

IN THE SUPREME COURT OF OHIO

LORRI TURNER, ADMINISTRATRIX, etc., : Case Nos. 2007-0035; 2007-0112
: :
Appellee, : On Appeal from the Cuyahoga County
: Court of Appeals, Eighth Appellate
-vs- : District
: :
OHIO BELL TELEPHONE COMPANY, et al., : Court of Appeals
: Case No. CA-05-087541
Appellants. : :

**BRIEF OF AMICUS CURIAE OHIO RURAL ELECTRIC COOPERATIVES, INC.
IN SUPPORT OF APPELLANTS, URGING REVERSAL**

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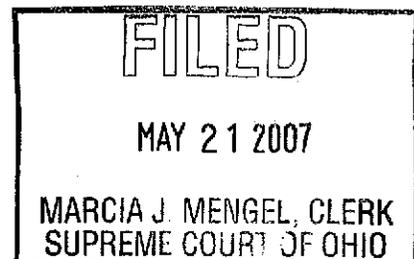


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STATEMENT OF INTEREST OF AMICUS CURIAE

Ohio Rural Electric Cooperatives, Inc. ("OREC") is a statewide association that provides various services to Ohio's non-profit electric cooperatives, including: (1) representing the cooperatives before the United States Congress and the Ohio General Assembly; (2) conducting safety and loss control programs; and (3) coordinating education and training programs for cooperative employees and directors. OREC's mission is to safeguard, enhance and optimize the business environment for electric cooperatives operating in the State of Ohio.

OREC's 24 member cooperatives provide electricity to homes and businesses in 77 of Ohio's 88 counties. OREC's cooperative members include: Adams Rural Electric Cooperative, Inc., Buckeye Rural Electric Cooperative, Inc., Butler Rural Electric Cooperative, Inc., Carroll Electric Cooperative, Inc., Consolidated Electric Cooperative, Inc., Darke Rural Electric Cooperative, Inc., Firelands Rural Electric Cooperative, Inc., The Frontier Power Company, Guernsey-Muskingum Electric Cooperative, Inc., Hancock-Wood Electric Cooperative, Inc., Holmes-Wayne Electric Cooperative, Inc., Licking Rural Electrification, Inc., Logan County Cooperative Power and Light Association, Inc., Lorain-Medina Rural Electric Cooperative, Inc., Mid-Ohio Energy Cooperative, Inc., Midwest Electric, Inc., North Central Electric Cooperative, Inc., North Western Electric Cooperative, Inc., Paulding-Putnam Electric Cooperative, Inc., Pioneer Rural Electric Cooperative, Inc., South Central Power Company, Tricounty Rural Electric Cooperative, Inc., Union Rural Electric Cooperative, Inc., and Washington Electric Cooperative, Inc. Midwest Energy Cooperative is not a member of OREC, but provides retail electric service to its consumer-owners in Ohio.

As illustrated in the table below, the cooperatives serve hundreds of thousands of Ohio consumers, and are responsible for the construction, maintenance, and inspection of tens of thousands of miles of line and hundreds of thousands of utility poles.

Cooperative	Total No. of Customers	Miles of Line	Approximate No. of Poles¹	Counties Served
Adams Rural Electric Cooperative, Inc.	8,539	1,306	22,986	Adams, Brown, Highland, Pike, and Scioto
Buckeye Rural Electric Cooperative, Inc.	19,019	2,632	46,323	Athens, Gallia, Jackson, Lawrence, Meigs, Pike, Ross, Scioto, and Vinton
Butler Rural Electric Cooperative, Inc.	11,024	1,045	18,392	Butler, Hamilton, Preble, and Montgomery
Carroll Electric Cooperative, Inc.	12,394	1,471	25,890	Carroll, Columbiana, Jefferson, Tuscarawas, Harrison, and Stark
Consolidated Electric Cooperative, Inc.	15,988	2,091	36,802	Delaware, Franklin, Knox, Licking, Marion, Morrow, Richland, and Union
Darke Rural Electric Cooperative, Inc.	5,047	863	15,189	Darke and Preble
Firelands Rural Electric Cooperative, Inc.	9,036	980	17,248	Ashland, Huron, Lorain, and Richland
The Frontier Power Company	8,722	1,498	26,365	Coshocton, Tuscarawas, Guernsey, Muskingum, Holmes, Knox, and Licking
Guernsey-Muskingum Electric Cooperative, Inc.	16,404	2,780	48,928	Guernsey, Muskingum, Tuscarawas, Morgan, Noble, Harrison, Coshocton, Licking, and Perry
Hancock-Wood Electric Cooperative, Inc.	12,679	1,613	28,389	Hancock, Wood, Sandusky, Seneca, Wyandot, Hardin, Allen, Putnam, Henry, and Erie

¹ Assumes one pole every 300 feet, which is the approximate average span length in the cooperative system.

Cooperative	Total No. of Customers	Miles of Line	Approximate No. of Poles¹	Counties Served
Holmes-Wayne Electric Cooperative, Inc.	16,650	2,192	38,579	Holmes, Wayne, Ashland, Stark, Tuscarawas, Coshocton, Knox, and Medina
Licking Rural Electrification, Inc.	24,009	2,954	51,990	Licking, Knox, Muskingum, Perry, Franklin, Richland, Ashland, Coshocton, and Delaware
Logan County Cooperative Power and Light Association, Inc.	4,623	725	12,760	Logan
Lorain-Medina Rural Electric Cooperative, Inc.	15,828	1,495	26,312	Lorain, Medina, Ashland, Huron, and Wayne
Mid-Ohio Energy Cooperative, Inc.	8,238	1,322	23,267	Marion, Hardin, Allen, Morrow, Wyandot, Crawford, Union, Auglaize, Logan, and Hancock
Midwest Electric, Inc.	10,316	1,546	27,210	Allen, Auglaize, Mercer, Van Wert, Putnam, Shelby, and Darke
Midwest Energy Cooperative	1,060	119	2,100	Fulton and Williams
North Central Electric Cooperative, Inc.	9,737	1,749	30,782	Seneca, Crawford, Richland, Huron, Sandusky, Hancock, Wyandot, and Wood
North Western Electric Cooperative, Inc.	5,856	971	17,090	Williams, Defiance, Henry, and Paulding

Cooperative	Total No. of Customers	Miles of Line	Approximate No. of Poles¹	Counties Served
Paulding-Putnam Electric Cooperative, Inc.	9,507	1,375	24,200	Paulding, Putnam, Defiance, Van Wert, and Allen
Pioneer Rural Electric Cooperative, Inc.	16,235	2,594	45,654	Miami, Shelby, Champaign, Darke, Montgomery, Clark, Madison, Union, Logan, Mercer, and Auglaize
South Central Power Company	111,017	11,552	203,315	Belmont, Fairfield, Franklin, Harrison, Highland, Hocking, Monroe, Perry, Pickaway, Pike, and Ross
Tricounty Rural Electric Cooperative, Inc.	4,385	607	10,683	Henry, Fulton, Putnam, Wood, and Lucas
Union Rural Electric Cooperative, Inc.	8,278	927	16,315	Union, Delaware, Logan, Marion, Hardin, and Champaign
Washington Electric Cooperative, Inc.	10,436	1,717	30,219	Guernsey, Noble, Monroe, Morgan, Athens, and Washington
TOTAL	375,027	48,124	846,988	

This case is of significant importance to OREC, the cooperatives whom it represents, the cooperatives' consumer-owners, and the public at large because it relates directly to the acceptable placement and location of utility poles and lines along Ohio's public roadways.

Collectively, the cooperatives own approximately 846,988 poles and 48,124 miles of line. Most of these poles and lines are located along Ohio's public roadways and within the road right-of-way (as opposed to being placed within a private easement). Under the new rule of law

announced by the Court of Appeals in this case, every one of the poles located within road right-of-way is now a liability magnet, and any pole placement can be second-guessed in the event of an automobile collision with that pole. As a matter of simply geometry, in any pole-impact accident, the plaintiff will now be able to argue that the pole would not have been hit had it been in a different location—an irrefutable fact, but a fact which OREC respectfully submits should be legally irrelevant.

ARGUMENT

The Ohio General Assembly long ago made the public policy judgment that because public utilities serve an important and unique public function, they should be afforded the opportunity to use public space to locate their facilities. Since this Court decided *Cambridge Home Telephone Co. v. Harrington* (1933), 127 Ohio St. 1, 186 N.E. 611, and *Ohio Bell Telephone Co. v. Lung* (1935), 129 Ohio St. 505, 196 N.E. 371, those decisions have been interpreted to mean that where a utility pole is located in an area intended or used for travel, the utility could be liable for the placement of the pole in that location. From that time more than seventy years ago, until this case, every Ohio court of appeals which has considered the liability of a utility for the placement of its facilities near the roadway has held that the placement of a utility pole in an area of the right-of-way *not* intended or used for travel does not constitute a danger or obstruction to those properly using the roadway; and that the utility therefore could not be liable in tort for its pole placement. See *Cincinnati Gas & Electric Co. v. Bayer* (1st Dist., Nov. 3, 1975), Hamilton App. Nos. C-74627, C-74628, 1975 Ohio App. LEXIS 6305; *Ferguson v. Cincinnati Gas & Electric Co.* (1st Dist. 1990), 69 Ohio App.3d 460; *Neiderbrach v. Dayton Power & Light Co.* (2d Dist. 1994), 94 Ohio App.3d 334; *Ohio Postal Telegraph-Cable Co. v. Yant* (5th Dist. 1940), 64 Ohio App. 189; *Mattucci v. Ohio Edison Co.* (9th Dist. 1946), 79 Ohio App. 367; *Crank v. Ohio Edison Co.* (9th Dist., Feb. 2, 1977), Wayne App. No. 1446, 1977 Ohio

App. LEXIS 9020; *Jocek v. GTE North, Inc.* (9th Dist., Sept. 27, 1995), Summit App. No. 17097, 1995 Ohio App. LEXIS 4343. In these decisions, the courts struck the proper balance between the rights of the public to travel safely on Ohio's public roads and the rights of public utilities to use the space beyond the traveled and improved portion of the roadway, where no motorist, other than one who had lost control and was therefore breaking the law, would ever find himself or herself.

The Court of Appeals in this case, by contrast, fashioned an eight-factor test to determine whether a utility can be held liable in a pole-collision case. *See Turner v. Ohio Bell Telephone Co.*, Cuyahoga App. No. CA-05-087541, 2006-Ohio-6168, at ¶¶ 9-12. The eight factors to be considered under this new test are (1) proximity to the road, (2) the condition of the road, (3) the direction of the road, (4) the curvature of the road, (5) the width of the road, (6) the grade of the road, (7) the slope of the road, and (8) the position of side drains or ditches. *Id.*, at ¶¶ 10, 12.

This test presents several fundamental problems. First, it has no statutory basis and is entirely judge-made. Second, it ignores altogether any consideration of the personal responsibility of those using the road to remain on the road. Third, it imposes upon utilities a duty to engineer their facilities to take into account out-of-control motorists—an inherently impossible task, given that the path of the errant vehicle will, by definition, be completely unpredictable.

If the Court of Appeals decision were to become Ohio law, the consequences for OREC, OREC's member cooperatives, and other Ohio utilities would be monumental. Utilities would be confronted with moving most (if not all) of their poles to a different location within the road right-of-way, or onto private property outside the road right-of-way.

That prospect is unworkable for numerous reasons. First, inspecting, re-engineering, and relocating poles and lines would cost tens (and perhaps hundreds) of millions of dollars – a cost that would be borne by each cooperative's consumer-owners in Ohio. Moreover, such an undertaking would overwhelm the cooperative's financial, equipment, and human resources for several years. System improvements, maintenance, tree-trimming, and other cooperative functions would suffer as a consequence.

Second, obtaining the necessary authority to relocate poles to private property, either by negotiating easements or by commencing eminent domain proceedings, would be costly and time-consuming. Also, forcing property owners located adjacent to public roadways to give up a significant portion of their front yards would be an unreasonable burden on property owners.

Third, even if a cooperative undertook the momentous project of moving poles and lines, there would still be no guarantee that it would escape liability, even if a pole was placed 30 feet away from the road on a private easement. The *Turner* factors would still be looming. A jury could decide that 30 feet away from the road was not sufficient given the grade of the road.

Fourth, attempting to interpret and apply the *Turner* factors would involve a considerable amount of guesswork on the cooperative's part. For example, if a road is sloped right to left at a five degree angle, how far away from the road should a pole be placed? What if the road angle is 10 degrees? If there is a curve in the road, how far away from the road should a pole be placed? Can a pole be placed at the apex of a curve, or does it have to be placed before or after the curve? How far before or after the apex of the curve? What if the road is resurfaced, widened, or otherwise changed after a pole is placed? There are simply too many variables and unknowns under the *Turner* analysis. A cooperative should not have to guess at appropriate pole

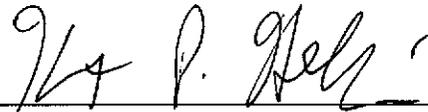
placement, and then still run the risk that a jury or judge interpreting and applying the *Turner* factors will decide the pole should have been located elsewhere.

The only other option for a cooperative or other utility, in a post-*Turner* world, would be to maintain the status quo—meaning that every existing pole placement could be challenged in the event that an automobile loses control, leaves the traveled and improved roadway, and strikes a utility pole. In that event, every one of the millions of utility poles located along Ohio's public roadways would become a liability magnet. That is not good public policy, and is unfair to the cooperatives, which are authorized to place their poles in the road right-of-way under Ohio law.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Court of Appeals, and adopt the propositions of law urged by the Appellants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

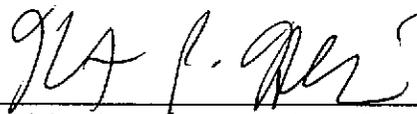
The undersigned certifies that the *Brief Of Amicus Curiae Ohio Rural Electric Cooperatives, Inc. in Support of Appellants, Urging Reversal*, was served upon the following by regular U.S. mail, postage pre-paid, on May 21, 2007:

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