (1953).

R.C. 4909.172 for inclusion in future system improvement charge proceedings. The Settlement specifically intends to bind the PUCO on account costs recoverable in future SIC filings.¹⁸ It would not benefit customers or the public interest for the PUCO to commit to any future Aqua SIC filing that is contrary to both Ohio statute and past PUCO practices.

The proposed Settlement harms customers in at least two ways. First, it would permit collection of costs from customers for the replacement of an \$832,862 elevated storage tank roof not permitted under the regulatory principle embodied in R.C. 4909.172. Elevated storage tank roofs are not an eligible item included in R.C. 4909.172 for consideration under a system improvement charge. Second, the proposed Settlement broadens the R.C. 4909.172 list to include account numbers rather than specific plant items identified by the Ohio statute for this proceeding and for future system improvement charge cases.

If adopted, the Settlement will result in Aqua charging customers for items previously disallowed as system improvement charges. That will harm customers and the public interest with unreasonable and unjust charges.

In Comments in this case and over the years, the PUCO Staff has recommended limiting charges to customers to only the specific plant replacement projects listed under R.C. 4909.172(C)(1). In its Comments, the PUCO Staff recommended a reduction to Aqua's requested system improvement charge by approximately \$2.0 million (net of

¹⁸ Proposed Settlement at 2; *See also*, Supplemental Direct Testimony of Aqua Witness Richard A. Hideg at 2, "going forward, the Stipulation identifies by NARUC account what costs may be properly included in future SIC filings."

retirements) from Aqua's proposal to charge customers for \$16.5 million (net of retirements).

OCC witness Wm. Ross Willis testified that the Aqua/PUCO Staff Settlement fails the PUCO's standards for considering settlements. Regarding the standard for benefiting customers and the public interest, Mr. Willis testified that the way to benefit customers and the public interest is to reject the settlement and adopt the recommendations of OCC and of the PUCO Staff in its initial Comments:

I recommend that the PUCO benefit customers and the public interest by reducing the charges in the approximate amount of \$2 million (net of retirements), as the PUCO Staff originally recommended in its Comments. This full reduction would mean that the charges proposed in the Settlement should be reduced by an additional \$ 832,862 (net of retirement), as the Settlement only reduces the charges by approximately \$1.1 million (net of retirements) instead of the approximate \$2 million (net of retirements).¹⁹

For these reasons, the PUCO should find that the Settlement harms customers and is not in the public interest; therefore, the Settlement should be rejected.

C. The proposed Settlement violates important regulatory principles and practices.

Adoption of the Settlement would deviate, for the first time since enactment of R.C. 4909.172 in 2004, from a system improvement charge that collects from customers more than costs for items that are specifically listed in the statute. OCC witness Willis testified, "[t]o deviate from the statute is inconsistent with PUCO principles and practices. System improvement charges limited to the specific items listed on R.C.

¹⁹ Direct Testimony of Wm Ross Willis filed December 10, 2018 at 5. Mr. Willis' testimony attaches the PUCO Staff Comments filed in this proceeding as WRW Attachment B.

4909.172 is consistent with PUCO past practices.”²⁰ Until this proposed Settlement, the PUCO Staff has appropriately recommended, and the PUCO has approved, collection of only the very specific plant replacement projects authorized and listed under R.C.

4909.172(C)(1), as thoroughly explained in Staff’s Comments filed in this proceeding.

The proposed settlement goes well beyond what is permitted under the statute. Nowhere in R.C. 4909.172 does it state that the cost of an elevated storage tank roof may be collected from customers. The signatory parties also seek to go beyond what is enumerated in the statute by permitting costs on a going-forward basis that are classified into 13 different account numbers, which is much broader than what the statute allows.

Inclusion of these accounts as eligible for SIC collection goes beyond what the statute allows and is contrary to PUCO practice and principles. The Settlement would allow for SIC-recovery of any of the items found in the below-listed accounts:

- 323 – Other Power Production Equipment

This account shall include the cost installed of any equipment used for the production of power, other than boiler plant equipment, principally for use in pumping operations. Subdivisions shall be maintained hereunder for the cost of equipment used for each type of power produced, such as hydraulic works, generators, etc.

- 324 – Steam Pumping Equipment

8 Items included in this account

- 325 - Electric Pumping Equipment

8 Items included in this account

- 326 – Diesel Pumping Equipment

8 Items included in this account

- 327 – Hydraulic Pumping Equipment

7 Items included in this account

²⁰ Direct Testimony of Wm. Ross Willis at 7; *See, also, In the Matter of the Application of Aqua Ohio, Inc. for Authority to Assess a System Improvement Charge*, Case No. 15-0863, Finding and Order (October 7, 2015).

- 328 – Other Pumping Equipment

This account shall include cost of equipment used in pumping operations not properly includible in accounts 324, 325, 326 and 327, such as gas engine and gasoline engine pumping equipment. Subdivisions shall be maintained hereunder for each type of pumping equipment.

- 332 – Water Treatment Equipment

73 Items included in this account

- 342 – Distribution Reservoirs & Standpipes

23 Items included in this account

- 343 - Transmission & Distribution Mains

22 Items in this account

- 345 – Services

12 Items in this account

- 346 – Meters

2 Items in this account

- 347 – Meter Installations

7 Items in this account

- 348 – Hydrants

8 Items in this account

R.C. 4909.172 is very specific as to what system improvement charges are allowable for a waterworks company. The statute does not identify any account numbers as being eligible. The statute specifically allows for the replacement of only existing plant including chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves, main extensions that eliminate dead ends to resolve documented water supply problems presenting significant health or safety issues to then existing customers, and main cleaning or relining.

Consequently, because the Settlement deviates from past PUCO practices of what system improvement charges should be allowed, and includes additional

items not identified by Ohio statute, combined with the fact that this new interpretation will apply in any future Aqua proceedings, the Settlement violates important regulatory principles and practices. Therefore, the PUCO should reject the Settlement.

D. The recommendation of OCC to protect customers from paying certain charges (and the PUCO Staff's earlier recommendation in this case) are supported by the Supreme Court of Ohio.

It is well-recognized that the PUCO is a creature of statute and has only those powers given it by statute.²¹ When the legislature amended R.C. 4909.172 in 2013, it took the opportunity to specifically expand and delineate the capital improvements appropriate for inclusion in calculating the SIC. The revised language added specific items eligible for capital improvements. If the items included in original R.C. 4909.172 (or amended R.C. 4909.172) were simply illustrative, there would have been no need for the General Assembly to amend the statute to include additional items. That it did so, only confirms that the items on the statutory list are exclusive, not illustrative.

The Supreme Court of Ohio ("Court") has recognized that the plain reading of a statute controls. The Court has held that when a statute lists specific items or categories for recovery, those items or categories are not illustrative or examples; the statute's enumerative list is exhaustive.²² When the PUCO and a utility tried to expand on the plain reading of a statute's enumerative list, the Court *In re Columbus S. Power*

²¹ See, e.g., *Elyria Tel. Co. v. PUCO*, 158 Ohio St. 441, 448 (1953).

²² *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-20 (2011).

Co. disagreed and remanded the case to the PUCO to determine if any of the listed categories authorize recovery.²³

The Court held that if a given provision does not fit within one of the categories listed “following,” it is not authorized by statute. The Court explained:

The commission believes that the phrase “without limitation” allows unlisted items, asserting that the nine categories are “illustrative...not exhaustive.” But this phrase does not allow unlisted items. Rather, it allows unlimited inclusion of listed items. The list limits the type of categories a plan may include, while the phrase “without limitation” allows as many or as much of the listed categories as the commission finds reasonable.²⁴

The Court was referring to the enumerated list of items that may be included in a utility’s electric service plan (“ESP”) under R.C. 4928.143(B)(2). The Court stated,

[b]y its terms, R.C. 4928.143(B)(2) allows plans to included only “any of the following” provisions. It does not allow plans to included “any provision.” So if a given provision does not fit within one of the categories listed “following” (B)(2), it is not authorized by statute.²⁵

The SIC statute is constructed similarly as the ESP statute. It reads: “For purposes of this section, a company’s cost of infrastructure plant may include depreciation expenses. Such infrastructure plant may consist of the following capital improvements that the commission determines are used and useful in rendering public utility service.” Part (C)(1) of the statute then enumerates that list:

In the case of a waterworks company, replacement of existing plant including chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves, main extensions that eliminate dead ends to resolve documented

²³ *Id.* at 520.

²⁴ *Id.* at 520.

²⁵ *Id.*

water supply problems presenting significant health or safety issues to then existing customers, and main cleaning or relining;

The word “including” in (C)(1) means, consistent with the Court’s analysis in *In re Columbus S. Power Co.*, that SIC inclusion “allows unlimited inclusion of listed items. The list limits the type of categories a plan may include.”²⁶ R.C. 4909.172’s words are not illustrative of items that may be included in a SIC—the items are an exhaustive list. As the Court recognized in *In re Columbus S. Power Co.*, “the plain language of the statute controls.”²⁷ Staff’s Comments complied with this analysis; the Settlement does not.

IV. CONCLUSION

OCC respectfully requests that the PUCO not allow Aqua to accomplish in this SIC case (and future SIC cases) a rewrite of the law that protects customers. Aqua should not be allowed to expand the list of plant items eligible for SIC-collection from customers to include items not specifically listed in R.C. 4909.172. Because the proposed settlement includes items for charges to customers that are beyond what is permitted under Ohio statute and deviate from prior PUCO practice for a system improvement charge, the Settlement should not be approved.

Instead, OCC respectfully requests that the PUCO reject the Settlement and adopt OCC’s recommendation and the PUCO’s Staff’s original Comments to protect consumers, consistent with Ohio law, the public interest and PUCO principles and practices.

²⁶ *Id.*

²⁷ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Post-Hearing Brief was served on the persons stated below via electronic transmission on this 21st day of December 2018.

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