

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Suburban Natural Gas Company for an Increase in Gas Distribution Rates.)	Case No. 18-1205-GA-AIR
)	
In the Matter of the Application of Suburban Natural Gas Company for Tariff Approval.)	Case No. 18-1206-GA-ATA
)	
In the Matter of the Application of Suburban Natural Gas Company for Approval of Certain Accounting Authority.)	Case No. 18-1207-GA-AAM
)	

**MEMORANDUM CONTRA SUBURBAN NATURAL GAS COMPANY’S
MOTION TO STRIKE OBJECTIONS
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) should deny Suburban Natural Gas Company’s (“Suburban”) motion to strike the Office of the Ohio Consumers’ Counsel’s (“OCC”) objections to the Staff Report. At issue are two of OCC’s objections: OCC Objection No. 4, where OCC advocates for a more reasonable cost allocation, and OCC Objection No. 5, where OCC advocates for variable rates over fixed charges. Suburban claims that these objections are barred by the doctrine of *res judicata*, a judicially-created doctrine that is sometimes used to prevent a party from litigating an issue that has already been decided.

But *res judicata* does not apply here for myriad reasons—the primary one being that the issues raised in this particular case simply have not been decided previously.

OCC is the statutory representative of Suburban’s residential customers.¹ It plays an important role in providing a voice to customers that otherwise would have none, and its voice should be heard in this case. The PUCO should reject Suburban’s attempt to prohibit OCC from raising important consumer protection issues.

II. ARGUMENT

A. **OCC Objection No. 4 regarding cost allocation is properly raised in this case. Suburban’s motion to strike fails because it misconstrues both the objection and the procedural history of this case.**

The Staff Report recommends that Small General Service (“SGS”) customers (which includes residential customers) pay over 82% of Suburban’s distribution revenue requirement.² The Staff Report did not rely on a cost of service study to arrive at this conclusion but instead relied on the cost allocation that was approved in Suburban’s last rate case over 11 years ago.³ In OCC Objection No. 4, OCC objected to this recommendation from the Staff Report.

As OCC explained in this objection and supporting testimony, the 82% allocation to SGS customers is based on Suburban’s *last* rate case, which was decided more than 11 years ago.⁴ Thus, OCC recommended that allocation be based on *current* revenues, which show that the SGS class contributes 79.11% of revenues.⁵

¹ R.C. Chapter 4911.

² Staff Report at 27.

³ See Direct Testimony of Robert B. Fortney on Behalf of the Office of the Ohio Consumers’ Counsel, Attachment RBF-B (Mar. 8, 2019) (the “Fortney Testimony”).

⁴ OCC Objections at 6; Fortney Testimony at 5-6.

⁵ Fortney Testimony at 6.

Suburban seeks to strike OCC Objection No. 4 on the grounds that the PUCO has purportedly already decided this issue in this case. But this is false—the PUCO has done no such thing.

Earlier in this case, Suburban filed a motion seeking a waiver of the standard filing requirement that it include a cost of service study.⁶ OCC did not oppose this request, as Suburban points out. But OCC’s non-opposition to this request is irrelevant for at least two reasons.

First, Suburban’s waiver request this was a procedural request. The PUCO has found that “the purpose of the [Standard Filing Requirements] is to enable the Staff to fulfill its statutory obligation to investigate the application and file a report to the Commission.”⁷ Thus, the PUCO has ruled that intervenors like OCC cannot oppose a utility’s request to waive a standard filing requirement.⁸ It would be unjust for OCC to lack standing to oppose a waiver request—a *procedural* issue—and then have that procedural ruling prohibit OCC from raising *substantive* issues regarding cost allocation.⁹

Second, and more to the point, OCC Objection No. 4 does not argue that a cost of service study should be required. OCC is not seeking to revisit that issue. But, there being no cost of service study, the PUCO must adopt *some* method of allocating costs. And that is the question that remains open for debate in this proceeding: Should the PUCO adopt

⁶ Motion of Suburban Natural Gas Company for a Waiver of a Standard Filing Requirement (Sept. 19, 2018).

⁷ See *In re Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase its Rates & Charges for Gas Servs. & Related Matters*, Case No. 07-1080-GA-AIR, Entry at 3 (Jan. 16, 2008).

⁸ *Id.*

⁹ *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St. 3d 488, 491 (2001) (*res judicata* is “not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice”).

the Staff Report’s proposed allocation, which is based on an 11-year old cost allocation, or should it adopt OCC’s proposed allocation, which is based on current revenues? When the PUCO granted Suburban’s request for a waiver of the cost of service study standard filing requirement, it did not rule that whatever cost allocation was included in the Staff Report was the final say on that issue.

When there is no cost of service study, the PUCO must adopt some alternative basis for allocating costs. OCC has a right to be heard on what that alternative basis should be. The PUCO should reject Suburban’s motion to strike OCC Objection No. 4.

B. The PUCO should reject Suburban’s effort to silence OCC’s advocacy by attempting to rely on the doctrine of *res judicata* where it doesn’t apply.

In OCC Objection No. 5, OCC recommended that any rate increase in this case be done on a volumetric basis instead of through an increase to Suburban’s already very high fixed charge. Suburban seeks to strike this objection, citing the doctrine of *res judicata*.¹⁰ According to Suburban, OCC is attempting to “relitigate an issue that it contested, and lost, in a previous Suburban rate proceeding in Case No. 17-594-GA-ALT,” and thus, *res judicata* bars OCC’s opposition to Suburban’s straight fixed variable rate design in the current rate case.¹¹ Suburban’s motion to strike fails, both as a matter of fact and as a matter of law.

The doctrine of *res judicata* “precludes the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.”¹² For *res judicata* to apply, the issue in question must

¹⁰ Motion to Strike at 9.

¹¹ Motion to Strike at 9-10.

¹² *State ex rel. Tantarelli v. Decapua Enters.*, 2019-Ohio-517 (Feb. 14, 2019), ¶ 14.

actually have been litigated between the parties.¹³ *Res judicata* does not apply here for numerous reasons.

First, Suburban falsely claims that OCC and Suburban litigated the straight fixed variable issue in Case No. 17-594-GA-ALT (the “Alternative Rate Case”). To the contrary, OCC explicitly *did not* litigate that issue, filing a letter on the docket in that case stating, “while we have been opposed to the straight fixed variable rate design in the past, and remain so to this day, ... we will not contest the implementation of SFV rate design for Suburban Natural Gas Company.”¹⁴ Instead, OCC reserved its right to litigate the issue in a future case—namely, this one.¹⁵ Thus, whether the PUCO should order Suburban to include a variable component in its rates was not litigated in the Alternative Rate Case for purposes of *res judicata*.¹⁶

Second, Suburban seems to suggest that if a party intervenes in a case, then every single issue addressed in that case, whether litigated or not, can never be litigated again.¹⁷ If this is how it works, then intervenors will have no choice but to litigate every single conceivable issue in every case filed at the PUCO to avoid their silence being later construed as binding for purposes of *res judicata*. This would not be an optimal result from the standpoint of administrative efficiency.

¹³ *Ameigh v. Baycliffs Corp.*, 81 Ohio St. 3d 247, 250 (1998) (“An issue must be actually and necessarily litigated for *res judicata* to apply to that issue in a later proceeding.”).

¹⁴ Case No. 17-594-GA-ALT, Letter (Oct. 18, 2017).

¹⁵ *Id.* Indeed, the PUCO did not even hold a hearing in the Alternative Rate Case.

¹⁶ *Ameigh v. Baycliffs Corp.*, 81 Ohio St. 3d 247, 250 (1998) (“An issue must be actually and necessarily litigated for *res judicata* to apply to that issue in a later proceeding.”).

¹⁷ Motion to Strike at 9-10 (stating that OCC was required to raise its straight fixed variable objections in the alternate rate plan case and thus effectively waived its right to do so here in the rate case).

Third, the issue of using straight fixed variable rate design in the Alternative Rate Case was not the same as it is here. In that case, Suburban was seeking to implement straight fixed variable rate design, but it was not seeking a rate increase.¹⁸ The question in that case was whether Suburban’s rate design should be changed—in a revenue neutral fashion—to increase its fixed distribution charges and decrease its variable distribution charges. In contrast, in the current case, Suburban is seeking a rate increase. Thus, the question in this case is whether any *increase* should be implemented through a fixed charge or a variable charge. This is a different factual and legal question than could have been raised in the Alternative Rate Case, which was not at all about rate increases, and which was filed under an entirely different statute (R.C. Chapter 4929). Thus, *res judicata* does not apply.

Fourth, the PUCO should give no weight to Suburban’s complaint about litigating similar issues in multiple cases.¹⁹ It is Suburban, and Suburban alone, that decided to file two separate cases in the span of less than two years. If Suburban was concerned about litigating similar issues in multiple cases, it could have filed this rate case in 2017 when it filed its alternate rate plan case. In fact, Suburban’s decision to file this case so soon after the alternative rate plan case is one of the reasons that its proposed increase to the fixed customer charge is so problematic: As OCC has stressed from the beginning of this case, Suburban filed this case seeking a higher fixed charge of over \$41 before its latest fixed charge increase (from around \$19 to around \$29) even went into effect.²⁰ It would be bad

¹⁸ Case No. 17-594-GA-ALR, Finding & Order ¶ 6 (Nov. 1, 2017) (noting that Suburban requested straight fixed variable rate design “not as an application for an increase in rates”); ¶ 30 (“the Commission finds that the application is not for an increase in rates”).

¹⁹ See Motion to Strike at 10.

²⁰ See OCC Motion to Intervene (Aug. 30, 2018).

policy—and fundamentally unfair—to allow a utility to make serial filings and then use the existence of serial filings as the basis for arguing that intervenors cannot be heard.

Fifth, the PUCO has a statutory duty to ensure that rates are just and reasonable under R.C. 4905.22. While it may have been just and reasonable for the PUCO to order a straight fixed variable rate design in the Alternative Rate Case in 2017 (something OCC does not concede, but merely agreed not to oppose at the time), that does not mean that it is just and reasonable for the PUCO to approve an even higher fixed charge in 2019. The PUCO should consider, among other things, the bill impact on customers when deciding whether rates in this case are just and reasonable. Those bill impacts are not the same as they were in 2017, when Suburban was not seeking a rate increase. And those bill impacts change depending on whether the rate increase is done through a fixed charge or a variable charge. *Res judicata* cannot bar the PUCO from fulfilling its statutory duty under R.C. 4905.22 to review rates for justness and reasonableness.

III. CONCLUSION

OCC is the statutory representative of Suburban's residential customers. While OCC and Suburban might not agree on what is best for those customers, OCC (and Suburban) have a right to be heard. The PUCO should reject Suburban's attempt to muzzle OCC's advocacy with its erroneous interpretation of the legal doctrine of *res judicata*. The issues that OCC has raised in its objections and testimony are important consumer issues that are well within the scope of this case. The PUCO should benefit from OCC's consumer advocacy in deciding this case in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 1st day of April 2019.

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Summary: Memorandum Memorandum Contra Suburban Natural Gas Company's Motion to Strike Objections by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.