

**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 in the Lake    | ) |                         |
| / Masury / Prior American / Prior        | ) |                         |
| Mohawk / Prior Tomahawk Properties       | ) |                         |

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**POST-HEARING BRIEF**  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) is presented with a Stipulation and Recommendation (Stipulation) that resolves all the issues in this proceeding. The Stipulation meets the Commission's three-part test for determining a stipulation's reasonableness. It is, therefore, reasonable and should be adopted by this Commission.

**PROCEDURAL HISTORY / SCHEDULE**

On March 1, 2018, Aqua Ohio, Inc. (the Company or Aqua) filed its application for a System Improvement Charge (SIC) determined in accordance with an expansive interpretation of the R.C. 4909.172(C)(1). On July 11, 2018, Staff filed its Comments

adopting a conservative interpretation of R.C. 4909.172(C)(1).<sup>1</sup> The parties (Ohio Consumers' Counsel (OCC), Aqua, and Staff) met for settlement discussions. On November 8, 2018, Aqua and Staff filed a Stipulation that purports to resolve all the issues in this proceeding. The Stipulation allows for replacement plant in this case and future SIC cases brought by Aqua from certain NARUC uniform system of accounts utility plant accounts that both parties believe are illustrated by R.C. 4909.172(C)(1).<sup>2</sup> This Stipulation is opposed by OCC. The hearing on this matter occurred on December 17, 2018.

## DISCUSSION

### I. The Stipulation meets the Three-Part Test for reasonableness.

Rule 4901-1-30, O.A.C, authorizes parties to Commission proceedings to enter into stipulations. Although not binding upon the Commission, the terms of such agreements are to be accorded substantial weight.<sup>3</sup> The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. The

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<sup>1</sup> Staff's comments focused, among other things, on its disagreements with the scope of **includable** plant replacement allowable under the ambiguous language of R.C. 4909.172(C)(1). However, it should not be inferred therefrom that plant which Staff found to be not includable in its comments were not also objectionable on the grounds that such plant was not replacement. It may have simply been a moot issue to Staff at the time. With that said, Staff supports the fact that all plant allowed under the Stipulation is both includable and replacement.

<sup>2</sup> Joint Exhibit 1 at paragraph 2 and 3.

<sup>3</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St, 3d 123, 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St, 2d 155, (1978).

standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings.<sup>4</sup> In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve cases.<sup>5</sup> When the Commission reviews a contested stipulation, as is the case here, the Court has also been clear that the requirement of evidentiary support remains operative. While the Commission "may place substantial weight on the terms of a stipulation," it "must determine, from the evidence, what is just and reasonable."<sup>6</sup> The agreement of some parties is no substitute for the procedural protections reinforced by the evidentiary support requirement.<sup>7</sup>

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<sup>4</sup> See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Ohio Edison Co.*, Case No. 92-1463-GA-AIR, et al. (August 26, 1993); *Ohio Edison Co.*, Case No. 89-1001-EL-AIR (August 19, 1993); *The Cleveland Electric Illumination Co.*, Case No. 88-170-EL-AIR (January 31, 1989); and *Restatement of Accounts and Records* (Zimmer Plant); Case No. 84-1187-EL-UNC (November 26, 1985).

<sup>5</sup> *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 559 (1994), citing, *Consumers' Counsel*, supra, at 126.

<sup>6</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992).

<sup>7</sup> *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 46.

Staff and Aqua respectfully submit that the stipulation here satisfies the reasonableness criteria, and that the evidence of record supports and justifies a finding that its terms are just and reasonable.

**A. Serious Bargaining**

The Stipulation is the product of serious negotiations among knowledgeable parties. The Signatory Parties (Staff and Aqua) have vast experience with SIC cases before the Commission. The OCC, which also participated in settlement discussions, has vast experience with SIC cases before the Commission. The Stipulation is the outcome of a lengthy process of investigation, discovery, discussion, and negotiation. All parties had the opportunity to negotiate, and the views of all parties were heard and considered before a stipulation was reached. Perhaps most important, all parties were represented by legal counsel experienced in the interpretation of Ohio public utilities law – given that the Stipulation interprets the language of R.C. 4909.172(C)(1).

Accordingly, the Stipulation is a product of serious bargaining among capable, knowledgeable parties.

**B. Public Interest**

The approval of the SIC itself supports Aqua in the continued provision of safe and reliable water service to its customers, which benefits Aqua, its customers, and the public interest.<sup>8</sup> To the extent a reduction in the SIC benefits ratepayers, the Stipulation

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<sup>8</sup> Joint Exhibit 1 at 6.

provides for a reduction in the charge filed by Aqua (from 3.937 percent to 3.66 percent).<sup>9</sup> The Stipulation also clarifies what costs may be included in a SIC.<sup>10</sup>

Accordingly, the Stipulation does benefit ratepayers and the public interest.

### **C. Regulatory Principle or Practice**

The Stipulation does not violate any regulatory principles or practices. The adoption of NARUC uniform system of accounts utility plant accounts 323-328, 332, 342, 343, and 345-348 as includable recovery plant in SIC cases brought by Aqua is reasonable because these utility plant accounts are illustrated by the listed plant in R.C. 4909.172(C)(1).

#### **1. The listed plant in R.C. 4909.172(C)(1) should be interpreted by this Commission as illustrative.**

For a waterworks company like Aqua, R.C. 4909.172(C)(1) provides that the infrastructure plant, allowable in a SIC, may consist of the following capital improvements that the Commission determines are used and useful in rendering public utility service:

“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.”

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

(Emphasis added). The question is what does the word “including” imply? Does the word “including,” in this context, restrict waterworks companies to replacement plant specifically listed or is it illustrative? In this context, neither the Commission nor the Supreme Court has interpreted R.C. 4909.172(C)(1). However, the Supreme Court’s interpretation of “including” in other contexts strongly suggests that “including,” in this context, means that the listed replacement plant in R.C. 4909.172(C)(1) is illustrative and not restrictive. The Court has found that a list following the term “including” in a statute indicates a clear intention not to limit, but to expand the list in accordance with the description provided by the list.<sup>11</sup> In another context, the Court found that a list of appealable actions following the word “includes” meant that the list simply illustrates types of appealable actions as opposed to providing an exhaustive list of appealable actions.<sup>12</sup> Finally, the Court found that a list of owners in a statute following the term “includes” was meant to illustrate an expansive group of owners, not to set forth an exhaustive list of owners.<sup>13</sup>

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<sup>11</sup> *See S. Cmty., Inc. v. State Employment Relations Bd.*, 38 Ohio St. 3d 224, 226, 527 N.E.2d 864, 866 (1988).

<sup>12</sup> *Trans Rail Am., Inc. v. Enyeart*, 123 Ohio St. 3d 1, 6, 913 N.E.2d 948, 953 (2009).

<sup>13</sup> *Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St. 3d 154, 158, 937 N.E.2d 109, 113 (2010).

**2. The Stipulation only allows for the recovery of replacement plant that is illustrated in R.C. 4909.172(C)(1).**

Rule 4901:1-15-32(B), O.A.C., requires waterworks companies to maintain their books and records in accordance with the uniform systems of accounts adopted by the National Association of Regulatory Utility Commissioners (NARUC) in 1973. The uniform system of accounts lists utility plant accounts as subsets of major property groupings.

The utility plant accounts chosen by Aqua and Staff for the Stipulation are utility plant accounts that are specifically illustrated by one of more of the listed replacement plant in R.C. 4909.172(C)(1) - chemical feed systems, filters, pumps, motors, plant generators, meters, service lines, hydrants, mains, and valves. Examine each utility plant account chosen for the Stipulation and such becomes clear:

- 323 – Other Power Production Equipment (plant generators);
- 324 – Steam Pumping Equipment (motors, pumps, valves);
- 325 – Electric Pumping Equipment (motors, pumps, valves);
- 326 – Diesel Pumping Equipment (motors, pumps, valves);
- 327 – Hydraulic Pumping Equipment (motors, pumps, valves);
- 328 – Other Pumping Equipment (motors and pumps);
- 332 – Water Treatment Equipment (chemical feeds, filters, valves, and meters);
- 342 – Distribution Reservoirs & Standpipes (valves);
- 343 – Transmission & Distribution Mains (meters, pumps, valves, and mains);
- 345 – Services (valves, mains, service lines);
- 346 – Meters (meters);
- 347 – Meter Installation (meters); and
- 348 – Hydrants (hydrants and valves)<sup>14</sup>.

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<sup>14</sup> See National Association of Regulatory Commissioners, Uniform System of Accounts for Classes A and B Water Utilities (1993), pgs. 69-76.

Furthermore, none of these selected utility plant accounts contain real property, intangible plant, general plant, or source of supply plant, which lack any representation in the listed illustrative plant of R.C. 4909.172(C)(1).

Therefore, the tank roof, categorized under utility plant account 343, is properly included as SIC eligible recovery plant in the Stipulation, and that applying the above utility plant accounts as SIC eligible plant in future SIC cases brought by Aqua is also compliant with R.C. 4909.172(C)(1). Accordingly, the Stipulation violates no regulatory principle or practice.

### CONCLUSION

The Stipulation meets all prongs of the three-part test. The Commission should adopt the Stipulation as its order in this case.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the Post-Hearing Brief submitted on behalf of the Public Utilities Commission of Ohio has been served upon the below-named counsel via electronic mail, this 21<sup>st</sup> day of December, 2018.

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