

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

The Ohio Supreme Court ruled that the PUCO violated the law (R.C. 4909.15) when it previously ruled that Suburban could charge customers for the entirety of a 4.9-mile pipeline extension.¹ Now, on remand, the PUCO must take a fresh look at the facts, and it must apply the law correctly to those facts. Until the PUCO does that, it remains to be determined what portion of the 4.9-mile pipeline extension was useful to consumers on the date certain, and therefore whether consumers need to pay for it through base distribution rates.

Despite this, Suburban demands that it be allowed to charge consumers for the entire 4.9-mile pipeline extension—not after the PUCO makes a lawful ruling on remand, but *now*. Suburban's theory is that the PUCO is required to enforce its Order approving charges for the entire 4.9-mile pipeline extension, even though that ruling violated the law and was **reversed** on appeal. For the reasons described below, the PUCO should reject Suburban's wildly mistaken

¹ *In re Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224.

interpretation of Ohio law and the disregard for the authority of the Ohio Supreme Court that Suburban asks the PUCO to countenance. It should deny Suburban's application for rehearing.

I. ARGUMENT

- A. The PUCO should deny Suburban Assignments of Error 1 and 2 because, following the Supreme Court's reversal of the PUCO's prior Order, it would be unlawful for consumers to pay rates for a pipeline that has not been determined to be "useful" in providing them utility service under R.C. 4909.15.**

Suburban Assignment of Error 1 argues that the PUCO erred by "voiding its Rate Order prior to hearing the case on remand."² Suburban Assignment of Error 2 likewise argues that the PUCO erred by "voiding its valid Rate Order by not implementing the authorized third phase of the rate increase, which results in confiscatory rates."³ While Suburban has fashioned two separate assignments of error, they essentially make a single point: Suburban believes that even after the Supreme Court of Ohio reversed the PUCO's ruling approving charges to consumers for the entire 4.9-mile pipeline extension, Suburban should be allowed to charge consumers for the entire 4.9-mile pipeline extension while the case is pending on remand. Suburban is incorrect.

- 1. Ohio law does not allow consumers to pay for property unless the PUCO rules that it is useful under R.C. 4909.15, and the PUCO has not issued a lawful ruling allowing charges to consumers for the entire 4.9-mile pipeline extension.**

Under R.C. 4909.15, a utility may only charge consumers for property that is "used and useful ... in rendering [] public utility service." R.C. 4905.22 likewise provides that "[a]ll charges made or demanded for any service rendered ... shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission."

² Suburban AFR at 6.

³ Suburban AFR at 10.

Earlier in this case, the PUCO ruled that the entirety of a 4.9-mile pipeline extension was “useful” to consumers under R.C. 4909.15.⁴ Thus, the PUCO approved a settlement that allowed Suburban to charge customers (after a phase-in) for the entire 4.9-mile extension.⁵ Immediately after that ruling, consumers began paying rates that included 2.45 miles (50%) of the pipeline extension.⁶ Since September 2020, consumers have been paying rates that include 3.92 miles (80%) of the pipeline extension.⁷

On appeal, the Supreme Court of Ohio ruled that the PUCO erred in approving charges to consumers for the entire 4.9-mile pipeline extension.⁸ As the Supreme Court explained, the PUCO violated R.C. 4909.15 in ruling that the entire 4.9-mile pipeline extension was useful: “The PUCO misapplied the used-and-useful test when it looked beyond the date certain and considered whether Suburban’s investment was prudent.”⁹ Because the PUCO failed to follow the law, the Court remanded the case to the PUCO to properly apply the law to the fact.¹⁰

Now that the case is on remand, here is where things stand. As of today, there is no lawful PUCO ruling allowing charges to consumers for the entire 4.9-mile pipeline extension. The PUCO’s ruling in that regard was reversed on appeal. And it remains to be determined whether, when applying the law correctly as interpreted by the Supreme Court of Ohio, the entire 4.9-mile pipeline extension was useful to consumers or only some portion thereof. As of today,

⁴ Opinion & Order ¶ 121 (Sept. 26, 2019).

⁵ *Id.* ¶ 148.

⁶ *Id.* ¶ 31.

⁷ *Id.*

⁸ *In re Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224.

⁹ *Id.* ¶¶ 27-34.

¹⁰ *Id.* ¶ 35.

the only thing that has been determined is that 2.0 miles of the 4.9-mile pipeline extension was useful on the date certain.

Accordingly, it would be unlawful under R.C. 4909.15 and 4905.22 for the PUCO to allow Suburban to charge consumers non-refundable rates that include the entire 4.9-mile pipeline extension. Thus, the PUCO properly ruled that (i) Suburban cannot increase its current rates to include the entire 4.9-mile pipeline extension, and (ii) it is appropriate for Suburban's rates to be collected subject to refund to the extent they include charges for more than 2.0 miles of the pipeline extension.¹¹

The PUCO should reject Suburban's argument that the PUCO should enforce its prior Order, which has already been reversed by the Supreme Court of Ohio, thus allowing Suburban to increase rates to include the entire 4.9-mile pipeline extension. What Suburban asks is not only to keep the current rates but also to further increase the rates it charges consumers, contrary to the ruling of the Supreme Court of Ohio.

2. Suburban's citations to cases about orders not "automatically" being void are inapplicable because that did not happen here, and no one is arguing that it should.

In support of its argument that it should be allowed to charge consumers for the entire 4.9-mile pipeline despite there being no lawful PUCO ruling that the entire 4.9-mile pipeline was useful on the date certain, Suburban cites cases that stand for the proposition that a PUCO ruling is not automatically void when the Supreme Court of Ohio reverses it. For example, Suburban cites *In re Columbus Southern Power Co.*, where the Court said that "a remand order of this court does not automatically render the existing rates unlawful."¹² Likewise, Suburban cites

¹¹ Entry (Oct. 6, 2021); Entry (Oct. 20, 2021).

¹² 2014-Ohio-462, ¶ 51 (cited on Suburban AFR page 7).

Cleveland Electric Illuminating Co. v. PUCO, where the Court similarly noted that when the Court reverses a PUCO ruling, the reversal “does not reinstate the rates in effect before the commission’s order or replace that rate schedule as a matter of law, but is a mandate to the commission to issue a new order, and the rate schedule filed with the commission remains in effect until the commission executes this court’s mandate by an appropriate order.”¹³

Suburban is correct that a Supreme Court ruling does not automatically void a PUCO ruling and does not automatically cause a change in rates. But no one here is arguing that anything should happen automatically. It is precisely *because* nothing happens automatically that immediately after the Court reversed the PUCO’s ruling, OCC filed a motion to protect consumers, asking that the PUCO (i) not allow Suburban to increase rates to charge consumers for the entire 4.9-mile pipeline extension or, in the alternative, (ii) make rates subject to refund.¹⁴

The PUCO subsequently issued an Entry that did two things. First, it prohibited Suburban from increasing its current rates, which include charges for 3.92 miles of the extension, to higher rates that would include the entire 4.9-mile pipeline extension. Second, it required Suburban’s rates to be collected subject to refund to the extent they include charges for more than 2.0 miles of the pipeline extension. Nothing happened automatically—on remand the PUCO took affirmative steps to protect consumers, consistent with the Supreme Court’s ruling.

Nothing in the authority cited by Suburban prohibits the PUCO from staying or modifying its Order on remand when doing so is necessary to protect consumers from paying unjust and unreasonable rates and necessary to preserve the intent of a Supreme Court ruling.

¹³ 46 Ohio St.2d 105, 105-06 (1976) (cited on Suburban AFR page 8).

¹⁴ 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 (Sept. 22, 2021).

Suburban’s authority stands merely for the proposition that nothing happens automatically and the PUCO must take affirmative steps—and that is precisely what the PUCO did here.

3. To protect consumers, the PUCO should reject Suburban’s misleading narrative that the Supreme Court did not find that the PUCO’s ruling was unlawful.

In an attempt to downplay the impact of the Supreme Court’s ruling, Suburban repeatedly claims that the Court did *not* find the PUCO’s ruling to be unlawful.¹⁵ But if, as Suburban claims, the Court did not find that the PUCO’s ruling was unlawful, then what does Suburban claim? Surely Suburban does not think that the Supreme Court’s ruling was that the PUCO’s ruling was *lawful*, given that it explicitly found that the PUCO misapplied the law. Yet Suburban goes so far in its application for rehearing as saying that despite the Court’s ruling, the PUCO’s ruling remains a “lawful Rate Order” and that the rates approved by the PUCO remain “lawfully approved rates.”¹⁶ It is not clear how Suburban could reach the conclusion that an order violating a law—which the Court clearly held was true of the PUCO’s Order—is nonetheless “lawful” or that rates approved by the PUCO in violation of a law somehow remain “lawfully approved rates.”

Black’s Law Dictionary plainly defines “unlawful” as “[n]ot authorized by law.” The Supreme Court of Ohio described the ways in which the PUCO’s conclusions regarding usefulness of the 4.9-mile pipeline extension were “not authorized by law”—the PUCO applied a

¹⁵ See, e.g., Suburban AFR at 5 (“the Court did not deem Suburban’s rates and charges, or any portion of them, unlawful...”), at 9 (“at no point in the Court Decision did the Court describe Suburban’s rates and charges as unlawful”), at 12 (“The Court never deemed that Suburban’s rates and charges were unlawful.”), at 14 (“The Court never deemed Suburban’s rates and charges unlawful...”).

¹⁶ Suburban AFR at 6, 12.

prudent investment rule that is not authorized by law, and the PUCO looked beyond the date certain in evaluating usefulness, which is not authorized by law.¹⁷

Under any reasonable interpretation of the Supreme Court’s Opinion, the PUCO’s Order approving charges for the entire 4.9-mile pipeline extension was unlawful. And unless and until there *is* a lawful PUCO order finding that the entire 4.9-mile pipeline extension was useful to consumers on the date certain, there is no basis to charge consumers for the entire 4.9-mile pipeline extension.

Suburban’s insistence that the PUCO must allow it to keep charging consumers for the entire 4.9-mile pipeline extension flies in the face of the Supreme Court’s ruling reversing the PUCO’s prior Order. Suburban’s claim is wildly mistaken. The PUCO should not allow itself to be led down the path of flaunting the authority of the Supreme Court of Ohio.

4. No constitutional taking has occurred because Suburban has not proven that it has a legal right to charge consumers for the entire 4.9-mile pipeline extension.

Suburban argues that not only should the PUCO permit it to charge consumers for the entire 4.9-mile pipeline extension, but that it has a constitutional right to do so because any contrary ruling would be confiscatory.¹⁸ This argument fails because, as explained above, it depends on Suburban’s false belief that the PUCO’s Order approving charges for the entire 4.9-mile pipeline extension somehow remains a “lawful” Order despite the Supreme Court ruling that the PUCO violated the law.

Suburban cites no authority for the proposition that it has a constitutional right to charges that have yet to be lawfully approved. As explained above, right now, there is no valid PUCO

¹⁷ *In re Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224, ¶¶ 27-34.

¹⁸ Suburban AFR at 12-13.

ruling saying that charges to consumers for the entire 4.9-mile pipeline extension are lawful. The only PUCO ruling to that effect was found to violate the law and was reversed by the Supreme Court of Ohio. Suburban cannot possibly have a constitutional right to collect rates that have never been lawfully approved by the PUCO.

Further, Suburban's claims regarding the alleged confiscation of its rates are factually inaccurate. Suburban argues that without any rate increase, its "net annual compensation ... represented a rate of return of 2.90 percent," which Suburban believes is "insufficient to provide Suburban reasonable compensation for the services rendered to its customers."¹⁹ But that 2.90% return assumes *no* rate increase at all—and Suburban has already received not one but two rate increases.

First, Suburban's charges to consumers increased to include, among other things, 50% of the 4.9-mile pipeline extension. Then Suburban increased its charges to consumers a second time to their current rate, which includes 80% of the 4.9-mile pipeline extension. So Suburban's reliance on the claimed 2.90% return, which assumes no rate increase, is inapplicable. Suburban also claims that requiring Suburban to "reduce its rates and charges to a confiscatory level contravenes Ohio law, is unconstitutional, and is unjust and unreasonable."²⁰ But the PUCO has not ordered Suburban to "reduce its rates." It ordered Suburban to maintain its current rates, subject to refund, while the case is pending on remand.

¹⁹ Suburban AFR at 13.

²⁰ Suburban AFR at 13.

B. The PUCO should deny Suburban Assignment of Error 3 as moot because the PUCO already ruled that Suburban is not required to collect the entirety of its rates subject to refund.

In its third assignment of error, Suburban argues that the PUCO erred by “ordering Suburban to collect the entirety of its existing customer service charges and usage charges subject to refund.”²¹ As Suburban itself acknowledges in its application for rehearing, however, the PUCO subsequently clarified that “only a portion of the amount was to be subject to refund.”²²

In its October 20, 2021 Entry, the PUCO stated that “it was not the intention of the Commission to require that the full amount of the customer service charge and the usage charge be collected subject to refund.”²³ Instead, rates are subject to refund “to the extent that they include costs associated with more than 2.0 miles of the 4.9-mile DEL-MAR pipeline extension.”²⁴

Thus, Suburban’s third assignment of error is moot and should be denied.

II. CONCLUSION

On remand, the PUCO has struck a balance. It has allowed Suburban to continue charging consumers for rates that include 3.92 miles of the pipeline extension. But it has required Suburban to charge rates subject to refund to the extent rates include more than 2.0 miles of the pipeline extension. This properly preserves the status quo following the Supreme Court of Ohio’s reversal of the PUCO’s prior ruling.

²¹ Suburban AFR at 13.

²² Suburban AFR at 13, n. 50.

²³ Entry ¶ 23.

²⁴ *Id.*

Suburban's arguments for now *increasing* its charges to consumers are wildly mistaken given the ruling of the state's highest court. Under the Court's reversal of the PUCO's decision, the direction of Suburban's rates should be lower, not higher.

Respectfully submitted,

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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 November 2021.

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Summary: Memorandum Memorandum Contra Suburban Natural Gas Co.'s
Application for Rehearing by Office of The Ohio Consumers' Counsel electronically
filed by Mrs. Tracy J. Greene on behalf of Healey, Christopher