

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
OHIO GAS COMPANY FOR AUTHORITY
TO ESTABLISH A RIGHT-OF-WAY RIDER.

CASE NO. 21-943-GA-RDR

IN THE MATTER OF THE APPLICATION OF
OHIO GAS COMPANY FOR TARIFF
APPROVAL.

CASE NO. 21-944-GA-ATA

IN THE MATTER OF THE APPLICATION OF
OHIO GAS COMPANY FOR APPROVAL TO
CHANGE ACCOUNTING METHODS.

CASE NO. 21-945-GA-AAM

SECOND ENTRY ON REHEARING

Entered in the Journal on May 4, 2022

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by Ohio Consumers' Counsel.

II. DISCUSSION

A. *Applicable Law*

{¶ 2} Ohio Gas Company (Ohio Gas or the Company) is a natural gas company and a public utility as defined by R.C. 4905.03 and R.C. 4905.02, respectively. As such, Ohio Gas is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4939.07 governs a public utility's recovery of public way fees. Pursuant to R.C. 4939.07(B), a public utility subject to the rate-making jurisdiction of the Commission may file an application for timely and full recovery of a public way fee levied upon and payable by the utility both after January 1, 2002, and after the test year of the utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates. R.C. 4939.07(B) further states that the Commission shall authorize by order the applied-for recovery, and the Commission order shall establish a cost recovery mechanism, such as a rider, for recovering the amount to be recovered; specify that amount; limit the amount to not more and not less than the amount

of the total public way fee incurred; and require periodic adjustment of the mechanism based on revenues recovered. Unless the public way fee levied on and payable by the public utility being recovered is determined to be unreasonable, unjust, unjustly discriminatory, or unlawful by the Commission, cost recovery under R.C. 4939.07(B) shall be from all customers of the public utility generally. R.C. 4939.07(B)(2).

{¶ 4} Pursuant to R.C. 4939.07(D)(1), a public utility subject to the rate-making jurisdiction of the Commission may file an application with the Commission for such accounting authority as may be reasonably necessary to classify certain costs as regulatory assets for the purpose of recovering those costs. Under R.C. 4939.07(D)(2), a cost is eligible for recovery only when it is both (a) directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way or an appropriate allocation and assignment of costs related to implementation of this section, excluding any cost arising from a public way fee levied upon and payable by the public utility, and (b) incurred by the public utility both after January 1, 2002, and after the test year of the utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates. As with an application under R.C. 4939.07(B), the Commission is statutorily obligated to authorize the applied-for accounting authority. R.C. 4939.07(D)(1).

{¶ 5} If the Commission determines that classification of a cost described in R.C. 4939.07(D)(2) as a regulatory asset is not practical or that deferred recovery of the cost would impose a hardship on the utility or its customers, the Commission shall establish a charge and collection mechanism to permit the public utility full recovery of that cost. Hardship is presumed for any public utility with less than 15,000 bundled sales customers and for any utility for which the annualized aggregate amount of additional cost that otherwise may be eligible for such classification exceeds the greater of \$500,000 or 15 percent of the total costs that are described in R.C. 4939.07(D)(2)(a) and were considered by the Commission for the purpose of establishing rates in the public utility's most recent rate case proceeding. R.C. 4939.07(D)(3).

{¶ 6} Finally, R.C. 4939.07(E) mandates that any application submitted under R.C. 4939.07(B) or (D) be processed as an application not for an increase in rates under R.C. 4909.18. Additionally, the Commission shall conclude its consideration of the application and issue a final order not later than 120 days after the application's filing date. A final order regarding a recovery mechanism authorized under the statute shall provide for any retroactive adjustment deemed appropriate by the Commission.

{¶ 7} R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in the proceeding by filing an application within 30 days of the entry of the order upon the Commission's journal.

B. Procedural History

{¶ 8} On September 15, 2021, pursuant R.C. 4939.07, Ohio Gas filed an application for authority to establish a right-of-way rider (ROW Rider), along with corresponding applications for authority to change accounting methods and to revise its tariffs (Application).

{¶ 9} On September 22, 2021, Ohio Consumers' Counsel (OCC) filed a motion to intervene on behalf of Ohio Gas's residential customers in Case No. 21-943-GA-RDR.

{¶ 10} On November 22, 2021, Staff filed its review and recommendation regarding the Company's Application (Staff Report) recommending that the Commission approve the Application subject to stated recommendations.

{¶ 11} On December 13, 2021, OCC filed comments requesting that the Commission reject Staff's recommendation and not approve the Application.

{¶ 12} By Finding and Order dated December 15, 2021, the Commission granted OCC's motion to intervene and approved the Application, subject to Staff's recommendations.

{¶ 13} On January 14, 2022, OCC filed an application for rehearing in Case No. 21-943-GA-RDR. Ohio Gas filed a memorandum contra the application for rehearing on January 24, 2022.

{¶ 14} In an Entry on Rehearing issued February 9, 2022, the Commission granted rehearing for further consideration of the matters specified in OCC's application for rehearing.

C. *OCC's Application for Rehearing*

{¶ 15} OCC asserts that the Commission's December 15, 2021 Finding and Order is unreasonable and unlawful because it misapplied R.C. 4939.07. More specifically, OCC contends that the Finding and Order authorizing Ohio Gas to charge consumers for capital costs associated with municipal rights-of-way is unreasonable and unlawful because the statute authorizes charging consumers only for expenses. In this, OCC argues that the Commission should apply the words in R.C. 4939.07 based on their meaning in the field of utility regulation, "consistent with the General Assembly's intent," and that, in failing to do so, the Commission made a legal error in applying the statute to allow Ohio Gas to charge consumers for capital investment costs associated with municipal rights-of-way.

{¶ 16} Citing to basic principles of statutory construction, OCC states that R.C. 4939.07's plain language must be construed and applied as written with words and phrases that have acquired a technical or particular meaning given that connotation. OCC argues that the Commission failed to analyze the statute in detail and erred in concluding that the statute does not categorize costs that are deferrable or recoverable. According to OCC, the statute first provides that the Commission shall authorize such accounting authority "as may be reasonably necessary to classify any cost described in division (D)(2) * * * as a regulatory asset for the purpose of recovering that cost." Here, OCC stresses the use of the term "regulatory asset," and asserts that only an expense-turned regulatory asset can be deferred for possible future collection from consumers. Per accounting rules authorized for use under R.C. 4905.13 and Ohio Adm.Code 4901:1-13-13, however, OCC contends that

costs of utility capital expenditures are not deferred for future collection from consumers. OCC avers that capital expenditures are not regulatory assets – only expenses so authorized by the Commission are regulatory assets.

{¶ 17} OCC contends that additional language within the statute supports its conclusion that only expenses, and not capital costs, are recoverable under R.C. 4939.07. First, OCC asserts that, because the term “test year” has a known, technical meaning and because the statute limits (in part) a cost’s eligibility for recovery to those costs incurred after the test year of the utility’s most recent rate proceeding in R.C. 4939.07(D)(2)(b), the costs described in the statute are expenses only. Second, OCC observes that the statute repeats its use of the term “regulatory asset” in R.C. 4939.07(D)(3), which, under specified circumstances, permits immediate collection of costs classified as such under (D)(1). For all of the above reasons, OCC submits that the Commission should have applied the known and customary terms used in R.C. 4939.07 to determine that Ohio Gas’s capital project costs are not expenses that can be deferred and, therefore, are not eligible for recovery under the statute.

{¶ 18} OCC further argues that allowing Ohio Gas to charge consumers for capital investment costs under the statute leads to an absurd result and double collection from consumers. OCC asserts that approval of the Application will result in unjust and unreasonable rates because, instead of paying a small annual percentage of long-lived capital assets through annual depreciation expenses, consumers will pay for the Company’s capital projects over a nine-month period rather than over 40 years. Additionally, OCC contends that the approved charge does not include the removal of retired plant from the rate base that was set in the Company’s most recent rate case, which results in Ohio Gas continuing to receive return of and on the retired assets despite the fact that they no longer being used to provide service.

{¶ 19} In short, OCC proclaims that allowing Ohio Gas to collect from consumers capital investments under R.C. 4939.07 turns longstanding and fundamental utility

ratemaking on its head and leads to an absurd result. OCC urges the Commission to grant rehearing, apply R.C. 4939.07 as plainly written, and reject the Company's Application.

D. The Company's Memorandum Contra Rehearing

{¶ 20} The Company's response to OCC's application for rehearing is twofold. First, Ohio Gas pronounces the application for rehearing to be procedurally flawed. Second, Ohio Gas counters the merits of the arguments set forth in the filing.

{¶ 21} Ohio Gas asserts that the Commission must deny the application for rehearing because it is untimely and fails to comply with the statutory requirements of R.C. 4903.10. Ohio Gas declares that this proceeding includes three separate applications—one to establish the ROW Rider (21-943-GA-RDR), one for tariff approval (21-944-GA-ATA), and one for authority to change accounting methods (21-945-GA-AAM)—but OCC filed to intervene and for rehearing in 21-943-GA-RDR only. Ohio Gas claims this is fatal to OCC's application for rehearing because the filing raises alleged errors that the Company surmises can only be raised in the accounting case. And, with OCC not making an appearance or seeking leave to file an application for rehearing in what the Company deems the correct case, Ohio Gas contends that the Commission is jurisdictionally precluded from considering the application for rehearing under R.C. 4903.10.

{¶ 22} In support of this argument, Ohio Gas points to the language of R.C. 4903.10 and a previous Commission proceeding the Company submits is exactly on point. In the dual-captioned proceeding *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 09-1089-EL-POR, and *In the Matter of the Application of Ohio Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case No. 09-1090-EL-POR (together, *Program Portfolio Plan Proceeding*), an intervenor submitted an application for rehearing that bore both captions but was filed only in Case No. 09-1089-EL-POR. On rehearing, the Commission noted that the party making an electronic filing controls in which case or cases the party will file its document. And, in that case, the intervenor "did not select

or input Case No. 09-1090-EL-POR and, therefore, the filing of its application for rehearing did not occur in Case No. 09-1090-EL-POR. As a result, there is no application for rehearing for the Commission to consider in 09-1090-EL-POR.” *Program Portfolio Plan Proceeding*, Entry on Rehearing (July 14, 2010) at 4. Ohio Gas submits that OCC’s application for rehearing raises accounting issues only and would be properly filed in Case No. 21-945-GA-AAM. Because OCC filed the application under only Case No. 21-943-GA-RDR, Ohio Gas urges the Commission to reach the same conclusion it did in the *Program Portfolio Plan Proceeding* and find that there is no application for rehearing to consider.

{¶ 23} As to the merits of the application for rehearing, Ohio Gas starts by stating that OCC’s argument regarding the double recovery of costs is incorrect. Ohio Gas explains that, throughout each calendar year, the Company expects to incur some level of directly incurred right-of-way costs eligible for recovery under Part A of the ROW Rider, which costs will be recognized in an annual true-up filing made by March 31 for rates effective October 31 of each year. Because the ROW Rider rates recover the annually authorized amount over the 12-month collection period, the amount will be accounted for in the same manner as other contributions in aid of construction. In other words, Ohio Gas states that the ROW Rider collections will be accounted for as a reduction to rate base—costs collected through the ROW Rider will not show up in future base rates. The Company further asserts that both Staff and the Commission are amply equipped to review future rate proceedings to ensure that costs collected through the ROW Rider are not later recovered in future base rates.

{¶ 24} Ohio Gas also maintains that OCC’s opposition to the structure of the ROW Rider is unwarranted. First, Ohio Gas argues that OCC’s position is undermined by the Commission’s authorization of numerous infrastructure development riders. The Company observes that the authorizing statutes for each mechanism use the term “cost,” or a derivate such as “cost-recovery,” with no reference to the term “expense.” Ohio Gas additionally explains that the accounting for both mechanisms is similar, with directly incurred costs being recorded as a regulatory asset until collected. Furthermore, the Company submits

that the ROW Rider is a more favorable mechanism for its customers. With the proposed ROW Rider, the Company affirms that it has voluntarily waived its right for an opportunity to earn its authorized rate of return on investment, a feature that would not be available if Ohio Gas proposed a capital expenditure program (CEP) rider as proposed by OCC in its original comments. Finally, the Company contends that the presence and availability of different cost recovery mechanisms (the CEP rider or an alternative rate plan) belies OCC's assertion that the ROW Rider leads to absurd results and is contrary to fundamental utility ratemaking.

{¶ 25} Finally, Ohio Gas characterizes OCC's statutory interpretation argument as an attempt to rewrite – rather than apply the plain meaning of – an unambiguous statute. Ohio Gas informs that R.C. 4939.07 uses the term “cost” 15 times, including when the statute defines a “cost eligible for recovery” as “only such cost” that is “the cost directly incurred by the public utility” and “the cost is incurred” after a specified timeframe. R.C. 4939.07(D)(2)(a) and (b). Yet, the term “expense” is never used. Thus, says Ohio Gas, a plain reading of the statute requires the Commission to analyze “costs,” and not “expenses” as proffered by OCC, when considering whether the Company's costs can be recovered through a mechanism under the statute. The Company additionally argues that OCC's belief that R.C. 4905.13 and Ohio Adm.Code 4901:1-13-13 prohibit capital costs from being recorded as regulatory assets is unfounded. Ohio Gas reasons that the statute grants jurisdiction over a public utility's accounting for regulatory purposes and the rule provides that natural gas utilities should generally follow a prescribed system of accounts, but neither prohibits the accounting necessary to permit the recovery of public way fees under R.C. 4939.07. In short, Ohio Gas argues that interpretation of the plain language of R.C. 4939.07 as written produces a result consistent with the Commission's December 15, 2021 Finding and Order. As such, the Company states that OCC's application for rehearing is without merit.

E. *The Commission's Conclusion*

{¶ 26} Initially, the Commission finds that OCC's application for rehearing is properly before us. While OCC risked the viability of its arguments by choosing to move for intervention, file comments, and file an application for rehearing under only one of the three case captions comprising these proceedings, that risk was not fatal in this instance. These proceedings are distinguishable from the *Program Portfolio Plan Proceeding* because OCC filed its application for rehearing in the relevant case. The controversy placed at issue by OCC is whether Ohio Gas's application to establish a ROW Rider under R.C. 4939.07 was properly approved. The application for rehearing may reference accounting principles, but OCC is clearly challenging the Commission's finding that the rider is appropriately established under the statute. And that challenge centers on statutory interpretation and the creation of the rider for cost recovery, not solely accounting methods. As such, the application for rehearing is properly filed and considered under Case No. 21-943-GA-RDR.

{¶ 27} Upon review, however, we find that the application for rehearing has no merit. Reading and interpreting the plain language of the statute leads only to the result reached in our Finding and Order: the statute sets forth a process for the deferral and recovery of right-of-way costs imposed on a public utility, as well as costs directly incurred by the utility as a result of local regulation of its occupancy or use of a public way, that is, essentially, mandatory. As noted by Ohio Gas, the statute uses the term "cost" numerous times without a single reference to expenses. In fact, in the same sentence OCC quotes regarding regulatory assets, the statute specifically states that a public utility may apply for, "and the [Commission] * * * shall authorize, such accounting authority as may be reasonably necessary to classify *any* cost described in [section (D)(2)] as a regulatory asset for the purpose of recovering that cost." R.C. 4939.07(D)(1) (emphasis added). The statute simply does not differentiate between costs and expenses or between types of costs, so long as the cost is one described in R.C. 4939.07(D)(2). Had the legislature intended that capital costs be excluded from consideration for recovery under R.C. 4939.07, it could have clearly stated as much. It did not. As such, the Commission cannot conclude that the legislature intended

to exclude said costs from the “any cost described in [R.C. 4939.07(D)(2)]” authorized for recovery under the statute. As discussed in the Finding and Order, the costs under consideration in Ohio Gas’s Application fall within the statutory definition and are, therefore, recoverable. Finding and Order (Dec. 15, 2021) at ¶ 20. We further find that there are adequate measures in place through the annual true-up of the ROW Rider, coupled with the opportunity to thoroughly review future base rate filings, to render OCC’s concerns regarding double recovery unfounded. Accordingly, the Commission concludes that OCC’s application for rehearing should be denied.

III. ORDER

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That OCC’s January 14, 2022 application for rehearing be denied.
It is, further,

{¶ 30} ORDERED, That a copy of this Second Entry on Rehearing be served upon all parties of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

PAS/hac

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Summary: Entry on Rehearing denying the application for rehearing filed by Ohio Consumers' Counsel electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio