

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

**APPLICATION FOR REHEARING
BY
SUBURBAN NATURAL GAS COMPANY**

Pursuant to R.C. 4903.10 and Ohio Adm.Code 4901-1-35, Suburban Natural Gas Company (Suburban), respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission or PUCO) Entry issued October 20, 2021, in the above-captioned cases (hereinafter October 20 Entry). In its October 20 Entry, the Commission denied Suburban's October 8, 2021 Motion to Stay the Commission's October 6, 2021 Entry (hereinafter, October 6 Entry) and directed Suburban to maintain the Phase II revenue requirement in establishing its rates. With both of the Commission's Entries, the Commission partially voided its September 26, 2019 Opinion and Order (Rate Order) and required Suburban to implement a revenue requirement that the Commission had already determined to be insufficient to provide Suburban reasonable compensation for the services rendered to its customers.¹ In order to reasonably and fairly compensate Suburban for the services rendered, the Rate Order had lawfully directed Suburban to

¹ Opinion and Order at ¶¶ 164-165 (Sept. 26, 2019) (Rate Order).

implement a three-phase rate increase wherein Phase III would be implemented on September 30, 2021.² However, prior to conducting the remand and before affording the parties the opportunity to brief the sole issue on remand, the Commission directed Suburban in both its October 6 Entry and its October 20 Entry to not implement the previously authorized third phase of the stipulated rate increase. The Entries also made either the entirety of Suburban's customer service charges and usage charges subject to refund,³ or a portion thereof.⁴ Although the Commission's October 20 Entry partially modified or clarified its October 6 Entry and Suburban has already sought rehearing of the October 6 Entry, the October 20 Entry was also unjust, unreasonable, and unlawful. Accordingly, to protect its interests, Suburban hereby requests rehearing of the October 20 Entry as the rates that the Commission ordered to be put in effect in October of 2021 and beyond are unjust, unreasonable, and deprive Suburban of revenue that was authorized under the lawful and effective Rate Order, rendering the rates confiscatory.⁵

Specifically, Suburban requests that the Commission find that its October 20 Entry was unlawful, unjust, unreasonable, and confiscatory in the following respects:

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully denying Suburban's Motion to Stay its October 6 Entry that voided its Rate Order prior to hearing the case on remand.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully voiding its valid Rate Order by not implementing the authorized third phase of the rate increase, which results in confiscatory rates.

² See Entry at ¶¶ 24-27 (Oct. 20, 2021). See also Rate Order.

³ See October 6 Entry at ¶¶ 16, 20 (Oct. 6, 2021).

⁴ October 20 Entry at ¶ 23 (Oct. 20, 2021) ("The Commission finds that Suburban's compliance tariff filing should be approved with modifications, as we agree with OCC that the tariffs should be clarified to provide that the customer service charge and the usage charge 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.").

⁵ *Id.*

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully ordering Suburban to collect a portion of its customer service charges and usage charges subject to refund.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The Commission should grant rehearing and abrogate or modify its October 20 Entry as requested herein by Suburban.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's October 20 Entry issued in the above-captioned case contravenes Ohio law, the Supreme Court of Ohio's (Court) September 21, 2021 decision (Court Decision),⁶ and the factual record in this case. Suburban filed an application for an increase in rates on August 31, 2018, seeking, in part, to recover costs associated with a necessary 4.9-mile pipeline extension to its existing Central Ohio natural gas system. Suburban designed and constructed the extension in response to a series of dangerous cold weather events, increased demand, and low pressure concerns, and placed the entire extension into service before the February 28, 2019 date certain. The entire extension was used and useful to customers as of the date certain.

After extensive settlement discussions, Suburban and Commission Staff filed a Joint Stipulation and Recommendation on May 23, 2019 (Stipulation) in an effort to resolve the case. As part of the Stipulation, Staff and Suburban agreed to recommend that the entire used and useful

⁶ See *In re Application of Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224 (Sept. 21, 2021) (Court Decision).

4.9-mile pipeline be phased into rate base over a three-year period, and that Suburban was entitled to a rate increase.⁷

Following a hearing, the Commission adopted the Stipulation in the Rate Order issued September 26, 2019.⁸ The Commission approved a new revenue requirement for Suburban's base rates that included, among other things, operating income, test year revenue, payroll expenses, employee benefits expense, labor expenses, professional expenses, miscellaneous expenses, rate of return, plant-in service.⁹ The new revenue requirement included the entire 4.9-mile pipeline extension, as the Commission determined that "the extension was both used and useful to Suburban's customers as of date certain," and Suburban had "adequately demonstrated that the 4.9-mile pipeline extension *was necessary to serve existing customers* as of February 28, 2019."¹⁰

However, following an appeal by the Office of the Ohio Consumers' Counsel (OCC) to the Court, the Court partially reversed and remanded the Commission's decision. While the Court did not find any harm to customers from the scheduled phase-in of the increase,¹¹ and declined to rule that the Commission's decision was against the weight of the evidence,¹² the Court found that the Commission had incorrectly applied the used-and-useful standard found in R.C. 4909.15(A)(1).¹³ Accordingly, the Court remanded the case to the Commission with the directive "to apply the appropriate standard."¹⁴

⁷ See Joint Stipulation and Recommendation at ¶ III.A.5.d (May 23, 2019) (Stipulation).

⁸ See Rate Order.

⁹ *Id.* at ¶¶ 163-168.

¹⁰ *Id.* at ¶ 121 (emphasis added).

¹¹ Court Decision at ¶ 42.

¹² *Id.* at ¶ 44

¹³ *Id.* at ¶ 27.

¹⁴ *Id.* at ¶ 35.

The Court did not, however, deem any portion of Suburban's rates or charges to be unlawful or order the Commission to reverse or refund any amounts. The Court simply directed the Commission to "apply the used-and-useful standard"¹⁵ as the actual "application of the relevant legal standard to the facts is something that is best left to the PUCO in the first instance."¹⁶ Therefore, rates authorized pursuant to the Rate Order (including all three phases of the phased-in increase and corresponding rates) remain lawful and in effect until the Commission conducts the remand, applies the used-and-useful standard to the facts of the case, and issues a new order. The Commission is free to reach the same conclusion as it did in the Rate Order or a new conclusion based on the record evidence in this case, but until it issues a subsequent order on remand, the Rate Order remains in full effect.

Despite this, the Commission issued its October 6 Entry, summarily directing Suburban to file tariffs that contravene the lawful Rate Order. The October 6 Entry unreasonably rejected Suburban's notice to implement Phase III of the rate increase and did not allow Suburban to implement the third phase of the authorized rate increase.¹⁷ Instead of implementing the previously authorized Year 3 revenue requirement of \$20,452,957.00, it directed Suburban to maintain the Year 2 revenue requirement of \$20,206,802.00.¹⁸ The Commission also directed Suburban to make the entirety of its customer service charges and usage charges (i.e., practically its entire revenue stream) subject to refund.¹⁹

¹⁵ Court Decision at ¶ 45.

¹⁶ *Id.*, citing *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617, ¶ 26.

¹⁷ See Entry at ¶¶ 16, 20 (Oct. 6, 2021).

¹⁸ *Id.*

¹⁹ *Id.* Although Suburban notes that the Commission partially corrected this error in a subsequent Entry by clarifying that only a portion of the customer service charges and usage charges should be subject to refund, Suburban still seeks to preserve this argument for appeal. See also Entry at ¶ 23 (Oct. 20, 2021).

As a result of the October 6 Entry, Suburban filed its Motion to Stay on October 8, 2021.²⁰ In its Motion to Stay, Suburban demonstrated that Suburban was likely to prevail on remand, that Suburban and its customers will suffer irreparable harm absent the stay, that the partial stay will not substantially harm any party, and that public policy favors the stay. However, the Commission again erred by unjustly, unreasonably, and unlawfully denying Suburban's Motion to Stay in its October 20 Entry, and directing Suburban to file tariffs that violate the Commission's valid Rate Order and that result in confiscatory rates. Rates based upon the Year 2 revenue requirement are insufficient to provide Suburban reasonable compensation for the services rendered to its customers.²¹ Accordingly, to protect its interests, Suburban requests rehearing of the October 20 Entry for the reasons set forth herein.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully denying Suburban's Motion to Stay its October 6 Entry that voided its Rate Order prior to hearing the case on remand.

The Court remanded this case to the Commission for application of the used and useful standard.²² Although the Court held that the Commission had erred by not properly applying the used and useful standard in its Rate Order, the Court did not make any findings that the Rate Order, or the rates and charges that it authorized, were unlawful. As such, the Commission set a procedural schedule for conducting the remand and directed interested parties to file additional

²⁰ Suburban also filed an Application for Rehearing regarding the October 6, 2021 Entry on November 5, 2021. To the extent those assignments of error have not been remedied, Suburban hereby incorporates those same arguments and positions herein.

²¹ Rate Order at ¶¶ 164-165.

²² See Court Decision at ¶ 45.

briefs on the sole issue remanded to the Commission preceding a future order on remand.²³ However, until the time that the Commission issues that new order on remand, the Rate Order remains in full effect.

Ohio statutory and case law confirms that when a Commission order is reversed and remanded by the Court, the order nonetheless remains in effect until the Commission issues a subsequent order on remand.²⁴ R.C. 4909.15(E) states that after the Commission “[fixes] and [determines] the just and reasonable rate...and [orders] such just and reasonable rate...to be substituted for the existing one...no change in the rate shall be made...by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.”²⁵

Relying on this statutory mandate, the Court has stated that “a remand order of this court does not automatically render the existing rates unlawful.”²⁶ The Court in *In re Columbus Southern* noted that its previous decision had not rendered the charges unlawful, and that the utility was authorized to collect them until the Commission issued a new order.²⁷ As the Court stated in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm’n*, when it “reverses and remands an order of the [Commission] establishing a revised rate schedule for a public utility, 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

²³ See Entry at ¶ 17 (“Initial and reply briefs should be filed by the parties no later than October 29, 2021, and November 12, 2021, respectively.”) (Oct. 6, 2021).

²⁴ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm’n*, 46 Ohio St.2d 105, 105-06 (1976).

²⁵ R.C. 4909.15(E)(2)(b).

²⁶ *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51.

²⁷ *Id.* at ¶¶ 51-52.

the commission remains in effect until the commission executes this court's mandate by an appropriate order.”²⁸ Here, the rate schedule that was authorized by the Rate Order to be in effect as of September 30, 2021 was the third phase of the rate increase. Accordingly, the rates and charges resulting from Phase III of the rate increase should be the rate scheduled in effect during the remand proceeding. The Commission, therefore, erred by directing Suburban to file tariffs that contravened the lawful Rate Order in effect prior to issuing its order on remand.

Given this error, Suburban filed a Motion to Stay on October 8, 2021. In its Motion to Stay, Suburban demonstrated that Suburban was likely to prevail on remand, that Suburban and its customers will suffer irreparable harm absent the stay, that the partial stay will not substantially harm any party, and that public policy favors the stay. Suburban’s Motion to Stay satisfied the Commission’s standard for granting stays of its administrative orders. Although the Commission had previously recognized that there is no controlling precedent in Ohio setting the conditions under which it will stay one of its orders,²⁹ it subsequently adopted a four-factor test governing a stay that was initially delineated in a dissenting opinion by Justice Douglas.³⁰ In its Motion to Stay, Suburban demonstrated that all four criteria were met to grant a stay:

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

²⁸ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm’n*, 46 Ohio St.2d 105, 105-06 (1976).

²⁹See *In the Matter of the Commission’s Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 5 (February 20, 2003).

³⁰*In the Matter of the Complaint of the Northeast Ohio Public Energy Council*, Case No. 09-423-EL-CSS, Entry at ¶ 6 (July 8, 2009); see also, *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 606 (1987).

4. The public interest lies with the stay.³¹

First, Suburban has made a strong showing that it is likely to prevail on remand. The Court remanded the Suburban’s rate case for one issue—the proper application of the used and useful standard.³² While the Court directed the Commission to apply the applicable legal standard to the record of the case, it did not direct the Commission to reverse or refund any lawful rates, nor did it find any rates unlawful. Subsequently, the Commission directed the parties to file additional briefs on the issue.³³ Ohio law, Commission precedent, the Court Decision, and the evidence in the record all point to a strong showing that Suburban will prevail on the merits on remand.

Even under the Court’s remand directive, the entire 4.9-mile pipeline remains used and useful as of the date certain. The Court did not find Suburban’s rates unlawful, or direct the Commission to reach a specific conclusion. Instead, the Court held that the ultimate determination for whether or not the rates are ‘lawful’ is best left to the Commission, stating that “[the] application of the relevant legal standard to the facts is something that is best left to the [Commission] in the first instance.”³⁴

The record evidence in this case demonstrates, even under the Court’s prescribed standard on remand, that the entire 4.9-mile pipeline was used and useful as of the date certain. The Court has previously held that the Commission may arrive at the same conclusions under the application

³¹ *Id.* See also *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Adjust its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2011*, Case No. 11-5843-GA-RDR, Entry on Rehearing at ¶¶ 22, 25 (Dec. 12, 2012); *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, et al., Entry at ¶ 8 (Aug. 22, 2012).

³² See Court Decision at ¶ 45.

³³ See Entry at ¶ 17 (“Initial and reply briefs should be filed by the parties no later than October 29, 2021, and November 12, 2021, respectively.”) (Oct. 6, 2021).

³⁴ Court Decision at ¶ 35, citing *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617, ¶ 26.

of a different standard on remand as it did previously.³⁵ Depriving Suburban of a revenue increase and the total revenue requirement authorized by the Rate Order will result in unjust and unreasonable rates that are confiscatory. As the Commission explained in the Rate Order, without the Rate Order increase, Suburban's net annual compensation represented a rate of return of 2.90 percent, which was insufficient to provide Suburban reasonable compensation for the services rendered to its customers.³⁶ Similarly, authorizing a gross annual revenue that results in a similar rate of return prior to remand will result in unjust and unreasonable compensation to Suburban and will endanger customers by preventing Suburban from supplying safe and reliable service.

Second, Suburban demonstrated that Suburban and its customers will suffer irreparable harm absent the stay as the entire pipeline extension is necessary to provide safe and reliable service to customers with adequate reserve capacity and the Phase II rates, subject to refund, are unjust, unreasonable, and confiscatory.³⁷ A party suffers irreparable harm "when there is no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be impossible, difficult or incomplete."³⁸ The Commission's October 20 Entry will cause harm for Suburban for which there is no plain, adequate and complete remedy at law and for which monetary restitution would be impossible, difficult or incomplete by effectively bankrupting Suburban. Bankrupting Suburban will also irreparably harm Suburban's customers by depriving them of safe and reliable service.

³⁵ See, e.g., *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 1-3, 11 (The Court initially ruled that the Commission "committed reversible error [by] approving the recovery of carrying costs associated with environmental investments without proper statutory authority." "On remand, the commission determined that the environmental-investment carrying costs were lawful," and the Court affirmed the Commission order.).

³⁶ Rate Order at ¶¶ 164-165.

³⁷ Motion to Stay at 9-10, 15-16 (Oct. 8, 2021).

³⁸ *In the Matter of the Complaint of the Northeast Ohio Public Energy Council*, Case No. 09-423-EL-CSS, Entry at ¶ 10 (July 8, 2009), citing *FOP v. City of Cleveland*, 141 Ohio App.3d 63, 81 (8th Dist. 2001).

Suburban demonstrated that reducing its rate base and operating revenue to the revenue requirement established by Phase II of the rate increase will prevent Suburban from meeting its existing financial obligations, causing Suburban to default on its loan covenants and suffer severe financial injury, jeopardizing its very existence and potentially placing the company in bankruptcy.³⁹ Should the company go bankrupt, even when Suburban ultimately prevails on remand, the financial harm will have occurred, triggering irreversible defaults—the very definition of an irreparable injury.

This will also cause irreparable harm to Suburban’s customers. Without sufficient and necessary operating income, Suburban will not be able to ensure safe and reliable natural gas service, possibly placing Suburban’s customers at risk until an alternative utility could provide service or Suburban is purchased.

Third, Suburban demonstrated that issuing the stay will not substantially harm any third party.⁴⁰ Suburban’s customers will not be harmed, as Suburban will be able to continue providing them with safe, reliable, and reasonably priced natural gas service.

Lastly, public policy clearly favors granting the Motion to Stay to allow the entire Rate Order to be effective, including the implementation of the third phase of the rate increase. Pursuant to R.C. 4929.02, it is the policy of the state in regards to natural gas service to “promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods.”⁴¹ Public policy in Ohio also favors reasonably compensating public utilities for the services rendered with just and reasonable rates authorized by the Commission. The filed-rate

³⁹ Motion to Stay at 16 (Oct. 8, 2021); *Id.*, Attachment A, Debt Service Ratio Calculation.

⁴⁰ Motion to Stay at 16 (Oct. 8, 2021).

⁴¹ R.C. 4929.02(A)(1).

doctrine⁴² further ensures stability for utilities and their customers by allowing utilities to collect rates without refund, even when the rates are later determined to be unreasonable, which promotes rate stability and predictability for consumers and financial integrity for the utility.

The Commission's October 20 Entry affirmed its October 6 Entry, which gave rise to the Motion to Stay. As such, the October 20 Entry also prevents Suburban from being reasonably compensated for services rendered, potentially subjecting Suburban's customers to a loss of safe and reliable service from Suburban. Public policy favors granting a partial stay that would prevent this outcome by promoting the availability of adequate, reliable, and reasonably priced natural gas service. By allowing Suburban to implement the previously authorized rates pursuant to the lawful Rate Order, granting the Motion to Stay would have also favored the filed-rate doctrine.

Even though Suburban's Motion to Stay satisfied the Commission's four-part standard for issuing a stay of an administrative ruling, the Commission erred by summarily rejecting the Motion to Stay. In its October 20 Entry, the Commission held that the October 6 Entry was lawful, as "the Company's current rate schedules filed with the Commission will remain in effect until a new order is issued based on the mandate from the Court."⁴³ This is inaccurate as the October 6, Entry (and now the October 20 Entry) unlawfully directed Suburban to not implement a previously authorized phase-in of the rate increase, which would have allowed Suburban to be compensated sufficiently at its authorized revenue requirement to be effective September 30, 2021. Not allowing the authorized revenue requirement to be implemented and collected from customers is a violation of Ohio law and Commission precedent. The rate schedules that were to be in effect as of September 30, 2021 were rates resulting from the implementation of the full revenue

⁴² See *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259, 141 N.E.2d 465, 469 (1957).

⁴³ See Entry at ¶ 22 (Oct. 20, 2021).

requirement authorized. Only the Year 3 revenue requirement was authorized and sufficient to reasonably compensate Suburban for services rendered as of September 30, 2021.

Until the Commission issues a new order on remand, Suburban's lawful rates remain those implemented by the September 26, 2019 Rate Order, which includes the Phase III rates scheduled to become effective on September 30, 2021. By directing Suburban to file rates contrary to those authorized by the Rate Order in its October 20 Entry, the Commission violated Ohio law and Commission precedent and subjected Suburban and its customers to risk of irreparable harm. As such, the Commission subsequently erred by denying Suburban's Motion to Stay in its October 20 Entry and by not giving full force and effect to the Rate Order and keeping that Rate Order in effect pending remand.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully voiding its valid Rate Order by not implementing the authorized third phase of the rate increase, which results in confiscatory rates.

In its October 20 Entry, the Commission also directed Suburban to file compliance tariffs pursuant to the October 6 Entry as modified by the October 20 Entry.⁴⁴ To the extent that the October 20 Entry served to reaffirm the Commission's October 6 Entry, the Commission erred in the same manner as it did in the October 6 Entry. Specifically, the Commission erred by unjustly, unreasonably, and unlawfully voiding its Rate Order prior to hearing the case on remand; by unjustly, unreasonably, and unlawfully voiding its valid Rate Order by not implementing the authorized third phase of the rate increase, which results in confiscatory rates.

As discussed above, public utilities are statutorily required to collect only those rates lawfully authorized.⁴⁵ Once authorized by the Rate Order, Suburban is allowed to collect those

⁴⁴ Entry at ¶¶ 23, 26 (Oct. 20, 2021).

⁴⁵ See, e.g., R.C. 4909.15(E)(2)(b).

rates, including Phase III of the rate increase as of September 30, 2021. The Commission erred by directing Suburban to not implement its rate increase established pursuant to the lawful Rate Order, which approved the phase-in of the rate increase included in the settlement. The Commission's October 20 Entry goes beyond the Court's mandate and unjustly and unreasonably denies the implementation of the authorized revenue requirement as of September 30, 2021.⁴⁶

Ohio precedent does not authorize the Commission to void or modify the Rate Order prior to conducting the remand and issuing a new order on remand. As discussed above, a Commission order, even once reversed and remanded by the Court, remains in effect until a new order is issued.⁴⁷ As such, the Commission's lawful Rate Order remains in effect pending the outcome of the remand, which includes allowing the third phase of the rate increase to go into effect given that the authorized revenue requirement as of September 30, 2021 was \$20,452,957.00. Even if the Commission decides to order the rates and charges to be collected subject to refund during a remand proceeding, the full rates and charges remain in effect pending the remand proceeding, and those rates and charges are not deemed subject to refund to customers unless and until the rates and charges are found to be unlawful.⁴⁸

Moreover, even when the Commission orders that certain rates and charges be collected subject to refund, it allows the utility to collect the entire amount of the authorized rates and

⁴⁶ See Entry at ¶¶ 16, 20 (Oct. 6, 2021).

⁴⁷ *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51.

⁴⁸ See, e.g., *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401; *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 29. Additionally, both of these cases dealt with riders rather than base rates.

charges at issue, subject to refund.⁴⁹ For example, in a review of Case No. 14-1297-EL-SSO,⁵⁰ the Court invalidated a rider.⁵¹ Upon remand to the Commission, the Applicant asked the Commission for authority to collect that rider subject to refund, while OCC argued that the rider should be set to zero, or in the alternate, subject to refund.⁵² The Commission issued an Entry, directing the applicant to collect the full amount of the rider, as authorized in the previous order, but subject to refund.⁵³ Therefore, while the applicant collected its rates subject to refund, it did so *at* the full amount previously authorized by a lawful Commission order, until the Commission issued a new order on remand, as is required by Ohio law.⁵⁴

The Commission erred in departing from precedent by directing Suburban not to implement Phase III of its lawful rate increase. The Court never deemed that Suburban's rates and charges were unlawful. As such, the lawful Rate Order remains in full effect and the Rate Order should be effectuated, which means the authorized revenue requirement in the amount of \$20,452,957.00 should be collected pursuant to the Stipulation and authorizing Rate Order. Moreover, the Commission should not violate its Rate Order, or void it, without first making a

⁴⁹ Suburban also notes that OCC requested that rates be subject to refund *in the alternative* of reducing the lawful rates. See 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, Request for Expedited Ruling and Memorandum in Support by Office of The Ohio Consumer's Counsel at 5 (Sept. 22, 2021) ("In the alternative, the PUCO should order that residential consumers' rates be collected subject to refund, pending resolution of this case on remand.").

⁵⁰ *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry (July 2, 2019).

⁵¹ See *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

⁵² *In the Matter of the Application of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry at ¶¶ 11-12 (July 2, 2019).

⁵³ *Id.* at ¶ 13.

⁵⁴ See *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51 ("a remand order of this court does not automatically render the existing rates unlawful.").

determination on remand of what charges are authorized under the Court Decision. There is simply no precedent for reducing the lawfully approved revenue requirement, and resulting rates and charges, that the Rate Order adopted.

Furthermore, depriving Suburban of the opportunity to collect its full, authorized revenue requirement in the amount of \$20,452,957.00 as approved by the Commission is unjust and unreasonable and will be confiscatory. The United States Constitution protects utilities from being limited to a charge for their property serving the public which is so ‘unjust’ as to be confiscatory.⁵⁵ If the rate does not afford sufficient compensation, the State has taken the use of the utility property without paying just compensation and as such violates the Fifth and Fourteenth Amendments.⁵⁶ An order that does not allow a utility to recover a reasonable rate is unconstitutional as it does not “adequately safeguard against imposition of confiscatory rates.”⁵⁷

The Commission’s October 20 Entry establishes confiscatory rates and charges that will not afford Suburban an opportunity to collect its full, authorized revenue requirement. The Commission explained in the Rate Order that, without the full authorized rate increase phased in over three years, Suburban’s net annual compensation at the time of the Rate Order represented a rate of return of 2.90 percent, which is insufficient to provide Suburban reasonable compensation for the services rendered to its customers.⁵⁸ Similarly, requiring Suburban to maintain a gross annual revenue that results in a similar low rate of return during the pendency of the remand will also result in unjust and unreasonable compensation to Suburban and will endanger customers by preventing Suburban from supplying safe and reliable service. Requiring Suburban to reduce its

⁵⁵ *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206 (1896).

⁵⁶ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989).

⁵⁷ *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001).

⁵⁸ Rate Order at ¶¶ 164-165.

rates and charges to a confiscatory level contravenes Ohio law, is unconstitutional, and is unjust and unreasonable.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully ordering Suburban to collect a portion of its customer service charges and usage charges subject to refund.

The Commission also erred in its October 20 Entry by ordering Suburban to collect its rates and charges subject to refund.⁵⁹ As discussed above, utilities are statutorily required to collect only those rates and charges lawfully authorized.⁶⁰ Typically, the filed-rate doctrine precludes utilities from refunding lawfully collected rates.⁶¹ As such, the Commission erred by making Suburban's rates and charges subject to refund in addition to directing Suburban not to implement its rate increase pursuant to the lawful Rate Order.

Again, the Court only directed the Commission to apply the used-and useful test to the evidence in the record on remand. The Court did not authorize the Commission to unreasonably require Suburban to make its customer service charges and usage charges subject to refund.⁶²

As discussed above, a Commission order, even if reversed and remanded by the Court, remains in effect until a new order is issued.⁶³ During the remand proceeding, the Commission's lawful Rate Order remains in effect. The full authorized rates and charges that were authorized to

⁵⁹ The Commission's October 6, 2021 Entry seemed to originally require Suburban to collect both its customer service charge and its usage charge (i.e., practically its entire revenue stream) subject to refund. The Commission clarified in its October 20, 2021 Entry that this was not the Commission's intent, and that only a portion of the amount was to be subject to refund. However, to the extent the October 6, 2021 Entry may have been unclear, Suburban seeks to preserve this argument for argument on appeal.

⁶⁰ See, e.g., R.C. 4909.15(E)(2)(b).

⁶¹ See *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259, 141 N.E.2d 465, 469 (1957).

⁶² See Entry at ¶¶ 16, 20 (Oct. 6, 2021).

⁶³ *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51.

be in effect as of September 30, 2021 should have been in effect and remained in effect pending the remand, and are only subject to refund if and when they are found to be unlawful.⁶⁴

The Commission erred in departing from precedent by directing Suburban to collect its Year 2 revenue requirement, and resulting rates and charges, subject to refund. The Court never deemed Suburban's rates and charges unlawful or directed that they be subject to refund. Additionally, the Commission should not violate or effectively revise its Rate Order without first making a determination on remand of what charges are unauthorized and subject to refund under the Court Decision. There is simply no precedent for the Commission's actions of reducing lawful rates and charges that were authorized as of September 30, 2021 *and* ordering those rates and charges to be collected subject to refund.

III. CONCLUSION

For the aforementioned reasons, Suburban respectfully requests that the Commission grant this application for rehearing and modify its order as set forth herein.

Respectfully submitted,

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⁶⁴ See, e.g., *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401; *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 29. Additionally, both of these cases dealt with riders rather than base rates.

CERTIFICATE OF SERVICE

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/s/ Kimberly W. Bojko
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Summary: Application for Rehearing electronically filed by Mrs. Kimberly W. Bojko
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