

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Aqua)
Ohio, Inc. for Authority to Assess a) Case No. 18-0337-WW-SIC
System Improvement Charge.)

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

The Office of the Ohio Consumers' Counsel ("OCC") opposes the Stipulation ("Settlement") because it expands the categories of items that may be included in the system improvement charge ("SIC"), forcing consumers to pay additional costs beyond what is indicated by statute. Section 4909.172(C)(1) of the Revised Code addresses the specific costs of infrastructure plant that a waterworks utility may collect from its customers through an infrastructure improvement surcharge, commonly known as a SIC. The PUCO's Finding and Order in this proceeding adopts the Settlement between Aqua Ohio, Inc. ("Aqua") and the Public Utilities Commission of Ohio ("PUCO") Staff. OCC opposed the Settlement for the reasons set forth in its Post-Hearing brief. OCC recommended that the PUCO instead adopt the Staff Comments initially filed in this proceeding, which applied R.C. 4909.172 to Aqua's SIC request, and came to a much different conclusion than was adopted in the Stipulation.

OCC files this application for rehearing of the Order entered by the PUCO that adopted the Settlement between Aqua and Staff expanding the statutory list of items includable in the infrastructure surcharge. The broad expansion of R.C. 4909.172(C)(1) causes harm to consumers because costs previously not chargeable to the utility's customers have been sanctioned.

The Order is unlawful and unreasonable in the following respects:

1. The PUCO's Order is unlawful and unreasonable because as a creature of statute the PUCO must follow Ohio law, but failed to do so in this case.

The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO's Order expands the list of plant items eligible for recovery through a system improvement charge under R.C. 4909.172(C)(1) in contravention of the section's statutory scheme. Instead of adhering to the list of items specifically laid out in the statute, the Order adopts the Settlement filed by Aqua and Staff, which allows for many more items to be charged to customers, as the Settlement calls for basing whether an item is eligible for SIC-recovery if it is found in one of 13 designated Uniform System of Accounts instead of strictly construing the list of eligible items for collection from customers based on the list included in the statute. This novel interpretation of R.C. 4909.172 was not part of the original statute or its revision, and the PUCO's order is devoid of any discussion of how these accounts fit into the statutory scheme of R.C. 4909.172. The PUCO's Order adopting the Settlement, which substitutes these accounts in place of specific mandated statutory items as SIC-recoverable, conflicts with R.C. 4909.172. The Order deviates, for the first time since the 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 and thus harms consumers. The PUCO should reconsider this proceeding and return to the traditional interpretation of R.C. 4909.172(C)(1).

II. STANDARD OF REVIEW

After an order is entered, intervenors in a PUCO proceeding have a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”¹ An application for rehearing must “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”²

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is “sufficient reason” to do so. After such rehearing, the PUCO may “abrogate or modify” the order in question if the PUCO “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted.”³

In this case, the standard for rehearing under R.C. 4903.10 is met. The PUCO should grant OCC’s application for rehearing and abrogate the Order as OCC recommends.

III. ASSIGNMENT OF ERROR

1. The PUCO’s Order is unlawful and unreasonable because as a creature of statute the PUCO must follow Ohio law, but failed to do so in this case.

The PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes.⁴ The Settlement adopted by the PUCO goes well beyond what is permitted under the statute. Nowhere in R.C. 4909.172(C)(1), does it state that the cost of an elevated storage tank roof may be collected from

¹ R.C. 4903.10.

² R.C. 4903.10(B). *See also* Ohio Adm. Code 4901-1-35(A).

³ R.C. 4903.10(B).

⁴ *See, e.g., Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 647 N.E.2d 136.

customers. The Settlement adopted by the PUCO goes beyond what is enumerated in the statute by permitting costs on a going-forward basis of items that are contained within 13 different account numbers, which is much broader than what the statute allows. Inclusion of these accounts as eligible for SIC collection is outside of what the statute allows and is contrary to PUCO practice and principles.

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.⁵

But under the Settlement, by bringing in the 13 accounts, many more items are potentially eligible for SIC inclusion. For example, one of the 13 accounts proposed to be included in and recovered through a SIC is Account 342 “Distribution Reservoirs and Standpipes” (excluding tank painting expenses).⁶ The items listed in this account include:

1. Aerators (when installed as an integral part of distribution reservoirs)
2. Bridges and culverts
3. Clearing land
4. Dams
5. Embankments
6. Fences
7. Foundations
8. Gates and gate houses
9. Landscaping
10. Lighting systems
11. Piping system within reservoirs

⁵ R.C. 4909.172(C)(1).

⁶ Settlement at 2.

12. Retaining walls
13. Roads and paths
14. Rust-proofing apparatus
15. Sewers
16. Spillways and channels
17. Standpipes
18. Superstructures
19. Tanks
20. Towers
21. Valves and appurtenances
22. Valve vaults and houses
23. Water level control apparatus

Account 342 is just one of the 13 accounts proposed to be included in a system improvement surcharge under the Settlement. From this list of 23 items within Account 342 that are now included in the SIC under the Settlement, only two of the items on this list, valves (items 21 and 22), are listed in the statute. The other 21 listed items, including tanks and tank roofs, are not included in R.C. 4909.172(C)(1).

The statutory language of R.C. 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), amended in 2013, 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.

This amended language added specific water capital improvement plant items eligible for inclusion in calculating the SIC. The Settlement adopted by the PUCO expands the list in R.C. 4909.172(C)(1) by including 13 separate accounts under which to charge consumers for plant, claiming they are included in R.C. 4909.172(C)(1). By adopting the Settlement,

the PUCO's order attempts to achieve in this case that which has not been authorized legislatively.⁷

The PUCO's Order adopting the Settlement harms consumers in the immediate and long-term. By broadening the scope of R.C. 4909.172 to include account numbers containing an expanded list of items within the accounts, rather than specific plant items identified by the Ohio statute, the Order authorizes collection of costs from customers for the replacement of an \$832,862 elevated storage tank roof not permitted under the statutory language of R.C. 4909.172. Elevated storage tank roofs are not an eligible item recoverable under R.C. 4909.172 for consideration under a system improvement charge. Looking long-term, the Settlement adopted in the PUCO's Order specifically serves as a direction to the PUCO on account costs recoverable in future SIC filings.⁸ The PUCO improperly allowed Aqua to accomplish in this SIC case (and potentially in future SIC cases) a rewrite of the law that protects consumers.

The PUCO was obligated to follow the law. In this case, the PUCO failed to do so. Therefore, the PUCO should grant OCC's application for rehearing and abrogate the Settlement. At a minimum, the PUCO should reverse its decision to charge consumers for the additional \$832,862 (net of retirement) for the tank roof.

⁷ See, e.g., *Elyria Tel. Co. v. PUCO*, 158 Ohio St. 441, 448 (1953).

⁸ 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." On March 4, 2019, Aqua filed a second SIC case. *In the Matter 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. 19-0567-WW-SIC.

IV. CONCLUSION

The fact that the legislature in its revision of R.C. 4909.172(C)(1) in 2013 expanded the list of recoverable plant items under a system improvement charge by specifically naming certain additional items for inclusion, but did not enumerate additional items, or additional accounts, is telling. The PUCO's order improperly expands the list by including items in 13 accounts in the Uniform System of Accounts as collectible from customers through a broad reading of R.C. 4909.172(C)(1). Because the Settlement includes accounts (with items within the accounts) 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 PUCO should not have approved the Settlement. OCC respectfully requests that the PUCO grant OCC's application for rehearing to protect consumers, consistent with Ohio law, the public interest and PUCO principles and practices.

Respectfully submitted,

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Ohio Consumers' Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 8th day of March 2019.

/s/ Amy Botschner O'Brien
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Summary: App for Rehearing Application for Rehearing by The Office of the Ohio Consumers' Counsel electronically filed by Ms. Jamie Williams on behalf of Botschner-O'Brien, Amy Ms.