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

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) Order on Remand issued February 23, 2022, in the above-captioned cases (hereinafter, Order on Remand). In its Order on Remand, the Commission concluded that only 2.0 miles of the DEL-MAR 4.9-mile pipeline extension were used and useful as of the date certain and modified the May 23, 2019, Joint Stipulation and Recommendation (Stipulation) to reflect that only 2.0 miles of the pipeline extension costs are to be recovered in rates.[1] The Commission directed Suburban to file new tariffs, with a lower monthly customer charge to reflect the costs associated with the shorter pipeline, and to issue refunds to customers dating back to September 21, 2021.[2]

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[1] *See* Order on Remand ¶¶ 57-59 (Feb. 23, 2022).

[2] *Id.* at ¶ 61.

Specifically, Suburban requests that the Commission find that its Order on Remand was unlawful, unjust, unreasonable, and confiscatory in the following respects:

ASSIGNMENT OF ERROR NO. 1: The Commission erred by unjustly, unreasonably, and unlawfully ignoring the manifest weight of the evidence in failing to find that the entire 4.9-mile pipeline extension was useful as of the date certain.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully ordering Suburban to implement unlawfully confiscatory rates in violation of Ohio and Federal law.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully ordering Suburban to issue refunds for previously collected rates in violation of Ohio law and the filed-rate doctrine.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by unjustly, unreasonably, and unlawfully staying its Rate Order and ordering that the customer service charges and usage charges be subject to refund prior to hearing the case on remand.

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 Order on Remand as requested herein by Suburban.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Commission's Order on Remand issued in the above-captioned case contravenes Ohio law, Commission precedent, and the manifest weight of the factual record in this case. On August 31, 2018, Suburban filed an application for an increase in base distribution rates. As part of the application, Suburban sought to recover costs associated with a necessary 4.9-mile pipeline extension to Suburban's central Ohio system, which Suburban had designed, constructed, and placed into service before the February 28, 2019 date certain. Suburban built the extension in direct response to a series of dangerous cold weather events, increased demand, and low pressure concerns on the system that could impact its ability to provide safe and reliable natural gas service to residential and commercial customers. As such, the entire pipeline extension was necessary and used and useful to customers as of the date certain.

Following a Report and Recommendation filed by Staff, an objection period, and extensive settlement discussions, Suburban and Commission Staff filed a Stipulation on May 23, 2019 to resolve the case in its entirety. The Stipulation recommended that the Commission find that the

entire 4.9-mile pipeline was used and useful as of the date certain, find that Suburban was entitled to an increase in rates, and allow Suburban to phase in the rate increase over a three-year period.[3]

The Commission subsequently adopted the Stipulation in its entirety in its September 26, 2019 Opinion and Order (Rate Order).[4] The Rate Order authorized Suburban to include, 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 as part of Suburban's new revenue requirement.[5] It also authorized Suburban to include the costs associated with the entire 4.9-mile pipeline extension in rate base. The Commission concluded that "the extension was both used and useful to Suburban's customers as of date certain," and that Suburban had "adequately demonstrated that the 4.9-mile pipeline extension *was necessary* to serve *existing customers* as of February 28, 2019."[6]

However, the Office of the Ohio Consumers' Counsel (OCC) appealed the Rate Order to the Supreme Court of Ohio. The Court subsequently issued an opinion on September 21, 2021 (Court Decision) partially reversing and remanding the Commission's Rate Order.[7] Importantly, the Court did not find any harm to customers from the scheduled phase-in of the increase,[8] and declined to rule that the Commission's decision was against the weight of the evidence.[9] However, the Court ultimately ruled that the Commission had incorrectly applied the used-and-useful

[3] *See* Joint Stipulation and Recommendation at ¶ III.A.5.d (May 23, 2019) (Stipulation).

[4] *See* Rate Order.

[5] *Id.* at ¶¶ 163-168.

[6] *Id.* at ¶ 121 (emphasis added).

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

[8] Court Decision at ¶ 42.

[9] *Id.* at ¶ 44.

standard found in R.C. 4909.15(A)(1) with regards to whether the entire pipeline was useful as of the date certain.[10] Accordingly, the Court remanded the case to the Commission with the directive "to apply the appropriate standard" for usefulness.[11]

Despite finding that the Commission had used a different standard, the Court did not deem any portion of Suburban's rates or charges to be unlawful or order the Commission to reverse or refund any amounts of the collected rates. The Court simply directed the Commission to "apply the used-and-useful standard"[12] 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."[13] Noting the "distinction between, on one side, a pipeline with adequate reserves and, on the other, a pipeline overbuilt with excess capacity," the Court stated that the Commission must determine "which side the 4.9-mile extension lies on" to determine whether or not the entire extension was useful as of the date certain.[14] Therefore, on remand, the Commission remained free to find the entirety of the 4.9-mile pipeline extension to be useful so long as the Commission applied the proper legal standard prescribed by the Court.

Following the Court Decision, the Commission directed interested parties to file initial and reply briefs on remand.[15] Suburban,[16] Commission Staff,[17] and Amicus Curiae Columbia Gas of

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[10] *Id.* at ¶ 27.

[11] *Id.* at ¶ 35.

[12] Court Decision at ¶ 45.

[13] *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.

[14] *Id*. at ¶ 13.

[15] Entry at ¶ 17 (Oct. 6, 2021).

[16] *See* Brief on Remand of Suburban Natural Gas Company (Oct. 29, 2021); Reply Brief on Remand of Suburban Natural Gas Company (Nov. 12, 2021).

[17] Initial Brief of the Staff of the Public Utilities Commission of Ohio (Oct. 28, 2021).

Ohio, Inc.[18] each filed briefs highlighting the extensive record evidence in this case which demonstrates that the entire 4.9-mile pipeline was useful as of the date certain, and urging the Commission to allow Suburban to include the costs associated with the entire pipeline extension in rate base. JobsOhio[19] and the Ohio Gas Association[20] also filed public comments supporting this conclusion.

Despite these well-pleaded arguments and comments, as well as the manifest weight of the record evidence, the Commission's Order on Remand reversed the Commission's prior ruling and found that only 2.0 miles of the 4.9-mile pipeline extension was useful as of the date certain.[21] As such, the Commission modified the Stipulation to reflect that only 2.0 miles of the pipeline extension costs are to be incorporated in rate base and recovered in rates.[22] Despite the longstanding *Keco* precedent,[23] the Commission also directed Suburban to refund the difference between these new rates and the previously collected amounts under the authorized rates in effect, which reflected the second phase of the authorized phased-in recovery of the costs associated with the entire 4.9-mile pipeline extension under the Stipulation approved by the Commission.[24] Again, in contravention to *Keco*, the Commission ordered these refunds to retroactively date back to September 21, 2021, a date several weeks before the Commission directed Suburban to collect its rates subject to refund.[25]

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[18] Motion for Leave to File Amicus Curiae Brief and Memorandum in Support of Columbia Gas of Ohio, Inc. (Oct. 29, 2021).

[19] Public Comment of Dana Saucier, Vice President, Head of Economic Development at JobsOhio (Nov. 8, 2021).

[20] Public Comment of the Ohio Gas Association (Oct. 29, 2021).

[21] Order on Remand at ¶ 1 (Feb. 23, 2022).

[22] *Id*. at ¶ 57.

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

[24] *Id.* at ¶ 61.

[25] *Id.* at ¶¶ 17, 61.

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 ignoring the manifest weight of the evidence in failing to find that the entire 4.9-mile pipeline extension was useful as of the date certain.

The briefs on remand filed by Suburban and other parties explained in detail how the manifest weight of the record evidence clearly demonstrates that the entire 4.9-mile pipeline extension was both used and useful as of the date certain. The Commission acted unjustly, unreasonably, and unlawfully when it found that only 2.0 miles of the pipeline were useful as of the date certain in contravention of the manifest weight of the record evidence. As such, the Commission erred in its Order on Remand.

In pertinent part, R.C. 4909.15(A) states:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:
>
> (1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

In the Court Decision, the Court admits that the word useful is not defined by the statute, but states that "'useful' in [R.C. 4909.15(A)] means 'advantageous' or 'beneficial,'" and so, to be included in rate base, "the property must be beneficial in rendering service for the convenience of the public as of the date certain."[26] The record evidence in this case clearly demonstrates that the entire 4.9-

[26] Court Decision at ¶ 25, *citing Columbus v. Pub. Util. Comm. of Ohio*, 62 Ohio St.3d 430, 436, 584 N.E.2d 646 (1992).

mile extension was beneficial in rendering safe and reliable service for the convenience of the public as of the date certain.

The Commission's conclusion, however, disregards significant portions of the record evidence from the hearing which demonstrated that the entire 4.9-mile pipeline was necessary to render safe and reliable service to its customers. The Commission incorrectly concluded "that Suburban did not provide sufficient evidence to establish that the full 4.9-mile pipeline extension was useful and beneficial in rendering service to the Company's customers as of the date certain."[27] The Commission largely focused on one statement from Suburban witness Grupenhof that was taken out of context, not the complete picture or testimony, and was referencing one point in time in 2018, not February 28, 2019, which was the date certain.[28] The Commission simply ignored the other portions of Suburban witness Grupenhof's testimony, and testimony by other Suburban witnesses, which demonstrate that the 4.9-mile pipeline extension provided necessary system pressure and reserve capacity that ensures safe and reliable service to existing customers in the event of cold weather events as of February 28, 2019.[29]

The Commission's Order on Remand also disregards significant portions of Suburban's record evidence which demonstrated that shorter alternatives would not be adequate or appropriate. The Order on Remand incorrectly states that other than testimony "that other pipeline lengths were considered," Suburban did not provide to the Commission any analysis of alternative lengths or

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[27] Order on Remand at ¶ 55.

[28] *See* Order on Remand at ¶ 56 ("2 mile option would have satisfied Suburban's system at the end of 2018.").

[29] Reply Brief on Remand of Suburban Natural Gas Company at 9-12 (Nov. 12, 2021).

present alternative scenarios and modeling to the Commission.[30] This conclusion is incorrect, as Suburban *did* submit record evidence on the modeling of alternative pipeline lengths.[31]

Suburban hired Utility Technologies International Corporation (UTI), "an engineering firm widely recognized as one of the best in the natural gas distribution space in Ohio," to perform that modeling.[32] Andrew Sonderman, the President and Chief Operating Officer of Suburban at the time, testified regarding this process:

> I commissioned UTI…to update and computerize our mapping system as step one; and to "point load" each individual customer service location and conservative specific load characteristics for each customer as step two.
>
> With that data, I asked UTI to model the pressure at the Lazelle Road terminus of the ARCO line that would result in the event of a repeat of the coldest actually experienced day in 2015. I requested a forecast for a three-year period factoring in existing requirements and projected incremental requirements using the best information available. We asked UTI for a three-year model because we knew there would be significant lead time associated with the planning, acquisition of regulatory approvals, securing land rights (to the extent not in the existing ARCO/Del Mar right of way), construction, purging and pressure testing of a steel pipeline of the necessary size.[33]

As part of this modeling, UTI *did* in fact model alternative lengths. UTI Engineering Manager Kyle Grupenhof specifically testified that UTI modeled 1-mile, 2-mile, and 3-mile pipelines, as well as interconnections at different points on the pipeline, in addition to the 4.9-mile pipeline UTI ultimately recommended.[34] As witness Grupenhof explained:

> [UTI] considered several different options. [UTI] looked at a potential new interconnection with Columbia Gas of Ohio at the intersection of Orange Road and Old State Road, which was found to be cost-prohibitive. [UTI] also looked at pipeline extensions of different lengths and determined, in conjunction with

[30] Order on Remand at ¶ 55.

[31] *See* Reply Brief on Remand of Suburban Natural Gas Company at 3-7 (Nov. 12, 2021).

[32] Co. Ex. 5, Supplemental Direct Testimony of Andrew J. Sonderman at 22 (June 7, 2019) (Sonderman Supplemental Testimony).

[33] Sonderman Supplemental Testimony at 22.

[34] Tr. Vol. II at 299 (Grupenhof).

> Suburban, that the 4.9-mile extension would be the best option given costs, regulatory approvals, timeline, and the benefit to customers.[35]

UTI also modeled various pressures in December 2015 and February 2016, which showed that Suburban could encounter issues with unacceptably low pressure events that would jeopardize Suburban's entire system and risk a catastrophic system failure, by the winter of 2018-2019 if a cold weather event like the one already experienced in February 2015 occurred again.[36] For example, the December 9, 2015 model projected a pressure of 76.30 psig in 2018; the February 3, 2016 model projected a pressure of 71.85 psig in 2018; the February 10, 2016 model projected a pressure of 53.27 psig in 2018; the April 6, 2017 model projected a pressure of 80.83 psig in 2018 and a pressure of 17.16 psig in 2019; and the August 31, 2018 model projected a pressure of 104.27 psig in 2018 and a pressure of 78.27 psig in 2019.[37]

Ultimately, Suburban and UTI determined that a shorter extension would be insufficient to provide adequate reserves to existing customers and provide safe and reliable service at adequate pipeline pressures:

> In our view, a shorter pipeline would not have been prudent and in the best interest of our customers. We balanced a number of factors in the equation, but the first and foremost was customer safety and the critical need for adequate pipeline pressure.[38]

In both Suburban's initial brief on remand and reply brief on remand, Suburban identified record evidence demonstrating the risks of failures associated with insufficient capacity and insufficient pressures and the potential results of such failures. In response, the Commission simply stated that "nothing in the record addresses the issue of whether 4.9 miles is the appropriate

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[35] Co. Ex. 4, Direct Testimony of Kyle Grupenhof at 7 (June 7, 2019) (Grupenhof Testimony).

[36] *Id.* at 6.

[37] *See* Co. Ex. 9 (May 29, 2019)

[38] Sonderman Testimony at 22.

length to ensure safe and reliable service to customers, while also reasonably accounting for adequate reserves,"[39] a conclusion that disregards ample record evidence.

Contrary to the Commission's conclusion in its Order on Remand, the Supreme Court of Ohio never stated that "any projection of future growth is irrelevant."[40] Instead, the Court stated that a facility is useful when it has "been taken by the public for its benefit," "which includes some extra capacity… [in] an appropriate circumstance."[41] The Court determined that adequate "reserve capacity could be useful (or beneficial) to consumers in providing protection against unforeseen contingencies in the same way that property insurance is useful to a homeowner."[42] Although there is a "distinction between, on one side, a pipeline with adequate reserves and, on the other, a pipeline overbuilt with excess capacity,"[43] the manifest weight of the record evidence clearly demonstrates that the entire 4.9-mile extension was useful to provide adequate reserves and ensure safe and reliable service to existing customers as of the date certain.

In order to operate safely and reliably, Suburban's system must remain above a minimum operating pressure and must have adequate reserve capacity. When modeling the system, UTI "determined that the pressure needs to be maintained *above* a minimum of 100 psig."[44] "Suburban is at the risk of experiencing a catastrophic system crash" unless the pressure remains above that bare minimum at all times, including during cold weather events such as the one that occurred in 2015.[45]

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[39] Order on Remand at ¶ 55.

[40] *See id.* at ¶ 58.

[41] Court Decision at ¶¶ 32-33 (citations omitted).

[42] *Id.* at ¶ 33.

[43] *Id*. at ¶ 13.

[44] Co. Ex. 4, Direct Testimony of Kyle Grupenhof at 5 (June 7, 2019) (Grupenhof Testimony) (emphasis added).

[45] *Id.* at 3.

Suburban witness Grupenhof explained that 100 psig is the bare minimum operating pressure, rather than a safe operating pressure, and that operating without adequate capacity would place the entire system perilously close to failure:

> But my point here instead of having been a minus 2 day and if the temperature we experienced had been minus 7 on that day, I am absolutely convinced that we would have dropped perilously below 100 pounds which we consider a minimum. We don't consider that safe. That's a minimum level. And I believe that we would have lost the system and that's why I say I think it was a blessing that we didn't have that temperature on that day before the weather delays that caused the construction of our pipeline to be completed would have protected against.[46]

UTI's modeling and recent history both provided extensive evidence regarding the risk that the system pressure would drop below minimum operating levels. As Suburban witness Grupenhof testified, "the pressure dropped below 100 psig at the Lazelle Road point of delivery in February 2015."[47] This occurred over four years prior to the date certain of February 28, 2019.[48] Additionally, Suburban experienced another low pressure event in January 2019, only a few weeks before the 4.9-mile extension was brought into service.[49] The subsequent event occurred on a holiday, when usage was significantly lower than it would have otherwise been on a work day with the same temperatures.[50] Had it not been a holiday, the system was at risk for failure because of the low operating pressures that occurred on that day.

Suburban also provided extensive record testimony regarding the consequences associated with such a catastrophic failure, creating an unacceptable risk for Suburban, which the Commission should also be concerned about when regulating public utilities. The record evidence

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[46] Tr. Vol. II at 389-90 (Grupenhof).

[47] Co. Ex. 4, Grupenhof Testimony at 3.

[48] *See* Court Decision at ¶ 29.

[49] *See* Co. Ex. 5, Sonderman Supplemental Testimony at 23.

[50] Tr. Vol. II at 320-321 (Redirect Examination of Grupenhof); Tr. Vol. II at 386-87 (Redirect Examination of Sonderman).

demonstrated that restoring a natural gas pipeline following a hypothetical failure would be costly, time consuming, and difficult:

> The process for restoring service after an outage contains several steps. First, Suburban would have to individually purge every single service line on its system, which includes over 13,000 service lines. Then, depending on the nature of the specific outage, Suburban would need to immediately design and execute a service restoration plan for the affected area(s). Suburban would certainly need to call upon other gas utilities for assistance. Following that process, Suburban would need to go to every home and business it serves and conduct a leakage inspection before finally being able to restore service. Each customer would have no gas service available up and until this time. Given that a vast majority of Suburban's customers utilize natural gas for heating, I would also expect these customers to be without heat during the service restoration period. This is why it is imperative that Suburban anticipate extreme surges in demand that would likely be experienced on the extreme cold days.[51]

In practice, similar outages have taken public utilities up to three weeks to remedy, as Suburban President and Chief Operating Officer Andrew Sonderman highlighted during his testimony at the evidentiary hearing:

> National Grid experienced very high demand from early heat sensitive customers in the metropolitan Newport, Rhode Island, and the system crashed. Over 6,000 customers were affected. National Grid mobilized over a thousand field service personnel from their company and from other companies that went in; and, again, as I was starting to explain, you have to cut off all the meters. You have to purge the gas pipeline because it's got air in it. You have got to repressurize the pipeline with natural gas. And then you have to go to every single service address, test for leaks in that service address, and restore service by opening the valve on the meter.
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> In that case, and these -- the temperatures in January, I think the actual outage occurred on January 21, it took them almost three weeks to restore service to customers. They had to open emergency shelters for folks with infirmities and medical conditions. That is a nightmare scenario that I prefer to avoid as president of Suburban Natural Gas Company.[52]

[51] Grupenhof Testimony at 4.

[52] Tr. Vol. II at 393-394 (Sonderman).

Suburban witness Sonderman testified as to the need for the entire 4.9-mile pipeline extension to provide sufficient reserve capacity and operating pressures to ensure safe and reliable service to existing customers:

> There is simply no question in my mind that the 4.9-mile extension of the 12-inch high pressure DEL-MAR pipeline is essential today to protect our existing heating customers based on the data and experience we had before us in late 2015 and now.[53]

Suburban has an obligation to provide safe and reliable service to its customers,[54] which even OCC's witness did not deny.[55] Given the real risk of potential failure by low pressure events, the consequences of system-wide outages, the degree of fluctuations associated with demand variances, and the actual low-pressure events Suburban experienced, the record evidence demonstrates that Suburban and its expert engineers determined that a 4.9-mile pipeline extension was necessary to provide safe and reliable service and adequate reserve margins to existing customers in the winter of 2018-2019. As such, the entire 4.9-mile pipeline extension was used and useful as of the date certain as it benefited existing customers by providing them with safe and reliable service and adequate reserve capacity and safe operating pressures to protect against unforeseen contingencies, including cold weather events.

Suburban presented extensive, uncontroverted record evidence demonstrating the need for sufficient reserve capacity and adequate operating pressures and the unacceptable risks and consequences associated with catastrophic system failures absent such reserve capacity and adequate operating pressures. Suburban also presented uncontroverted evidence that the entire

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[53] Sonderman Testimony at 23.

[54] *See, e.g.*, R.C. 4929.02(A)(1), R.C. 4905.06, and Ohio Adm.Code 4901:1-13-02(A).

[55] Tr. Vol. III at 552, 581 (Cross Examination of Willis).

4.9-mile extension was necessary to deliver adequate reserve capacity and to maintain adequate and safe operating pressures.

Every interested party, save OCC, reaches the same conclusion. Columbia, a competing natural gas distribution utility, noted that the pipeline extension benefited customers by providing "adequately pressurized facilities for Suburban to deliver gas to customers on a day-to-day basis and [protecting] Suburban's customers from the potential for a catastrophic failure."[56] The Commission's Staff also stated that the record evidence in this case demonstrates "that the entire 4.9-mile DEL-MAR pipeline extension was used and useful as of the date certain, pursuant to the legal standard set forth in R.C. 4909.15(A)(1), and in accordance with the Court's decision."[57] JobsOhio[58] and the Ohio Gas Association[59] also supported the inclusion of the entire 4.9-mile pipeline extension in Suburban's rate base. Staff and all parties and commenters (except OCC) reviewed the same record evidence and agree that the entire pipeline was, as of the date certain, advantageous and beneficial in rendering natural gas service for the convenience of the public.[60]

Moreover, a review of the Commission's initial Opinion and Order in this case reveals that it too initially agreed with its Staff and all parties and commenters (except OCC) and found, based on the facts and record evidence before it, that the entire 4.9-mile pipeline was in fact used and useful as of the date certain. More specifically, the Commission found:

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[56] Columbia Amicus Brief at 8.

[57] Staff Remand Brief at 3.

[58] Public Comment of Dana Saucier, Vice President, Head of Economic Development at JobsOhio (Nov. 8, 2021) (attached hereto as Attachment A).

[59] Public Comment of the Ohio Gas Association (Oct. 29, 2021) (attached hereto as Attachment B).

[60] S*ee* Suburban Remand Brief at 4-14, Staff Remand Brief at 3, Columbia Amicus Brief at 8, Public Comment of the Ohio Gas Association at 1-2 (Oct. 29, 2021), and Public Comment of Dana Saucier, Vice President, Head of Economic Development at JobsOhio at 2 (Nov. 8, 2021) ("The Supreme Court's decision remanding this case to you boils down to a very simple question: was the entirety of the Del-Mar Pipeline extension beneficial as of February 28, 2019. The answer to this question is yes.").

{¶ 121} We find, upon review of the evidence provided by the parties, that **Suburban has adequately demonstrated that the 4.9-mile DEL-MAR pipeline extension was necessary to serve existing customers as of February 28, 2019.** While we agree with OCC that there is a distinction between the terms "used" and "useful," in contrast to Staff's contention that the terms carry the same meaning, as explained below, **here the extension was both used and useful to Suburban's customers as of date certain.** Due to modeling conducted by UTI as a result of the February 24, 2015 low-pressure event, Suburban projected that, by the 2018-2019 winter, assuming a negative five degree temperature, additional capacity was required to serve existing customers and to ensure adequate pressure at Lazelle Road (Tr. Vol. II at 273; Co. Ex. 4 at 8; Co. Ex. 5 at 21-22). We find that models run by UTI on December 9, 2015 (76.30 psig), February 3, 2016 (71.85 psig), February 10, 2016 (53.27 psig), and April 6, 2017 (80.83 psig) all projected that the pressure at Lazelle Road would be below 100 psig, thereby necessitating the DEL-MAR pipeline extension by year end 2018. Furthermore, even though the August 31, 2018 model projects that the pressure at Lazelle Road during year end 2018 would be 104.27 psig, this is barely above the minimum acceptable level of 100 psig. (Co. Ex. 4, Attach. KDG-1 at 1- 5.) During a particularly cold stretch with multiple contingencies, as explained below, Suburban may not have been able to provide safe, adequate, and reliable service to its customers. Moreover, the evidence demonstrates that Suburban projected completion of the extension by year end 2018, specifically October 31, 2018, but due to weather delays, including record rainfall during the 2018 autumn and winter, and issues with obtaining easements from landowners, this was not attainable. (Tr. Vol. II at 267-269; 374; Co. Ex. 4 at 7.) Despite delays, Suburban was able to place the DEL-MAR pipeline extension into service by February 22, 2019, before the February 28, 2019 date certain. **As such, the extension was both used by customers as of date certain and useful to them because it provided them with safe and reliable service at that time.**

{¶ 122} **In finding that the pipeline extension was necessary for Suburban's system,** we further note that, on January 21, 2019, Martin Luther King Jr. Day, the pressure at Lazelle Road fell to only 105 psig. Considering that businesses and schools were closed that day, resulting in lower usage, Suburban expected the pressure to be higher. Additionally, the record demonstrates that the pressure at Lazelle Road did, in fact, fall below 100 psig on February 24, 2015. As witness Sonderman stated, the risk of an outage intensifies when multiple days of cold weather occur, combined with other factors such as customer load and wind chill (Tr. Vol. II at 372, 375). Furthermore, 100 psig is a minimum safe pressure and we find that a natural gas utility like Suburban, which is engaged in providing a critical and necessary commodity, especially during the winter must prepare for contingencies in order to ensure safe and reliable service.

{¶ 123} While, in its reply brief, OCC maintains that, even if the extension is deemed prudent from a business operations perspective, it was not used and useful as of date certain, we find that the cases OCC relies on do not support its contention.

In one case, the Commission denied the inclusion of a turbine unit and three generating units in Ohio Edison Company's (Ohio Edison) plant-in-service because they were not in use as of date certain, September 30, 1983. *In re Ohio Edison Co.*, Case No. 83-1130-EL-AIR, Opinion and Order (July 27, 1984). The Commission noted that the turbine had not been in service on date certain for Ohio Edison's previous rate case or the rate case at issue, and was, in fact, held out of service for over four years. With regard to the generating units, Ohio Edison had not operated them since January 1983 and it had no plans for these units through June 1988, past the date certain of September 30, 1983. Because of the length of time the generating units had been out of service coupled with the absence of any definite plans for their use in the near term future, the Commission concluded that these units should also be excluded from rate base. **Here, even though Suburban placed the DEL-MAR pipeline extension into service only six days before date certain, it was serving the Company's current customers as of date certain and will be in service in the foreseeable future.**

{¶ 124} The second case OCC cites to convince us that the pipeline extension is not used and useful as of date certain involves unmarketability of land and is not applicable here. *In re Ohio Edison Co.,* Case No. 89-1001-EL-AIR, Opinion and Order (Aug. 16, 1990). In that case, Ohio Edison objected to Staff's exclusion of costs for excess acreage associated with five substations. Ohio Edison argued that, when the parcels were purchased for the substation, a portion of land was unusable. Because the marketable portions of the parcels were being used for utility service, Ohio Edison argued that the full market value of all the land, which could not be inflated by the unmarketable portions, should have been included in rate base. Though the Commission recognized that Ohio Edison raised a valid argument, the Commission held that the company did not provide additional evidence to demonstrate the unmarketability of the land in question. Consequently, the Commission found that Staff's exclusion was proper. This case is not instructive in determining whether the DEL-MAR pipeline extension was used and useful as there are no allegations of land marketability.

* * *

{¶ 147} For the reasons stated above, **we find that the inclusion of the DEL-MAR pipeline extension in rate base, as well as the rate of return recommended by the Signatory Parties, are reasonable and supported in the record** (Co. Ex. 2 at 11-12; Co. Ex. 5 at 14, 18, 25- 26; Staff Ex. 7 at 5). We, therefore, do not agree with OCC's position that the Stipulation will result in unjust or unreasonable rates.

* * *

{¶ 163} The **value of Suburban's property used and useful for the rendition of service to customers affected by this application**, determined in accordance with R.C. 4909.15, is not less than $21,155,890 for Year 1 of the phase-in.[61]

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[61] Rate Order at ¶¶ 121-124, 147, 163 (emphasis added).

On rehearing the Commission similarly found that the entire 4.9-mile pipeline was in fact used and useful as of the date certain:

> {¶ 19} Upon review of OCC's first and second assignments of error, we initially **find that we have already specifically addressed arguments related to the length and capacity of the 4.9-mile DEL-MAR pipeline extension and whether the pipeline was used and useful as of date certain under R.C. 4909.15, and rejected those arguments.** Addressing OCC's first assignment of error, we find, once again, **the evidence presented during the hearing supports the entire 4.9 DEL-MAR pipeline extension.** OCC places much emphasis on Suburban witness Kyle Grupenhof's testimony that a shorter, two-mile pipeline would have sufficed for the 2018-2019 winter (Tr. Vol. II at 278). However, **considering the totality of evidence presented,** we were persuaded that 100 psig is a minimum safe pressure. Further, we found that a natural gas utility like Suburban, which is engaged in providing a critical and necessary commodity, should prepare for contingencies in order to ensure safe and reliable service during winter. This was confirmed by modeling completed by Suburban's contracted engineering company, Utility Technologies International Corp. (UTI), which identified the projected pressure at the Lazelle Road POD by year end 2018: December 9, 2015 (76.30 psig), February 3, 2016 (71.85 psig), February 10, 2016 (53.27 psig), April 6, 2017 (80.83 psig), and August 31, 2018 (104.27 psig). Though the most recent model on August 31, 2018, indicated that the Lazelle Road POD would be above the minimum pressure level, the pressure of 104.27 psig was barely above the minimum safe pressure of 100 psig. As we explained, Suburban's ability to provide safe, adequate, and reliable service may have been impacted during a particularly cold stretch over multiple days and involving multiple contingencies. Opinion and Order at ¶¶ 121-122.
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> {¶ 21} Furthermore, OCC did not present the testimony of an engineer refuting the testimony provided by Suburban and providing alternate evidence demonstrating that a shorter extension with lower capacity could have safely served customers during the 2018- 2019 winter. As such, **we relied on the evidence provided by Staff's and Suburban's witnesses who supported the phase-in of the 4.9 DEL-MAR pipeline extension into rate base because it was necessary for the provision of safe, reliable, and adequate natural gas service to existing customers through the 2018-2019 winter.** Therefore, OCC's first assignment of error is denied.
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> * * *
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> {¶ 23} Finally, to the extent OCC argues that our Opinion and Order violates R.C. 4903.09, we find this argument unpersuasive. As explained above, in our Opinion and Order, **we made extensive findings of fact and set forth the reasons prompting our decision finding the length and capacity of the DEL-MAR pipeline as appropriate based on those findings of fact, pursuant to R.C.**

4903.09. Consequently, because we provided ample justification, we reject OCC's arguments related to R.C. 4903.09.[62]

Inexplicably and without explanation and justification or new record evidence to do so, the Commission, on remand, disregarded the record evidence that it itself cited and relied upon and reversed itself. The Commission also did not identify any rationale that would support its reversal in violation of R.C. 4903.09.[63] Accordingly, the Commission erred when it unjustly, unreasonably, and unlawfully ignored the manifest weight of the record evidence in finding that only 2.0 miles of the pipeline extension were useful as of the date certain. The Commission's decision is not supported by the record evidence or Ohio law, and, therefore, should be reconsidered on rehearing to remedy this error.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by unjustly, unreasonably, and unlawfully ordering Suburban to implement unlawfully confiscatory rates in violation of Ohio and Federal law.

In addition to reversing itself and finding that only 2.0 miles of the pipeline was useful as of the date certain, the Order on Remand directed Suburban to revise its tariffs to reflect that only costs associated with 2.0 miles of the pipeline extension are to be recovered in rates.[64] This results in rates that are unjustly, unreasonably, and unlawfully confiscatory.

A confiscatory rate is one that violates the Fifth and Fourteenth Amendments to the Constitution of the United States.[65] The Fifth Amendment holds that no person "shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

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[62] Second Entry on Rehearing at ¶¶ 19, 21 (April 22, 2020) (emphasis added).

[63] R.C. 4903.09 provides that, "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

[64] *See* Order on Remand ¶¶ 57-59 (Feb. 23, 2022).

[65] *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 591 (1896).

public use, without just compensation."[66] The Fourteenth Amendment incorporated the Fifth Amendment to the states.[67] These due process rights and the requirement for just compensation apply to public utilities.

A confiscatory rate is a "rate that does not permit recovery of actual costs together with a fair return."[68] If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.[69] Additionally, the Supreme Court of the United States has held that utilities are constitutionally entitled to a reasonable opportunity to recover prudently-incurred costs,[70] and to recover a fair and reasonable rate of return on their capital investment.[71]

In its Order on Remand, the Commission ordered Suburban to only recover the costs associated with 2.0 miles of its reasonable, prudent, and lawful investment in the 4.9-mile pipeline extension, even though the entirety of the pipeline was necessary to provide adequate reserve capacity, appropriate operating pressures, and safe and reliable service to customers as of the date certain. By doing so, the Commission unjustly, unreasonably, and unlawfully deprived Suburban of recovery of actual costs together with a fair return,[72] a reasonable opportunity to recover prudently-incurred costs,[73] and a fair and reasonable rate of return on Suburban's capital

[66] Fifth Amendment to the U.S. Constitution.

[67] Fourteenth Amendment to the U.S. Constitution, Section 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[68] *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 906 (S.D.Ohio 2004) (*Mon Power*).

[69] *Id.* at 919, *citing Duquesne Light Co. v. Barasch,* 488 U.S. 299, 307–08 (1989).

[70] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

[71] *Bluefiled Water Works and Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923).

[72] *Monongahela Power Co. v. Schriber*, 322 F.Supp.2d 902, 906 (S.D.Ohio 2004) (*Mon Power*).

[73] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

investment.[74] As such, the Commission erred by setting unconstitutionally confiscatory rates. The Commission should, therefore, reconsider its decision on rehearing to remedy this error.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by unjustly, unreasonably, and unlawfully ordering Suburban to issue refunds for previously collected rates in violation of Ohio law and the filed-rate doctrine.

The Commission also erred by unjustly, unreasonably, and unlawfully ordering Suburban to issue refunds for previously collected rates in violation of Ohio law and the filed-rate doctrine. Utilities may only collect rates and charges that have been lawfully authorized.[75] The Supreme Court of Ohio has made it clear that under Ohio law, R.C. 4905.32, "a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected."[76] Additionally, the Court has stated that "[n]either the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco*."[77]

Further, 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.[78] 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."[79] The Supreme Court of Ohio

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[74] *Bluefield Water Works and Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679 (1923).

[75] *See, e.g.*, R.C. 4909.15(E)(2)(b).

[76] *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465, 467 (1957).

[77] *Green Cove Resort/Owners' Assn. v. Pub. Uitl. Comm'n*, 103 Ohio St.3d 125, 2004-Ohio-4774.

[78] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 105-06 (1976).

[79] R.C. 4909.15(E)(2)(b).

has routinely held that "a remand order of this court does not automatically render the existing rates unlawful."[80]

In turn, the filed-rate doctrine shields utilities from financial uncertainty by protecting them from being forced to issue refunds for lawfully collected rates.[81] As such, the filed-rate doctrine generally precludes utilities from refunding lawfully collected rates.[82] The Commission has previously recognized the filed-rate doctrine and denied refunds of lawfully collected rates.[83] There is one limited exception to this doctrine.

The Commission and its Staff have previously explained that the exception to the filed-rate doctrine requires two independent conditions to both be met.[84] The limited exception to the filed-rate doctrine applies when the tariff provision for the rate or charge is reconcilable (i.e., a rider), and the tariff provision for the rate or charge must contain language to provide for the refunds (i.e., rider rate approved making the rider subject to refund). To be reconcilable, "the rider must be subject to future adjustments which are implemented without prior Commission review and approval and be subject to true up and reconciliation."[85] "The second independent condition requires that the tariff contain language providing for refunds."[86] If the tariff language does not

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[80] *In re Columbus Southern Power Co*., 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51; *see also Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 105-06 (1976).

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

[82] *Id.*

[83] *In The Matter Of The Application Of The Dayton Power And Light Company To Establish A Standard Service Offer In The Form Of An Electric Security Plan*, Case Nos. 08-1097-EL-SSO, et al., Fifth Entry on Rehearing at ¶ 52, *citing Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829 at ¶ 27.

[84] *Id.* at ¶ 53; *see also* Commission Letter to Senator Romanchuk at 1 (May 24, 2021).

[85] *River Gas Co. v. Pub. Util. Comm'n*, 69 Ohio St.2d 509 (1982).

[86] *In The Matter Of The Application Of The Dayton Power And Light Company To Establish A Standard Service Offer In The Form Of An Electric Security Plan*, Case Nos. 08-1094-EL-SSO, Fifth Entry on Rehearing at ¶ 54, *citing In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co*., 153 Ohio St.3d 289, 2018-Ohio-229 at ¶ 19.

set forth a refund mechanism, refunds cannot be subsequently ordered without violating the restrictions on retroactive ratemaking.[87]

As such, by ordering Suburban to issue refunds for lawfully collected rates, the Commission violated Ohio law. First, the filed-rate doctrine generally prohibits refunds for lawfully collected rates, and lawfully implemented rates remain in effect until the Commission issues a new order. In this case, the Supreme Court of Ohio did not find 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"[88] 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."[89] As such, until the Commission issued the Order on Remand, the rates from the Rate Order remained in effect, and are not subject to refund under the filed-rate doctrine.

Second, the exception does not apply. The Commission ordered refunds of base distribution rates, rather than a reconcilable rider "subject to future adjustments which are implemented without prior Commission review and approval and be subject to true up and reconciliation."[90] Additionally, the tariff language did not contain a refund mechanism until the Commission's October 6, 2021 Entry.[91] However, if the tariff language does not set forth a refund mechanism, refunds cannot be subsequently ordered without violating the restrictions on

[87] *In re Ohio Edison*, 153 Ohio St.3d 289, 2018-Ohio-229 at ¶ 19.

[88] Court Decision at ¶ 45.

[89] *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.

[90] *River Gas Co. v. Pub. Util. Comm'n*, 69 Ohio St.2d 509 (1982); *see also* Commission Letter to Senator Romanchuk (May 24, 2021), at 1.

[91] *See* Entry at ¶ 16 (Oct. 6, 2021).

retroactive ratemaking.[92] Therefore, even if the filed-rate doctrine does not bar refunds for lawfully collected rates (which it does) and even if the refunds were for a reconcilable rider rather than base distribution rates (which they are not) any refunds prior to the October 6, 2021 Entry would be barred for not including refund language by the prohibition against retroactive ratemaking.

Thus, the Commission acted unjustly, unreasonably, and unlawfully when it ordered Suburban to refund previously authorized base distribution rates to customers dating back to September 21, 2021. The Commission should, therefore, reconsider its decision on rehearing to eliminate any refunds to customers.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by unjustly, unreasonably, and unlawfully staying its Rate Order and ordering that the customer service charges and usage charges be subject to refund prior to hearing the case on remand.

The Commission's Order on Remand failed to even mention the two pending rehearing requests timely submitted by Suburban on November 5, 2021 and November 19, 2021 concerning the October 6, 2021 Entry (October 6 Entry) and the October 20, 2021 (October 20 Entry) or the Third Entry on Rehearing that granted the applications for rehearing for further consideration of the matters specific therein.[93] The Commission's failure to address the pending rehearing requests constitutes error. Nonetheless, assuming the Commission's February 23, 2022 Order on Remand deemed the rehearings moot, Suburban hereby seeks rehearing of the February 23, 2022 Order on Remand with regard to the failure to find that Suburban's authorized Phase III rates should have been implemented, and not made subject to refund, pending the issuance of the Order on Remand.

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[92] *Id.*, *citing In re Ohio Edison*, 153 Ohio St.3d 289, 2018-Ohio-229 at ¶ 19.

[93] Third Energy on Rehearing at ¶ 1 (Dec. 1, 2021).

The October 6 Entry and October 20 Entry partially stayed the Commission's prior Rate Order, which had authorized Suburban to implement a three-phase rate increase, by not allowing Suburban to implement the authorized Phase III rates and by making Suburban's rates and charges subject to refund. Prior to conducting the remand and before affording the parties the opportunity to brief the sole issue on remand, the Commission directed Suburban to not implement the third phase of the stipulated rate increase and to make the entirety of Suburban's customer service charges and usage charges (i.e., practically its entire revenue stream) subject to refund.[94] As explained above, Ohio statutory and case law makes it clear 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.[95] As explained above, 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."[96] Relying on this statutory mandate, the Court has stated that "a remand order of this court does not automatically render the existing rates unlawful."[97]

For example, in *In re Columbus Southern Power Co*., the Court considered a remand order by the Commission. The Court had previously reversed and remanded a Commission order approving an electric security plan.[98] When the case returned to the Court on remand, the Court noted that its previous decision had not rendered the charges unlawful, and that the utility was

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[94] See Entry at ¶¶ 16, 20 (Oct. 6, 2021)

[95] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 105-06 (1976).

[96] R.C. 4909.15(E)(2)(b).

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

[98] *Id.* at ¶ 1

authorized to collect them until the Commission issued a new order.[99] 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 the commission remains in effect until the commission executes this court's mandate by an appropriate order."[100] Here, the rate schedule that was authorized by the Rate Order to be in effect is the third phase of the rate increase (i.e., Phase III rates). The third phase of its lawful rate increase was authorized to go into effect on September 30, 2021. Accordingly, those rates and charges should have gone into effect as authorized and remained during the pendency of the remand proceeding.

In its October 6 Entry, however, the Commission erred by contravening this statutory law and Court precedent. Although the Commission had "fixed and determined the just and reasonable rate" pursuant to R.C. 4909.15(E) in its Rate Order, the Entry nonetheless directed Suburban to file tariffs that violated that Rate Order. The Rate Order determined that Suburban had "adequately demonstrated that the 4.9-mile pipeline extension *was necessary* to serve *existing customers* as of February 28, 2019" and authorized Suburban to phase in the 4.9-mile pipeline extension and its authorized rate increase over three years.[101] The Commission's October 6, 2021 Entry disregarded this lawful Rate Order by staying its Rate Order and directing Suburban not to implement its authorized Phase III rate increase scheduled to go into effect on September 30, 2021.

[99] *In re Columbus Southern Power Co*., 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 51-52.

[100] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 105-06 (1976).

[101] Rate Order at ¶¶ 121, 145-147, 163, 171 (approving stipulated phase-in of rates described at ¶ 25).

As the Court has routinely held, a decision by the Court reversing and remanding a Commission order does not automatically render that order unlawful, and it remains in effect until the Commission issues a subsequent order,[102] which would include a directive in the order for a new rate to become effective or the utility to take some action in the future. The Commission has recognized that under this precedent, lawful rates remain in effect unless otherwise directed by the Court or until the Commission issues a new order on remand. According to the Commission, "[it] is well established that, when the Supreme Court of Ohio reverses and remands an order of the Commission, the reversal is not self-executing and the Commission must modify its order or issue a new order."[103] Additionally, in the remand of Case No. 14-1297-EL-SSO, the Court reversed a Commission order approving a utility's electric security plan.[104] On remand, OCC requested that the Commission set the utility's rider to zero.[105] The Commission declined to do so, noting that it had not received any such mandate from the Court.[106]

Even if the Commission is authorized to make base rates subject to refund and orders the rates and charges be collected subject to refund during a remand proceeding, the full rates and charges remain in effect pending the outcome of the remand proceeding, and those rates and charges are not deemed subject to refund to customers unless and until the rates and charges are

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

[103] *In the Matter of the Application of the Dayton Power and Light Company to Establish a Standard Service Offer in the Form of An Electric Security Plan*, Case Nos. 12-426-EL-SSO, et al., Finding and Order at ¶ 12 (Aug. 26, 2016), *citing Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976).

[104] *In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401.

[105] *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 ¶ 12 (July 2, 2019).

[106] *See id.* at ¶ 13.

found to be unlawful.[107] 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 charges at issue, subject to refund.[108] For example, in a review of Case No. 14-1297-EL-SSO,[109] the Supreme invalidated a rider.[110] 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.[111] 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.[112] 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.[113]

The Commission erred in clearly 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

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[107] *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.

[108] Suburban also notes that OCC requested that rates be subject to refund *in the alternative* of reducing the lawful rates. *See* Cconsumer 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.").

[109] *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).

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

[111] *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).

[112] *Id.* at ¶ 13.

[113] *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.").

should be effectuated, which means the Phase III rates and charges should have been implemented pursuant to the Stipulation and authorizing Rate Order. Moreover, the Commission should not stay or violate its Rate Order without first making a determination on remand of what charges are authorized under the Court Decision. There is simply no precedent for reducing the lawfully approved rates and charges that the Rate Order adopted.

Given that the Court Decision did not deem Suburban's rates and charges to be unlawful, but merely directed the Commission to apply a different standard to the record before it, and until a subsequent order is issued *following that remand*, any tariffs must comply with the Commission's lawful Rate Order and the lawful Rate Order must be given full effect. Furthermore, depriving Suburban of the opportunity to collect its full, authorized revenue requirement in the amount of $20,452,957.00 as set forth in the Stipulation and approved by the Commission while remand was pending is unjust and unreasonable and confiscatory. As noted above, 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.[114] 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.[115] 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."[116] During the pendency of the remand, the Commission established confiscatory rates and charges that did not afford Suburban an opportunity to collect its authorized revenue requirement. Staying its Rate Order and limiting Suburban to a gross annual revenue that

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

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

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

results in a similar rate of return that was earned prior to remand that the Commission had found to be insufficient to provide Suburban with reasonable compensation for the services rendered,[117] resulted in unjust and unreasonable compensation to Suburban pending remand.

At the time the Commission stayed its Rate Order, it had made no findings or orders determining that any amount of the pipeline extension was not used and useful as of the date certain and, therefore, had not determined that there should be an associated reduction to Suburban's rate base, thereby resulting in a lower revenue requirement. As such, the Commission erred by staying the Rate Order pending the outcome of the remand proceeding and by directing Suburban to charge rates, subject to refund, different from those authorized by the Rate Order. 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.[118]

III. CONCLUSION

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

Respectfully submitted,

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[117] Rate Order at ¶¶ 164-165.

[118] *Id.*

(willing to accept service by email)

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CERTIFICATE OF SERVICE

The Public Utility Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on March 25, 2022 upon the parties of record.

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Summary: Application for Rehearing electronically filed by Mrs. Kimberly W. Bojko on behalf of Suburban Natural Gas Company