

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 COMPANY'S
MOTIONS TO STRIKE OCC'S OBJECTIONS AND FOR SANCTIONS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

In an OCC appeal, the Supreme Court of Ohio overturned a PUCO order that misapplied the used and useful standard in allowing Suburban to charge consumers too much for a pipeline.¹ But one wouldn’t know from Suburban’s hubris that it just lost an appeal in the Supreme Court of Ohio for overcharging consumers.

OCC had good grounds to file Objections to Suburban Natural Gas Company’s (“Suburban”) March 4, 2022 tariffs filed with the Public Utilities Commission of Ohio (“PUCO”). The Objections were neither false nor a “sham” as Suburban claims. A “sham” more aptly describes Suburban’s motions to strike the Objections and sanction OCC. Suburban’s motions are little more than a baseless attempt to intimidate OCC from

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

advocating for consumers. OCC will advocate for Ohio consumers. Suburban's motions should be **denied**.

To protect consumers, OCC objected to Suburban's tariffs that failed to reference a future refund to consumers for charges associated with more than the 2.0 miles of pipeline extension. Consumers are entitled to the protection of Ohio law for paying only just and reasonable utility rates. This protection can be found in the Supreme Court of Ohio's decision and the determination of the PUCO that only 2.0 miles of pipeline extension were used and useful as of the date certain in Suburban's rate case. For the reasons explained below, Suburban's motions should be denied.

II. ARGUMENT

A. There are good grounds for OCC's Objections, and they are necessary to advocate for consumer protection. Suburban's motions for sanctions and to strike the Objections should be denied.

Suburban accuses OCC of acting in "bad faith" in filing its Objections.² Suburban asks the PUCO to strike the Objections and sanction OCC (by awarding Suburban expenses and attorneys' fees) under Civ. R. 11 and O.A.C. 4901-1-27. There is no basis for Suburban's claims or for sanctions against OCC (or Assistant Consumers' Counsel, Angela O'Brien, who signed the pleading). Neither OCC, nor its counsel, violated the rules by filing the Objections to protect consumers.

² Suburban Memorandum Contra and Motion to Strike the Objections Filed by the Office of the Ohio Consumers' Counsel and Motion for Sanctions (March 25, 2022), Motion, at 1.

As an initial matter, the PUCO generally does not have jurisdiction to award attorneys' fees and monetary damages.³ Suburban's requests for attorneys' fees and expenses should be rejected for this reason alone.

Suburban's reliance on Civ. R. 11 ("Rule 11") for its motions to strike the Objections and for sanctions against OCC is also misplaced. Rule 11 provides that an attorney's signature to a pleading "constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

Under Ohio law, "[i]t is well settled that the language of Civ. R. 11 only permits sanctions against the attorney who signed the document."⁴ Therefore, Suburban's motion incorrectly "requests that the Commission *sanction OCC* by issuing an award to Suburban of expenses and reasonable attorney fees incurred in bringing this motion under this rule."⁵ According to the plain language of Rule 11 and Ohio case law interpreting Rule 11, the Commission cannot sanction OCC. Suburban's motion should be denied.

Suburban's motion for sanctions (whether against OCC or its counsel) must also fail because Suburban cannot demonstrate bad faith on OCC's part. Rule 11 employs a subjective bad faith standard and a two-step process.⁶ To begin, the PUCO (or court)

³ See e.g. *Ohio Public Interest Action Group Inc. v. Public Utilities Com.*, 43 Ohio St.2d 175, 184, 331 N.E.2d 730, 736; *In the Matter of the Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Company*, 10-693-EL-CSS, Opinion (January 18, 2011), at ¶ 15; and *In the Matter of the Complaint of Brian K. Harris v. Cincinnati Bell Telephone Co.*, 99-1238-TP-CSS, Entry (July 20, 2000), at ¶ 8.

⁴ *Ferron v. Video Professor, Inc.*, 5th Dist. Delaware No. 08-CAE-09-0055, 2009-Ohio-3133, ¶ 80 (citations omitted).

⁵ Suburban Motion, Memorandum in Support, at 6 (emphasis added).

⁶ *Ferron v. Video Professor, Inc.*, 5th Dist. Delaware No. 08-CAE-09-0055, 2009-Ohio-3133, ¶ 77 (quoting *Stone v. House of Day Funeral Serv., Inc.*, 140 Ohio App.3d 713, 748 N.E.2d 1200 (6th Dist.2000)).

must determine if any one of the three Rule 11 requirements has been violated. Then, the PUCO would have to determine whether the violation was *willful* as opposed to merely negligent.⁷ The Supreme Court of Ohio has held that Rule 11 requires a “subjective bad faith standard to invoke sanctions by requiring that any violation must be willful.”⁸ The Court has further explained that “bad faith” for purposes of Rule 11 requires a “dishonest purpose or some moral obliquity,” or “implies conscious doing of wrong.”⁹ According to the Court, bad faith “partakes of the nature of fraud.”¹⁰

In addition, the attorney’s actual intent or belief is relevant to the determination of willfulness.¹¹ Sanctions can be imposed only when there has been a demonstration that the attorney acted willfully and in bad faith by filing a pleading that the attorney believes lacks good grounds or is filed merely for the purpose of delay.¹² If and when such determination is made, the court would have broad discretion as to what, if any, sanction is to be administered.¹³ Further, before Rule 11 sanctions can be imposed, the court would be required to hold an evidentiary hearing.¹⁴

⁷ *Namenyi v. Tomasello*, 2nd Dist. Greene No.2013-CA-75, 2014-Ohio-4509, ¶ 14 (citations omitted).

⁸ *State ex rel. Dreamer v. Mason*, 2007-Ohio-4789, ¶ 19 (Affirming decision to deny Civ. R. 11 sanctions because there was no evidence of willful violation.).

⁹ *State ex rel. Bardwell v. Cuyahoga County Board of Comm’rs*, 2010-Ohio-5073, ¶ 8 (quoting *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 151, 21 O.O.2d 420, 187 N.E.2d 45 (reversed on other grounds)).

¹⁰ *Id.*

¹¹ *Ferron*, 2009-Ohio-3133 at ¶ 77; *see also*, *Bardwell v. Cuyahoga Cty. Bd. of Comm’rs*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274.

¹² *Id.*

¹³ *Stevens v. Kiraly*, 24 Ohio App.3d 211, 213-214, 494 N.E.2d 1160, 1163-1164 (1985).

¹⁴ *Ebbing v. Ricketts*, 133 Ohio St.3d 339, 2012-Ohio-4699, 978 N.E.2d 188 (citing *Bikkani v. Lee*, 8th Dist. No. 89312, 2008-Ohio-3130, ¶ 31 (“if an arguable basis exists for an award of sanctions under Civ.R. 11, a trial court must hold a hearing on the motion”); *see also* *T.M. v. J.H.*, 6th Dist. Nos. L-10-1014 and L-10-1034, 2011-Ohio-283, ¶ 98 (“It is an abuse of discretion to award attorney fees [under Civ.R. 11 and R.C. 2323.51] without [an evidentiary] hearing”).

In this case, there were good grounds to support the Objections given Suburban's continued position that it gets to charge consumers for the entire 4.9 mile pipeline extension. The Supreme Court of Ohio reversed and remanded the PUCO's September 26, 2019 order, where the PUCO misapplied Ohio law in finding that 4.9 miles of the Suburban pipeline extension were "used and useful" and could be charged to Suburban's consumers.¹⁵ On remand from the Court, the PUCO correctly applied the law and found that only 2.0 miles of the pipeline extension were used and useful.¹⁶ The PUCO directed Suburban to file revised tariffs reflecting a new customer charge and "to issue a refund to customers for any amounts collected as of September 21, 2021, that included costs associated with more than 2.0 miles of the 4.9-mile DEL-MAR pipeline extension."¹⁷

Suburban does not accept the Supreme Court of Ohio decision and the PUCO's order on remand that only 2.0 miles of the pipeline extension were used and useful. Suburban continues to take the untenable position that it is still entitled to charge consumers for the entire 4.9 mile pipeline extension.¹⁸ And while Suburban's March 4, 2022 tariffs reflected the customer charge ordered by the PUCO, nothing in the tariffs referenced the refund the PUCO ordered for amounts Suburban previously charged to consumers for costs associated with more than 2.0 miles of pipeline.¹⁹ Thus, OCC objected to the extent the tariffs contained no reference to the refund.

¹⁵ *In re Suburban Natural Gas Co.*, Slip Opinion No. 2021-Ohio-3224.

¹⁶ Order on Remand (February 23, 2022).

¹⁷ Order on Remand, ¶ 61.

¹⁸ *See e.g.* Suburban's Application for Rehearing (November 5, 2021), Suburban's Application for Rehearing (November 19, 2021), Suburban's Application for Rehearing (March 25, 2022).

¹⁹ *Id.*

OCC's Objections were reasonable. Tariffs that are not in compliance with PUCO orders are subject to objection. There have been many instances of parties, like OCC, objecting to utility tariffs that are supposedly filed "in compliance" with PUCO orders.²⁰ There is nothing that makes such filings in "bad faith" or that amounts to a "sham."

Consumers deserve clarity in Suburban's tariffs. Consumers should be able to look at Suburban's March 4 tariff filing and see that a refund by Suburban of overcharged amounts is forthcoming. A simple sentence or footnote within the tariff could have accomplished this.

Suburban claims that OCC misrepresented the PUCO's Order on Remand and the process whereby Suburban is to work with the PUCO Staff to determine the credit (refund) back to consumers for amounts previously charged by Suburban.²¹ OCC did no such thing. OCC simply objected that there was no reference to the refund to consumers.

Suburban also claims that OCC's Objections were filed by OCC to delay the proceedings in violation of Civ. R. 11 and O.A.C. 4901-1-27.²² That is wrong too. The Objections do not delay litigation or the substantive outcome of this case at all.

First, Suburban cites O.A.C. 4901-1-27, but that PUCO rule by its express terms applies to "Hearings." The evidentiary hearings in this case occurred and ended almost *three years* ago in 2019. There are no further hearings currently scheduled. There is no

²⁰ See e.g. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Revs. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO *et al.*, FirstEnergy Solutions Corp.'s Objections to Ohio Power Company's Compliance Tariffs (March 6, 2012), Industrial Energy Users-Ohio's Objections to Ohio Power Company's Compliance Tariffs and Request to Set a Reconciliation Date (March 2, 2012), Objection to Compliance Filing of Ormet Primary Aluminum Corporation (March 5, 2012).

²¹ Suburban Motion, Memorandum in Support, at 4.

²² Suburban Motion, Memorandum in Support, at 1-2, note 5.

basis for Suburban's argument that O.A.C. 4901-1-27 somehow authorizes the PUCO to impose sanctions on OCC.

Second, as Suburban stated in its motions, the PUCO's order on remand set forth a process for Suburban to update its tariff filings.²³ Thus, OCC's Objections may become moot as Suburban files updated tariffs clarifying the refund to consumers. Suburban also recently filed an application for rehearing of the PUCO's order on remand.²⁴ But OCC's Objections do not affect when the PUCO will rule on that. OCC's Objections also do not disrupt or seek a continuance of any procedural schedule. In short, OCC's Objections will not result in undue delay in this proceeding. Suburban's motions should be denied.

B. OCC's Objections are procedurally proper and consistent with OCC's prior consumer protection practice in this case of filing objections to Suburban's tariffs. Suburban's motions should be denied.

Suburban claims that OCC's Objections should be stricken because, in Suburban's view, they are a procedurally improper motion with no separate memorandum in support.²⁵ The PUCO should reject this claim as well.

Pleadings and motions are two different things. Generally speaking, a pleading sets forth a party's position in a case, whereas a motion asks the tribunal (here, the PUCO) to issue a ruling or order. OCC's two-page Objections are a *pleading* that sets forth OCC's position regarding Suburban's March 4 tariff. It was not a "motion" as Suburban wrongly claims. The Objections set forth OCC's position on Suburban's March 4 tariffs and, like OCC does in many pleadings it files, argued that the PUCO should take

²³ Suburban Motion, Memorandum in Support, at 2-3.

²⁴ Suburban Application for Rehearing (March 25, 2022).

²⁵ Suburban Motion, Memorandum in Support, at 5.

appropriate action under the law to protect consumers.²⁶ OCC further cited R.C. 4905.54 for the proposition that the PUCO has authority to assess penalties against Suburban for violating a PUCO order.²⁷ Suburban's claims that OCC's language somehow transforms the Objections into a procedurally improper motion are absurd. Parties participating in proceedings before the PUCO regularly argue in pleadings what the PUCO should or should not do under the law. That does not mean every pleading filed with those arguments is also a "motion" that requires a separate memorandum contra under O.A.C. 4901-1-12.

Moreover, OCC's Objections are *consistent with its prior practice in this very case* of objecting to Suburban's proposed tariffs. On October 15, 2021, OCC filed objections to Suburban's tariffs to the extent that they were vague.²⁸ Yet Suburban did not file motions to strike or for sanctions against OCC then. The PUCO subsequently directed Suburban to clarify its tariff consistent with OCC's recommendation.²⁹ The PUCO stated in a subsequent entry: "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."³⁰ The PUCO did not find that OCC's October 15, 2021 objections were procedurally improper.

²⁶ Objections, at 2.

²⁷ *Id.*

²⁸ See Objections to Suburban's Non-Compliant Tariffs by Office of the Ohio Consumers' Counsel (October 15, 2021).

²⁹ Entry (October 20, 2021), at ¶ 23.

³⁰ Entry (October 20, 2021), at ¶ 23 (emphasis added).

OCC's Objections were proper and similar to the objections OCC previously filed in this case.³¹ While Suburban may respond to the Objections, there is no basis for Suburban's claims that the Objections violate O.A.C 4901-1-12. There certainly is no basis for sanctions against OCC. How can OCC's Objections possibly be "bad faith" or improper when OCC previously followed the exact same procedure in this case without complaint? It is Suburban who is the vexatious litigator here – not OCC.

Suburban also complains of wasted resources and the "cost [to] Suburban and its *customers* [] for having to respond to such a frivolous pleading."³² This claim should be rejected too. The irony of Suburban's new-found concern for costs to consumers is stunning. Indeed, Suburban is still doing all it can to *charge* consumers for a pipeline extension that the PUCO found (on remand from the Court) not to be used and useful under Ohio's ratemaking law (R.C. 4909.15).³³

As for the costs to Suburban in this case, Suburban (a fully regulated distribution utility represented by counsel) has no cause to complain. The Supreme Court of Ohio has held that: "Any uncertainty which the utility harbors as to the used and useful status of its property, and therefore its includability in the rate base, can be minimized by the careful selection of the date at which the utility chooses to file its application for the rate increase."³⁴ Thus, Suburban could have controlled the result here – and its subsequent costs and resources – but it failed to do so.

³¹ Entry (October 20, 2021), at ¶ 23.

³² Suburban Motion, at 1, Memorandum in Support, at 5 (emphasis added).

³³ See e.g. Suburban's Application for Rehearing (November 5, 2021), Suburban's Application for Rehearing (November 19, 2021), Suburban's Application for Rehearing (March 25, 2022).

³⁴ *Office of the Ohio Consumers Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 449, 457, 391 N.E.2d 311, 315.

Finally, Suburban could have simply responded to OCC's Objections and/or agreed to reference the future refund in its tariffs. Instead, Suburban paid its attorneys likely hundreds of dollars per hour to attack OCC. OCC cannot be blamed for Suburban's decision to pay for attorney work product that has no legal basis and serves no purpose but to bully OCC and besmirch its counsel. For this additional reason, Suburban's motions should be denied.

C. Granting Suburban's motions would be bad public policy and harm consumers.

Suburban's motions prove that consumers need strong consumer advocacy from OCC. Granting Suburban's motion for sanctions and to strike the Objections would be horrible policy for consumers. Suburban cannot demonstrate that OCC has acted in bad faith by filing the Objections to Suburban's tariffs. Suburban cannot demonstrate that OCC has acted in a way inconsistent with the PUCO's rules or OCC's past practice in this case. Yet Suburban now wants money from OCC and to deny consumers a voice. Granting Suburban's motions – and requiring OCC to pay attorneys' fees to Suburban – would set a precedent that would cripple OCC's ability to advocate for consumers in matters involving powerful utility interests.

Consumers need a voice through their advocate, OCC, regarding their essential utility services. Sanctions against OCC and in favor of a utility would chill that voice especially where, as here, the utility cannot even demonstrate a violation of any rule or law, let alone bad faith. It is incumbent on the PUCO to protect the consumers' voice in utility matters. This is true now more than ever when consumers have lost trust in their public officials in the wake of the H.B. 6 scandal and resignation of former PUCO chair. Suburban's baseless motions should be denied. Suburban should stop playing the victim.

The PUCO's focus should be to administer justice for the real aggrieved party, the residential consumers represented by OCC that the Supreme Court protected.

III. CONCLUSION

There is no basis for Suburban's claims that OCC acted in bad faith through its Objections. There are good grounds for OCC's Objections in this case where Suburban continues to insist that consumers pay for Suburban's entire 4.9 mile pipeline extension despite contrary Supreme Court of Ohio and PUCO precedent. OCC's Objections were procedurally proper and consistent with OCC's prior practice in this case. OCC's advocacy is necessary so that consumers are not overcharged by Suburban for a pipeline extension that the PUCO found not to be used and useful. The PUCO should deny Suburban's motions to strike and for sanctions against OCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the Memorandum Contra was served by electronic transmission upon the parties below this 11th day of April 2022.

/s/ Angela D. O'Brien
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Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of
O'Brien, Angela D