

IN THE SUPREME COURT OF OHIO

Utility Service Partners, Inc. : No. 08-1507  
: :  
Appellant, : Appeal from the Public  
: Utilities Commission of Ohio  
v. : :  
: Public Utilities Commission  
The Public Utilities Commission of Ohio, : of Ohio  
: Case No. 07-478-GA-UNC  
Appellee. : :

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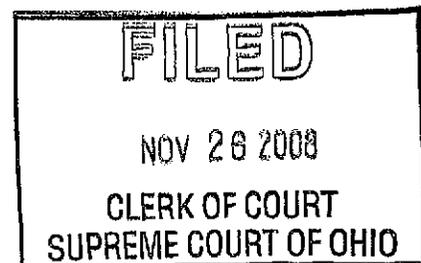
REPLY BRIEF OF APPELLANT UTILITY SERVICE PARTNERS, INC.

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## I. INTRODUCTION

The Appellee and the Intervenor (the Intervenor, Columbia Gas of Ohio, Inc.) (“Columbia”) have, not surprisingly, tried to take a “broad brush” approach and twist this case into one ostensibly asking the question as to whether the Commission has power to improve, increase, or enhance safety. But this case is much more than that and it involves several fundamental issues.

The Court must decide whether the General Assembly intended to give the Commission “carte blanche authority” to do whatever it deems necessary and proper to improve, increase, or enhance public safety or whether the Commission must exercise statutory power to protect the public safety. This Court must also decide whether the Commission is required to have a factual basis or reason to change a nearly century old policy. The Court must also determine whether a simple “rational nexus” test justifies the Commission’s actions when it substantially impairs contractual obligations or takes the property of the Appellant, or the Commission’s actions are only justified when there is a significant and legitimate public purpose established.

The Appellant submits that the appeal before the Court gives it a unique opportunity to establish a “bright line” as to what the Commission can lawfully do and what it cannot lawfully do. The Commission’s actions with respect to the “Design-A” risers were lawful and fully justified. A real and present danger exists with respect to the life and property of the public in all of Ohio. A factual basis was established prompting the Commission to order the survey and removal of Design-A risers in order to protect the public safety. A significant and legitimate public purpose in protecting the public safety was also established.

On the other hand, none of those conditions were established with respect to customer owned service lines. Neither Columbia, the Commission staff, nor any party in the case

presented any evidence of a factual investigation, survey, or analysis to determine that the status of customer service lines in Columbia's service territory had deteriorated to the point where they constituted a hazardous facility. No evidence was introduced to show that states where public utilities own the service lines have a safer gas pipeline system than states where the customer owns the service line. Finally, there was no showing of the existence of a significant and legitimate public purpose that would justify the substantial impairment or the taking of over 100,000 contracts that the Appellant has with Ohio customers.

The Court should "draw the line" and find that while the Commission acted lawfully with respect to the Design-A risers, it exceeded its authority with respect to transferring maintenance and ownership over customer service lines to Columbia in this case.

## II. ARGUMENT

### Proposition of Law No. 1:

**The Commission is a creature of the General Assembly, and has only the powers and jurisdiction expressly conferred by statute. Time Warner Axs v. Public Utilities Comm'n (1996), 75 Ohio St.3d 229, 661 N.E.2d 1097 ; Radio Relay Corp. v. Public Utilities Comm'n (1976), 45 Ohio St.2d 121, 341 N.E. 2d 826 ; Village of New Bremen v. Public Utilities Comm'n (1921), 103 Ohio St. 23, 132 N.E. 162.**

The Commission can only regulate that over which it has statutory authority. While the Commission has jurisdiction over natural gas companies such as Columbia<sup>1</sup>, the Commission has no authority to require property owners to only use Columbia for repair of the customer service lines they own. The Commission cannot regulate non-utility property, such as customer service lines, or non-utility businesses, such as landlords, plumbers, contractors or warranty service providers. As expected, the Commission and Columbia argued that everything that can possibly affect public utility service is within the Commission's reach. This Court has ruled many times

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<sup>1</sup> Section 4905.04 - .06, Revised Code grants the Commission supervisory authority over public utilities.

that the Commission has only those powers and authorities specifically delegated to it by the General Assembly. Time Warner Axs v. Public Utilities Comm'n (1996), 75 Ohio St.3d 229, 661 N.E. 2d 1097 ; Radio Relay Corp. v. Public Utilities Comm'n (1976), 45 Ohio St.2d 121, 341 N.E. 2d 826 ; Village of New Bremen v. Public Utilities Comm'n (1921), 103 Ohio St. 23, 132 N.E. 162. Simply put, the Commission's powers are finite, not infinite and the Commission cannot claim undelegated authority because it would be useful in carrying out the duties which the General Assembly has given the Commission.

The Court must look at the only two sources of authority relied upon by the Commission – Sections 4905.95 and 4905.06, Revised Code to determine if the General Assembly has in fact authorized the Commission to act to transfer ownership and responsibility for the maintenance of customer service lines from customers to Columbia.

There is a huge “disconnect” between Section 4905.95, Revised Code and the Commission's actions which was brought to light by the Commission's Brief. This disconnect relates to the duty of the Commission to protect the public safety compared to what the Commission has done to “improve” or “increase” public safety. Recognizing the limits of the statute and the total absence of evidence from Columbia and the Staff on this issue will lead the Court to reverse the Commission's unlawful decision.

At pages 10-11 of its Brief, the Commission cites Section 4905.95(B), Revised Code and compares it with page 19 of the April 9, 2008 Opinion and Order (“Order”). The following table contrasts the statute with the Order:

<p>If, pursuant to a proceeding it specially initiates or to any other proceeding and after the hearing provided for under Division (A) of this section, the commission finds that:</p> <p>(1) An operator has violated or failed to comply with, or is violating or failing to comply with Sections 4905.90 to 4905.96 of the Revised Code or the pipeline safety code the commission by order:</p> <p>(a) Shall require the operator to comply and to undertake corrective action necessary to protect the public safety;</p> <p>(b) May assess upon the operator forfeitures ...</p> <p>(2) An intrastate pipe-line transportation facility is <u>hazardous</u> to life or property, the Commission by order:</p> <p>(a) Shall require the operator of the facility to take corrective action to <u>remove the hazard</u>. Such corrective action may include suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other action;</p> <p>(b) May direct the attorney general to seek remedies. (emphasis added)</p>	<p>It is clear to us that leaks in customer service lines, including gas risers, <u>can be</u> a safety hazard. It is also clear to us that proper maintenance of such lines and full compliance with federal and state safety regulations is made <u>more difficult</u> by ownership and responsibility being held by different entities, as, among other things, Columbia, under the existing approach, has no ability to train the repair personnel, to supervise the actual repair process, or to ensure uniformity in the approach to repair maintenance.</p> <p style="text-align: center;">* * *</p> <p>We believe that adoption of the Amended Stipulation is <u>likely to result</u> in a safer system, overall. <u>Increasing public safety</u>, as it relates to the gas distribution system, is critical. (emphasis added)</p>
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The Commission has not followed the statute cited by the Commission in its Brief. Under Section 4905.95(B), Revised Code, the Commission must find either that an operator (Columbia) has violated the law or that an intrastate pipe-line transportation facility is hazardous to life or property. It found neither. Other than Design-A risers, the Commission did not identify any specific intrastate pipe-line transportation facility to be hazardous to life or property. Columbia and the Commission speak entirely in generalities; this statute requires specific

findings. The Commission did so with specificity with respect to the Design-A risers. The Commission retained a consultant. (Supplement to Appellant's Merit Brief, p. S-005) It published the recommendations of the consultant. It asked for comments. It found that the Design-A risers were hazardous to life or property. It ordered natural gas companies to make a survey of all such Design-A risers and to replace them. (Supplement to Appellant's Brief, p. S-010) The appellant has no objection to the Commission's actions with respect to the Design-A risers because the Commission followed the requirements of Section 4905.95, Revised Code.

The Commission's actions with respect to customer service lines is another story. The Commission, in both its Order and in its Brief, talks in terms of service lines that "can be" and "could be" hazardous and the need to "improve" or "increase" public safety. Section 4905.95(B), Revised Code authorizes the Commission, after a finding that an intrastate pipe-line transportation facility is hazardous to life or property, to protect the public safety by requiring the operator to remove the hazard. It gives no authority for the Commission to take any action in the absence of a finding that either the operator violated the law or that an intrastate pipe-line transportation facility is hazardous to life or property. The General Assembly did not authorize action in the situation where a pipe-line facility "could be" or "can be" or "might be" hazardous.

Even so, Columbia or the Commission Staff might have satisfied these requirements by introducing any evidence at the hearing tending to show that states where the customers own the service lines are identifiably more dangerous than those states where the public utility owns the service lines. Had that type of evidence been introduced into this record, that might have supported a Commission action to transfer maintenance responsibility and ownership of customer service lines from the customer to the public utility. But there is absolutely no

evidence in this record which identifies, other than the Design-A risers, any intrastate pipe-line transportation facility that is hazardous to life or property. Specifically, Columbia witness Ramsey did not see the type of catastrophic failures in steel customer service lines that are seen with Design-A risers.<sup>2</sup> Mr. Ramsey could not recall ever seeing an incident of the catastrophic failure in a customer service line.<sup>3</sup>

Neither Columbia nor the Staff presented any evidence regarding a clamor from the public over the safety of customer-owned service lines.

The Commission's April 9, 2008 Order should have stopped at solving the Design-A riser issue, not granting a monopoly to Columbia over the service and maintenance of customer service lines which are not owned by the utility.<sup>4</sup> Record support abounds as to why the Commission should have stopped at solving the Design-A riser problem and should have left the ownership and responsibility for customer service lines alone. See pgs. 17-19 of the Merit Brief of the Appellant which is incorporated by reference herein.

Section 4905.95(B), Revised Code mandates that the Commission either find that the operator violated the law or an intrastate pipe-line transportation facility is hazardous to life or property before the Commission can require the operator to take corrective action to remove the hazard. No such specific finding was made.

The Commission also relies on Section 4905.06, Revised Code. That statute provides general supervisory authority to the Commission over all public utilities and their property. This statute goes on to give the Commission the power to inspect, which includes "the power to prescribe any rule or order that the Commission finds necessary for protection of the public

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<sup>2</sup> Tr. I, 57. Supplement to Appellant's Merit Brief, at S-044.

<sup>3</sup> Id.

<sup>4</sup> USP Ex. 7, p. 7. Supplement to Appellant's Merit Brief, at S-031.

safety.” The Appellant submits that the phrase “protecting the public safety” is intended to give the Commission authority to guard against or defend the public where a specific hazardous situation has been identified. Again, the Commission acted properly when it found that Design-A risers are hazardous and should be removed. The Commission took the proper steps and had sufficient evidence to make that finding and take such remedial steps.

On the other hand, the Commission readily admits that it did not conduct a safety investigation of all service lines prior to issuing an order. See Finding 7 of the June 4, 2008 Entry on Rehearing at Appellant’s Appendix, A-047. The Appellant agrees that the Commission did not have to investigate all service lines but it certainly should have investigated a sampling of customer service lines to determine if a hazard to public safety existed. The Commission must base its decision on the record before it. Ideal Transp. Co. v. Public Utilities Comm’n of Ohio (1974), 42 Ohio St.2d 195, 71 Ohio Op.2d 183, 326 N.E.2d 861. Without any evidence or record supporting a finding that the transfer of maintenance responsibility and ownership of customer service lines is needed to protect the public safety against a hazardous situation, the Commission has no authority to act.

The Commission’s April 9, 2008 Order must be reversed.

**Proposition of Law No. 2:**

**If the Contract Clause is to retain any meaning at all, it must be understood to impose some limits upon the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. Allied Structural Steel Co. v. Spannaus (1978), 438 U.S. 234, 242.**

The Commission admits at page 17 of its Order that “The proposal before us would impair existing contracts to some extent.” See Appellant’s Appendix at A-023. In its Brief at page 27, the Commission admits that “the severity of the impairment is slight”, but the Commission, both in its Order and in its Brief, talk about the impairment to the Appellant’s

business, not its contracts. Over 100,000 warranty service contracts are being rendered useless as a result of the Commission's Order (Appellant's Supplement to Merit Brief, p. S-018); the United States Constitution demands that the obligations of contracts not be impaired unless there is truly a significant and legitimate public purpose (U.S. Constitution, Section 10, Article I). Contrary to the Commission's view, there are limits as to a state's authority to impair contracts. Allied Structural Steel Co. v. Spannaus (1978), 438 U.S. 234, 242. There must be a significant and legitimate public purpose if the state is to impair contracts. Energy Reserves Group v. Kansas Power & Light Co. (1983), 459 U.S. 400, 411. The Appellant submits that the facts in this case provide a good illustration of what is a significant and legitimate public purpose and what is not.

With respect to the Design-A risers, the Commission Staff recommended initiating a statewide investigation because of a series of natural gas incidents – involving the release of gas from an intrastate gas pipeline facility resulting in death, personal injury, in-patient hospitalization or estimated property damage of \$50,000 or more – that happened in Ohio between 2000 and 2003. (Supplement to Appellant's Merit Brief, p. S-005)

The Commission opened Case No. 05-463 to examine riser types, installation and overall performance because of the potential risk by risers as a link between the gas distribution service line and the meter located near or within a customer's premises. The Commission employed consultants through the University of Akron who developed investigative procedures, and testing methods as well as to provide ongoing consultation including conclusions and recommendations. (Supplement to Appellant's Merit Brief, p. S-005) The Commission ordered the four largest local distribution companies in Ohio (including Columbia) to conduct a statistically valid sampling study of inventory risers to determine the manufacturer of each gas service riser and

collect associated data. (Supplement to Appellant's Merit Brief, p. S-006) After doing extensive testing, the Staff advised the Commission that Design-A risers (risers assembled in the field) with a low gasket force retention that are subjected to certain tensile loading and low temperature cycling are more prone to failure than other types of risers. (Supplement to Appellant's Merit Brief, p. S-009-10)

The reported incidents and the Commission's investigation and independent consultant reports have established a significant and legitimate public purpose as to the statewide public safety risk as to Design-A risers. The Commission ordered that Design-A risers be surveyed, tested and replaced. This was necessary to protect the statewide public safety against an identifiable hazardous facility, namely Design-A risers.

The Appellant submits that the Commission's action in ordering that Design-A risers be replaced statewide was appropriate given the parameters of Section 4905.95(B), Revised Code and was necessary to remove a specific type of intrastate transportation facility (Design-A risers) in order to achieve public safety on a statewide basis, a significant and legitimate public purpose. In other words, there were specific intrastate transportation facilities (Design-A risers) that were found to be hazardous on a statewide basis and the Commission ordered their removal. The Commission's actions with respect to the Design-A risers demonstrates the existence of a significant and legitimate public purpose so that the Commission could lawfully act to remove an existing public safety hazard even to the extent that it may impair contracts.

On the other hand, the Commission's actions with respect to customer service lines in Columbia's service territory provides the Court with an example of how a Commission can exceed its statutory authority under the guise of "improving public safety." There were no incidents involving Columbia customer service lines in this record. There were no consultants

retained to study Columbia customer service lines. There was no evidence of a factual investigation or survey of any customer service lines in Columbia's service territory. There was no evidence introduced tending to show that an abnormal amount of customer service lines in Columbia's service territory were characterized as "hazardous." There was no evidence tending to show that states where the public utility owned the customer service line had a better safety record than in Columbia's service territory where the customer service line was owned by the customers.

As the United States Supreme Court held in Energy Reserves Group v. Kansas Power & Light Co. (1983), 459 U.S. 400, 411, "the threshold inquiry is 'whether' the state law has, in fact, operated as a substantial impairment of a contractual relationship." Allied Structural Steel Co., 438 U.S. at 244. "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." Allied Structural Steel Co., 438 U.S. at 245. The Court also stated that "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." Energy Reserves Group, 459 U.S. at 411. Here, the uncontradicted testimony of USP witness Riley was that over 100,000 contracts would be rendered worthless by the Commission's adoption of the Amended Stipulation and Recommendation. (Supplement to Appellant's Merit Brief, at S-108) The test is not whether the Appellant's business has been destroyed or what steps can be taken to mitigate damage, but whether the Commission's actions substantially impaired the obligations of contracts. There can be no doubt that the Appellant's external gas line warranty contracts in Ohio have been impaired.

The Court also stated that "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past."

Energy Reserves Group, 459 U.S. at 411. The Commission has not regulated customer service lines or warranty contracts for nearly a century.

The United States Supreme Court went on to state that “[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. . . . The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.” Energy Reserves Group, 459 U.S. at 411-12.

Protecting the public safety by removing existing hazardous facilities such as Design-A risers on a statewide basis clearly is a significant and legitimate public purpose. But transferring the responsibility and ownership of customer service lines to one public utility (Columbia) merely because a Staff witness opines, without a factual basis, that it may “improve” or “enhance” the safety of the system without any evidence that there is even a safety hazard is not a significant and legitimate public purpose. The facts before the Court are closer to the Allied Structural Steel case in which the Minnesota statute was aimed at specific employers instead of acting to meet an important general social problem. See Energy Reserves Group, 459 U.S. at 412 n.13. In this case, the Commission did not transfer maintenance responsibility and ownership of customer service lines on a statewide basis.

The Appellant submits that if the Commission’s and Columbia’s argument is accepted, there will be no limits on the Commission when it comes to impairing contracts. The Court must “draw the line” and find that the Commission acted lawfully only with respect to its statewide remedy for Design-A risers, but not with respect to customer service lines in Columbia’s service territory.

**Proposition of Law No. 3:**

**The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefore. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing, enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated. City of Cincinnati v. Louisville & Nashville R.R. Co. (1912), 223 U.S. 390, 400.**

While the Commission's Brief focuses on the taking of the physical property of the customer, the United States Supreme Court has recognized that a state can exercise eminent domain over a contract right. Thus, even if the Court does not find that the Commission's action has not substantially impaired the obligation of contracts, this Court must still determine if an unconstitutional taking has occurred. The Appellant submits that the Commission has effected a taking of contract rights without compensation.

The only evidence in this case on the issue is the testimony of USP President Phil Riley who testified that the Commission's action would render useless over 100,000 Ohio contracts. See Supplement to Appellant's Merit Brief, at S-018. By creating and giving a monopoly to Columbia to maintain, repair, and replace customer service lines, the Commission has taken the contract rights of both the Appellant and its customers. The Commission's April 9, 2008 Order takes that property right away and provides no compensation to either Utility Service Partners or its customers. This is especially egregious since Utility Service Partners purchased the warranty service business from Columbia in 2003. (Supplement to Appellant's Merit Brief, at S-017-018)

At pages 42-43 of the Commission's Brief, the Appellee cites the case of State ex rel. Pizza v. Rezcallah (1998), 84 Ohio St.3d 116, 131, 702 N.E. 2d 81 for the proposition that "private property rights may be limited through the state's exercise of its police power when

restrictions are necessary for the public welfare.” The Commission’s reliance on this case is misplaced.

In the Rezcallah case, this Court found that under certain conditions, a statute violated the takings clauses of the United States and Ohio Constitutions. The Court stated in paragraph 2 of its syllabus:

To the extent that R.C. § 3767.06(A) requires a trial court, upon a finding of a nuisance, to issue an injunction closing property against its use for any purpose for one year, and to the extent that it allows release from such injunction only through the filing or renewal of a bond in the full value of the property, the statute violates the Fourteenth Amendment Due Process Clause and the Fifth Amendment Takings Clause of the United States Constitution, and Section 19, Article I of the Ohio Constitution, when applied to an owner who did not negligently or knowingly acquiesce to, and did not participate in the creation or perpetuation of the nuisance. (Lindsay v. Cincinnati (1961), 172 Ohio St. 137, 15 O.O.2d 278, 174 N.E.2d 96, overruled.)

Clearly, the Rezcallah case does not support the Commission’s argument.

At page 43 of its Brief, the Commission states that “approval of the Amended Stipulation would likely result in a safer gas distribution system and that improving public safety, as related to the gas distribution system, is of critical importance.” This is not a “substantive due process” case. “Improving public safety” -- based on something that is “likely” to result in such an improvement -- is not a justification for either impairing contracts or taking property rights. Something more is necessary. “Yet there is no showing in the record before us that the severe disruption of contractual expectations was necessary to meet an important general social problem.” Allied Structural Steel Co. v. Spannaus (1978), 438 U.S. 234, 247.

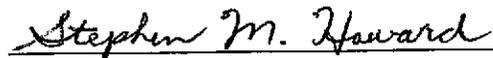
As in the case of the Design-A risers, the Commission demonstrated that the removal of such risers was necessary to remove a hazardous transportation facility and protect the public safety. With respect to the transfer of responsibility to Columbia over the maintenance, repair,

and replacement of customer service lines, the Commission has effected a taking of contract rights without just compensation. The Commission's April 9, 2008 Order must be reversed.

### III. CONCLUSION

Of course, no one is against public safety. But when the Commission's actions are not based on factual evidence and substantially impair the obligations of others or involve a regulatory taking of private property, the Court must objectively evaluate the requirements of the United States Constitution and Ohio law. If it applies the same standards and tests to the Commission's actions with respect to "Design-A risers" and with respect to the customer service lines, the Court must reverse the Commission's decision with respect to its attempt to act beyond its statutory authority by transferring jurisdiction and control over private property of Ohioans to a public utility without any factual basis or without the establishment of a significant and legitimate public purpose.

Respectfully submitted,

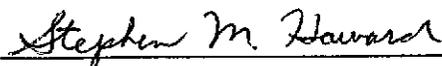


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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief of Utility Service Partners was served upon the following persons by hand delivery or first class U.S. mail, postage prepaid this 26<sup>th</sup> day of November, 2008:

  
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