**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| --- | --- | --- |
| In the Matter of the Application of Ohio Gas Company for Authority to Establish a Right-of-Way Rider. | )  )  ) | Case No. 21-943-GA-RDR |

**APPLICATION FOR REHEARING**

**BY**

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January 14, 2022 (willing to accept service by e-mail)

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As OCC has long explained, single-issue ratemaking is bad for consumers. Unfortunately, in this case, it has gotten even worse for consumers. The PUCO has misapplied a single-issue ratemaking statute[[1]](#footnote-2) and authorized the Ohio Gas Company (“Ohio Gas” or “Utility”) to charge consumers for capital costs associated with municipal rights-of-way when the statute does not permit it to do so.[[2]](#footnote-3) Ohio Gas consumers in Williams, Fulton, Henry, Defiance, Paulding, and Lucas counties are paying unjust and unreasonable rates as a result of the PUCO’s ruling in this proceeding.

The PUCO’s Finding and Order is unreasonable and unlawful because it misapplied the statute. Accordingly, under R.C. 4903.10, OCC applies for rehearing of the Finding and Order. As explained more fully in the following memorandum in support, the PUCO’s Finding and Order was unreasonable in the following respect:

ASSIGNMENT OF ERROR NO. 1: The PUCO’s Finding and Order authorizing Ohio Gas to charge consumers for capital costs associated with municipal rights-of-way is unreasonable and unlawful because the statute (R.C. 4939.07) authorizes charging consumers only for expenses.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# I. BACKGROUND

Under a single-issue ratemaking statute (R.C. 4939.07) that seemingly has never before been used by a natural gas utility, Ohio Gas asked the PUCO for authority to charge consumers for capital costs associated with municipal rights-of-way.[[3]](#footnote-4) The PUCO Staff issued its Staff Report on November 22, 2021 and recommended the PUCO approve the application with modifications.[[4]](#footnote-5)

Less than a month later, the PUCO approved (with modification) Ohio Gas’s application to charge consumers for capital costs associated with municipal rights-of-way. Consumer protection requires that the PUCO grant rehearing. It made a legal error in applying the statute. Ohio Gas’s application should have been denied because under the statute governing the application, capital project costs associated with municipal rights-of-way are not collectable from consumers.

# II. MATTERS FOR REHEARING

## **A. ASSIGNMENT OF ERROR NO. 1:** The PUCO’s Finding and Order authorizing Ohio Gas to charge consumers for capital costs associated with municipal rights-of-way is unreasonable and unlawful because the statute (R.C. 4939.07) authorizes charging consumers only for expenses.

### The PUCO should apply the words in R.C. 4939.07 based on their meaning in the field of utility regulation, consistent with the General Assembly’s intent.

Of public utility regulation, the Ohio Supreme Court has explained:

There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance, and in which the authority to review such rates is vested exclusively in the Supreme Court . . . .[[5]](#footnote-6)

“The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission.”[[6]](#footnote-7) Public utility regulation is a specialized, highly technical field wherein many terms with a technical or particular meaning are used. That is why even the Ohio Supreme Court must sometimes rely on the PUCO when applying a statute involving highly specialized issues.[[7]](#footnote-8)

This case turns on the statutory construction of R.C. 4939.07. Principles of statutory construction are well-known. One must start with the statute’s plain language.[[8]](#footnote-9) Particularly relevant in the world of public utility regulation, “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”[[9]](#footnote-10) Where, as here, a statute is clear and unambiguous, it should be applied as written.[[10]](#footnote-11) Ambiguity in a statute exists only if its language is susceptible to more than one reasonable interpretation.[[11]](#footnote-12) Applying these principles, there is no ambiguity in this statute and the PUCO must apply it as written.

### To consumers’ detriment, the PUCO made a legal error in applying R.C. 4939.07 to allow Ohio Gas to charge consumers for capital investment costs associated with municipal rights-of-way.

There is no dispute that Ohio Gas will be charging its consumers for capital costs associated with municipal rights-of-way due to the Finding and Order.[[12]](#footnote-13) Based on R.C. 4939.07’s text, OCC previously explained that the statute permits charging consumers for expenses associated with municipal rights-of-way incurred by a utility, not capital project costs.[[13]](#footnote-14)

The PUCO did not analyze the statute in detail. Instead, it said: “Contrary to OCC’s assertions, the statute does not otherwise categorize costs that are deferrable or recoverable.”[[14]](#footnote-15) The PUCO’s application of the statute is wrong.

In relevant part, the statute first provides that the PUCO shall authorize such accounting authority “as may be reasonably necessary to classify any cost described in division (D)(2) of this section as a *regulatory asset* for the purpose of recovering that cost.”[[15]](#footnote-16) The term “regulatory asset” has a known, technical, particular meaning in public utility regulation (and consistent with the General Assembly’s directive,[[16]](#footnote-17) that known, technical, particular meaning should be ascribed to it). Only an action by the regulator allows a utility to treat an expense as an asset, thereby moving the expense from the utility’s income statement to its balance sheet.[[17]](#footnote-18) The expense-turned regulatory asset can then be deferred, if certain requirements are met, for possible future collection from consumers.[[18]](#footnote-19)

Utility capital expenditures are not deferred for future collection from consumers, per accounting rules.[[19]](#footnote-20) Capital costs are *already* reflectedon the balance sheet as an asset, but not a regulatory asset. They may *already* be collected from consumers in a base rate case (or, in Ohio, in a capital expenditure program).[[20]](#footnote-21) Capital expenditures are not regulatory assets. Once approved by the PUCO, expenses are regulatory assets. Under R.C. 4939.07 (D)(1), the PUCO is given authority to classify (D)(2) costs as a regulatory asset. And since capital investments cannot be authorized as regulatory assets, it must follow that the (D)(2) costs are limited to expenses and not capital investment costs.

The PUCO should have applied R.C. 4939.07 accordingly. The PUCO should have recognized that the General Assembly purposefully used technical terms with known meanings within the utility regulatory world and rejected Ohio Gas’s attempt to collect capital project costs that should be collected through other more traditional ratemaking processes from consumers. The PUCO simply ignored the General Assembly’s words and their contextual meaning.

The costs described in R.C. 4939.07 (D)(2) confirm that expenses, not capital investment costs, are collectible from consumers under the statute. Two requirements must be met before a R.C. 4939.07 (D)(2) cost may be classified as a regulatory asset under R.C. 4939.07 (D)(1).

First, “[t]he cost is directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way or an appropriate allocation and assignment of costs related to implementation of this section, excluding any cost arising from a public way fee levied upon and payable by the public utility.”[[21]](#footnote-22) Second, “[t]he cost is incurred by the public utility both after January 1, 2002, *and after the test year of the public utility's most recent rate proceeding* or the initial effective date of rates in effect but not established through a proceeding for an increase in rates.”[[22]](#footnote-23) The term “test year” has a known, technical, particular meaning in public utility regulation (and consistent with the General Assembly’s directive,[[23]](#footnote-24) that known, technical, particular meaning should be ascribed to it).

Section (D)(3) of R.C. 4939.07 permits immediate collection of Section (D)(2) costs classified as a regulatory asset under Section D(1) upon a showing by the utility that deferring collecting the costs would be impractical or work a hardship on the utility or consumers.[[24]](#footnote-25) Once again, the statute uses the term “regulatory asset,” which has a known, technical, particular meaning. And as the PUCO knows, that the term “regulatory asset” applies only to utility expenses, not capital investment.

The PUCO should have applied the known and customary meaning to the term “regulatory asset” and determined that Ohio Gas’ capital project costs are not expenses that can be deferred and, therefore, are not eligible for recovery under the statute as a regulatory asset. The PUCO’s failure to apply the known and customary definitions for the terms “regulatory asset,” “deferral,” and “test year” as used in R.C. 4939.07 results in its failure to properly apply the statute

Allowing Ohio Gas to charge consumers for capital investment costs under the statute would lead to an absurd result, contrary to well-known principles of statutory construction, as detailed below.[[25]](#footnote-26)In turn, the absurd result is contrary to the just and reasonable results intended when the General Assembly enacts a statute.[[26]](#footnote-27) As OCC explained in its comments, Ohio Gas’s proposal (now approved by the PUCO) will result in unjust and unreasonable rates. Instead of paying a small annual percentage of long-lived capital assets collected through annual depreciation expenses, consumers will now pay for the total costs of Ohio Gas’s capital projects over a nine-month period rather than over 40 years (Ohio Gas’ 2.5% annual depreciation rate for Account 376 – Distribution Mains).[[27]](#footnote-28)

Additionally, the PUCO’s approval of Ohio Gas’s proposal will permit double collection from consumers.[[28]](#footnote-29) Ohio Gas’s proposal (now approved by the PUCO) will permit the utility to collect capital project costs for relocating and improving gas distribution mains from consumers over a nine-month period rather than over 40 years via a new charge. The charge does not include the removal of the retired plant from the rate base that was set in the Ohio Gas’s most recent rate case. As a result, Ohio Gas will continue to receive return of (through depreciation expenses built into base rates) and return on (rate of return built into the base rates) the retired assets despite that the retired assets are no longer used to provide utility service to consumers. Ohio Gas will continue to receive return of and on the retired plant assets until the assets are removed from rate base at Ohio Gas’s next rate case. Allowing Ohio Gas to collect from consumers capital investment under the statute turns longstanding and fundamental utility ratemaking on its head and leads to an absurd result.

# III. CONCLUSION

The PUCO should grant rehearing on OCC’s assignment of error and modify or abrogate its Order as described above. Granting rehearing is necessary to immediately protect allof Ohio Gas’s consumers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 14th day of January 2022.

*/s/ William J. Michael*

William J. Michael

Assistant Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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1. R.C. 4939.07. [↑](#footnote-ref-2)
2. Finding and Order (December 15, 2021). [↑](#footnote-ref-3)
3. Application at 1*.* [↑](#footnote-ref-4)
4. Staff Review and Recommendation at 6 (November 22, 2021) (“Staff Report”). [↑](#footnote-ref-5)
5. *Kazmaier Supermarket Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 151 (1991). [↑](#footnote-ref-6)
6. *Id.* at 151. [↑](#footnote-ref-7)
7. *See, e.g., In re Ohio Edison Co.*, 157 Ohio St.3d 73, 75 (2019). [↑](#footnote-ref-8)
8. *See, e.g., State ex rel. Burrows v. Indus. Comm’n*, 78 Ohio St.3d 78, 81 (1993). [↑](#footnote-ref-9)
9. R.C. 1.42. [↑](#footnote-ref-10)
10. *See, e.g., Burrows*, supra note 6. [↑](#footnote-ref-11)
11. *See*, *e.g*., [*State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513 (1996).](https://plus.lexis.com/document/?pdmfid=1530671&crid=37b257bf-6ffb-4557-8d6f-277647ad3ca8&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3YT4-S8D0-0039-4118-00000-00&pdcontentcomponentid=9250&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=tf4k&earg=sr2&prid=9182a30c-3345-4721-822b-c141bbadb9df) [↑](#footnote-ref-12)
12. *See* OCC’s Comments 3-4. [↑](#footnote-ref-13)
13. *See* OCC’s Comments at 2-5. [↑](#footnote-ref-14)
14. Finding and Order at para. 20. The PUCO mentions the “[n]otwithstanding any other provision of law” part of the statute. *Id.* That part of the law is not germane here. We are contesting the PUCO’s construction of *this* law, based on what *this* law says. [↑](#footnote-ref-15)
15. R.C. 4939.07(D)(1) (italics added). [↑](#footnote-ref-16)
16. R.C. 1.42. [↑](#footnote-ref-17)
17. *See,* 18 C.F.R. Part 201 – Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act, at Definition No. 31 “Regulatory Asset”; R.C. 4905.13; and O.A.C. 4901:1-13-13. [↑](#footnote-ref-18)
18. *Id.* [↑](#footnote-ref-19)
19. *See, e.g*., 18 C.F.R. Part 201 – Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act, at “Gas Plant Instructions.”; R.C. 4905.13; O.A.C. 4901:1-13-13. [↑](#footnote-ref-20)
20. R.C. 4929.111. [↑](#footnote-ref-21)
21. R.C. 4939.07(D)(2)(a). [↑](#footnote-ref-22)
22. *Id.* at (D)(2)(b). [↑](#footnote-ref-23)
23. R.C. 1.42. [↑](#footnote-ref-24)
24. R.C. 4939.09(D)(3). [↑](#footnote-ref-25)
25. *See, e.g., Mishr v. Bd. of Zoning Appeals of Pol.*, 76 Ohio St.3d 238, 240 (1996). [↑](#footnote-ref-26)
26. R.C. 1.47(D). [↑](#footnote-ref-27)
27. 100%/2.5% = 40. *See* ‘Natural Gas Companies Annual Report of Ohio Gas Company for the Year Ended December 31, 2019,’ at 30. [↑](#footnote-ref-28)
28. *See* OCC’s Comments at 8-9. [↑](#footnote-ref-29)