

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

Bruce Weston (0016973)
Ohio Consumers' Counsel

Christopher Healey (0086027)
Counsel of Record
Angela D. O'Brien (0097579)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Healey]: (614) 466-9571
Telephone [O'Brien]: (614) 466-9531
christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov
(willing to accept service by e-mail)

October 28, 2019

TABLE OF CONTENTS

	PAGE
I. STANDARD OF REVIEW	2
II. THE USED AND USEFUL STANDARD UNDER R.C. 4909.15.....	2
III. ASSIGNMENTS OF ERROR	7
Assignment of Error 1: The Order’s conclusion that the 4.9-mile Pipeline Extension was used and useful is contrary to the overwhelming evidence that at most, Suburban needed a 2.0-mile pipeline extension, and thus, the Order allowing charges to customers violates R.C. 4903.09 and 4909.15 and related statutes.....	
	7
Assignment of Error 2: None of the Order’s purported justifications for approving a 4.9-mile extension instead of a 2.0-mile extension comply with the used and useful standard under R.C. 4909.15, and thus, the Order allowing charges to customers is unlawful.	
	11
A. The fact that Suburban might have had to build another extension after a 2.0-mile extension is entirely irrelevant to whether plant is useful on date certain. 11	
B. Whether investing in a 2.0-mile extension might increase costs in the future is irrelevant to whether the 4.9-mile extension was used and useful on date certain.	
	12
C. The “lumpy” nature of utility investment simply means that utilities should file rate cases more regularly, not that they can charge existing customers for plant that might someday become used and useful for future customers.	
	13
Assignment of Error 3: The Order’s approval of a “phase-in” of the 4.9-mile Del-Mar Pipeline Extension (including the charges to customers) violates R.C. 4909.15, even if Suburban agreed to it.	
	15
IV. CONCLUSION.....	17

**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
)	

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

Suburban Natural Gas and the PUCO Staff agreed to a settlement¹—and the PUCO approved it—allowing Suburban to charge customers for the entirety of an \$8.9 million 4.9-mile pipeline extension. Suburban put the pipeline into service on February 22, 2019, just six days before the deadline of February 28, 2019 (the “date certain” for valuing plant). But while Suburban may have finished its pipeline by the deadline for the rate case, the PUCO cannot approve charges to customers unless the pipeline is “used and useful” for utility service to customers. The pipeline isn’t used and useful to customers. So the PUCO’s order that approved charges to customers for the pipeline is unlawful.

Further, under the Settlement, the 4.9-mile pipeline will be “phased in” over a period of two years, with 50% included in rates immediately upon approval, an additional 30% one year after that, and the remaining 20% another year after that.

¹ Stipulation and Recommendation (May 23, 2019) (the “Settlement”).

On rehearing, the PUCO should modify the Settlement in two ways. First, the PUCO should rule that, at most, only 2.0 miles of the 4.9-mile Pipeline Extension are used and useful, so customers should only pay at most for that 2.0 miles.² Second, the PUCO should rule that the “phase-in” under the Settlement is unlawful and therefore must be removed from the Settlement. At most, only the 2.0 miles of pipeline could be included in rate base now. If any of the remaining 2.9 miles becomes used and useful in the future, Suburban can file another rate case as the law provides.

The PUCO erred in concluding that the Settlement passed the PUCO’s three-part test for approving settlements when it allowed Suburban to charge customers for the entire 4.9-mile pipeline extension over a three-part “phase-in.” The Order³ is unlawful and unreasonable in the following respects:

Assignment of Error 1: The Order’s conclusion that the 4.9-mile pipeline extension was used and useful is contrary to the overwhelming evidence that at most, Suburban needed a 2.0-mile pipeline extension, and thus, the Order allowing charges to customers violates R.C. 4903.09 and 4909.15 and related statutes.

Assignment of Error 2: None of the Order’s purported justifications for approving a 4.9-mile pipeline extension instead of a 2.0-mile pipeline extension comply with the used and useful standard under R.C. 4909.15, and thus, the Order allowing charges to customers is unlawful.

Assignment of Error 3: The Order’s approval of a “phase-in” of the 4.9-mile pipeline extension (including the charges to customers) violates R.C. 4909.15, even though Suburban agreed to it.

² In addition to removing the extra 2.9 miles from plant in service, other flow-through adjustments (property taxes, etc.) would need to be made as well.

³ Opinion & Order (September 26, 2019) (the “Order”).

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Christopher Healey

Christopher Healey (0086027)

Counsel of Record

Angela D. O'Brien (0097579)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone [Healey]: (614) 466-9571

Telephone [O'Brien]: (614) 466-9531

christopher.healey@occ.ohio.gov

angela.obrien@occ.ohio.gov

(willing to accept service by e-mail)

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

Suburban Natural Gas did not need to build a 4.9-mile pipeline extension to be able to provide safe and reliable service to customers on February 28, 2019, the date certain in this case. Suburban's own expert witness admitted this: "From our calculations the 2 mile option would have satisfied Suburban's system at the end of 2018, so they would have been good this winter."⁴ Despite this—and despite a mountain of other evidence provided by Suburban itself showing that the 4.9 mile pipeline extension was way too long for current needs—the Order concluded that Suburban met its burden of proving that a 4.9 mile pipeline extension, instead of a 2 mile extension, was necessary on date certain.

The 4.9-mile pipeline extension was not used and useful on date certain. By approving the Settlement and allowing Suburban to charge customers for the entire 4.9 miles, the Order violated both R.C. 4909.15 and 4903.09. On rehearing, the PUCO should modify the Settlement

⁴ Tr. Vol. II at 278:13-24 (Grupenhof). Tr. Vol. II at 332:25-333:17 (Suburban witness Grupenhof confirming that when his model referenced end of 2018, that meant the entire 2018-2019 winter, including the February 28, 2019 date certain).

by (i) removing 2.9 of the 4.9 miles of the pipeline extension from rate base (along with making the necessary flow-through adjustments like property taxes, etc.), and (ii) eliminating the unlawful “phase-in” of plant from the Settlement. These modifications are necessary both to protect consumers and comply with the law.

I. STANDARD OF REVIEW

After an order is entered, an intervenor in a PUCO proceeding has a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”⁵ An application for rehearing must “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”⁶

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.”⁷

II. THE USED AND USEFUL STANDARD UNDER R.C. 4909.15

As the Supreme Court of Ohio has repeatedly emphasized, the PUCO is a “creature of statute” that “may exercise only that jurisdiction conferred upon it by the General Assembly.”⁸ As such, it must follow the “mandatory ratemaking formula under R.C. 4909.15.”⁹ Under this mandatory formula, the PUCO must determine the value of the utility’s property that is “used

⁵ R.C. 4903.10.

⁶ R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

⁷ R.C. 4903.10(B).

⁸ *See, e.g., Columbus S. Power Co. v. PUCO*, 67 Ohio St.3d 535, 537 (1993).

⁹ *Id.*

and useful ... as of the date certain, in rendering the public utility service for which rates are to be fixed and determined”¹⁰ and set rates based on that value.¹¹

The date certain concept is important. It requires the PUCO to analyze the used and usefulness of utility property on a single date, and a single date only.¹² As the Ohio Supreme Court’s explained regarding R.C. 4909.15, whether the property in question might have been used and useful in the past, or might be used and useful in the future, is irrelevant:

Incorporated in this statutory language [R.C. 4909.15] is the generally accepted principle that a utility is not entitled to include in the valuation of its rate base property not actually used and useful in providing its public service, no matter how useful the property may have been in the past or may yet be in the future.¹³

Fundamentally, property is useful to customers on date certain if it allows a utility to serve those customers safely and reliably.¹⁴ If a utility can serve its customers safely and reliably without the property, then it would by definition be superfluous, which is the opposite of useful. The PUCO’s past interpretation of the used and useful standard confirms this interpretation. In particular, the PUCO has consistently and repeatedly ruled that if property is larger than

¹⁰ R.C. 4909.15(A)(1).

¹¹ R.C. 4909.15(B), (E).

¹² *In re Application of Ohio Edison Co.*, Case No. 82-1025-EL-AIR, 1983 Ohio PUC LEXIS 40, at *21 (September 14, 1983) (“The date certain is the appropriate point in time at which to value the property...”). *W. Ohio Gas Co. v. Pub. Util. Comm’n*, 294 U.S. 63, 78 (1935) (“The property for which constitutional protection is invoked is that ‘used and useful in the public service,’ not the enlarged business of the future which petitioner hopes to obtain through the present expenditure of money.”).

¹³ *Indus. Energy Users-Ohio v. PUCO*, 117 Ohio St.3d 486, 492-93 (March 13, 2008) (quoting *Office of the Ohio Consumers’ Counsel v. PUCO*, 58 Ohio St.2d 449, 453 (1979)). *See also In re Application of Columbus & S. Ohio Elec. Co.*, Case No. 81-1058-EL-AIR, 1982 Ohio PUC LEXIS 2, at *10-11 (November 5, 1982) (“The fact that the property may eventually be used to provide service to customers does not make the land currently used and useful for remaking purposes.”).

¹⁴ *Public Serv. Commission v. Diamond State*, 468 A.2d 1285, 1290 (Del. 1983) (property is only used and useful if it is “reasonably necessary to the efficient and reliable provision of utility service to the public”) (quoting *L.S. Ayres & Co. v. IPALCO*, 169 Ind. App. 652, 681 (Ind. Ct. App. 1976)).

necessary to serve customers on date certain, then the PUCO must exclude from rate base that portion of the property that is above what is needed.

In *In re Application and Complaint and Appeal of Columbus and Southern Ohio Electric Co.*, for example, the PUCO Staff concluded that certain parcels of land were “greater in area than reasonably required” to provide utility service and thus recommended they be excluded from rate base.¹⁵ The PUCO agreed with Staff’s conclusion that the property was not “totally used and useful” and thus excluded from rate base those portions not reasonably necessary for utility service.¹⁶

In *In re Application of Dayton Power and Light Co.*, the PUCO Staff found during its investigation that the utility acquired land but that only one-third of it was necessary.¹⁷ The PUCO agreed and excluded the remaining two-thirds from property used and useful on date certain.¹⁸

In *In re Application of Ohio Edison Co.*, the utility purchased 166.7 acres of land, but the PUCO Staff found that only 20% of the land was actually necessary to provide utility service.¹⁹ The PUCO agreed and found that the remaining 80% was excessive and therefore not used and useful.²⁰

¹⁵ Case No. 77-545-EL-AIR, 1978 Ohio PUC LEXIS 3, at *17 (March 31, 1978).

¹⁶ *Id.* at *20-23.

¹⁷ Case No. 81-21-EL-AIR, 1982 Ohio PUC LEXIS 8, at *9 (February 3, 1982).

¹⁸ *Id.* at *9-10.

¹⁹ Case No. 82-1025-EL-AIR, 1983 Ohio PUC LEXIS 40, at *27 (September 14, 1983).

²⁰ *Id.* at *28.

In *In re Application of the Toledo Edison Co.*, the utility owned a 16-floor office building but leased about half of it to other tenants.²¹ The PUCO ruled, therefore, that those leased portions were not used and useful and could not be included in rate base.²²

In *In re Application of Ohio Edison Co.*, again the utility purchased more land than it needed because, according to the utility, it was impossible to purchase only the smaller parcel that was necessary for utility service.²³ The PUCO nonetheless ruled that only those portions necessary for utility service were used and useful.²⁴

While many of these cases involve the purchase of land, the law makes no distinction between different types of property, be it land, wires, natural gas pipelines, office buildings, or any other type of utility plant. What matters is that these cases unambiguously interpret R.C. 4909.15 to mean that a utility must right-size its investments.²⁵ When a utility invests in property in excess of what is reasonable necessary for safe and reliable utility service on date certain, R.C. 4909.15 requires the excess property to be excluded from rate base so that customers do not pay for it.²⁶

The expert witnesses in this case—including those testifying on behalf of Staff, Suburban, and OCC—all agreed with this basic principle. OCC witness Willis, for example,

²¹ Case No. 79-143-EL-AIR, 1980 Ohio PUCO LEXIS 3, at *10 (February 3, 1980).

²² *Id.* at *12.

²³ Case No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 912 (August 16, 1990).

²⁴ *Id.* at *16-17.

²⁵ See also *Office of Consumers' Counsel v. PUCO*, 67 Ohio St.2d 153, 168 (1981) (“If a utility completes a project that should have been abandoned, then the commission must under the ‘used and useful’ requirement of R.C. 4909.15(A)(1) disallow rate base treatment ...”).

²⁶ Excluding the excess from rate base is also necessary to mitigate the effects of the “Averch-Johnson” effect, which is where utilities in rate of return based regulation overinvest in plant to increase profits. See, e.g., *Montana Power Co. v. FERC*, 599 F.2d 295, 304 (9th Cir. 1979) (utilities are “padding their rate bases” to increase profits); *Office of Attorney General v. Wash. Utils. & Transp. Comm’n*, 423 P.3d 861, 871 (Wash. Ct. App. 2018) (witness describing the Averch-Johnson effect as: “It has been widely documented that utilities subject to rate of return regulation have an incentive to over-invest in capital in order to increase earnings.”).

testified that a natural gas pipeline would not be useful if it were built longer than it needed to be.²⁷ If a pipeline is longer than necessary, it should be considered plant held for future use, which is not includable in rates.²⁸ PUCO Staff witness Lipthratt was asked, “in determining whether or not Staff believed that the pipeline was used and useful, you considered whether it was too long or not, correct?”²⁹ His response: “Exactly.”³⁰ PUCO Staff witness Sarver concurred, testifying that part of the PUCO Staff’s investigation in a natural gas base rate case is to determine whether a pipeline is the correct length.³¹ He also described the concept of “gold plating,” which is where a utility goes “over the top” or builds a pipeline “much more costly than it would need to be to serve the needs of either the utility or its customers.”³² The PUCO Staff similarly agreed that utilities are not allowed to overinvest and charge customers for the excess investment: “The primary negative consequence of installing a pipeline of greater capacity than necessary would be that additional cost would be associated with the additional size increment.”³³ Along the same lines, Suburban witness Grupenhof testified that it is important to minimize costs when building a pipeline.³⁴

²⁷ OCC Ex. 13 (Willis Supplemental Testimony) at 7-12. *See also S. States Utils. v. Florida PSC*, 714 So. 2d 1046, 1057 (1998) (pipeline is “100% used and useful if the pipes were of the *minimum size* necessary to supply the existing customers”) (emphasis added).

²⁸ OCC Ex. 13 (Willis Supplemental Testimony) at 7-8 (explaining why the 4.9-mile Pipeline Extension is plant held for future use); *In re Application of Columbus & S. Ohio Elec. Co.*, Case No. 81-1058-EL-AIR, Opinion & Order (“Ohio law does not permit the inclusion of property held for future use in rate base...”).

²⁹ Tr. Vol. V at 740:3-7 (Lipthratt).

³⁰ Tr. Vol. V at 740:3-7 (Lipthratt).

³¹ Tr. Vol. V at 725:3-7 (Sarver).

³² Tr. Vol. V at 718:2-10 (Sarver).

³³ Suburban Ex. 6, Page 2.

³⁴ Tr. Vol. II at 263:10-13 (Grupenhof) (“Q. And all else equal, the utility should try to minimize the cost; is that right? A. Yeah. I mean, that’s in everybody’s best interest, I think.”).

In short, it is not enough to simply prove that a utility owns a piece of property and is in fact using it. For property to be used and useful, the utility must also prove that it is not bigger (and therefore more expensive) than necessary to provide safe and reliable service to customers on date certain.

III. ASSIGNMENTS OF ERROR

Assignment of Error 1: The Order's conclusion that the 4.9-mile Pipeline Extension was used and useful is contrary to the overwhelming evidence that at most, Suburban needed a 2.0-mile pipeline extension, and thus, the Order allowing charges to customers violates R.C. 4903.09 and 4909.15 and related statutes.

Although OCC continues to believe that Suburban did not need to put any pipeline extension into service prior to the date certain in this case, there is at least some evidence of concerns regarding potential low pressure at the Lazelle Road point of delivery. But there is no evidence whatsoever that to address those concerns, Suburban needed a 4.9-mile pipeline extension on date certain instead of a 2.0-mile pipeline extension. In that regard, the Order unreasonably and unlawfully concluded that the entire 4.9-mile pipeline extension was used and useful. At most, the facts support a conclusion that 2.0 miles was used and useful and the remaining 2.9 miles was not. On rehearing, consistent with the PUCO precedent discussed above,³⁵ the PUCO should rule that the remaining 2.9 miles is excluded from rate base and that customers are not required to pay for it. Suburban can file another rate case in the future if the remaining 2.9 miles become used and useful.

In support of its finding that the 4.9-mile Pipeline Extension was used and useful, the Order relies on various facts. But not one of these facts shows that 4.9 miles was necessary instead of 2.0 miles:

³⁵ See section II.

- “We find that models run by UTI on December 9, 2015 (76.30 psig), February 3, 2016 (71.85 psig), February 10, 2016 (53.27 psig), and April 6, 2017 (80.83 psig) all projected that the pressure at Lazelle Road would be below 100 psig, thereby necessitating the DEL-MAR pipeline extension by year end 2018.”³⁶ But none of these projections show that 4.9 miles was necessary instead of 2.0 miles.
- “[E]ven though the August 31, 2018 model projects that the pressure at Lazelle Road during year end 2018 would be 104.27 psig, this is barely above the minimum acceptable level of 100 psig.”³⁷ But nothing about this projection shows that 4.9 miles was necessary instead of 2.0 miles.
- “During a particularly cold stretch with multiple contingencies, as explained below, Suburban may not have been able to provide safe, adequate, and reliable service to its customers.”³⁸ But there is no evidence that a 4.9 mile extension, as opposed to a 2.0 mile extension, was required to provide safe, adequate, and reliable service to customers.
- “[T]he evidence demonstrates that Suburban projected completion of the extension by year end 2018, specifically October 31, 2018, but due to weather delays, including record rainfall during the 2018 autumn and winter, and issues with obtaining easements from landowners, this was not attainable.”³⁹ But there was evidence that Suburban’s decision to build a 4.9 mile pipeline instead of a 2.0 mile pipeline *contributed* to the delay, so this fact actually weighs against the PUCO’s finding that 4.9 miles was necessary.⁴⁰
- “Despite delays, Suburban was able to place the DEL-MAR pipeline extension into service by February 22, 2019, before the February 28, 2019 date certain. As such, the extension was both used by customers as of date certain and useful to them because it provided them with safe and reliable service at that time.”⁴¹ But there is no evidence that Suburban needed a 4.9 mile extension instead of a 2.0 mile extension to provide safe and reliable service on date certain.

³⁶ Order ¶ 121.

³⁷ Order ¶ 121.

³⁸ Order ¶ 121.

³⁹ Order ¶ 121.

⁴⁰ Tr. Vol. II at 269:12-16 (Suburban witness Grupenhof testifying that a pipeline shorter than 4.9 miles likely could have been built more quickly); Tr. Vol. II at 276:3-6 (Suburban witness Grupenhof testifying that Ohio Power Siting Board approval could have been received more quickly for a pipeline shorter than 4.9 miles).

⁴¹ Order ¶ 121.

- “In finding that the pipeline extension was necessary for Suburban’s system, we further note that, on January 21, 2019, Martin Luther King Jr. Day, the pressure at Lazelle Road fell to only 105 psig. Considering that businesses and schools were closed that day, resulting in lower usage, Suburban expected the pressure to be higher.”⁴² But there is no evidence that a 4.9-mile extension, as opposed a 2.0-mile pipeline, was necessary to address this low-pressure concern.
- “[T]he record demonstrates that the pressure at Lazelle Road did, in fact, fall below 100 psig on February 24, 2015.”⁴³ But there is no evidence that a 4.9-mile extension, as opposed to a 2.0-mile extension, was required to avoid this low-pressure concern.
- “It is even more relevant to note that [the August 31, 2018] model indicates that the pressure without the extension drops to 78.72 psig in 2019, while the pressure with the extension is 232.50 psig.”⁴⁴ But there is no evidence that a 4.9 mile extension, as opposed to a 2.0 mile extension, was required to increase pressure materially above 100 psig.⁴⁵

All of this evidence on which the Order relies suggests that Suburban may have prudently decided to build a pipeline extension. But none of it even remotely suggests that 4.9 miles was necessary at date certain instead of 2.0 miles. To the contrary, the Order essentially admits this point: “[W]e find that ... a two-mile extension may have served customers through the 2018-2019 winter.”⁴⁶

The only thing wrong with this statement is its use of the word “may.” There is no “may.” Suburban’s engineer unambiguously testified that in his expert opinion, Suburban could have safely served customers through the 2018-2019 winter with a 2.0 mile extension instead of

⁴² Order ¶ 121.

⁴³ Order ¶ 121.

⁴⁴ Order ¶ 126.

⁴⁵ Moreover, the fact that pressure would drop to 78.72 psig in 2019 is not “even more relevant,” as the Order suggests; in fact, it is entirely *irrelevant*. Suburban witness Grupenhof testified that the 78.72 psig projection is for the *end* of 2019, which is well after the date certain. *See* Tr. Vol. II at 301:6-13.

⁴⁶ Order ¶ 125.

a 4.9 mile extension: “From our calculations the 2 mile option would have satisfied Suburban’s system at the end of 2018, so they would have been good this winter.”⁴⁷

This is not testimony from an OCC witness attempting to support OCC’s position. This is Suburban’s own engineer, admitting that 2.0 miles was sufficient on date certain. The PUCO cannot ignore this definitive statement from Suburban’s witness that a 2.0-mile pipeline is all that Suburban needed to provide safe and reliable service on date certain. Nor can it ignore the substantial evidence—again, evidence supplied by Suburban itself—that the 4.9-mile extension was too long:

- The 4.9-mile extension is big enough to serve peak capacity of 842 mcfh, which is 184% of the date-certain peak capacity of 457 mcfh.⁴⁸
- The 4.9-mile extension is big enough to serve peak capacity in 2028—nine years from now.⁴⁹
- The 4.9-mile extension is big enough to increase pressure at Lazelle Road to 230 psig, more than double the 100 psig pressure required for safe and reliable service.⁵⁰
- The 4.9-mile extension is big enough to serve Suburban’s current 13,500 southern system customers, *plus* an additional 4,000 to 20,000.⁵¹
- The primary reason that Suburban built a pipeline extension 4.9 miles long, instead of some other length, was not because 4.9 miles was the length it needed, but because 4.9 miles was the longest it could be built

⁴⁷ Tr. Vol. II at 278:13-24 (Gruppenhof).

⁴⁸ OCC Ex. 5, page 4 (Suburban’s response to OCC discovery request).

⁴⁹ *Id.*

⁵⁰ Suburban Ex. 9 at 5 (Suburban’s projections showing 230 psig on date certain for the 4.9-mile extension).

⁵¹ The Order states that the PUCO finds it “important to refute OCC’s contention that the DEL-MAR pipeline extension was overbuilt to accommodate 4,000 to 20,000 future customers and thereby possibly double its customers base.” Order ¶ 126. This is not “OCC’s contention.” This is an explicit admission by Suburban’s engineer. *See* Suburban Ex. 4 (Gruppenhof Testimony) at 8 (admitting that the 4.9 mile extension “could sustain the addition of 4,000 customers”); Tr. Vol. II at 274:2-3 (Gruppenhof) (testifying that it could sustain the addition of 20,000 customers, depending on where those customers were located).

while still qualifying for expedited review under Ohio Power Siting Board rules and regulations.⁵²

The evidence simply does not support the Order's conclusion that a 4.9-mile pipeline extension was used and useful—every piece of record evidence shows that 4.9 miles was too long and that 2.0 miles was more than enough on date certain.

Assignment of Error 2: None of the Order's purported justifications for approving a 4.9-mile extension instead of a 2.0-mile extension comply with the used and useful standard under R.C. 4909.15, and thus, the Order allowing charges to customers is unlawful.

A. The fact that Suburban might have had to build another extension after a 2.0-mile extension is entirely irrelevant to whether plant is useful on date certain.

In an attempt to avoid the unavoidable conclusion that only 2.0 miles was required on date certain, the Order cites irrelevant evidence about what Suburban might have to do *after* the date certain if it built a 2.0-mile pipeline extension:

With regard to OCC's arguments about the precise length of the extension, we find that, while a two-mile extension may have served customers through the 2018-2019 winter, Suburban would need to immediately initiate the OPSB regulatory process again to build additional pipeline to ensure adequate capacity to serve existing customers soon after.⁵³

This statement demonstrates the Order's misuse of the used and useful standard. The used and useful standard requires the PUCO to take a snapshot on the date certain and determine whether a utility's plant is used and useful on that date.⁵⁴ If it is used and useful, then the utility can charge customers for it, and if it is not, then the utility cannot. Whether the utility might need to make additional investments *after* the date certain is irrelevant to used and usefulness under

⁵² Tr. Vol. II at 274:13–277:8 (Gruppenhof).

⁵³ Order ¶ 125.

⁵⁴ R.C. 4909.15.

the law. And of course, it is the utility that decides what the test year and date certain will be, so it cannot complain about the consequences of a date certain that results in certain property being found not used and useful.⁵⁵

The plain language of R.C. 4909.15 is clear: the PUCO must determine whether the property in question is used and useful on date certain. The PUCO is not allowed to consider whether, in the long run, it might make sense to overbuild now rather than invest in the future.

B. Whether investing in a 2.0-mile extension might increase costs in the future is irrelevant to whether the 4.9-mile extension was used and useful on date certain.

As a second justification for approving the 4.9-mile extension instead of a shorter 2.0-mile extension, the PUCO notes that building a 2.0-mile extension followed by an additional future extension “would also increase overall cost of necessary improvements to Suburban’s distribution system, thereby increasing the rates customers pay.”⁵⁶

This statement is problematic for several reasons. First, it is circular because it assumes that these future investments are “necessary.” But we don’t know that they are necessary. All we know right now is that at most, Suburban needed a 2.0-mile extension on date certain. Whether Suburban might need additional lengths of pipeline in the future is a question for a future case.

Second, whether building a 2.0-mile extension followed by another future extension would “increase overall cost” has nothing to do with the used and useful standard. Again, under R.C. 4909.15, the PUCO must determine the value of a utility’s property “used and useful as of

⁵⁵ *Office of Consumers’ Counsel v. PUCO*, 58 Ohio St.2d 449, 457 (1979) (“Any uncertainty which the utility harbors as to the used and useful status of its property, and therefore its includability in the rate base, can be minimized by the careful selection of the date at which the utility chooses to file its application for the rate increase.”).

⁵⁶ Order ¶ 125.

the date certain” and set rates based on that value.⁵⁷ The statute does not say that the PUCO may deviate from this standard in an attempt to decrease costs paid by consumers in future cases (though a goal of decreasing costs that consumers pay is an important one for the PUCO to consider in many circumstances and would be accomplished by adopting OCC’s position in this application for rehearing). The PUCO must interpret the law as written. Even if investing in pipeline piecemeal might increase costs in the long run (a fact not proven to be true), the PUCO lacks authority to make this judgment and ignore the plain language of R.C. 4909.15.

C. The “lumpy” nature of utility investment simply means that utilities should file rate cases more regularly, not that they can charge existing customers for plant that might someday become used and useful for future customers.

As its final justification for allowing Suburban to charge customers for 4.9 miles of pipeline even though a maximum of 2.0 miles was used and useful on date certain, the Order cites guidance from the National Association of Regulatory Utility Commissioners (“NARUC”) that “utility investment is often lumpy in nature, such that it may be cost ineffective to add small increments of plant and equipment each year, rather than building to meet a longer growth horizon.”⁵⁸ The used and useful standard is an important protection for existing customers who, as in this case, are being asked to pay for plant to serve new customers added in the future.

First, the 16-year-old NARUC Rate Case and Audit Manual does not trump Ohio statute in Ohio rate case proceedings. Whether NARUC considers it appropriate under some circumstances to look at a “longer growth horizon” is irrelevant. Ohio law—R.C. 4909.15—requires the PUCO to explicitly *not* look at a longer growth horizon because it requires the PUCO to look at the value of used and useful plant on a single date, the date certain.

⁵⁷ R.C. 4909.15(A)(1), (B), (E).

⁵⁸ Order ¶ 125.

Second, immediately before the manual’s language about “lumpy” utility investment, it concludes: “Plant that is considered to be excessive may not be appropriate for inclusion in rates at this time.”⁵⁹ The Order ignores this more fundamental principle regarding the used and useful standard—one that is particularly relevant here where Suburban built excessive plant.

Third, the rate case manual says nothing about valuing property on a date certain. In fact, in its entire 52 pages, it never once references the concept of a date certain.⁶⁰ Even if the PUCO were to give the manual some weight, it deserves no weight in deciding whether plant is used and useful on a date certain, as required by Ohio law.

Fourth, whether utility *investment* may be lumpy in nature is not the point. Utilities make capital investments all the time. They do not file a rate case every time they add plant. It is the utility’s responsibility to manage its investments and file periodic rate cases to allow a reasonable opportunity to earn a rate of return on its investments. Utilities have no reasonable expectation that the minute new plant goes into service, customers must pay for it, especially here in Ohio. If a utility chooses to overinvest in plant, then it can either (i) wait a few years to file a rate case when the entire plant is used and useful or (ii) file one rate case now to add some of the plant to rates and then file another rate case in the future to add the rest. What the utility cannot do under the law is overbuild for the addition of future customers and charge existing customers for it now, just so that it can avoid filing a future rate case.⁶¹ That is the entire point of the date certain concept, and the Order violates that by allowing Suburban to include 4.9 miles of pipeline in rate base when, at most, 2.0 miles were used and useful on February 28, 2019.

⁵⁹ Suburban Ex. 10 at 16.

⁶⁰ Suburban Ex. 10.

⁶¹ See *In re Toledo Edison Co.*, Case No. 75-758-EL-AIR, 1976 Ohio PUC LEXIS 1, at *9 (Nov. 30, 1976) (finding that it may be prudent for a utility to invest in property now to use in the future, but that the property only becomes used and useful at that future time, not at the time of purchase).

Assignment of Error 3: The Order’s approval of a “phase-in” of the 4.9-mile Del-Mar Pipeline Extension (including the charges to customers) violates R.C. 4909.15, even if Suburban agreed to it.

Under the Settlement, the 4.9-mile Pipeline Extension is “phased in” over two years, with 50% included in rates upon approval of the Settlement, 80% included in rates one year thereafter, and 100% included another year after that.⁶² In the Order, the PUCO unreasonably ruled that because Suburban voluntarily accepted this phase-in, the phase-in is lawful.⁶³ But the voluntary nature of the phase-in is irrelevant under the law. The statute makes no distinction between voluntary and involuntary phase-ins. Thus, the PUCO lacks statutory authority to approve a phase-in of plant under any circumstances, voluntary or otherwise.

Again, the PUCO is a “creature of statute” that “may exercise only that jurisdiction conferred upon it by the General Assembly.”⁶⁴ As such, it must follow the “mandatory ratemaking formula under R.C. 4909.15.”⁶⁵ Under this mandatory formula, the PUCO must determine the value of the utility’s property that is “used and useful ... as of the date certain, in rendering the public utility service for which rates are to be fixed and determined”⁶⁶ and set rates based on that value.⁶⁷

Mandatory means mandatory. It does not mean, “mandatory unless the utility agrees to something different,” even if that something different (*e.g.*, a phase-in) appears to be less favorable for the utility. Nothing in the plain language of R.C. 4909.15 allows the PUCO to

⁶² Settlement § III.A.2.

⁶³ Order ¶ 145.

⁶⁴ *See, e.g., Columbus S. Power Co. v. PUCO*, 67 Ohio St.3d 535, 537 (1993).

⁶⁵ *Id.*

⁶⁶ R.C. 4909.15(A)(1).

⁶⁷ R.C. 4909.15(B), (E).

deviate from the mandatory ratemaking formula simply because the utility agrees to such deviation in a settlement.

The Order errs in its analysis of Supreme Court precedent. It is true that in *Columbus Southern Power Co. v. PUCO*,⁶⁸ the PUCO attempted to force the utility to accept a phase-in, *i.e.*, the phase-in was not voluntary. But the question of a voluntary phase-in, in contrast, was not before the Court. So the Court could not, and did not, make any distinction between involuntary and voluntary phase-ins: “[C]onsidering the detail with which the General Assembly has legislated in this area, we find if it had intended to grant the PUCO authority to phase in a utility’s annual revenue increase, it would have specifically provided such a mechanism.”⁶⁹ The Court’s opinion says nothing about voluntary vs. involuntary. It is an interpretation of the plain language of R.C. 4909.15, and the plain language of R.C. 4909.15 does not say anything about deviating from the mandatory ratemaking formula at the election of the utility.

The Order also relies on *In re Dayton Power & Light Co.*⁷⁰ in support of approving the phase-in under the Settlement. The Order notes that it approved a phase-in for DP&L in 1992 under a settlement signed by various parties, including OCC. But *Dayton Power* is not binding or even persuasive authority here. First, and most importantly, the phase-in in the DP&L case was unlawful for all the same reasons the phase-in is unlawful here—it violated R.C. 4909.15. The fact that no one chose to oppose it, and that the PUCO approved the stipulation in 1992, does not mean that the PUCO can now violate the plain language of R.C. 4909.15 by approving the Settlement in this case involving Suburban. PUCO decisions cannot overrule the plain language of a statute. Second, the DP&L case was resolved by unanimous stipulation, and thus it sets no

⁶⁸ 67 Ohio St.3d 535 (1993).

⁶⁹ *Columbus Southern*, 67 Ohio St.3d at 540.

⁷⁰ Case No. 91-414-EL-AIR, Opinion & Order (January 22, 1992).

precedent.⁷¹ Third, the fact that “OCC” signed the DP&L stipulation 28 years ago is irrelevant. The Consumers’ Counsel at the time may have elected to join the stipulation for any number of reasons, and his decision is in no way binding on the current Consumers’ Counsel.

Phasing in plant is not allowed under R.C. 4909.15. The PUCO cannot force a utility to use a phase-in, and a utility cannot volunteer for a phase-in. The statute makes no distinction. The phase-in under the Settlement is unlawful.

IV. CONCLUSION

On rehearing, the PUCO should rule that only 2.0 miles of the 4.9-mile Pipeline Extension is used and useful. Customers should not pay for the remaining 2.9 miles, which should not be included in rate base. Finally, the phase-in under the Settlement should be eliminated.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers’ Counsel

/s/ Christopher Healey

Christopher Healey (0086027)
Counsel of Record
Angela D. O’Brien (0097579)
Assistant Consumers’ Counsel

Office of the Ohio Consumers’ Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Healey]: (614) 466-9571
Telephone [O’Brien]: (614) 466-9531
christopher.healey@occ.ohio.gov
angela.obrien@occ.ohio.gov
(willing to accept service by e-mail)

⁷¹ Case No. 91-414-EL-AIR, Opinion & Order, 1992 Ohio PUC LEXIS 57, at *51 (January 22, 1992) (approved stipulation stating that is “is not deemed binding in any other proceeding”).

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Application for Rehearing was served by electronic transmission upon the parties below this 28th day of October 2019.

/s/ Christopher Healey
Counsel of Record

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

SERVICE LIST

robert.eubanks@ohioattorneygeneral.gov
werner.margard@ohioattorneygeneral.gov
cmooney@opae.org

bojko@carpenterlipps.com
see@carpenterlipps.com
dressel@carpenterlipps.com

Attorney Examiners:

Sarah.parrot@puco.ohio.gov
Anna.sanyal@puco.ohio.gov

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

10/28/2019 4:21:02 PM

in

Case No(s). 18-1205-GA-AIR, 18-1206-GA-ATA, 18-1207-GA-AAM

Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.