

IN THE SUPREME COURT OF OHIO

**RUMPKE SANITARY LANDFILL,
INC., et al.,**

Appellees,

vs.

**COLERAIN TOWNSHIP, OHIO,
et al.,**

Appellants.

: **Case No.: 11-0181**
:
:
: **On Appeal from the Hamilton County**
: **Court of Appeals, First Appellate District**
:
:
: **Court of Appeals Case No.:**
: **C-090223**
:
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**REPLY BRIEF OF AMICI CURIAE BOKESCREEK TOWNSHIP, CARROLL-
COLUMBIANA-HARRISON JOINT SOLID WASTE MANAGEMENT DISTRICT,
ERIE COUNTY, LAKE TOWNSHIP, LOGAN COUNTY, LORAIN COUNTY, MEDINA
COUNTY, MIAMI COUNTY, MONROE TOWNSHIP, NEW RUSSIA TOWNSHIP,
NORTH CENTRAL OHIO SOLID WASTE MANAGEMENT DISTRICT, OTTAWA-
SANDUSKY-SENECA JOINT SOLID WASTE MANAGEMENT DISTRICT, RICHLAND
TOWNSHIP, AND STARK-TUSCARAWAS-WAYNE JOINT SOLID WASTE
MANAGEMENT DISTRICT, TO APPELLEES, RUMPKE SANITARY LANDFILL,
INC., ET AL.'S MERIT BRIEF**

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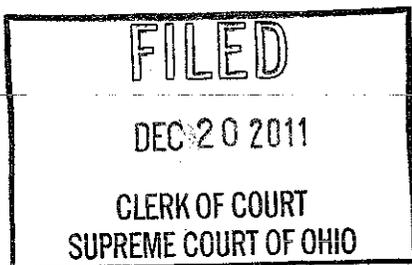
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I. INTRODUCTION

The merit brief filed by amici curiae solid waste management districts and individual counties and townships, as well as the amicus curiae briefs filed by the State of Ohio and the township association, address a common concern. The legislative balance of regulation at all levels of government might be disrupted if private companies can unilaterally convert themselves into public utilities based on the common law factors articulated in *A&B Refuse Disposers, Inc. v. Bd. of Ravenna Twp. Trustees* (1992), 64 Ohio St.3d 385, 389, 596 N.E.2d 423. Dismissive at best, Rumpke Sanitary Landfill, Inc.'s ("Rumpke") Merit Brief fails to adequately assuage the serious concerns emanating from each of these local and state entities.¹

If a duly authorized policy-making body – e.g., the State legislature or a home rule municipality – grants public utility status to a private company, then it is appropriate for other government agencies to cooperate with that determination. Harmonizing the divergent interests of governmental entities in developing land use policies was the principle concern behind this Court's decision in *Brownsfield v. State* (1980), 63 Ohio St.2d 282, 407 N.E.2d 1365. The same principle is arguably the reason for the public utility exemption in R.C. 519.21.

However, when no governmental authority explicitly recognizes a private company as a public utility, as is the case with the Rumpke Landfill, the rationale for exemption from township zoning restrictions evaporates. The result of a judicial determination of public utility status is that the oversight usually performed by the township is shifted to other entities, such as the

¹ Throughout its Merit Brief, Rumpke is particularly critical of the integrity and alleged bias of the Colerain Township Trustees in pursuing this lawsuit. Ohio EPA currently has a fact sheet publicly available on its website dated December 2011, detailing on-going efforts to address elevated temperatures, poor gas quality, and odor control issues that are a natural consequence of a landfill of Rumpke's size. See Ohio EPA December 2011 Fact Sheet, available at <http://www.epa.ohio.gov/pic/RumpkeHamCo.aspx> (accessed Dec. 19, 2011). There is unquestionably a valid basis for local government concern regarding expansion of the facility.

county, the solid waste management district, or Ohio EPA, which may not be in the best position to oversee “private” public utilities. Because amici curiae believe allowing Rumpke to obtain public utility status without legislative recognition will have negative public policy effects, they respectfully submit this reply brief in support of Appellant Colerain Township.

II. ARGUMENT

Proposition of Law No. II: A privately owned sanitary landfill cannot be a common law “public utility” exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

A. Rumpke’s Landfill fails to satisfy numerous public utility factors, including the most important factor - that government regulations control the business.

Contrary to Rumpke’s contention that it possesses *all* of the characteristics of a common law public utility, Rumpke’s merit brief demonstrates that several conditions for the existence of a public utility are noticeably absent for its landfill.

First, the evidence does not demonstrate that Rumpke has dedicated its property to the public service, nor does Rumpke sell the use of its landfill space directly to the public. Such dedication is required to qualify as a public utility, as long established by this Court. See *Jonas v. Swetland Co.* (1928), 119 Ohio St. 12, 16, 162 N.E.45 (citing *Hisse v. Guran* (1925), 112 Ohio St. 59, 146 N.E. 808). At most, the evidence demonstrates that Rumpke primarily markets and sells its landfill service to commercial and municipal waste collectors and haulers, not to the general public. In fact, Rumpke admits its landfill services are sold through negotiated contracts with waste collectors and haulers. See Rumpke Merit Brief at 26 (discussing negotiated rates for negotiated services). A business concern that primarily serves the general public ordinarily does

not negotiate its rates and services on a customer-by-customer basis, depending on how much each customer can bear.

There is nothing in Rumpke's Articles of Incorporation indicating that Rumpke has dedicated or devoted itself to general public service.² See *Affiliated Service Corp. v. Public Utilities Com.* (1933), 127 Ohio St. 47, 52, 186 N.E. 703 ("charter purposes may be taken into consideration as reflecting in some degree upon the operative methods of the business in which it was engaged"). There is no evidence that Rumpke has accepted a public franchise or called to its aid the police power of the state, such as the exercise of eminent domain. When a business has not unequivocally dedicated its private property to public utility service, generally does not sell directly to the general public, and has not accepted a public franchise or the aid of the state's police power, that business is simply not a public utility. See *Southern Ohio Power Co. v. Public Utilities Com.* (1924), 110 Ohio St. 246, 143 N.E. 700, paragraphs one and two of the syllabus.

Second, there is no evidence before this Court that every individual member of the public has a legal right to be served by the Rumpke Landfill. See *Southern Ohio Power Co.* at 252 (quoting *Allen v. R.R. Comm. of California* (1918), 179 Cal. 68, 175 Pac. 466) ("To constitute a public utility the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the right to demand that that service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges. Public use means the use by the public and by every individual member of it, as a legal right."). The evidence of a legal right is found in the availability of a legal remedy to

²Ohio Secretary of State, Business Services Database, available at http://www2.sos.state.oh.us/pls/bsqry/f?p=100:7:2734767808888674::NO:7:P7_CHARTER_NUM:424968 (accessed Dec. 15, 2011).

enforce the right. 1 Blackstone Comm. 239, 245.³ The public does not have a legal right to receive Rumpke's services, because individual members of the public have no cause of action or other available relief when Rumpke refuses admittance to the Rumpke Landfill to dispose of waste. If it is true as professed by Rumpke that Rumpke has never turned anyone away from its Landfill, it is due solely to Rumpke's determined self-interest. This cannot be the basis of service provision for a public utility.

Although Rumpke asserts on page 23 of its Merit Brief that Rumpke has never denied any person access to the Rumpke Landfill to dispose of "qualifying" waste, the accompanying discussion concerning termination of service for non-payment strongly indicates Rumpke exercises the prerogative of a privately owned and operated, non-public utility to arbitrarily terminate service without due process whenever Rumpke determines that a customer has failed to adhere to Rumpke's terms of service. Also, it is difficult to believe that the Rumpke Landfill offers the same access and prices to its trash hauling competitors as it gives to its own hauling subsidiaries. The public's lack of a legal remedy against Rumpke for denial of service not only differentiates Rumpke from a true public utility, but it also explains Colerain Township's difficulty in documenting complaints against Rumpke for denial of service – there is simply no mechanism to complain. This is the antithesis of a public utility.

Rumpke's Merit Brief at page 23 further reinforces amici curiae's differentiation of Rumpke from other traditional public utilities, which are regulated by the government. As an example, Rumpke asserts that the public has the same right to receive Rumpke's services as it has to receive electric utility services from Duke Energy. Rumpke is simply and absolutely wrong on this point. As a highly-regulated public utility, Duke Energy is prohibited from

³ "The want of right and the want of remedy are the same thing." *Ashby v. White* (1703), 92 Eng. Rep. 126, 136.

terminating services to customers within its service territory without affording the customer the opportunity for notice and a hearing, even if the customer has not paid his or her electric bill. See Ohio Admin. Code 4901-9-01(E); see also *In re Ghebremariam v. Duke Energy Ohio, Inc.*, PUCO No. 10-1260-EL-CSS, 2011 Ohio PUC LEXIS 842 (July 6, 2011) (prohibiting disconnection of services for nonpayment during a bona fide dispute before the PUCO). Members of the public have no similar protection from a termination or denial of service by Rumpke.

On page 8 of its Merit Brief, Rumpke dismissively states that “[i]ts regulation by the Ohio EPA, the Hamilton County Solid Waste District and the Hamilton County Board of Health provide all of the controls necessary to protect the general public.” This patently ignores the fact that not one of these entities has any control over Rumpke’s allowance of access to its Landfill, or the potential for monopolistic rate gauging pricing – a problem not posed by traditional public utilities such as Duke Energy.

Third, relative to the element of “public concern,” Rumpke’s Merit Brief demonstrates that **no** government agency at the state or local level regulates the business relationship between Rumpke and its customers. As stated in *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290, 2006-Ohio-2420, 847 N.E.2d 420 at ¶ 29, “Castle’s operations are similar to many other private business operations in that they must comply with various regulations, e.g., safety or environmental regulations, in order for the business to operate; however, those regulations do not control the relation between the business and the public as its customers.” The landfill regulations Rumpke cites are rules adopted by Ohio EPA to ensure the environmental safety of the landfill, local solid waste management district rules to ensure the safe and sanitary

management of solid waste,⁴ and health department regulations that ensure the landfill does not endanger public health. These are exactly the same kind of regulations the Court has previously found insufficient to evidence the level of government control required to recognize a waste disposal business as a public utility. See *A&B Refuse* at 389; *Inland Refuse Transfer Co. v. Limbach* (1990), 53 Ohio St. 3d 10, 12; 558 N.E.2d 42. The degree of government regulation that is necessary to qualify as a public utility “equates to control” of the business. *Inland* at 12. This factor “is one of the most important criteria, if not the most important,” in determining whether an entity is a public utility. *Castle Aviation* at ¶ 27. In this case, the evidence of public utility-type government regulation is non-existent.

Rumpke’s Merit Brief states the regulations imposed by Ohio EPA, the local health department and the solid waste management district go beyond the issues of environmental and public health and safety; however, Rumpke never identifies any regulations that govern Rumpke’s relationship with its customers, or the amount of control over Rumpke’s business. The closest Rumpke gets is Ohio EPA and the health department’s inclusion of the landfill’s hours of operation in the landfill’s permit. The reality is that Rumpke maintains the exclusive right to determine what its hours of operation will be – they are not dictated by the agencies. The agencies use the facility’s hours of operation to determine things like the amount of air pollutants (methane gas and particulates) the facility will emit, and to know when the facility will be open so that Ohio EPA and health department landfill inspectors can do their jobs. In its zeal to illustrate even one regulation that conceivably controls its landfill business, Rumpke argues on page 19 of its Merit Brief that the Hamilton County Solid Waste Management District can prohibit waste from going to Rumpke’s landfill and thereby force Rumpke out of business. The

⁴ See R.C. 3734.53(A) (defining the purpose for establishing solid waste management districts and the function of solid waste management plans).

District has no such power, as demonstrated by Rumpke's earlier argument on page 16 that R.C. 3734.52(E) requires the District "to provide for the maximum feasible utilization" of existing landfills such as Rumpke's.

Fourth, no governmental agency regulates Rumpke's rates and charges for the use of its landfill. In the public utility setting, the utility provider typically has a governmentally-approved rate schedule that is publicly disseminated and posted at the facility, or the government authorizes a maximum amount the utility can charge. See, e.g., R.C. 743.26; R.C. Chapter 4909.⁵ The total absence of any state or local effort to regulate the price Rumpke charges for use of its services (despite Rumpke's self-proclaimed monopoly status) is contrary to the idea that Rumpke's services are a matter of public concern. See also, *Indus. Gas Co. v. Pub. Util. Comm.* (1939), 135 Ohio St. 408, 414, 21 N.E.2d 166.

Approval of a rate schedule or tariff is what enables members of the public to know they are not being discriminated against versus similarly situated customers regarding the provision or cost of the service.⁶ Another purpose of providing a particular rate schedule is to generate a rate of return which the regulating agency determines is just and reasonable and which will enable

⁵ See also, *McRae v. Robbins* (1942), 151 Fla. 109, 128, 9 So.2d 284 ("To that end, both our National and State governments have attempted by statute to prohibit monopolies and all combinations in restraint of trade and free competition; or where monopolies are inevitable, such as is usually the case with public utilities, the effort has been to establish commissions for their strict regulation, both as to the character of service rendered and the prices charged the public, else the individual citizens composing the public would be helpless and would be compelled to pay any rates or charges these utilities might see fit to impose, no matter how exorbitant or discriminatory.").

⁶ *Fields v. Missouri Power & Light Co.* (Mo. 1963), 374 S.W.2d 17, 32 ("The reason the schedule of rates and charges of a public utility filed with and approved by the Commission may be said, in the form of a generality, to acquire "the force and effect of law" is that the statute provides that the public utility cannot serve anyone except according to that schedule of rates and charges. The schedule is binding upon the public generally only in the sense that under the law the public utility is prohibited from permitting any member of the public to receive service contrary thereto.").

the utility to continue operation at an acceptable level of operating income. See *Illinois Bell Tel. Co. v. Ill. Commerce Comm.* (1990), 203 Ill. App.3d 424, 428, 561 N.E.2d 426. Rumpke's brief freely admits it can and does charge whatever it wants for its landfill disposal service. Rumpke describes its rates as "negotiated rates for negotiated services." Rumpke Merit Brief at 24-26. The evidence confirms Rumpke negotiates different disposal rates on a deal-by-deal basis. Appellant's Supp., vol. 1, at 48-74. Such arbitrary, non-standardized rate-setting is inconsistent with acquiring public utility status.

Certainly, Rumpke contends that its rates are reasonable – but there is no way to test that assertion. There is no evidence of a standard rate schedule containing Rumpke's prices for businesses and members of the public to deposit waste in the landfill. It is also conceivable there would be downward pressure on prevailing landfill disposal rates if there was more robust competition in southwest Ohio, which would demonstrate the rates Rumpke currently charges are excessive. Rumpke's response to the suggestion that its unregulated rates may be excessive is that the Hamilton County Solid Waste Management District "can shut [the landfill] down." Rumpke Merit Brief at 24. But Rumpke simultaneously asserts the District cannot close the landfill because R.C. 3734.52(E) requires the District to "provide for the maximum feasible utilization" of its landfill. Rumpke Merit Brief at 16. Rumpke is basically saying it can do whatever it wants with disposal rates because: (a) the landfill is private; (b) it is not subject to PUCO-type regulation; and (c) the District has limited recourse against the landfill to protect the public interest. Again, this is the antithesis of a public utility.

~~Fifth, Rumpke does not possess a true monopoly on waste disposal in southwest Ohio.~~ Rumpke's four-year contract to accept all of the waste collected by the City of Cincinnati's sanitation department was competitively bid. Appellant's Supp., vol. 1, at 60 and 64. Thus, the

Rumpke Landfill doesn't receive the City's solid waste because it is a public utility – it receives the waste because the City determined Rumpke submitted the “most advantageous” proposal. *Id.* Cincinnati may use a different landfill when the City conducts its next bidding process for waste disposal, or the City may contract with multiple landfills to meet its disposal needs, as the Rumpke contract explicitly allows. The Hamilton County Solid Waste Management Plan identified ten publicly-available landfills other than the Rumpke Landfill that currently receive solid waste generated within Hamilton County. Appellant's Supp., vol. 2, pp. VI-5 and VI-6. The Hamilton County Solid Waste Management Plan proves that Rumpke's local market penetration is not due to necessity, but is instead due to convenience and/or price, or other factors.

In sum, the evidence supports the proposition that Rumpke's landfill is a large, highly successful, private business concern and nothing more. The landfill is not dedicated to the public; it's dedicated to enrichment of the landfill's owners. No government agency has declared Rumpke a public utility, or attempted to regulate Rumpke's disposal rates or its business dealings with its customers. For the most part, Rumpke does not deal directly with the general public; it deals with municipal and commercial waste haulers who deliver waste to the landfill. Waste haulers have the option to take their waste to other landfills, but they choose to go to Rumpke's landfill for reasons of convenience, price or other factors. Rumpke's landfill lacks several important attributes of a public utility. Therefore, this Court should reverse the decision of the Court of Appeals below.

B. The law does not permit Rumpke to unilaterally become a public utility without recognition by a competent legislative body.

Another reason Rumpke's position is unsustainable is that it flows from the fundamentally incorrect assumption that a company may unilaterally thrust itself onto the sovereign government and demand to be treated as a public utility. Under Rumpke's theory of the case, the benefits of public utility status (which, in addition to exemption from township zoning, typically includes exemption from certain aspects of taxation, see R.C. 5751.01(E)(2), the power of eminent domain, exemption from antitrust laws, exclusive service territories, access to direct government credit and investment, etc.) is an entitlement or reward for a company that meets some (but not all) of the *A&B Refuse* factors. At common law, however, a public utility was considered to be a public trust, granted by the sovereign, and virtually an arm of the government itself. *Scofield v. Ry. Co.* (1885), 43 Ohio St. 571, 595-96, 3 N.E. 907.⁷ Public utility status is a bilateral relationship between the utility provider and the sovereign. *Id.* (quoting *Messenger v. Penn. Ry. Co.* (1873), 36 N.J.L. 407, 413) ("These prerogatives are grants from the government, and public utility is the consideration for them."). Thus, the utility provider takes on the common law legal duties of indiscriminate service to the general public at reasonable (i.e., governmentally controlled) rates or charges but also receives the benefits of the legal protections conferred by the sovereign. The sovereign must regulate the utility's provision

⁷ See also Rossi, *The Common Law "Duty To Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 Vand. L. Rev. 1233, 1244-46 (1998); *State ex rel. Letneweber v. Union Gas & Elec. Co.* (1913), 31 Ohio Dec. 567, 573, 14 Ohio N.P. (n.s) 97 ("The obligation to render these services is no mere contractual obligation, it is a public duty. In this view, a public utility corporation, in its dealings with the community does not carry out its contracts, it performs its duties. A public service company is a public servant. Its duties, though originating in a contract, are enjoined on it by law, and they result from its trust and station as a public utility company.").

of services and treatment of the public, and in turn enjoys the benefits of improved quality of life for its citizens through the general availability of important goods and services.⁸

In the context of the bilateral relationship between the sovereign and a private company that seeks public utility status, it must be the sovereign who proceeds first to recognize a particular service as a public utility, which then gives companies the ability to determine whether they agree to dedicate their property and services to the public trust. Otherwise, the government may be compelled against its wishes to regulate a company's rates and provision of services, as well as confer the special privileges that inure to public utilities, even if the sovereign believes it is not in the public interest to establish such a relationship. Such a proposition is unsound as a matter of policy, and research does not reveal any case law that goes to such extreme. Thus, it should be left to the respective legislative authorities of the state and its political subdivisions to decide whether Rumpke's landfill should acquire the status of a public utility, with all of the attendant privileges and obligations that go along with it. It is undisputed that not one governmental agency in Ohio has designated Rumpke's landfill services to be a public utility. Even as to Rumpke's relationship with the City of Cincinnati, upon which the Appellee and the lower courts placed so much emphasis to support their positions, the evidence demonstrates the City has chosen to work with Rumpke as a garden-variety private contractor, rather than designating Rumpke as a public utility under the City's constitutional power. Ohio Constitution, Article XVIII, Section 4; Appellant's Supp. Vol. 1, p. 60-72. The complete absence of any governmental recognition of the Rumpke Landfill as a public utility should preclude a judgment in favor of Rumpke in this case.

⁸ See generally, Rossi, fn. 7.

A case cited in Rumpke's merit brief, *Center Twp. Bd. of Trustees v. Valentine* (Oct. 13, 1999), Wood Cty. C.P. No 97-CV-534, exemplifies the unsatisfactory outcomes that result when there is no state or local legislative determination that a particular service is a public utility, but the court nevertheless proceeds to find the service is a public utility. The service in *Valentine* was the operation of a 60 acre dump with four or five bulldozers for the disposal of waste construction and demolition materials. Although the dump was open to the general public, the nature of the business was to receive loads of heavy waste construction and demolition debris ("C&DD") such as concrete, bricks, asphalt and the like from construction contractors, building demolishers, and other entities involved in heavy construction and demolition work, such as governmental highway and street departments. At the time, there were 75 licensed C&DD facilities in the state. Applying the *A&B Refuse* factors, the *Valentine* Court held the dump was a public utility, and therefore exempt from township zoning. No matter how one dissects the decision, it is hard to imagine how an inconsequential C&DD facility like Valentine's can be viewed as a public utility. Neither the state nor any political subdivision ever designated the facility as a public utility. Indeed, it appears that only two people in the world considered the C&DD dump to be a public utility – its owner, Mr. Valentine, and the ruling judge.

If a court can apply *A&B Refuse* to support finding a little C&DD company to be a public utility, then nothing prevents the extension of *A&B Refuse* to all kinds of private businesses that offer the general public a good or service perceived to be important or essential, sell it for a reasonable (or at least not a plain-on-its-face objectionable) price, with the company possessing a dominant position in the local market. If these factors are enough to make a business a "common law public utility," then many other businesses could be considered to be public utilities as well.

For example, health insurers;⁹ drug manufacturers and retail pharmacies;¹⁰ cement, sand, gravel, lumber and other building supply producers and sellers;¹¹ fertilizer companies; petroleum refineries and gasoline stations; and milk producers and retailers could likewise assert public utility status to avoid oversight by the local zoning authority. It is entirely possible to envision these and myriad other industries and companies seeking public utility status in order to exempt themselves from township zoning under circumstances that are indistinguishable from Rumpke's in this case. Moreover, if Rumpke can thrust its public utility status on the government unsolicited, then why couldn't an individual member of the public request a court to find a company is a public utility based on the *A&B Refuse* factors in order to impress upon the company the common law duties of a public utility?

C. This Court should clarify, limit, or overhaul the A&B Refuse factors.

What the *Valentine* decision and these other hypothetical possibilities illustrate is that this Court should clarify, limit, or overhaul *A&B Refuse*, because it is being distorted to allow private companies, not recognized by any governmental agency as a public utility, to co-opt special privileges such as exemptions from township zoning. This Court should replace *A&B Refuse* with an entirely different standard that defers to legislative determinations of public utility status.

⁹ Wellpoint, Inc. maintains a 76% share of the combined PPO/HMO health insurance market in the Cincinnati-Middleton metropolitan statistical area. Its next nearest competitor is Humana with an 8% share. See American Medical Association publication *Competition in Health Insurance: A comprehensive study of U.S. markets*, available at www.ama-assn.org/ama1/pub/upload/mm/368/compstudy_52006.pdf (accessed Dec. 15, 2011).

¹⁰ Becton Dickinson commands an 80% share of the market for drug syringes required by the public for daily insulin injections. See http://www.mendosa.com/insulin_pens.htm (accessed Dec. 15, 2011).

¹¹ CalPortland, a sand and gravel supplier in the State of Washington, boasts that its Dupont, Washington operation "supplies 75 percent of the aggregates needed from Olympia to Everett." <http://www.calportlandresource.com/dupont/expansion.aspx> (accessed Dec. 15, 2011). One can readily envision that a sand and gravel operation in Ohio could advance a similar claim.

This is what the United States Supreme Court did in *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934), when it concluded that 60 years of judicial efforts to determine when a private company is a public utility that is subject to State-imposed limits on rates and charges, beginning with *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77 (1877), had resulted in an unworkable doctrine that occasionally led to absurd results.

The criteria utilized by the U.S. Supreme Court were essentially the same as those set forth in *A&B Refuse*: has the company devoted its business to the public?; are the company's goods or services essential or a matter of public concern?; does the company provide services to the general public?; and does the company occupy a monopoly or oligopoly position in the market? See generally, *Nebbia*, supra. Using these factors over the years, the U.S. Supreme Court found diverse private businesses had "converted" themselves into public utilities, including grain elevators,¹² fire insurers,¹³ stockyards,¹⁴ warehouses,¹⁵ and banks.¹⁶ Chief Justice Taft summarized the principle of these decisions in *Wolff Packing Co. v. Court of Indus. Relations* (1923), 262 U.S. 522, 535-36 as follows:

Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.

* * *

¹² *Munn v. Illinois*, 94 U.S. 113, 24 L. Ed. 77 (1877).

¹³ *German Alliance Ins. Co. v. Lewis*, 223 U.S. 389, 32 S. Ct. 277, 56 L. Ed. 476 (1914).

¹⁴ *Stafford v. Wallace*, 258 U.S. 495, 42 S. Ct. 397, 66 L. Ed. 735 (1922) ("The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East.").

¹⁵ *Brass v. North Dakota*, 153 U.S. 391, 14 S. Ct. 857, 38 L. Ed. 757 (1894).

¹⁶ *Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103 (1923) (citing *Noble St. Bank v. Haskell*, 219 U.S. 104, 31 S. Ct. 186, 55 L. Ed. 112 (1911)).

The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

This law was directly incorporated into Ohio case law through the decision in *Southern Ohio Power* at 253, and its spirit lives on in *A&B Refuse*.

However, it is forgotten that in *Munn v. Illinois* and its progeny, the U.S. Supreme Court was using the concept of public utility and a public service corporation to define the limits of governmental power to regulate prices and other economic conditions of private businesses under the Fourteenth Amendment. There was no consideration in those cases of whether the company was legally entitled to exercise the privileges of a public utility. Amici curiae submit that the common law public utility factors developed by the U.S. Supreme Court to determine when the government may regulate prices charged by private companies is not a suitable test for determining whether a private company is entitled to exercise the privileges of a public utility, which is the issue raised by Rumpke in this case. The latter question is properly a function for legislative bodies rather than the courts.

In addition, it must also be observed that the U.S. Supreme Court ultimately abandoned using the common law public utility factors as a basis for determining when a private company's business became sufficiently a matter of public concern that the government could constitutionally impose price controls. *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934). The Court criticized the relevance of monopoly as a factor: "although it was referred to in the decision [*Munn v. Illinois*] as a "virtual monopoly." This meant only that their elevator was strategically situated and that a large portion of the public found it highly inconvenient to deal with others. *Nebbia* at 532. The Court criticized the relevance of

“dedication” factor: “The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue.” *Id.* at 534. The Court criticized the “affected with a public interest” factor: “‘affected with a public interest’ can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. *Id.* at 536. In the end, the *Nebbia* Court acknowledged the common law public utility factors “are not susceptible of definition and form an unsatisfactory test.” *Id.* The Court concluded it is up to legislative bodies to make policy choices regarding when price controls should be imposed on private companies, and those choices should not be upset by the Court unless they are arbitrary, discriminatory or irrelevant to the policy adopted by the legislature. *Id.* at 538-39. With *Nebbia*, the Court discarded its use of the common law public utility factors to determine the validity of government price controls. *Olsen v. Nebraska*, 313 U.S. 236, 61 S. Ct. 862, 85 L. Ed. 1305 (1941).

This raises the question: if the United States Supreme Court has discarded the public utility analysis, shouldn't the Ohio Supreme Court discard it, too? Decisions such as *Valentine* demonstrate that the current articulation of the common law public utility factors in *A&B Refuse* are, as the *Nebbia* Court declared, “not susceptible of definition and form an unsatisfactory test,” and can lead to questionable, if not absurd, outcomes. Rumpke's landfill clearly is not a public utility – it has no intention of standardizing its disposal fees or limiting them to a specified amount, nor does it intend to provide service to any party with which it does not have a negotiated contract. The *A&B Refuse* test invites private companies like Rumpke to engage in blatant opportunism by exploiting the vagueness and generality of the *A&B Refuses* factors in order to cloak the company with public utility status when, in reality, the company is simply a

successful and strategically located business that is more convenient for a large portion of the public to use than other purveyors of the same services. The Court should clarify or limit *A&B Refuse* so that private companies stop misusing the case to circumvent township zoning. Alternatively, the Court should abandon *A&B Refuse* and leave it to the State and political subdivisions to determine when a public utility relationship is established.

III. CONCLUSION

Whether this Court chooses to redefine or abandon the criteria for establishing common law public utilities in Ohio is not ultimately determinative of this case. A private company's unilateral declaration that it is a public utility simply cannot be the standard. Rumpke's landfill does not meet the critical criteria laid out in *A&B Refuse* for defining a public utility; this Court should reverse the Court of Appeals on this basis alone. However, the very fact that this case has progressed all the way to this Court demonstrates how unworkable the *A&B Refuse* case has become. Therefore, this Court should follow the lead of the U.S. Supreme Court and clarify, limit, or abandon the *A&B Refuse* case once and for all.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing *Reply Brief of Amici Curiae Bokescreek Township, Carroll-Columbiana-Harrison Joint Solid Waste Management District, Erie County, Lake Township, Logan County, Lorain County, Medina County, Miami County, Monroe Township, New Russia Township, North Central Ohio Solid Waste Management District, Ottawa-Sandusky-Seneca Joint Solid Waste Management District, Richland Township, and Stark-Tuscarawas-Wayne Joint Solid Waste Management District, to Appellees, Rumpke Sanitary Landfill, Inc., et al.'s Merit Brief* was mailed this 20th day of December, 2011, to:

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