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Court slams Ohio PUC for lax need review of new gas pipeline

By Tom Tiernan

Overturing an unanimous decision of the regulatory agency, the Ohio Supreme Court rebuked the Public Utilities Commission of Ohio this week for approving cost recovery for a new natural gas pipeline that evidence showed was longer and more costly than immediately needed to serve ratepayers.

The 6-1 ruling by the court Tuesday on the 2019 PUCO ruling was applauded by the state's utility ratepayer advocate, who suggested the case involving a Suburban Natural Gas Co. pipeline was only the latest in a long history of lax project reviews by the commission.

The Ohio Consumers Counsel (OCC) pointed out that the state Supreme Court made a similar finding about the PUCO violating the state's "used and useful" ratemaking standard in 1979 when it prematurely allowed rate recovery for the Davis-Besse nuclear plant.

"Forty-two years later and with yesterday's Supreme Court decision granting OCC's appeal, the PUCO is still violating the used and useful standard in Ohio law, to the benefit of a utility and at consumer expense," the OCC said Wednesday. "What has changed?"

The court said PUCO cited prudence standards in accepting a staff-negotiated settlement with Suburban that authorized rate recovery for a longer pipeline than the utility needed to meet consumer needs and avoid pipeline pressure dropping below minimum operating standards.

But the court said that while that PUCO's approach in the case might serve to avoid the need for small, incremental additions to the pipeline over short periods of time, "the problem is that such considerations go beyond the used-and-useful test"—the standard for utility rate recovery in Ohio.

The fight was over a small project by a small utility. Suburban serves about 16,000 customers in four counties north of Columbus, and the project was a 4.9-mile pipeline extension authorized by the Ohio Power Siting Board that went into service in February 2019.

Despite the small stakes, the OCC said the PUCO decision allowing rate recovery for the full 4.9-mile pipeline was improper because the \$8.9 million project was more costly than needed. The consumer advocate noted that siting board staff and engineering studies showed that a shorter two-mile pipeline was all that was needed for Suburban customers by the end of 2019.

Regulatory agencies at the state and federal level are facing similar issues, with the Federal Energy Regulatory Commission examining its public need determination process for new gas pipelines to ensure ratepayers are not saddled with unnecessary costs.

On the other side of the argument, pipeline operators such as Suburban argue that environmental harm associated with pipeline construction can be minimized by installing facilities slightly larger than what is needed at the time an application is made.

The PUCO conceded that a 2-mile pipeline addition may have been adequate to serve customers and avoid pressure problems by a certain date, but worried that Suburban would have to seek another extension later. It pointed to a National Association of Regulatory Utility Commissioners' guidebook about the "lumpy nature" of utility investments, essentially concluding that the 4.9-mile pipeline and rate recovery agreement was a prudent investment, the court related.

However, the court noted that the used-and-useful test has been a feature of utility ratemaking in Ohio since 1911—and that it fundamentally requires that facility investments must be used and useful to utility

customers who are paying for them at the time the projects are placed into service.

That does not mean that some added capacity could not be deemed useful or beneficial for consumers to guard against contingencies, the court added.

"In evaluating such circumstances, however, the question always must be whether the property is used and useful, not whether it was a prudent investment," the court said.

The court said the PUCO could not substitute its own test for what is called for in state utility ratemaking law, but that is exactly what it did when it authorized the rate settlement to take effect without examining whether the size of the pipeline would be deemed useful for Suburban customers in the winter of 2019.

None of the evidence in the case showed that a 4.9-mile pipeline extension was needed, with the data showing only that a pipeline addition of some length was needed to address safety concerns by the end of 2019, the court said.

"Because the PUCO failed to properly apply the used-and-useful standard, we remand this case for it to do so," it said. "On remand, the PUCO must evaluate the evidence and determine whether the 4.9-mile pipeline extension was used and useful as of the date certain."

Justice Michael Donnelly cast the only dissenting vote in the court ruling, saying the court should have afforded the PUCO more discretion in determining issues of pipeline capacity and utility needs to maintain safe service. The PUCO determination that the 4.9-mile pipeline extension was useful at the time it went into service should have been upheld, especially since the OCC did not provide its own engineering analysis and relied on testimony from one witness, he said.