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 / Prior American / Prior Mohawk / Prior Tomahawk Properties.	)))))	Case No. 18-0337-WW-SIC

POST HEARING BRIEF
OF AQUA OHIO, INC.

Mark A. Whitt (0067996)
Andrew J. Campbell (0081485)
Rebekah J. Glover (0088798)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3973
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

(Counsel willing to accept service by email)

ATTORNEYS FOR AQUA OHIO, INC.

TABLE OF CONTENTS

I. INTRODUCTION

This case comes down to a single question of law: when a statute states a general category, and then uses the word *including* to list a number of items within that category, how should the list be understood? Is such a list partial and illustrative? Or is the list exclusive and exhaustive?

The statute at issue in this case is R.C. 4909.172, in particular division (C)(1), and it has just such a structure. It authorizes the recovery of costs associated with the following:

> replacement of existing plant *including* chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves * * *.

(Emphasis added.) The issue here is whether *any* item fitting within the general category ("replacement of existing plant") is recoverable, or *only* those items specifically listed thereafter ("chemical feed systems, filters, pumps, motors," etc.).

The Stipulation recommends recovery of the costs of replacing a tank roof. The undisputed facts make clear that the tank roof serves an important purpose in providing water service, and that the associated costs were properly accounted for as "replacement of existing plant." But the Office of the Ohio Consumers' Counsel (OCC) claims that because "tank roofs" are not specifically enumerated in the statute, the costs of replacing one cannot be recovered.

Aqua Ohio, Inc. (Aqua or the Company) disagrees, and the law is on its side. The Supreme Court of Ohio has long held that the word *including* "implies that that which follows is *a partial*, *not an exhaustive listing* of all that is subsumed within the stated category." *In re Hartman*, 2 Ohio St.3d 154, 156 (1983) (emphasis added). Indeed, the Court describes this interpretation as both "clear" and "obvious":

> The legislature's choice of the word 'including' . . . indicates a clear intention not to limit, but merely to describe or illustrate. The word 'including' obviously is one of enlargement, and not limitation.

S. Cmty., Inc. v. State Employment Relations Bd., 38 Ohio St.3d 224, 226 (1988). Other cases could be cited, and are discussed below.

So when OCC interprets the word *including* in R.C. 4909.172(C)(1) to limit the scope of investment to specifically enumerated items, it violates the clear teaching of the Supreme Court of Ohio. The SIC statute permits Aqua to recover the costs of "replacement of existing plant," regardless of whether the plant items are listed in the statute. OCC's only basis for challenging the Stipulation is erroneous as a matter of law, and the Commission should approve it as filed.

II. PROCEDURAL BACKGROUND

R.C. 4909.172 permits waterworks companies to recover costs associated with plant investment, in particular the costs associated with the replacement and rehabilitation of aging mains and existing plant. The infrastructure investment supported by this statute is crucial to service reliability and water quality. To fund this critical investment, R.C. 4909.172 authorizes an infrastructure improvement surcharge, which Aqua and Staff have referred to as a System Improvement Charge (SIC). Under this statute and the corresponding rules, Aqua has been able to invest millions of dollars in vital improvements to its water service facilities over the last several years.

On March 1, 2018, in accordance with R.C. 4909.172 and Ohio Adm. Code 4901:1-15-35, Aqua filed an application for approval of, and authority to recover, plant investment costs through its SIC. Aqua requested approval to assess a 3.937 percent surcharge to recover expenses associated with certain capital improvements necessary to the provision of safe and reliable waterworks service. On March 23, OCC filed a motion to intervene, and a few weeks later, the Commission issued an entry that set a deadline for comments from interested parties for July 11.

Staff was the only party to file comments, in which it recommended approval of Aqua's application, subject to certain modifications. There was some initial dispute between Staff and

Aqua over the scope of "plant replacement" permitted in the charge, but on November 8, after several months of discussions, involving both OCC and Staff, Aqua and Staff filed a Stipulation and Recommendation (Stipulation).

The Stipulation outlined the agreed-upon terms for recovery of costs in both this proceeding and future proceedings. The Stipulation approved a 3.66 percent surcharge, a significant reduction from Aqua's original request of 3.937 percent. (Stip. at 2.) And the Stipulation established an agreed-upon scope of investment that may be included in future SIC applications. (*Id*.) In particular, the Stipulation provides a list of utility plant accounts that Aqua and Staff agree qualify for recovery—assuming that the costs are properly accounted for, and otherwise recoverable under the statute. (*Id*.)

OCC participated in settlement negotiations but ultimately declined to sign the Stipulation. (Aqua Ex. 4.0 (Hideg Supp.) at 6.) On December 10, Aqua and OCC filed testimony respectively for and against the Stipulation. On December 12, an unopposed motion was filed waiving cross-examination, stipulating to the admission of testimony, and proposing an agreed-upon briefing schedule. A brief hearing was held on December 17, at which the motion was granted, exhibits and testimony were entered into the record, and the briefing schedule was set.

III. STANDARD OF PROOF

Ohio Admin. Code 4901-1-30 authorizes parties to enter into stipulations in proceedings before the Commission. These stipulations are recommendations and are not binding on the Commission, but they are afforded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *City of Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). In evaluating stipulations, the Commission has traditionally employed a three part-test:

- Is the settlement a product of serious bargaining among capable, knowledgeable parties?

- Does the settlement, as a package, benefit ratepayers and the public interest?
- Does the settlement violate any important regulatory practice or principle?

See, e.g., *In re Application of Columbus S. Power Co.*, Case No. 09-1089-EL-POR, Opin. & Order at 21 (May 13, 2010). The Ohio Supreme Court has also consistently approved this test. *See, e.g.*, *Indus. Energy Consumers v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561 (1994).

IV. ARGUMENT

In this brief, Aqua will first demonstrate that the Stipulation complies with the Commission's three-part test for stipulations. The Company will then rebut OCC's argument that the Stipulation violates R.C. 4909.172 by allowing Aqua to recover the costs of replacing plant not specifically listed in the statute. Finally, Aqua will show that the Stipulation is *not* contrary to prior Commission practice, and that OCC's claim to the contrary is misleading and incorrect.

A. The Stipulation complies with the Commission's three-part test.

The Commission should approve the Stipulation. It complies with all three applicable criteria, violates none, and should be approved.

1. The Stipulation is the product of serious bargaining among capable, knowledgeable parties.

It is an uncontested fact that the Stipulation was the product of serious bargaining among capable, knowledgeable parties.

Aqua witness Richard Hideg testified that the "Stipulation is the outcome of a lengthy process of investigation, discovery, discussion, and negotiation." (Hideg Supp. at 5.) The parties were undoubtedly experienced, capable, and knowledgeable, "represented by able, experienced counsel and [with] access to technical experts." (*Id*.) Mr. Hideg explained that as a result of these negotiations, "the Company made additional commitments and accepted additional limitations to those proposed in its application," including limits "on what plant accounts [Aqua] may propose in future SIC filings." (*Id*. at 5–6.)

Although OCC opposes the Stipulation, OCC witness Ross Willis to his credit does not contest the fact that serious bargaining occurred. Mr. Hideg confirmed that "although [OCC] did not sign the Stipulation, the proposal forming the basis of the Stipulation was shared with OCC, and OCC was invited to and did participate in settlement discussions." (Hideg Supp. at 6.)

This prong of the three-part test appears uncontested, and the evidence supports the fact that the Stipulation was the product of serious bargaining among capable, knowledgeable parties.

2. The Stipulation, as a package, benefits ratepayers and is in the public interest.

As a package, the Stipulation also benefits ratepayers and advances the public interest. It does so in numerous ways.

a. The Stipulation permits the recovery of critical investments in Aqua's infrastructure.

One purpose of the SIC is to help finance critical investment in replacing aging infrastructure and thus maintaining the physical system used to provide water service. *See* R.C. 4909.172. As Mr. Hideg explained, the SIC serves important public interests by financially "support[ing] Aqua in the continued provision of safe and reliable water service to its customers, which benefits Aqua, its customers, and the public interest." (Hideg Supp. at 6.)

b. The Stipulation directly reduces the bill impact of the SIC.

Additionally, assuming that a reduction in the SIC benefits ratepayers, the Stipulation does that as well. The exclusions agreed to between Aqua and Staff resulted in "a reduction in the charge filed by Aqua (from 3.937 to 3.66 percent)." (*Id*.) The agreed-upon reduction of the SIC will directly reduce customer bills.

c. The Stipulation will indirectly reduce bill impacts by limiting the scope of investment that may be included in future charges.

The Stipulation will also reduce bills indirectly, as Aqua has agreed to "limit the scope of includable plant accounts may also reduce the amount of future SICs." (*Id*.)

Aqua accepted these restrictions on includable investment even though they go beyond the restrictions imposed by statute. (*See id*.) The SIC statute permits the recovery of the costs of "replacement of existing plant." R.C. 4909.172(C)(1). Used in this sense, the term *plant* has been interpreted by the Ohio Supreme Court to denote "the land, buildings, machinery, apparatus, and fixtures employed in carrying on . . . a mechanical or other industrial business." *see In re Appl. of Middletown Coke Co.*, 127 Ohio St.3d 348, 2010-Ohio-5725, ¶ 18 (quoting *Webster's Third New International Dictionary* at 1731 (1986)); *see id*. ("the siting board's jurisdiction extends to land, buildings, and equipment employed in carrying on the business of generating electricity").

The takeaway here is that the term *plant* encompasses not only personal property (such as machinery, equipment, and apparatus) but also real property (such as land and buildings). For this reason, Aqua believes that the SIC statute could be interpreted to permit the recovery of any "plant replacement" costs, even if associated with real property or sources of water supply. Nevertheless, in an effort to reach a compromise with Staff, Aqua agreed to exclude items categorized in real-property and source-of-supply plant accounts, not only from this charge, but from future charges as well. (*See* Hideg Supp. at 5–6; Stip. at 2–3.)

d. The Stipulation also serves interests of administrative efficiency.

Finally, approval of the Stipulation will serve interests of administrative efficiency. The Stipulation "clarifies what costs may be included in a SIC." (Hideg Supp. at 6.) In future filings, the task of auditing Aqua's filings will be much simpler, as the includable plant accounts have now been clearly delineated. To be sure, Staff will still review the costs included within the charge, and ensure that costs are properly categorized and otherwise statutorily permitted. The Stipulation requires that each cost be "properly classified in the [listed] accounts" and "otherwise qualify for recovery under R.C. 4909.172." (Stip. at 2.) But it will not be necessary in future

filings to question what *kinds* of accounts and costs are permissible, which in this proceeding required significant time and discussion.

3. The stipulation does not violate any important regulatory principle or practice.

Finally, the Stipulation does not violate any important regulatory principle or practice. The SIC is a relatively recent statutory creation, and the governing "regulatory principles" are affirmatively set forth by statute. R.C. 4909.172 enshrines many traditional regulatory principles: such as notice to ratepayers; the "used and useful" and "reasonable rate of return" requirements; and principles of gradualism, such as limits on both the amount and number of charges.

Aqua's application complied with statute, and nothing in the Stipulation affects that. On the contrary, by explicitly requiring that each recoverable cost "otherwise qualify for recovery under R.C. 4909.172," the Stipulation affirmatively supports compliance with the applicable regulatory principles.

In summary, the evidence shows that the Stipulation complies with all three parts of the Commission's test.

B. OCC's position that the statute restricts recovery to "specifically listed" items disregards decades of Supreme Court precedent requiring a broader construction.

OCC, however, opposes the Stipulation, claiming that the Stipulation is against the public interest and violates regulatory principles. Mr. Willis correctly notes that the Stipulation permits recovery of "costs related to the replacement of an elevated storage tank roof." (OCC Ex. 1.0 (Willis Dir.) at 6.) But he claims that "tank roofs are not an eligible item included [in] R.C. 4909.172 for consideration under a System Improvement Charge." (*Id*.) As he sees it, the SIC may only recover the "specific plant items identified by the Ohio statute." (*Id*. at 6.)

Mr. Willis's arguments depend on the assumption that *only* the "specific plant items" (*id*.) listed in the statute are eligible for recovery. But as Aqua will demonstrate, OCC's restrictive interpretation of R.C. 4909.172 disregards decades of Supreme Court precedent.

1. OCC assumes that the statutory term *including* is a word of restriction; the Ohio Supreme Court has made clear that it is "a word of expansion."

The provision under dispute is R.C. 4909.172(C)(1), which among other things authorizes recovery of the following:

> replacement of existing plant *including* chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves * * *.

(Emphasis added.) The question that divides OCC and Aqua is whether the list of plant items following the word *including* is illustrative or exhaustive. OCC assumes that the list is exhaustive.

Mr. Willis claims again and again that the only items allowed in the SIC are those "specifically listed in the statute" (*id*. at 6); "specific plant items identified by the Ohio statute" (*id*.); or those items "enumerated in the statute" (*id*. at 8). Indeed, he goes so far as to *add* the word "only" to the description of the statutory scope: 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." (*Id*. at 10 (emphasis added).)

a. The Ohio Supreme Court has clearly and repeatedly held that the term *including* denotes a partial, illustrative list, not an exhaustive one.

But to read the statute this way, OCC must disregard the clear and repeated guidance of the Ohio Supreme Court. The Court has consistently taught that the word "including" in such contexts is *not* exhaustive, but merely illustrative.

The Court's explanation in *In re Hartman* is typical. 2 Ohio St. 3d 154 (1983). In that case, the Court held that the term *including* implies that whatever follows "is *a partial*, *not an*

exhaustive listing of all that is subsumed within the stated category." *Id*. at 156 (emphasis added). As the Court continued:

> "Including" is *a word of expansion rather than one of limitation or restriction*. Indeed, the United States Supreme Court, defining "including" within the context of Section 26 of the Federal Farm Loan Act of 1916, stated that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."

Id. (emphasis added). As this quotation makes clear, the "expansive" or "illustrative" understanding of the term *including* is not new, but was already established by the U.S. Supreme Court in 1916, over one hundred years ago.

This holding of the Court in *Hartman* is not new, nor is it isolated, but one that has been repeated again and again:

- "The legislature's choice of the word 'including' in R.C. 4117.02(M) indicates a clear intention not to limit, but merely to describe or illustrate. The word 'including' obviously is one of enlargement, and not limitation." *S. Cmty., Inc. v. State Employment Relations Bd.*, 38 Ohio St.3d 224, 226 (1988).
- "The statute says that 'action' or 'act' *includes* certain things, thus showing the General Assembly's intent to illustrate the types of actions that may be appealable, rather than to set out an exhaustive list." *Trans Rail Am., Inc. v. Enyeart*, 123 Ohio St. 3d 1, 2009-Ohio-3624, ¶ 28 (emphasis sic).
- "The auditor regards R.C. 323.151(A)(2)'s list of those encompassed by the term 'owner' as exhaustive. We disagree. By using the phrase 'owner *includes,*' the General Assembly indicated its intent not to set forth an exhaustive list." *Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St. 3d 154, 2010-Ohio-4992, ¶ 15 (emphasis sic).

It bears noting that in each one of these cases, the Court interpreted a statute that, like R.C. 4909.172(C)(1), used the word *including* standing alone; none of these statutes used the even more emphatic phrase *including but not limited to*. These interpretations make it abundantly clear: the word "including" does not limit, it enlarges; it denotes a partial listing, not an exhaustive one.

b. Applying these cases to the statute under review, it is clear that recovery under the SIC is not restricted to "specifically listed items."

These holdings show that OCC's restrictive interpretation of the word "including" in R.C. 4909.172 is incorrect.

Again, the statute permits recovery of the costs of "replacement of existing plant *including* chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves." R.C. 4909.172(C)(1). Applying these precedents, it is clear that the list of specific assets must be considered "a partial, not an exhaustive listing." *Hartman*, 2 Ohio St. 3d at 156. The Commission's role is to implement the legislative intent, and the use of the word *including* reflects "a clear intention not to limit, but merely to describe or illustrate." *S. Cmty.*, 38 Ohio St.3d at 226.

It follows, then, that R.C. 4909.172(C)(1) authorizes the recovery of any investment "subsumed within the stated category," namely, replacement of existing plant. *See Hartman*, 2 Ohio St. 3d at 156. Contrary to OCC, recovery is not limited to the specific assets enumerated in the statute; these are merely illustrative.

2. The record shows that the tank roof fit within the category of "replacement of existing plant" and thus is eligible for recovery.

Here, the only asset challenged by OCC as being improperly included within the SIC is a tank roof. But OCC's only argument for excluding this project is that tank roofs are not specifically listed in the statute. (*See, e.g.*, Willis Dir. at 8 ("Nowhere in R.C. 4909.172 does it

state that the cost of an elevated storage tank roof may be collected from customers.").) Again, under the governing law, the question is not whether "tank roof" is a listed replacement item; it is whether "tank roof" fits within the general category "replacement of existing plant." And here, the undisputed evidence shows that it did.

a. The evidence shows that the tank, and its roof, represent utility plant.

First, the evidence shows that the tank roof constituted "plant." The tank and its roof are considered "plant" under the accounting system that Aqua is required to follow by law, and this understanding is also consistent with the common understanding of the term.

Aqua is required by law to follow the Commission's accounting directives. Under the Ohio Administrative Code, "Waterworks companies should use the uniform systems of accounts that were adopted by the 'National Association of Regulatory Utility Commissioners' in 1973." Rule 4901:1-25-32(B). Mr. Hideg explained that Aqua adheres to the NARUC Uniform System of Accounts that Aqua is "required to follow by the Commission." (Hideg Supp. at 5.) Under that system, "[t]he tank is considered personal property and classified under a water utility plant account." (Hideg Supp. at 5.) This establishes that the tank itself is required to be considered "water utility plant." Mr. Hideg further explained that "[t]he specific account is Account 342, Distribution Reservoirs and Standpipes, and the instructions to this plant account specify that a 'roof' is an item of cost included in the account." (*Id*.) The fact that Aqua is required by the Commission to account for the tank and its roof as "utility plant" settles the question of whether it should be considered "plant" for purposes of determining the SIC.

But it also bears noting that the required accounting treatment lines up with the common understanding of the term *plant*. The term *plant* means "[t]he land, buildings, machinery, apparatus and fixtures employed in carrying on a trade or a mechanical or other industrial business." *Webster's Third New Intl. Dictionary* at 1731 (2002 ed.). Similarly, the Ohio Supreme

Court has interpreted *plant* to encompass the "land, buildings, and equipment employed in carrying on the business" of the service provider." *In re Appl. of Middletown Coke Co.*, 127 Ohio St.3d 348, 2010-Ohio-5725, ¶ 18. Under these definitions, to constitute *plant* a thing must fit within certain *physical* categories (*e.g.*, apparatus, fixtures, equipment), and must be used for a certain *purpose* (*i.e.*, to carry on a particular business).

As for its physical nature, a tank, which includes its roof, clearly fits into any number of the categories, and may naturally be considered a fixture, an apparatus, or item of equipment. And as for its purpose, the evidence shows that the tank was used to "carry on the business" of providing water service. Mr. Hideg explained that the tank "holds 'finished' water that is ready for distribution into the system," meaning that the water "held in this tank is fully treated and is ready to drink." (Hideg Supp. at 4.) And "the replacement of the roof [was] necessary to enable the continued use of the tank in providing service." (*Id*. at 5.) "Without a roof, the water would not have been protected from unwanted materials and potential contamination," and a "tank without a sound roof would be useless in providing water service to Aqua's customers." (*Id*.)

In short, whether under the required accounting treatment or under common sense, the tank and its roof must be considered "plant."

b. The project also involved the *replacement* of the existing roof.

The statute, of course, does not just authorize recovery of the costs of plant, but of "replacement of existing plant." The evidence shows that the tank roof project involved a replacement of existing plant. Mr. Hideg described this as a "major replacement project," as the existing "roof was failing and beginning to leak." (*Id*.) Similarly, the Staff comments characterized Aqua's SIC investments as "plant replacement." (Staff Comments at 4.) Although Staff initially questioned whether certain projects could be recovered under the SIC, it did not question whether the projects constituted plant replacement.

c. No contrary evidence suggests that the tank roof does not constitute replacement of existing plant.

OCC presented no evidence to the contrary. Again, OCC's opposition to the tank roof was entirely based on its faulty interpretation of the statute as only permitting enumerated items. OCC has *not* claimed that the tank roof either did not constitute "plant," or did not constitute a "replacement." Thus, the undisputed record evidence shows that the tank roof fit within the category of "replacement of existing plant."

3. A recent Ohio Supreme Court decision interpreting the phrase "include, without limitation" involved an entirely different statutory structure.

Aqua would briefly discuss the Supreme Court's somewhat recent decision in *In re Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788. No party has cited or pointed to this case thus far. But given the lack of a reply brief, and the possible superficial similarity between that case and this one, Aqua will address it.

In *Columbus Southern Power*, the Court interpreted a law that provided that an electric security plan "may provide for or include, without limitation, any of the following," and then listed nine categories of cost recovery. *See* R.C. 4928.143(B)(2). The Court agreed that "this section permits plans to include *only listed* items." 128 Ohio St.3d 512, ¶ 31 (emphasis sic). The Court explained that this structure "allows plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.'" *Id*. ¶ 32.

The reasoning in *Columbus Southern Power* does not apply in this case. The two cases involve different statutory constructs. In this case, the SIC statute authorizes recovery of a *general* category ("replacement of existing plant") and then provides a list of items illustrating that category. In contrast, the statute at issue in *Columbus Southern Power* did *not* provide a general category, but *only* authorized "any of the following" provisions. For that reason, the

"following" provisions were the only ones allowed for inclusion in a plan, and were not deemed illustrative.

Whether or not OCC cites *Columbus Southern Power*, it does not apply.

C. OCC's allegation that the Stipulation contradicts prior Commission practice is incorrect and misleading.

The foregoing demonstrates that OCC's primary argument is incorrect: SIC recovery is permitted for "replacement of existing plant," and is not limited to the items specifically listed in R.C. 4909.172(C)(1). This leaves one final point.

OCC claims that the Stipulation contradicts prior Commission practice. According to Mr. Willis, a restrictive interpretation is "consistent with PUCO practices," and "[u]ntil 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)." (Willis Dir. at 7.) This is incorrect and misleading.

To begin with, the statutory provision at issue here was not enacted until 2013. So the scope of allowable "plant replacement" under R.C. 4909.172(C)(1) was *not* at issue in any of the many SIC cases predating 2013. Aqua concedes that the scope of recovery was narrower prior to 2013. But no "consistent PUCO practice" on this point can be derived from pre-2013 cases. Proving the point, the only specific example provided by OCC of a "prior PUCO practice" occurred in 2015. (*See id*. at 5 & 7 (citing Case No. 15-0863-WW-SIC).)

And even that case does not support OCC. In the 2015 case, Staff filed comments recognizing that the SIC statute "authorizes cost recovery for replacement of existing plant," but recommending that various costs be excluded on the basis they represented "new plant." (15-863 Staff Comments at 4 (Aug. 14, 2015).) Aqua did not oppose the adjustments, since they did not affect the amount of the SIC, but did file comments indicating its disagreement and reserving the right to object in future cases. (15-863 Aqua Reply at 1–2 (Aug. 24, 2015).)

Two things should be clear from this case. First, even if the 2015 SIC case had involved precisely the same issue as this one, it was *not litigated*, which means the outcome has no preclusive effect. *See e.g.*, *State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 2008-Ohio-6254, ¶¶ 30-31, 120 Ohio St.3d 386 (citing *Thompson v. Wing*, 70 Ohio St.3d 176, 185, 637 N.E.2d 917 (1994)). Second, and regardless, the case involved an entirely different issue than this one. In 2015, Staff questioned whether the plant was "new" or "replacement," not whether the items were specifically listed in the statute.

In short, even assuming that a "prior PUCO practice" could trump an express statutory authorization, there is no such contradictory practice to speak of.

V. CONCLUSION

The Commission should find that the Stipulation satisfies its three-part criteria and approve the Stipulation as filed and grant all other necessary and proper relief.

Dated: December 21, 2018

Respectfully submitted,

/s/ Andrew J. Campbell

Mark A. Whitt (0067996)
Andrew J. Campbell (0081485)
Rebekah J. Glover (0088798)
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 224-3973
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

(Counsel willing to accept service by email)

ATTORNEYS FOR AQUA OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 21st day of December, 2018, to the following:

amy.botschner.obrien@occ.ohio.gov
william.michael@occ.ohio.gov
robert.eubanks@ohioattorneygeneral.gov
steven.beeler@ohioattorneygeneral.gov
anna.sanyal@puco.ohio.gov

/s/ Rebekah J. Glover
One of the Attorneys for Aqua Ohio, Inc.

Summary: Text Post-Hearing Brief electronically filed by Ms. Rebekah J. Glover on behalf of Aqua Ohio, Inc.