

**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.)

**MEMORANDUM CONTRA SUBURBAN'S MOTION TO STAY THE PUCO'S
OCTOBER 6, 2021 ENTRY THAT MADE CHARGES SUBJECT TO REFUND
BY
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)

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In response to the PUCO’s October 6, 2021 Entry, Suburban filed a motion to partially “stay the execution” of the PUCO’s Entry, with a request for an expedited ruling. According to Suburban, the PUCO’s ruling would require Suburban to make the entirety of its base distribution revenues (that is, the entire customer charge for all customers and all base distribution charges) subject to refund.¹ Suburban is wrong, and its Motion for Stay should be denied.

Even if Suburban’s Motion for Stay were considered by the PUCO (which it should not be) the four-factor test used by the PUCO to review stays is not satisfied. The PUCO’s test considers: (1) “There has been a strong showing that the party seeking the stay is likely to prevail on the merits,” (2) “The party seeking the stay has shown that it will suffer irreparable

¹ See Stay Motion at 5.

harm absent the stay,” (3) The stay would not cause substantial harm to other parties,” and (4) “The public interest lies with the stay.”²

I. BACKGROUND

The PUCO Staff and Suburban Natural Gas signed a settlement that includes, among other things, a provision that would allow Suburban to charge consumers for the entirety of a 4.9-mile pipeline extension (following a two-year phase-in).³ OCC opposed the Settlement, challenging Suburban’s claim that the entire 4.9-mile pipeline extension was “useful” to consumers under R.C. 4909.15. Over OCC’s objections, the PUCO approved the Settlement.⁴ OCC appealed to the Supreme Court of Ohio.⁵ On appeal, OCC conceded that 2.0 miles of the pipeline extension was useful to consumers but argued that the remaining 2.9 miles was not.

While OCC’s appeal was pending, Suburban was allowed to charge consumers for the pipeline extension. From September 30, 2019 to September 29, 2020, consumers paid rates (a \$34.00 per month flat customer charge) to Suburban that included 2.45 miles of the pipeline extension.⁶ On September 30, 2020, consumers began paying rates (a \$34.41 per month flat customer charge) to Suburban that included 3.92 miles of the pipeline extension.⁷ On August 23, 2021, Suburban filed updated tariffs, proposed to go into effect September 30, 2021, that would increase consumers rates once again (to \$34.60 per month), this time to include all 4.9 miles of

² Stay Motion at 5-6.

³ Stipulation and Recommendation (May 23, 2019) (the “Settlement”).

⁴ Opinion & Order (Sept. 26, 2019).

⁵ Ohio Supreme Court Case No. 2020-0781.

⁶ Settlement at 5 (initial rates to include 50% of the value of the 4.9-mile pipeline extension); Suburban Tariff Sheets, Original Sheet No. 6, filed September 27, 2019.

⁷ Settlement at 6 (rates to include 80% of the value of the 4.9-mile pipeline extension after one year); Suburban Tariff Sheets, Original Sheet No. 6, filed September 25, 2020.

the pipeline extension.⁸ All these charges to consumers were agreed to by the PUCO Staff and the utility. Then the PUCO, by all four Commissioners and Chair Sam Randazzo, approved the settlement over OCC's objections.

But the Supreme Court of Ohio holds a different opinion than the PUCO. In OCC's appeal to the Supreme Court, the Court ruled on September 21, 2021 that the PUCO violated the law in ruling that the entire 4.9-mile pipeline extension was "useful."⁹ The Court remanded the case to the PUCO so that the PUCO could apply the correct legal standard. The correct standard is in R.C. 4909.15 for determining what portion of the 4.9-mile pipeline extension might be useful to consumers and thus eligible to be included in rates.

Immediately thereafter, OCC sought to protect consumers. Because the Court ruled that the PUCO violated the law, there is no basis at this time for consumers to pay rates that include a pipeline extension that is not useful. Accordingly, OCC filed a motion asking the PUCO to lower residential consumers' rates (to \$33.09 per month) to include the value of only 2.0 miles of the pipeline extension.¹⁰ In the alternative, OCC asked the PUCO to make Suburban's rates subject to refund while the case is on remand.

The PUCO did not adopt OCC's proposal to lower residential consumers' rates to \$33.09 per month. But it also rejected Suburban's request to increase rates to \$34.60.¹¹ Thus, residential consumers continue to pay \$34.41 per month, meaning they continue to pay for 80% (3.92 miles) of the pipeline extension. At the same time, however, the PUCO did protect consumers by

⁸ Notice of Suburban Natural Gas Co. to Implement Phase III of its Rate Increase (Aug. 23, 2021).

⁹ *In re Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224.

¹⁰ Consumer Protection Motion to Reject Suburban's Proposed 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 (Sept. 22, 2021) (the "OCC Motion").

¹¹ Entry ¶ 16.

adopting in part an alternative remedy requiring Suburban's customer charge and usage charge to be collected subject to refund as of September 21, 2021.¹²

In response to the PUCO's October 6, 2021 Entry, Suburban filed a motion to partially "stay the execution" of the PUCO's Entry, with a request for an expedited ruling. According to Suburban, the PUCO's ruling would require Suburban to make the entirety of its base distribution revenues (that is, the entire customer charge for all customers and all base distribution charges) subject to refund.¹³

OCC opposes Suburban's motion for several reasons. First, there is nothing to "stay" because under R.C. 4903.15, the PUCO's order is already effective. Second, when consumers challenge a PUCO ruling, they are often made to wait months or even years for relief (including in this case, where the appeals process took two full years). At that point they can be irreparably harmed by being required to pay rates that are never refunded. But here, where it is the *utility* that claims it's aggrieved by a PUCO ruling, claiming irreparable harm, the utility demands immediate relief through an expedited motion. The PUCO should decline Suburban's invitation to establish this type of double-standard that a utility's problems must be fixed immediately while consumers are made to wait out the often-lengthy application for rehearing and appeals process.

¹² *Id.*

¹³ *See Stay Motion at 5.*

II. ARGUMENT

- A. Suburban’s claim of irreparable harm does not justify modifying the PUCO’s order through a motion and on an expedited basis. Consumers have repeatedly been irreparably harmed by having to wait months or even years for relief from PUCO rulings, only to be told that they get no refund, even when the charges they paid were unlawful.**

The gist of Suburban’s motion is that the PUCO must act quickly to protect Suburban from “irreparable harm.”¹⁴ The PUCO should reject this reasoning because it ignores the fact that consumers have been repeatedly irreparably harmed by unlawful PUCO rulings, and they have been made to wait months or years for the rehearing and appeal process to play out. They have not been granted expedited relief to protect them from unlawful rates. Yet now, when it is a utility that feels aggrieved, it expects the PUCO to jump quickly to remedy a perceived injustice.

Moreover, consumers – and not Suburban – are the aggrieved party from the PUCO’s unlawful order and Suburban’s ratemaking. That is now clear.

Case in point: Suburban’s own consumers could suffer irreparable harm in this very case. As explained above, from September 2019 to September 2020, Suburban’s residential consumers paid a \$34.00 monthly flat charge for natural gas distribution service. That included charges for 2.45 miles of the 4.9-mile pipeline extension. From September 2020 to September 2021, Suburban’s residential consumers paid a \$34.41 monthly flat charge for natural gas distribution service. That include charges for 3.92 miles of pipe. If the PUCO ultimately rules on remand that only 2.0 miles were used and useful (as it should), then consumers will have paid charges for nearly two years that exceed the value of that 2.0 miles—and Suburban will likely argue against

¹⁴ Stay Motion at 1, 3, 6, 7, 10, 15, 16, 19.

giving its customers a refund.¹⁵ Not getting a refund when you pay unlawful charges is true irreparable harm.

So while Suburban believes that the October 6, 2021 Entry will cause it irreparable harm, and it wants the PUCO to immediately fix the problem, Suburban’s own consumers had to wait two years for the application for rehearing and appeals process to finally have a chance at getting a lawful ruling. And ultimately, if OCC prevails on remand (as it should) and consumers do not get a refund, Suburban will have reaped a *windfall* for two years, at consumer expense.

This is not an isolated occurrence. Residential consumers in Ohio have paid hundreds of millions of dollars in charges that were later found to be unlawful, and for which consumers received no refund. This includes (i) paying \$219 million to Dayton Power and Light in “distribution modernization” charges that were later found unlawful and never refunded,¹⁶ (ii) paying \$456 million to FirstEnergy in “distribution modernization” charges that were later found unlawful and never refunded,¹⁷ and (iii) \$368 million in “provider of last resort” charges to AEP that were later found unlawful and never refunded.¹⁸

If irreparable harm justified sidestepping the rehearing process and allowing a party to instead obtain expedited relief through a motion, then every PUCO ruling authorizing nonrefundable charges to consumers would need to be immediately stayed pending resolution of

¹⁵ The Entry only made rates refundable as of September 21, 2021, so any charges before that date will be kept by Suburban.

¹⁶ *In re Application of the Dayton Power & Light Co. to Establish a Standard Service Offer in the Form of an Elec. Sec. Plan*, Case No. 16-395-EL-SSO (Nov. 21, 2019). *See also* OCC Subsidy Scorecard, available at http://www.occ.ohio.gov/sites/default/files/subsidy-scorecard_n.pdf (calculating unlawful DP&L DMR charges at \$219 million).

¹⁷ *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73 (2019). *See also* OCC Subsidy Scorecard, available at http://www.occ.ohio.gov/sites/default/files/subsidy-scorecard_n.pdf (calculating unlawful FirstEnergy DMR charges at \$456 million).

¹⁸ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011). *See also* OCC Subsidy Scorecard, available at http://www.occ.ohio.gov/sites/default/files/subsidy-scorecard_n.pdf (calculating unlawful AEP provider of last resort charge at \$368 million).

all applications for rehearing and appeals. OCC would certainly welcome such a process for the benefit of consumers. But it would be wildly inequitable if consumers continued to be required to pay nonrefundable rates while *their* challenges to those rates were pending, whereas *utilities* like Suburban can instead be granted an immediate stay of any order that they don't like.

B. Even if the PUCO were to apply Suburban's proposed four-factor test for a stay (which it should not), Suburban's request does not meet that test.

According to Suburban, a stay is warranted when the following four factors are satisfied:

(1) "There has been a strong showing that the party seeking the stay is likely to prevail on the merits," (2) "The party seeking the stay has shown that it will suffer irreparable harm absent the stay," (3) "The stay would not cause substantial harm to other parties," and (4) "The public interest lies with the stay."¹⁹

Suburban cites not a single case in which the PUCO has applied this four-factor test to a request to stay a PUCO ruling. Thus, the PUCO should not apply this test to Suburban's request.

Nevertheless, even if the PUCO were to apply this four-factor test, Suburban does not pass.

1. Suburban is not likely to prevail on the merits because the evidence—including Suburban's own expert testimony—convincingly shows that only 2.0 miles of the pipeline was useful to consumers at date certain.

Suburban claims that it is likely to prevail on the merits. That is, Suburban believes that when the PUCO considers this case on remand, the PUCO will again find that the entire 4.9-mile pipeline extension is useful to consumers.²⁰

¹⁹ Stay Motion at 5-6.

²⁰ Stay Motion at 11-14.

In its favorable ruling to consumers, the Ohio Supreme Court ruled that the word “useful,” as found in R.C. 4909.15, means “advantageous” or “beneficial.”²¹ Suburban makes no mention of this ruling and does not make any attempt in its motion to explain why the entire 4.9-mile pipeline extension was advantageous or beneficial to consumers on the date certain. Indeed, Suburban doesn’t use the words “advantageous,” “beneficial,” or any derivatives thereof anywhere in its motion.

Instead, in support of its claim that it is likely to prevail on the merits, Suburban provides lengthy block quotes from the PUCO’s prior rulings in this case—the very rulings that the Supreme Court ruled were in violation of R.C. 4909.15. If the PUCO’s prior reasonings were sufficient to show that the entire 4.9-mile pipeline extension was useful on the date certain, then the Supreme Court would not have reversed the PUCO’s ruling.

Contrary to Suburban’s claims, the evidence overwhelmingly shows that the extra 2.9 miles of the pipeline extension provide no benefits to consumers whatsoever; they would have gotten precisely the same service with a 2.0-mile pipeline extension:

- 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 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.”²²
- 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.²³
- The 4.9-mile extension is big enough to serve peak capacity in 2028—nine years after the date certain.²⁴

²¹ *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, ¶ 25.

²² Tr. Vol. II at 278:13-24 (Gruppenhof).

²³ OCC Ex. 5, page 4 (Suburban’s response to OCC discovery request).

²⁴ *Id.*

- 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.²⁵
- The 4.9-mile extension is big enough to serve Suburban’s 13,500 southern system customers at date certain, *plus* an additional 4,000 to 20,000.²⁶
- 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 while still qualifying for expedited review under Ohio Power Siting Board rules and regulations.²⁷

This evidence shows that while 2.0 miles of pipe may have been beneficial and advantageous to consumers on the date certain, the additional 2.9 miles provides no benefits or advantages. The additional 2.9 miles *might* be useful in the future—but under the Supreme Court’s ruling, the PUCO cannot attempt to predict the future in approving rates:

We conclude that the PUCO did err: in evaluating the rate increase, the PUCO looked beyond whether the entire extension was used and useful on the applicable date and considered whether it was a prudent investment because it might prove useful in the future.²⁸

Thus, Suburban is far from showing that it is likely to prevail on the merits. Instead, the opposite is likely. The PUCO, following the mandate from the Court regarding the proper interpretation of R.C. 4909.15, should come to the correct conclusion—that only 2.0 miles of pipe was useful to consumers on the date certain.

²⁵ Suburban Ex. 9 at 5 (Suburban’s projections showing 230 psig on date certain for the 4.9-mile extension).

²⁶ 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).

²⁷ Tr. Vol. II at 274:13–277:8 (Gruppenhof).

²⁸ *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, ¶ 2.

2. Suburban has not shown that it will suffer irreparable harm absent a stay.

Suburban says that it will be irreparably harmed because it will default on its debt if it is only allowed to charge consumers for 2.0 miles of the pipeline extension.²⁹ But even under Suburban’s own analysis, it appears this default would not occur until September 2022, almost a year from now.³⁰ A claim that Suburban might default a year from now is not an irreparable harm that requires immediate PUCO resolution.

Further, whether Suburban would actually default is highly speculative at this point. Suburban’s filing is filled with contingent language: “*potentially* placing the company in bankruptcy”;³¹ “*should* Suburban go bankrupt”;³² “customers *could be* at risk for a loss of safe and reliable service”;³³ “the *expected outcome* would be that the bank would either be forced to call the loan or require an additional capital infusion by the shareholders”;³⁴ the “bank would *likely* want to reduce the financed debt”;³⁵ “*potentially* subjecting Suburban’s customers to a loss of safe and reliable service”;³⁶ “*may* prevent Suburban from providing safe and reliable natural gas service.”³⁷ This type of speculation cannot form the basis of Suburban’s claim of irreparable harm.

²⁹ Stay Motion at 16.

³⁰ See Stay Motion, Attachment A (Suburban claiming a default based on projected information through September 2022).

³¹ Stay Motion at 16 (emphasis added).

³² Stay Motion at 16 (emphasis added).

³³ Stay Motion at 16 (emphasis added).

³⁴ Stay Motion, Attachment A (emphasis added).

³⁵ Stay Motion, Attachment A (emphasis added).

³⁶ Stay Motion at 17-18 (emphasis added).

³⁷ Stay Motion at 1 (emphasis added).

3. A stay of the PUCO’s order would cause irreparable harm to residential consumers.

The third factor under Suburban’s proposed test is whether the stay would cause substantial harm to other parties.³⁸ According to Suburban, residential consumers would not be irreparably harmed because they “will be best served by having a public utility that is reasonably compensated for the provision of service or, at the very least, has operating revenue to run its business so that it does not default on loan covenants and is able to provide safe and reliable natural gas service.”³⁹

What Suburban ignores, however, is that its residential consumers would be irreparably harmed if the PUCO were to (i) allow Suburban to continue charging them \$34.41 per month (as it is doing right now) when such rates include 3.92 miles of the 4.9-mile pipeline extension, and (ii) the amounts that consumers pay for anything more than 2.0 miles were not refundable. As explained above, consumers have already been irreparably harmed by the PUCO’s order approving the Settlement because they will not likely get a refund for any charges they paid before September 21, 2021. Staying the PUCO’s order requiring refunds would irreparably harm consumers by making additional charges nonrefundable.

4. The public interest is not supported by Suburban’s proposed stay.

The fourth factor in Suburban’s proposed test is whether the “public interest lies with the stay.”⁴⁰ This factor strongly weighs against a stay of the PUCO’s order requiring rates to be refundable.

³⁸ Stay Motion at 6.

³⁹ Stay Motion at 17.

⁴⁰ Stay Motion at 6.

As explained above, Suburban's request for a stay is an attempt to end-around the statutory application for rehearing process. If the Stay Motion were granted, it would establish precedent that *utilities* can get PUCO rulings overturned on an expedited basis simply by filing a motion and claiming irreparable harm, whereas *consumers* need to wait months or years for the application for rehearing and appeals process to play out, all the while paying rates that might never be refunded. This disparity in treatment would be an affront to equity and good public policy.

C. If the PUCO does grant Suburban's motion (which it should not), then Suburban's residential customer rates should remain refundable to the extent they include charges for more than 2.0 miles of the 4.9-mile pipeline extension.

Suburban is asking the PUCO to stay its order requiring Suburban's rates to be made refundable. It is not clear whether Suburban is asking the PUCO to (i) eliminate the refundability requirement altogether or (ii) modify the requirement so that only the amounts attributable to more than 2.0 miles of the pipeline extension are refundable. If the PUCO grants Suburban's motion at all (which it should not, for the reasons described above), then the PUCO should still require any charges to consumers that include more than 2.0 miles of pipe to be refundable.

As explained above, Suburban's customers are currently paying rates that include 3.92 miles of the 4.9-mile pipeline extension. Residential consumers, for example, are paying a \$34.41 per-month fixed customer charge. By OCC's calculation, if rates were to include only 2.0 miles of pipe, residential consumers would be paying \$33.09. Thus, for residential consumers, Suburban's rates should be refundable for the difference (\$1.32 per month for each residential consumer). That way, if the PUCO ultimately rules on remand (as it should) that consumers can only pay for 2.0 miles of pipe, they will get a refund, as of the date of the Supreme Court's ruling, for charges exceeding 2.0 miles.

D. Suburban’s request for an expedited ruling is inconsistent with O.A.C. 4901-1-12(C).

Under O.A.C. 4901-1-12(C), a motion “may include a specific request for an expedited ruling.” When a party wants an expedited ruling, “[t]he grounds for such a request shall be set forth in the memorandum in support.” Suburban’s motion includes a request for an expedited ruling.⁴¹ Suburban failed to comply with the second part of the rule requiring the grounds for such request in the memorandum in support. Suburban’s memorandum in support does not mention the request for expedited ruling at all. For this independent reason, the PUCO should deny Suburban’s motion.

III. CONCLUSION

The PUCO should ensure that consumers are protected from paying unjust and unreasonable rates, consistent with the law. As the Ohio Supreme Court just ruled, that includes consumers only paying for property that is used and useful under R.C. 4909.15. The PUCO must remember—it was Suburban that decided to spend nearly \$9 million to build a 4.9-mile pipeline instead of a smaller one. And it was Suburban that chose the date certain in this case, thus establishing the date on which the PUCO is legally required to assess Suburban’s request to charge consumers. Neither OCC nor Suburban’s customers had any say in these business and legal decisions.

Suburban’s Stay Motion is procedurally improper and materially deficient, and seeks preferential treatment for utilities that consumers are not afforded. It should be denied.

⁴¹ Stay Motion at 2 (“pursuant to Ohio Adm.Code 4901-1-12(C) Suburban requests an expedited ruling of this motion”).

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 Memorandum Contra was served by electronic transmission upon the parties below this 15th day of October 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

Attorney Examiners:

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

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

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Summary: Memorandum Memorandum Contra Suburban's Motion to Stay the PUCO's October 6, 2021 Entry That Made Charges Subject to Refund by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.