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

In its second application for rehearing,[1] Suburban rehashes the same arguments it made in its first application for rehearing.[2] Those arguments failed before, and they fail again here.

In essence, Suburban's argument boils down to this: Suburban believes that even though the Supreme Court reversed the PUCO's September 26, 2019 Opinion and Order (the "September 2019 Order") on the grounds that the PUCO violated R.C. 4909.15, that order somehow remains a "lawful" order, and Suburban should be allowed to charge customers the full rate increase approved under that order. This bold theory has no basis in law, and basic common sense shows that Suburban is mistaken.

Right now there exists no lawful ruling allowing Suburban to charge customers for more than 2.0 miles of its 4.9-mile pipeline extension. Thus, the PUCO's recent rulings protect consumers by (i) denying Suburban the right to increase rates to include the entire 4.9-mile

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[1] Application for Rehearing by Suburban Natural Gas Company (Nov. 19, 2021) ("Second AFR").

[2] Application for Rehearing by Suburban Natural Gas Company (Nov. 5, 2021) ("First AFR").

pipeline extension in rates and (ii) requiring Suburban to charge rates subject to refund to the extent they include charges for more than 2.0 miles of the pipeline extension. The PUCO should reject Suburban's second application for rehearing which, like its first, seeks to undo these consumer protections.

I. ARGUMENT

A. The PUCO should deny Suburban's Second AFR because it relies primarily on the false claim that the PUCO's September 2019 Order remains a "lawful" order, despite the Supreme Court of Ohio ruling that the very same order was inconsistent with a law (R.C. 4909.15).

The bulk of Suburban's Second AFR relies on Suburban's now oft-repeated claim that the PUCO's September 2019 Order somehow remains a "lawful" order, even though the Supreme Court of Ohio ruled that the PUCO's rulings in that order did not comply with the law (R.C. 4909.15). Indeed, in Suburban's latest application for rehearing, it refers to the September 2019 Order as "lawful" no fewer than 12 times.[3] But no matter how many times Suburban says it, an order that was approved only because of a misapplication of law cannot be a "lawful" order. That was the basis of the Supreme Court of Ohio's reversal of that order and the reason Suburban's persistent rehearing effort must fail.

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

[3] *See* Second AFR at i (claiming the order "lawfully directed Suburban to implement a three-phase rate increase"), at ii ("lawful and effective Rate Order"), at 3 ("rates authorized pursuant to the Rate Order … remain lawful"), at 3 ("lawful Rate Order"), at 6 ("lawful Rate Order"), at 10 ("lawful Rate Order"), at 11 ("Suburban's lawful rates remain those implemented by the September 26, 2019 Rate Order"), at 12 (using the phrase "lawful Rate Order" twice), at 13 ("lawful Rate Order"), at 15 (using the phrase "lawful Rate Order" twice).

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.[4]

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.

B. 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 "denying Suburban's Motion to Stay its October 6 Entry that voided its Rate Order prior to hearing the case on remand."[5] 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."[6] 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

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

[5] Suburban AFR at 6.

[6] Suburban AFR at 10.

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 require 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."

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.[7] Thus, the PUCO approved a settlement that allowed Suburban to charge customers (after a phase-in) for the entire 4.9-mile extension.[8] Immediately after that ruling, consumers began paying rates that included 2.45 miles (50%) of the pipeline extension.[9] Since September 2020, consumers have been paying rates that include 3.92 miles (80%) of the pipeline extension.[10]

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.[11] 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

[7] Opinion & Order ¶ 121 (Sept. 26, 2019).

[8] *Id.* ¶ 148.

[9] *Id.* ¶ 31.

[10] *Id.*

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

considered whether Suburban's investment was prudent."[12] Because the PUCO failed to follow the law, the Court remanded the case to the PUCO to properly apply the law to the fact.[13]

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, 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.[14]

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.

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[12] *Id.* ¶¶ 27-34.

[13] *Id.* ¶ 35.

[14] Entry (Oct. 6, 2021); Entry (Oct. 20, 2021).

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."[15] Likewise, Suburban cites *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."[16]

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.[17]

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[15] 2014-Ohio-462, ¶ 51 (cited on Second AFR page 5).

[16] 46 Ohio St.2d 105, 105-06 (1976) (cited on Suburban AFR page 5-6).

[17] 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).

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. 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. 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 ruling saying that charges to consumers for the entire 4.9-mile pipeline extension are lawful. The

[18] Second AFR at 11-15.

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.

C. The PUCO should deny Suburban Assignment of Error 3 because the PUCO lawfully protected consumers by ordering Suburban to collect rates subject to refund, pending a final ruling on remand.

In its third assignment of error, Suburban argues that the PUCO erred by "ordering Suburban to collect a portion of its existing customer service charges and usage charges subject to refund."[19] Suburban is incorrect for several reasons.

First, Suburban's argument again relies on the false narrative that the PUCO's September 2019 Order remains a "lawful" order.[20] The order was not lawful because it was based on a wrong interpretation of a law. Thus, there being no lawful PUCO order allowing Suburban to charge customers for more than 2.0 miles of the pipeline extension, it is proper for rates to be refundable to the extent they include more than 2.0 miles.

Second, Suburban claims that "[t]ypically, the filed-rate doctrine precludes utilities from refunding lawfully collected rates."[21] In support of this argument, Suburban cites the 1957 *Keco Industries* case, where the Court ruled that refunds are generally not allowed.[22] But more recent Ohio Supreme Court clarified that refunds are barred "*unless* the tariff applicable to those rates sets forth a refund mechanism."[23] The PUCO complied with this more recent Supreme Court directive by ordering Suburban to include a refund mechanism in its tariffs. This protects

[19] Second AFR at 15.

[20] Second AFR at 15-16.

[21] Second AFR at 15.

[22] Second AFR at 15 (citing *Keco Indus. Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957)).

[23] *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶ 23 (emphasis added).

consumers because the current rates they pay include 3.92 miles of the pipeline extension, and they will deserve a refund if the PUCO ultimately rules on remand, as it should, that rates should only include 2.0 miles of pipe.

II. CONCLUSION

The PUCO's September 2019 Order is not a lawful order because it was premised on a violation of Ohio's ratemaking laws. While this case is pending a final decision on remand, it is only fair that consumers be protected by not paying unjust and unreasonable rates and that those rates be collected from consumers subject to refund. Suburban's second application for rehearing should be denied.

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 29th day of November 2021.

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