

## 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

### FIFTH ENTRY ON REHEARING

Entered in the Journal on September 7, 2022

#### I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing filed by Suburban Natural Gas Company on November 5, 2021, November 19, 2021, and March 25, 2022.

#### II. DISCUSSION

##### A. *Procedural Background*

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

{¶ 3} The fixation of rates for public utilities in the state of Ohio is governed by R.C. Chapter 4909. R.C. 4909.15 sets forth the formula prescribed by the General Assembly for the fixation of reasonable rates for a public utility. Among other things, in fixing just and reasonable rates, the Commission is required, pursuant to R.C. 4909.15(A)(1), to determine 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.”

{¶ 4} On August 31, 2018, Suburban filed, pursuant to R.C. 4909.18, an application to increase its rates for natural gas distribution service.

{¶ 5} Pursuant to R.C. 4909.19, Staff conducted an investigation of the facts, exhibits, and matters relating to the application. On February 6, 2019, Staff filed a written report of its investigation (Staff Report). Objections to the Staff Report were filed by Suburban, Ohio Consumers’ Counsel (OCC), and Ohio Partners for Affordable Energy (OPAE) on March 8, 2019.

{¶ 6} On May 23, 2019, a joint stipulation and recommendation (Stipulation) was filed by Suburban and Staff. OCC and OPAE opposed the Stipulation.

{¶ 7} On September 26, 2019, the Commission issued an Opinion and Order, adopting the Stipulation and resolving all of the issues related to Suburban’s application to increase its natural gas distribution rates. Among other matters, the Stipulation provided for a phase-in of the total revenue increase and revenue requirement over three years, as well as a phase-in of Suburban’s 4.9-mile DEL-MAR pipeline extension into rate base over a three-year period. More specifically, the Stipulation stated that 50 percent of the current book value of the pipeline extension would be included in rate base in the first year of the phase-in, followed by 80 percent in the second year, and the full 100 percent in the third year and thereafter. September 26, 2019 Opinion and Order at ¶¶ 25-26, 31.

{¶ 8} On October 28, 2019, OCC filed an application for rehearing, which was denied by the Commission on April 22, 2020.

{¶ 9} On June 22, 2020, OCC filed a notice of appeal to the Supreme Court of Ohio with respect to the Commission’s orders in these proceedings.

{¶ 10} On September 4, 2020, Suburban filed a request to implement the second phase of its distribution rate increase, which was approved to the extent set forth in an Entry issued by the Commission on September 23, 2020. Suburban was authorized to implement a fixed customer service charge of \$34.41 for the small general service (SGS) class, a fixed customer service charge of \$178.95 with a volumetric charge of \$2.1251 per thousand cubic feet (Mcf) for the large general service (LGS) class, and a fixed customer service charge of \$168.61 with a volumetric charge of \$2.3817 per Mcf for the large general transportation service (LGTS) class. In accordance with the Commission's Entry, Suburban filed tariffs reflecting the approved charges on September 25, 2020.

{¶ 11} On August 23, 2021, Suburban filed a notice requesting approval of revised tariffs to implement the third and final phase of its distribution rate increase, with an effective date of September 30, 2021. In the notice, Suburban proposed a fixed customer service charge of \$34.60 for the SGS class, a fixed customer service charge of \$195.87 with a volumetric charge of \$2.1811 per Mcf for the LGS class, and a fixed customer service charge of \$186.90 with a volumetric charge of \$2.4444 per Mcf for the LGTS class.

{¶ 12} On September 14, 2021, Staff filed its review and recommendation in response to Suburban's notice.

{¶ 13} On September 21, 2021, the Supreme Court of Ohio determined that the Commission failed to properly apply the used-and-useful standard set forth in R.C. 4909.15(A)(1) with respect to the DEL-MAR pipeline extension, specifically "by looking beyond the date certain and in considering whether the investment was prudent rather than 'useful.'" The Court, therefore, remanded these proceedings to the Commission to "evaluate the evidence and determine whether the 4.9-mile pipeline extension was used and useful as of the date certain." *In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224, 184 N.E.3d 44, ¶ 35.

{¶ 14} On September 22, 2021, OCC filed a motion and request for expedited ruling. In its motion, OCC requested that, in light of the Court's decision, the Commission deny

Suburban's request to implement the third year of the phase-in. In addition, OCC proposed that the Commission direct Suburban to file tariffs reflecting the value of 2.0 miles of the 4.9-mile DEL-MAR pipeline extension, while these proceedings are pending on remand. According to OCC, this would decrease the customer service charge for the SGS class from \$34.41 to \$33.09 per month. In the alternative, OCC requested that the Commission immediately order that the customer service charge be subject to refund as of the date of the Court's decision.

{¶ 15} On September 29, 2021, Suburban filed a memorandum contra OCC's motion. Among other things, Suburban argued that OCC misstated the Court's holding and other aspects of the Court's decision; ignored key precedent and R.C. 4909.15, pursuant to which Commission rate orders remain in effect until the Commission issues a subsequent order; acted untimely in opposing the Company's notice to implement the third year of the phase-in; attempted to relitigate issues that have already been resolved by the Court or the Commission; and sought to interject additional record evidence. Suburban also emphasized that OCC's request to include only 2.0 miles of the 4.9-mile DEL-MAR pipeline extension in rate base, which would result in a \$5 million reduction, would prevent the Company from meeting its existing financial obligations and cause severe financial injury.

{¶ 16} By Entry dated October 6, 2021, the Commission found, in light of the Court's decision, that Suburban's distribution charges should remain at the amounts currently in effect. The Commission also directed Suburban to file revised tariffs that provide that the customer service charge and usage charge are being collected subject to refund, as of September 21, 2021, and until otherwise ordered by the Commission. Finally, the Commission established a briefing schedule for the parties to address the issue of whether the 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.

{¶ 17} On October 8, 2021, Suburban filed a motion seeking a partial stay of execution of the October 6, 2021 Entry.

{¶ 18} On October 13, 2021, Suburban filed correspondence, along with compliance tariffs in response to the October 6, 2021 Entry.

{¶ 19} On October 15, 2021, OCC filed a memorandum contra Suburban's motion for a stay.

{¶ 20} OCC also filed on October 15, 2021, an objection requesting that the Commission reject Suburban's compliance tariffs.

{¶ 21} By Entry issued on October 20, 2021, the Commission noted that it was not the intention of the Commission to require that the full amount of the customer service charge and the usage charge be collected subject to refund; rather, it was only a portion of the charges that would be subject to further review by the Commission on remand. The Commission found that Suburban's compliance tariff filing should be approved with modifications, in order to provide that the customer service charge and the usage charge were subject to refund to the extent that they included costs associated with more than 2.0 miles of the 4.9-mile DEL-MAR pipeline extension. Finally, Suburban's motion for a partial stay was denied as moot.

{¶ 22} Pursuant to the October 20, 2021 Entry, Suburban filed revised tariffs on October 21, 2021.

{¶ 23} On October 28, 2021, Staff filed its initial brief addressing the issue identified in the Court's remand. Initial briefs on remand were filed by Suburban and OCC on October 29, 2021.

{¶ 24} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined

therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 25} On November 5, 2021, Suburban filed an application for rehearing of the October 6, 2021 Entry. OCC filed a memorandum contra the application for rehearing on November 15, 2021.

{¶ 26} On November 12, 2021, reply briefs on remand were filed by Suburban and OCC.

{¶ 27} On November 19, 2021, Suburban filed an application for rehearing of the October 20, 2021 Entry. OCC filed a memorandum contra the application for rehearing on November 29, 2021.

{¶ 28} By Third Entry on Rehearing dated December 1, 2021, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing filed by Suburban on November 5, 2021, and November 19, 2021.

{¶ 29} On February 23, 2022, the Commission issued an Order on Remand. Upon review of the record, and in accordance with R.C. 4909.15(A) and the Court's decision, the Commission concluded that there was insufficient evidence to demonstrate that the entire 4.9-mile pipeline extension was useful as of the date certain and that the Stipulation should, therefore, be modified.

{¶ 30} Pursuant to the February 23, 2022 Order on Remand, Suburban filed revised tariffs on March 4, 2022.

{¶ 31} On March 25, 2022, Suburban filed an application for rehearing of the February 23, 2022 Order on Remand. OCC filed a memorandum contra the application for rehearing on April 4, 2022.

{¶ 32} By Fourth Entry on Rehearing dated April 20, 2022, the Commission granted rehearing for further consideration of the matters specified in the application for rehearing filed by Suburban on March 25, 2022.

{¶ 33} The Commission has reviewed and considered all of the arguments raised in the applications for rehearing filed by Suburban on November 5, 2021, November 19, 2021, and March 25, 2022. Any argument raised on rehearing that is not specifically discussed herein has been thoroughly and adequately considered by the Commission and should be denied.

**B. Summary of the Applications for Rehearing**

**1. NOVEMBER 5, 2021 APPLICATION FOR REHEARING**

{¶ 34} In its November 5, 2021 application for rehearing, Suburban raises three grounds for rehearing with respect to the Commission's October 6, 2021 Entry. First, Suburban argues that the Commission erred by unjustly, unreasonably, and unlawfully voiding the September 26, 2019 Opinion and Order prior to hearing the issue remanded by the Supreme Court of Ohio. Specifically, Suburban asserts that, until the Commission issues an order addressing the Court's remand, the September 26, 2019 Opinion and Order remains in full effect. According to Suburban, R.C. 4909.15(E) and Ohio Supreme Court precedent are 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. *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶¶ 51-52; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 105-106, 346 N.E.2d 778 (1976). Asserting that the September 26, 2019 Opinion and Order authorized the rates for the third year of the phase-in to take effect on September 30, 2021, Suburban maintains that those rates should be in effect during the remand proceedings, particularly given that the Court did not determine that the Company's rates and charges are unlawful. Suburban concludes that the Commission erred in the October 6, 2021 Entry by directing the Company

to file tariffs with rates and charges that deviate from those authorized in the September 26, 2019 Opinion and Order.

{¶ 35} In its second ground for rehearing, Suburban contends that the Commission erred by unjustly, unreasonably, and unlawfully voiding the September 26, 2019 Opinion and Order by not implementing the authorized third phase of the rate increase, which results in confiscatory rates. Noting that public utilities are required by R.C. 4909.15(E) to collect only those rates lawfully authorized, Suburban asserts that it is permitted to collect the rates authorized in the September 26, 2019 Opinion and Order, including, as of September 30, 2021, the rate increase for the third year of the phase-in. Suburban argues that the October 6, 2021 Entry goes beyond the Court's mandate and unjustly and unreasonably rejected the Company's notice to implement the rate increase for the third phase, which the Company claims has not been determined to be unlawful. Suburban maintains that the September 26, 2019 Opinion and Order remains in effect pending the outcome of the remand proceedings, which includes allowing the third phase of the rate increase to take effect. Suburban emphasizes that, even if the Commission orders rates and charges to be collected subject to refund during remand proceedings, the full rates and charges remain in effect; further, according to the Company, those rates and charges are not deemed subject to refund to customers unless and until the rates and charges are found to be unlawful. *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906; *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 29. Additionally, Suburban avers that the October 6, 2021 Entry established confiscatory rates and charges that will not afford the Company an opportunity to collect its authorized revenue requirement, is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

{¶ 36} In its third ground for rehearing, Suburban asserts that the Commission erred by unjustly, unreasonably, and unlawfully ordering the Company to collect the



entirety of its existing customer service charge and usage charge subject to refund.<sup>1</sup> Suburban argues that public utilities are required under R.C. 4909.15(E) to collect only those rates and charges that are lawfully authorized and that the filed-rate doctrine prevents them from refunding lawfully collected rates. *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259, 141 N.E.2d 465 (1957). Suburban emphasizes that the Court did not deem the Company's rates and charges unlawful or direct that they be subject to refund. Suburban adds that the Commission should not effectively modify the September 26, 2019 Opinion and Order without first making a determination on remand as to which charges are unauthorized and subject to refund. Suburban claims that the Commission erred by making the rates and charges subject to refund, while also directing Suburban not to implement the lawful rate increase authorized by the September 26, 2019 Opinion and Order. Suburban also reiterates that the authorized rates and charges must remain in effect during the remand proceedings and that they are only subject to refund if and when they are found to be unlawful.

{¶ 37} In its November 15, 2021 memorandum contra, OCC addresses Suburban's first and second grounds for rehearing together. OCC emphasizes that Suburban should not be allowed to continue charging customers for the entire pipeline while the case is pending on remand. OCC states that it would be unlawful, pursuant to R.C. 4909.15, for the Commission to allow Suburban to continue charging customers non-refundable rates that include the entire pipeline extension, as there is no lawful Commission ruling that allows Suburban to charge customers for the entire pipeline. According to OCC, the Ohio Supreme Court found the Commission's September 26, 2019 Opinion and Order to be unlawful when it reversed and remanded the case back to the Commission. Additionally, OCC contends that no constitutional taking occurred because Suburban has not shown that it has a legal right to charge customers for the entire pipeline extension. OCC states that Suburban

---

<sup>1</sup> Suburban acknowledges that, although the October 6, 2021 Entry required Suburban to collect its customer service charge and its usage charge subject to refund, the Commission subsequently clarified in its October 20, 2021 Entry that only a portion of the amount of those charges is subject to refund. Suburban states that it must nonetheless protect its interests by preserving its argument for appeal.

already received two rate increases, undercutting Suburban's claim of a constitutional taking, and the rate increases account for 50 percent of the pipeline costs and 80 percent of the pipeline costs. OCC also argues that Suburban's reference to *In re Columbus Southern Power Co.* and *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* is inapplicable because in this proceeding, the Ohio Supreme Court ruling did not automatically void the Commission ruling. Rather, the Commission issued a new entry to prohibit Suburban from increasing its rates and required Suburban's rates to be collected subject to refund.

{¶ 38} As to Suburban's third assignment of error, OCC argues that it is moot. According to OCC, Suburban acknowledges in its application for rehearing that only a portion of the charge is subject to refund. OCC also cites the Commission's October 20, 2021 Entry that states only rates related to more than two miles of the pipeline extension are subject to refund.

## 2. NOVEMBER 19, 2021 APPLICATION FOR REHEARING

{¶ 39} Suburban raises three grounds for rehearing with respect to the Commission's October 20, 2021 Entry. In its first ground for rehearing, Suburban argues that the Commission erred in denying the Company's motion to stay the October 6, 2021 Entry, as the Commission voided the September 26, 2019 Opinion and Order prior to issuing an order on remand. Suburban asserts 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. R.C. 4909.15(E); *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976). According to Suburban, the rate schedule that was authorized by the September 26, 2019 Opinion and Order to be in effect as of September 30, 2021, was the third phase of the rate increase and that the rates for the third phase should, therefore, be in effect during the remand proceeding. Suburban also argues that, given this error, it filed a motion to stay on October 8, 2021, in which it demonstrated that the Company was likely to prevail on remand, that the Company and its customers will suffer irreparable harm absent a stay, that a partial stay will not substantially harm any party, and that public

policy favors a stay. Suburban claims that it satisfied the Commission's four-part test for consideration of a stay and that the Commission erred in denying the Company's motion. Suburban contends that, by precluding implementation of the phase-in rates for the third year, the Commission violated Ohio law and subjected the Company and its customers to the risk of irreparable harm.

{¶ 40} In its second ground for rehearing, Suburban asserts that the Commission erred in voiding the September 26, 2019 Opinion and Order by not implementing the authorized third phase of the rate increase, which results in confiscatory rates. Suburban contends that the Commission has deprived the Company of the opportunity to collect its full authorized revenue requirement and that the state has, therefore, taken the use of the Company's property without paying just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896); *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001). Suburban claims that, because the Commission has required the Company to maintain a gross annual revenue that results in an insufficient rate of return during the pendency of the remand, the Company will suffer from unjust and unreasonable compensation and be prevented from supplying safe and reliable service.

{¶ 41} Suburban, in its third ground for rehearing, contends that the Commission erred in ordering the Company to collect a portion of its customer service charge and usage charge subject to refund. Suburban notes that the Court did not authorize the Commission to require the Company to make its customer service and usage charges subject to refund. Suburban also emphasizes that it is statutorily required to collect only those rates and charges that are lawfully authorized, that the filed-rate doctrine precludes the Company from refunding lawfully collected rates, and that the Court did not deem the Company's rates and charges unlawful. According to Suburban, the full rates and charges that were authorized to be in effect as of September 30, 2021, should be in effect and remain in effect

pending the issuance of a remand order, and should only be subject to refund if and when they are found to be unlawful.

{¶ 42} In its November 29, 2021 memorandum contra, OCC first generally disputes Suburban's premise that the September 26, 2019 Opinion and Order is a lawful order. OCC argues that the September 26, 2019 Opinion and Order was reversed by the Ohio Supreme Court, thus it is not a lawful order. OCC states that there is no basis to charge consumers for the entire pipeline extension because there is no longer a lawful Commission order finding that the entire pipeline extension was useful on the date certain.

{¶ 43} As to the first and second grounds for rehearing, OCC reiterates that Suburban's arguments are premised on the idea that the September 26, 2019 Opinion and Order remains valid, which OCC disputes. OCC also cites R.C. 4909.15 and 4905.22 for the proposition that a utility can only charge customers for property that is used and useful. OCC reasons that the Commission initially found that the entire pipeline extension was used and useful, but that finding was reversed by the Ohio Supreme Court, so there is no lawful ruling allowing charges for the entire pipeline extension. For those reasons, OCC contends that it would be unlawful, pursuant to R.C. 4909.15 and 4905.22, for the Commission to allow Suburban to charge customers for the entire pipeline extension. OCC also contends that Suburban's citations for the argument that a Commission order is not automatically void when the Ohio Supreme Court reverses it are inapplicable. OCC asserts that *In re Columbus Southern Power Co.* and *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* do not apply because the Commission issued an entry after the Ohio Supreme Court ruling. OCC asserts that nothing prohibits the Commission from modifying or staying the September 26, 2019 Opinion and Order, especially when the modification is in response to the Ohio Supreme Court ruling. Further, OCC disputes Suburban's claim that it has a constitutional right to collect the disputed charges. According to OCC, the charges have not yet been lawfully approved, as there is no valid Commission ruling stating that charges for the entire pipeline extension are lawful. Thus, OCC reasons that there can be no constitutional right to collect charges that have not been approved.

{¶ 44} With respect to the third ground for rehearing, OCC again disputes Suburban's reliance on the idea that the September 26, 2019 Opinion and Order is still a lawful order. OCC asserts that the order was based on an incorrect interpretation of the law and is therefore invalid. For that reason, OCC contends that it is proper for rates to be refundable to the extent they include charges for costs related to more than two miles of the pipeline extension. OCC states that the Commission complied with Ohio Supreme Court precedent by setting forth a refund mechanism in the Commission's October 20, 2021 Entry, citing *In re Application of Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, ¶ 23. More specifically, OCC adds that customers are paying charges for 3.92 miles of the pipeline extension, and they will deserve a refund if the Commission rules that rates should only include two miles of pipeline.

### 3. MARCH 25, 2022 APPLICATION FOR REHEARING

{¶ 45} With respect to the February 23, 2022 Order on Remand, Suburban raises four grounds for rehearing. First, Suburban argues that the Commission ignored 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. According to Suburban, the Commission incorrectly concluded that the Company did not provide sufficient evidence to establish that the full 4.9-mile pipeline extension was useful and beneficial in rendering service to its customers as of the date certain. Suburban claims that the Commission primarily focused on one part of Company witness Grupenhof's testimony that referenced one point in time in 2018, not February 28, 2019, which was the date certain. Suburban argues that the Commission disregarded other portions of the testimony demonstrating that the 4.9-mile pipeline extension, as of the date certain, provided necessary system pressure and reserve capacity to ensure safe and reliable service to existing customers in the event of cold weather events. Suburban adds that the Commission overlooked record evidence that demonstrates that shorter alternatives would not be adequate or appropriate. Suburban emphasizes that its hired engineering firm, Utility Technologies International Corporation (UTI), modeled alternative pipeline lengths and system pressures, with UTI and the Company ultimately

determining that a shorter extension would be insufficient to provide adequate reserves to existing customers or safe and reliable service at adequate pipeline pressure. Suburban also states that it provided evidence regarding the risk that the system pressure would drop below minimum operating levels, as well as the consequences associated with a catastrophic failure due to low operating pressure. Additionally, Suburban asserts that future growth can play a role in the used and useful analysis. Suburban emphasizes that the Court held that extra capacity is useful in appropriate circumstances, such as when it serves to protect against unforeseen contingencies. Finally, Suburban argues that the Commission disregarded the evidence that it relied upon in the September 26, 2019 Opinion and Order and the April 22, 2020 Second Entry on Rehearing and failed to explain its reversal, in violation of R.C. 4903.09.

{¶ 46} Second, Suburban claims that the Commission erred in ordering the Company to implement confiscatory rates, in violation of state and federal law. According to Suburban, the Commission, contrary to United States Supreme Court precedent and the Fifth and Fourteenth Amendments to the United States Constitution, deprived the Company of recovery of actual costs together with a fair return, a reasonable opportunity to recover prudently-incurred costs, and a fair and reasonable rate of return on its capital, given that the entire 4.9 mile pipeline extension was necessary to provide adequate reserve capacity, appropriate operating pressure, and safe and reliable service to customers as of the date certain.

{¶ 47} Third, Suburban contends that the Commission erred in ordering the Company to issue refunds for previously collected rates, in violation of Ohio law and the filed-rate doctrine. Suburban asserts that the filed-rate doctrine generally prohibits refunds for lawfully collected rates and that lawfully implemented rates remain in effect until the Commission issues a new order. According to Suburban, the Supreme Court of Ohio did not find any portion of the Company's rates or charges to be unlawful or order the Commission to reverse or refund any amounts and, therefore, the rates set in the Opinion and Order remained in effect until the Commission issued the Order on Remand and are

not subject to refund under the filed-rate doctrine. Suburban also notes that the Commission has recognized an exception to the filed-rate doctrine where the tariff provision for the rate or charge is reconcilable through a rider and contains language to provide for the refunds. Suburban claims that this exception is not applicable here, as the Commission ordered refunds of base distribution rates rather than a reconcilable rider and the Company's tariff language did not contain a refund mechanism until the October 6, 2021 Entry was issued.

{¶ 48} Finally, Suburban asserts that the Commission erred by staying the September 26, 2019 Opinion and Order and ordering that the customer service charge and usage charge be subject to refund prior to issuing an order on remand. Suburban notes that the Commission did not address in the February 23, 2022 Order on Remand the applications for rehearing filed by the Company on November 5, 2021, and November 19, 2021. Suburban states that, assuming the Order on Remand deemed the applications for rehearing moot, the Company seeks rehearing of the Order on Remand on the basis that the Commission did not find that the Company's authorized rates for the third year of the phase-in should have been implemented, and not made subject to refund, pending the issuance of the Order on Remand. As in its earlier applications for rehearing, Suburban argues 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. R.C. 4909.15(E); *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976). Suburban asserts that, 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 found to be unlawful. Noting that the Court did not deem Suburban's rates and charges unlawful, the Company claims that the Commission erred in departing from precedent by precluding implementation of the third year of the phase-in. Suburban also reiterates that, during the pendency of the remand, the

Commission established confiscatory rates and charges that did not afford the Company an opportunity to collect its authorized revenue requirement.

{¶ 49} In its April 4, 2022 memorandum contra, OCC asserts that the Commission properly applied the used and useful standard based on the Ohio Supreme Court's decision in this case. OCC contends that Suburban's first assignment of error merely rehashes the evidence that the Commission has already considered. OCC emphasizes that the Commission detailed the rationale for its decision, and that decision was firmly grounded in the record evidence, including evidence provided by Suburban's own witness.

{¶ 50} In response to Suburban's second ground for rehearing, OCC asserts that Suburban has no right to charge customers for more than the used and useful portion of the pipeline. OCC contends that Suburban doesn't have the right to charge customers for property that is not used and useful, so Suburban is not entitled to charge for the entire pipeline extension, thus the Commission did not unconstitutionally take anything from Suburban. OCC adds that Suburban could have waited to file its application for the rate increase to help build a stronger case that the full pipeline extension was used and useful on the date certain. Additionally, OCC notes the used and useful test continues to be utilized by the Ohio Supreme Court as the appropriate standard for consideration.

{¶ 51} OCC responds to Suburban's third argument by asserting that Suburban's argument relies on its claim that the September 26, 2019 Opinion and Order remained a lawful order after it was reversed and remanded by the Ohio Supreme Court, which OCC disputes. OCC emphasizes that the Commission issued an entry on October 6, 2021 that directed Suburban to file tariffs subject to refund as of the date of the Ohio Supreme Court decision, September 21, 2021. OCC asserts that the Commission's directive to refund consumers for charges collected after the Ohio Supreme Court decision does not violate the filed-rate doctrine.

{¶ 52} In response to Suburban's fourth argument, OCC first emphasizes that the Commission's Third Entry on Rehearing, issued on December 1, 2021, granted Suburban's



November 5, 2021, and November 19, 2021 applications for rehearing for the purpose of further consideration. OCC asserts that Suburban could have filed an application for rehearing of the December 1, 2021 Third Entry on Rehearing but did not do so, and is thus precluded from seeking rehearing on those issues now. According to OCC, Suburban's argument relies on the false premise that Suburban should be allowed to charge customers for the entire pipeline extension even though the Ohio Supreme Court reversed the Commission's September 26, 2019 Opinion and Order. OCC argues that the Commission rightfully ordered that Suburban could not further increase rates to include charges for the entire pipeline extension and the rates to be collected are subject to refund, to the extent they include charges for more than 2 miles of the pipeline extension. OCC agrees with Suburban that an Ohio Supreme Court decision does not automatically void a Commission ruling, but OCC explains that is why the Commission issued its October 6, 2021 Entry. OCC also contends that Suburban has cited no authority that would prohibit the Commission from staying or modifying its earlier order to preserve the intent of the Ohio Supreme Court ruling.

### **C. Commission Conclusion**

{¶ 53} As noted above, the Ohio Supreme Court remanded these proceedings on September 21, 2021, for the Commission to apply the proper used-and-useful standard with respect to Suburban's 4.9-mile pipeline extension. *In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224, 184 N.E.3d 44, ¶ 35. In response to the Court's directive, the Commission issued an Entry on October 6, 2021, which directed Suburban to file revised tariffs providing that the customer service charge and usage charge were being collected subject to refund, as of September 21, 2021. Subsequently, on October 20, 2021, the Commission issued an Entry to clarify that the customer service charge and usage charge were subject to refund only to the extent that they included costs associated with more than 2.0 miles of the 4.9-mile pipeline extension. Following the submission of remand briefs by the parties, the Commission issued an Order on Remand on February 23, 2022. Suburban timely filed applications for rehearing of the Commission's October 6, 2021, and October 20,

2021 Entries, as well as the February 23, 2022 Order on Remand. Given the similarities in several of Suburban's arguments, we will address the applications for rehearing in a collective approach.

{¶ 54} First, Suburban contends that, contrary to Ohio Supreme Court precedent, the Commission erred by staying or voiding the September 26, 2019 Opinion and Order prior to issuing an order on remand. The cited cases, however, do not support Suburban's position. Although we concur that the remand by the Court did not automatically render Suburban's existing rates unlawful, we disagree with the Company's claim that the Commission allegedly voided or stayed the September 26, 2019 Opinion and Order in a manner that is inconsistent with precedent. The Court has found that a remand does not automatically render the existing rates unlawful, because the rate schedule filed with the Commission remains in effect until the Commission executes the Court's mandate by an appropriate order. *In re Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976). Here, the rate schedule that was on file with the Commission and that remained in effect following the Court's remand was the rate schedule for the second year of the phase-in, which was approved by the Commission on September 23, 2020, and filed with the Commission by the Company on September 25, 2020. Although Suburban asserts that the Commission should have permitted the Company to implement the rates for the third year of the phase-in, the Court's precedent makes clear that it is the rate schedule filed with the Commission that remains in effect until the Commission issues a new order on remand. *Id.* Further, although the September 26, 2019 Opinion and Order approved the Stipulation's proposal to phase the pipeline extension into rate base over a three-year period, the Stipulation also contemplated that Suburban's revenue requirement allocation would be reviewed by Staff and approved by the Commission in advance of the second and third years of the phase-in. In fact, Suburban filed a notice seeking approval of revised tariffs to implement the third year of the phase-in on August 23, 2021; however, the request was not approved or even considered by the Commission due to the issuance of the Court's opinion

on September 21, 2021. As Suburban's proposed rate schedule for the third year was at no point approved by the Commission, it was never in effect or on file with the Commission. We, therefore, find that Suburban's arguments on this issue lack merit and, accordingly, the Company's first ground for rehearing in the November 5, 2021, and November 19, 2021 applications for rehearing, as well as the fourth ground for rehearing in the March 25, 2022 application for rehearing, should be denied.

{¶ 55} We likewise find no merit in Suburban's contention that, by precluding the Company from implementing the third year of the phase-in, the Commission established confiscatory rates, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In support of this argument, Suburban mainly reiterates that it should be permitted to implement the rates for the third year of the phase-in, as contemplated under the September 26, 2019 Opinion and Order. As discussed above, the Commission did not at any point approve or even act upon Suburban's notice requesting approval of revised tariffs to implement the third year of the phase-in. Additionally, there is no evidence supporting Suburban's position that the rates for the second year of the phase-in or the rates that are currently in effect are confiscatory, and the Company's position is undercut by the fact that it voluntarily agreed to the phase-in as part of the Stipulation that it recommended for the Commission's consideration. For these reasons, Suburban's second ground for rehearing in the November 5, 2021, November 19, 2021, and March 25, 2022 applications for rehearing, as well as the fourth ground for rehearing in the March 25, 2022 application for rehearing, should be denied.

{¶ 56} We also find no merit in Suburban's claim that the Commission erred in ordering that a portion of the customer service charge and usage charge be collected subject to refund. As Suburban acknowledges, there are certain circumstances where rates and charges may properly be made subject to refund. Here, we directed that a portion of Suburban's customer service and usage charges be subject to refund based on the Court's decision to remand the proceedings to the Commission. In prior cases involving a remand by the Court, the Commission has similarly directed that a rate or charge designated for

further review be collected from customers subject to refund during the pendency of the remand. See, e.g., *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, et al., Entry (May 18, 2016); *In re Columbus Southern Power Co.*, Case No. 08-917-EL-SSO, et al., Entry (May 25, 2011); *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863. The only other option available to the Commission, besides making the rates subject to refund, would have been to stay collection of the rate increase entirely, in light of the Ohio Supreme Court's reversal of the September 26, 2019 Opinion and Order. Suburban's third ground for rehearing in the November 5, 2021, November 19, 2021, and March 25, 2022 applications for rehearing should be denied.

{¶ 57} Finally, we do not agree with Suburban's assertion that the Commission overlooked evidence or otherwise failed to properly weigh the evidence. In applying the used-and-useful standard in R.C. 4909.15(A)(1), as instructed by the Court, we concluded that there is insufficient evidence in the record that the entire 4.9-mile pipeline extension was useful as of the date certain. As the Commission thoroughly explained in the February 23, 2022 Order on Remand, the evidence in the record does not show that a pipeline extension of 4.9 miles was beneficial for customers as compared to a shorter extension. Although Suburban witness Grupenhof indicated that other pipeline lengths were considered, the Company did not offer into the record any analysis of a length other than 4.9 miles. Further, as we found and discussed in the Order on Remand, the record reflects that a 2.0-mile pipeline extension would have been sufficient to serve the Company's customers on the date certain. February 23, 2022 Order on Remand at ¶¶ 54-57. In addition, consistent with the requirements in R.C. 4903.09, we fully explained the basis for our findings in the Order on Remand, which were informed by the directives and guidance in the Court's decision. As we noted, Suburban did not provide evidence of various alternative scenarios and modeling other than for a 4.9-mile pipeline extension. In the absence of this type of analysis, we are unable to determine, as advised by the Court's opinion, whether the 4.9-mile pipeline extension is a pipeline with adequate reserves or a pipeline overbuilt with excess capacity. *In re Application of Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-

3224, 184 N.E.3d 44, ¶ 39. As to Suburban's argument that expected future growth can play a role in the used and useful analysis, the Commission agrees when the circumstances are appropriate. However, in this proceeding, the Commission notes that, as described in the Order on Remand and consistent with the evidence, Suburban did not demonstrate the appropriate circumstances. The Commission followed the facts of the case and properly issued its decision. The Commission, therefore, justified the reversal from the September 26, 2019 Opinion and Order. Accordingly, the first ground for rehearing in Suburban's March 25, 2022 application for rehearing lacks merit and should be denied.

### III. ORDER

{¶ 58} It is, therefore,

{¶ 59} ORDERED, That the applications for rehearing filed by Suburban on November 5, 2021, November 19, 2021, and March 25, 2022, be denied. It is, further,

{¶ 60} ORDERED, That a copy of this Fifth 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

JWS/mef

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**9/7/2022 2:11:39 PM**

**in**

**Case No(s). 18-1205-GA-AIR, 18-1206-GA-ATA, 18-1207-GA-AAM**

Summary: Entry on Rehearing denying the applications for rehearing filed by Suburban Natural Gas Company on November 5, 2021, November 19, 2021, and March 25, 2022 electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio