

**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) Case No. 18-1207-GA-AAM
Certain Accounting Authority.)

**CONSUMER PROTECTION MOTION TO REJECT SUBURBAN’S PROPOSED RATE
INCREASE TARIFFS AND TO LIMIT ITS TARIFF CHARGES FOR ITS 4.9-MILE
DEL-MAR PIPELINE TO NO MORE THAN AMOUNTS FOR TWO MILES OF PIPE
IN CONSIDERATION OF YESTERDAY’S SUPREME COURT OVERTURNING OF
THE PUCO’S DECISION,
OR, IN THE ALTERNATIVE,
MOTION FOR MAKING SUBURBAN’S CHARGES SUBJECT TO REFUND
EFFECTIVE YESTERDAY
AND
REQUEST FOR EXPEDITED RULING
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Public Utilities Commission of Ohio (“PUCO”) should act quickly to protect consumers by granting this motion, which is justified by the Supreme Court of Ohio’s September 21, 2021 opinion reversing and remanding the PUCO’s rulings in this case regarding charges to consumers for Suburban’s 4.9-mile pipeline extension. In that opinion, the Court ruled that the PUCO misapplied the law when it found that the entire 4.9-mile pipeline was “used and useful” in providing utility service to consumers.¹ Accordingly, consumers should no longer be paying

¹ *In re Application of Suburban Natural Gas Co.*, Slip Op. No. 2021-Ohio-3224 (Sept. 21, 2021) (the “Supreme Court Opinion”).

rates that are based on the PUCO's decision to allow the utility to charge for the full cost of the 4.9-mile pipeline extension.

To protect consumers while proceedings on remand are pending, the PUCO should take the following steps.

First, the PUCO should protect consumers from paying the cost of more than two miles of the pipeline. On August 23, 2021, Suburban filed its Notice to Implement Phase III of its Rate Increase.² Currently, customers are paying rates based on 80% of the value of the 4.9-mile pipeline extension.³ If Suburban's August 23, 2021 tariffs are allowed to go into effect, consumers' rates would increase, requiring them to pay rates based on 100% of the value of the 4.9-mile extension. This is clearly contrary to the Supreme Court's ruling, which said that the PUCO's ruling allowing charges for the entire pipeline was unlawful.

Second, the PUCO should order Suburban to immediately file new tariffs that include rates based on the value of 2.0 miles of the pipeline extension. While this case is pending on remand, it would be appropriate for consumers to be charged rates that are based only on the value of 2.0 miles of the pipeline extension.

Third, in the alternative, the PUCO should require any charges that consumers pay on or after September 21, 2021 (the date of the Court's ruling) to be subject to refund, pending resolution of this case on remand. This will protect consumers from continuing to pay rates that the Supreme Court has ruled were approved in an unlawful PUCO Order.

Finally, under O.A.C. 4901-1-12(C), OCC asks that the PUCO issue an expedited ruling granting this motion immediately. Every day that passes without a PUCO ruling granting this

² Notice of Suburban Natural Gas Company to Implement Phase III of its Rate Increase (Aug. 23, 2021).

³ PUCO Order ¶ 93 (80% of book value of 4.9-mile pipeline extension to be included in rates in second part of phase-in); Entry (Sept. 23, 2020) (authorizing Suburban to implement rates under second part of phase-in).

motion is another day on which consumers could be paying charges that are unlawful under the Supreme Court's September 21, 2021 ruling. Ohio consumers are already harmed by the PUCO's longstanding utility-friendly, anti-consumer approach of denying refunds. Consumers should be granted immediate relief from these charges while this case is pending on remand.

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)

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

I. INTRODUCTION AND BACKGROUND

The controversy in this case centers on a 4.9-mile pipeline extension that Suburban built. There was a settlement between Suburban and the PUCO Staff, which OCC asked the PUCO to reject. But the PUCO unanimously approved the Staff-Suburban settlement and ruled that the entire 4.9-mile pipeline was “used and useful” to consumers, thus requiring consumers to pay rates based on the full \$8.9 million cost of the pipeline as of the date certain.⁴ OCC then appealed the Order to the Supreme Court of Ohio, arguing (among other things) that the PUCO misapplied the law and that no more than 2.0 miles of pipeline was used and useful as of the date certain.⁵

On September 21, 2021, the Court ruled, reversing the PUCO Order and remanding the case to the PUCO.⁶ The Court agreed with OCC that the PUCO’s ruling requiring consumers to

⁴ Opinion & Order (Sept. 26, 2019) (the “PUCO Order”); Stipulation and Recommendation (May 23, 2019) (the “Settlement”).

⁵ See generally Supreme Court Opinion.

⁶ Supreme Court Opinion ¶ 2.

pay for the entire 4.9-mile pipeline extension was unlawful.⁷ The Court found that the PUCO erred by looking beyond the date certain, which is not allowed under Ohio’s statutory used and useful standard.⁸ The Court also agreed with OCC that the PUCO erred by applying the wrong ratemaking test. The PUCO used a prudent investment test instead of the statutory used and useful test. The PUCO’s violation wrongly placed the risk of Suburban’s investments on Ohio *consumers*, when the utility’s *shareholders* bear the risk under Ohio’s statutory used and useful test.⁹

On remand, the PUCO is required to apply the law correctly (*i.e.*, consistent with the Supreme Court Opinion) in determining whether consumers should pay for any portion of the 4.9-mile pipeline extension. In the meantime, the PUCO must swiftly take steps to protect consumers from paying unlawful charges based on the entire cost of the pipeline.

Consumers are currently paying rates that include 80% of the cost of the 4.9-mile pipeline extension (consistent with the “phase-in” that the PUCO approved as part of the Settlement).¹⁰ And Suburban recently filed proposed tariffs to increase rates to include 100% of the cost of the 4.9-mile extension (again consistent with the approved “phase-in”).¹¹ But because these charges are based on the PUCO’s unlawful Order, they should immediately be modified to protect consumers.

OCC requests that consumers’ base rates be immediately reduced to include only the value of 2.0 miles of the pipeline extension. If 2.0 miles are included in rate base, then it appears

⁷ Supreme Court Opinion ¶¶ 15-34.

⁸ Supreme Court Opinion ¶¶ 28-29.

⁹ *Id.* ¶ 32.

¹⁰ See PUCO Order ¶ 93 (80% of book value of 4.9-mile pipeline extension to be included in rates in second part of phase-in); Entry (Sept. 23, 2020) (authorizing Suburban to implement rates under second part of phase-in).

¹¹ Notice of Suburban Natural Gas Company to Implement Phase III of its Rate Increase (Aug. 23, 2021).

(subject to data for confirmation) that residential consumers should pay a monthly customer charge of no more than \$33.09, as calculated in the attachments to this motion. In the alternative, residential consumers' rates should be collected subject to refund, effective September 21, 2021 (the date of the Court's ruling) so that consumers are protected from paying unlawful rates.

II. RECOMMENDATIONS

A. **The PUCO should reject Suburban's request to increase residential consumers' rates by implementing Phase III of the phase-in because such increase is contrary to the Supreme Court's Reversal.**

Suburban proposed that residential consumers' rates should increase to \$34.60 per month, effective September 30, 2021.¹² These rates are based on the full cost (100%) of the 4.9-mile pipeline extension.¹³ But the Supreme Court has ruled that the PUCO's approval of charges based on the entire 4.9-mile length of the pipeline was unlawful:

[T]he PUCO departed from the proper standard by looking beyond the date certain and in considering whether the investment was prudent rather than "useful." Because the PUCO failed to properly apply the used-and-useful standard, we remand this case for it to do so. On remand, the PUCO must evaluate the evidence and determine whether the 4.9-mile pipeline extension was used and useful as of the date certain.¹⁴

Thus, until the PUCO makes a further ruling on remand, it would be unlawful for the PUCO to allow an increase in consumers' rates, charging them for the full value of the 4.9-mile pipeline extension. The PUCO should reject Suburban's request to increase residential consumers' rates to \$34.60 per month.

¹² See Notice of Suburban Natural Gas Company to Implement Phase III of its Rate Increase, Second Revised Sheet No. 6, Page 1 (Aug. 23, 2021).

¹³ Settlement at 6.

¹⁴ Supreme Court Opinion ¶ 35.

B. The PUCO should order Suburban to reduce residential consumers' rates to \$33.09 per month so that current rates include only the cost of 2.0 miles of the pipeline extension.

Suburban's consumers are currently paying rates (\$34.41 per month) based on 80% of the value of the 4.9-mile pipeline extension.¹⁵ This is equivalent to consumers paying for about 3.9 miles of the pipeline.¹⁶ This is unlawful under the Supreme Court's reversal of the PUCO's decision. This charge also violates R.C. 4905.22, which requires all rates to be just and reasonable; rates that violate a Supreme Court ruling cannot be just and reasonable.

Under the Court's ruling (and OCC's use of two pipeline miles as the limit for charges), charges for anything above those 2.0 miles of pipeline should be barred. Unless and until the PUCO applies the law correctly on remand, there is no basis for any charges to consumers for anything more than 2.0 miles of the pipeline extension.

OCC has recalculated Suburban's rate base using the cost of 2.0 miles of the pipeline extension. These calculations are attached hereto as an exhibit. Under OCC's calculations, customers should pay a rate of no more than \$33.09 per month based on the cost of 2.0 miles of the 4.9-mile extension. This is lower than the current rate of \$34.41 per month, which is based on 80% of the value of the pipeline extension. The PUCO should order Suburban to immediately file compliance tariffs with a small general service class rate of \$33.09 per month.

Ordering Suburban to lower its rates to comply with the Supreme Court's ruling is consistent with PUCO precedent. In a case involving an electric utility, the PUCO had approved provider of last resort ("POLR") charges to consumers.¹⁷ OCC appealed that ruling. On appeal,

¹⁵ See PUCO Order ¶ 93 (80% of book value of 4.9-mile pipeline extension to be included in rates in second part of phase-in); Entry (Sept. 23, 2020) (authorizing Suburban to implement rates under second part of phase-in).

¹⁶ 80% of 4.9 miles is 3.92 miles.

¹⁷ *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO.

the Ohio Supreme Court found that the PUCO's ruling was unlawful, and it remanded the case to the PUCO for further proceedings consistent with the Court's ruling.¹⁸ On remand, OCC (and others) filed a motion asking the PUCO to eliminate the unlawful charges while the case was pending on remand.¹⁹ The PUCO granted OCC's motion, ordering the utility to eliminate the unlawful charges while the case was pending on remand.²⁰ It should do the same here by eliminating charges to consumers for anything more than 2.0 miles of the pipeline while the case is pending on remand.

C. In the alternative, the PUCO should order that residential consumers' rates be collected subject to refund, pending resolution of this case on remand.

If the PUCO does not order Suburban to immediately reduce its rates to reflect the cost of only 2.0 miles of the pipeline extension, then it should otherwise protect consumers. The PUCO should require Suburban's rates to be collected subject to refund, effective September 21, 2021 (the date of the Supreme Court Order).

The PUCO has, in the past, ordered that utility rates should be collected subject to refund following a ruling from the Ohio Supreme Court. In a recent case involving an electric utility, the Supreme Court ruled that the utility's infamous "distribution modernization charge" was unlawful and remanded the case to the PUCO.²¹ On remand, the PUCO ruled that it was appropriate to order the utility's rates be subject to refund "to give full effect to the Supreme Court's ultimate decision...."²² Notably, the PUCO ordered the rates subject to refund even

¹⁸ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

¹⁹ Case No. 08-917-EL-SSO, Motion Requesting the PUCO Alter or Amend Existing Rates of Columbus Southern Power Co. and Ohio Power Co. Pending Remand, or, in the Alternative, Motion for Stay of Collection of Rates from Customers or Motion to Collect Subject to Refund (Apr. 26, 2011).

²⁰ *Id.*, Entry (May 4, 2011).

²¹ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 (2019).

²² *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO, Entry ¶ 13 (July 2, 2019).

though the PUCO had not yet, at the time, received the formal mandate from the Supreme Court remanding the case to the PUCO.²³ It should likewise act immediately to protect Suburban's consumers from paying unlawful charges without possibility of refund.

III. REQUEST FOR EXPEDITED RULING

Time is of the essence for consumer protection. Each day that passes is another day where consumers are paying charges that are unlawful under the Supreme Court's reversal of the PUCO's decision. The PUCO must act quickly to protect consumers. Accordingly, there is good cause under O.A.C. 4901-1-12(C) to grant this motion on an expedited basis. OCC cannot certify that no party opposes the request for an expedited ruling.

IV. CONCLUSION

Consumers should not be made to continue paying rates that include anything more than two miles of the utility's pipeline extension, given the Supreme Court's decision yesterday. The PUCO should grant this motion immediately to protect consumers from unjust and unreasonable rates.

²³ *Id.*

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)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Motion was served by electronic transmission upon the parties below this 22nd day of September 2021.

/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@ohioAGO.gov
werner.margard@ohioAGO.gov

bojko@carpenterlipps.com
dressel@carpenterlipps.com
rdove@keglerbrown.com

Attorney Examiners:

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

SUBURBAN NATURAL GAS COMPANY
CASE NO. 18-1205-GA-AIR
OVERALL FINANCIAL SUMMARY
FOR THE TWELVE MONTHS ENDED FEBRUARY 28, 2019

SCHEDULE A-1
PAGE 1 OF 1

Line No.	Description	Supporting Schedule Reference	Applicant	Staff	
				Lower Bound	Upper Bound
1	Rate Base as of Date Certain	B-1	\$ 25,877,578	\$ 20,290,122	\$ 20,290,122
2	Current Operating Income	C-1	(649,180)	1,072,924	1,072,924
3	Earned Rate of Return: Line (2) / Line (1)	(n/a)	-2.51%	5.29%	5.29%
4	Recommended Rate of Return	D-1	7.26%	7.26%	7.26%
5	Required Operating Income: Line (1) x (4)	(n/a)	1,879,161	1,473,063	1,473,063
6	Operating Income Deficiency: Line (5) - Line (2)	(n/a)	2,528,341	400,138	400,138
7	Gross Revenue Conversion Factor	A-2	1.331086	1.265823	1.265823
8	Revenue Deficiency: Line (6) x Line (7)	(n/a)	3,365,439	506,504	506,504
9	Revenue Increase Recommended	E-4	3,365,439	506,504	506,504
10	Test Year Adjusted Operating Revenues	C-1	17,949,119	18,998,910	18,998,910
11	Revenue Requirements: Line (9) + Line (10)	(n/a)	\$ 21,314,558	\$ 19,505,415	\$ 19,505,415
12	Increase Over Current Revenue: Line (9) / Line (10)	(n/a)	18.75%	2.67%	2.67%
				Midpoint	506,504

SUBURBAN NATURAL GAS COMPANY
CASE NO. 18-1205-GA-AIR
CUSTOMER CHARGE RATIONALE

Data: ___ Actual "X" Estimated
Type of Filing: "X" Original ___Updated___Revised
SCHEDULE REFERENCE NO(S): E-4

WORKPAPER WPE-4
PAGE 1 of 1
0

Customer Charge Calculation

Revenue Requirement		\$19,505,414.75
Less: Gas Costs	<u>10,665,824</u>	
		<u>10,665,824</u>
Revenue Requirement not including gas costs		\$8,839,591
Small General Service Customers	\$7,251,265	
Number of Small Gen Svs Bills	219,132	
Small General Service Monthly Charge		\$33.09
Large General Service Customers	\$1,588,326	
Number of Large Gen Svs Bills	2,988	
Revenue from Large Gen Serv Monthly Charge	\$175.00	\$522,900
Revenue from Large Gen Serv Volumetric Chg (5,648,409 CCF consumption)		\$1,065,426
Volumetric Chg per CCF		<u>0.1886241</u>
Total Monthly and Volumetric Charge		\$8,839,591

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

Summary: Motion Consumer Protection Motion to Reject Suburban's Proposed Rate Increase Tariffs and to Limit Its Tariff Charges for Its 4.9-Mile Del-Mar Pipeline to No More Than Amounts for Two Miles of Pipe in Consideration of Yesterday's Supreme Court Overturning of the PUCO's Decision, Or, In the Alternative, Motion for Making Suburban's Charges Subject to Refund Effective Yesterday and Request for Expedited Ruling by Office of The Ohio Consumer's Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Healey, Christopher