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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Tariffs to Recover Through An Automatic Adjustment Clause Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment	)	Case No. 07-478-GA-UNC

REPLY BRIEF OF ABC GAS REPAIR, INC.

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II. INTRODUCTION

Looking only at Columbia's brief, one might erroneously conclude that ABC and USP were somehow the Petitioners, thereby bearing the burden of proof in this matter. Columbia's brief argues at length that ABC's and USP's evidentiary support is somehow deficient in one manner or another. Thus, for example, Columbia proclaims that each of the broader policy concerns raised by ABC and USP should be wholly disregarded, apparently because ABC and USP are also worried about their economic interest. Columbia's Brief, at 10. Elsewhere, Columbia attacks ABC's and USP's quantum of proof--baldly proclaiming that "there is no evidence in the record that suggests ABC or USP even contemplated customer concerns." *Id.*, at 11.

In fact, however, these arguments are strikingly disingenuous. Columbia is the Petitioner. Columbia is the party seeking to disrupt more than 80 years of precedent and property rights. Columbia bears the burden of proving that the draconian changes proposed by the IRP and Stipulation should become law. Columbia, and not ABC or USP, is the party seeking to justify the IRP and Stipulation by raising arguments about safety, customer confusion, and control. It is Columbia's burden to prove that the longstanding and current system of privately owned customer service lines poses some actual threat to public safety. It is Columbia's burden to show that the current system has led to widespread customer confusion—and that the supposed confusion would be eliminated rather than exacerbated by the IRP or Stipulation. It is Columbia's burden it cannot maintain adequate control over quality, materials and recordkeeping under the current system of private customer service line ownership.

Charged with these burdens, one might have expected Columbia to buttress its claims with specific case studies or examples of how the current system of privately held customer service lines was somehow unsafe for any one of its million-plus customers in Ohio. One might have expected Columbia to introduce survey results showing widespread customer confusion over service line ownership, which might otherwise be remedied under the IRP or Stipulation. Perhaps one might have looked to Columbia for an annotated report demonstrating how Columbia's existing controls over materials, record-keeping, and inspections have failed or could only be improved upon by appropriating the privately held service lines.

Columbia has failed each and every one of these expectations. Instead of studies, Columbia offers only innuendo and *ad hominem* attacks on the Intervenors. Instead of annotated reports, Columbia offers only its naked and conclusory assertions that public safety is somehow at stake. Such assertions are belied by the actual testimony adduced in this matter, however. Columbia's own witnesses acknowledged time and again that there are no generalized public safety concerns implicated by the current and longstanding system of privately owned customer service lines. Columbia's own witnesses acknowledged the broad array of controls that Columbia currently enjoys to assure adequate record-keeping, materials and workmanship. And Columbia admitted that it could alleviate whatever customer confusion over service line ownership supposedly exists through simple education—precisely as it does on a host of other customer issues.

Most fundamentally, Columbia bears the burden of proving that its appropriation of customer service lines under the IRP or Stipulation would make good law. Inasmuch as the evidence wholly points to the contrary, Columbia has failed its burden.

II. LAW AND ARGUMENT

A. Columbia Has Failed Its Burden of Demonstrating That The Public Interest Would Be Served By Taking The Right To Repair and Own Customer Service Lines.

1. Columbia does not demonstrate in any manner how public safety would be improved by the IRP or Stipulation.

Although Columbia argues that its taking ownership of customer services lines is necessary to improve public safety, Columbia is unable to establish that the current system of privately owned service lines is somehow unsafe as it has existed over the past 80 plus years. Given the precipitous action that Columbia proposes, one would expect Columbia to be armed with examples of hazardous situations turning on the privately-held nature of customer service lines. Yet no such evidence exists. Columbia's own witness acknowledged that, unlike Design A risers, customer service lines are simply not prone to catastrophic failure. Ramsey, Tr. Vol. I, at 57. Indeed, the most that Columbia can muster in its brief is the anemic observation that individual customer service lines can, in some instances, develop hazardous leaks. Columbia's Brief, at 14. Of course, this observation does nothing whatsoever to satisfy Columbia's burden of proof. The issue is not whether individual lines leak. The issue is whether those leaks in the aggregate pose some widespread threat warranting wholesale response. (And if so, whether, the response of unilateral appropriation is the measure best tailored to whatever threat supposedly exists).

Because the testimony clearly establishes that customer services lines as a group do not represent a hazard to the public, Columbia is not able to make a credible claim to be able to improve customer safety. Columbia instead tries to combine arguments about the safety of Type-A Risers with arguments about the safety of customer service lines to paint an incorrect and misleading picture. Unlike Type-A Risers, customer service lines are not

prone to sudden catastrophic failure. Morbitzer Direct, at 2. Rather, the testimony has established that customer service lines decay at a predictable rate in the ground. *Id.* at 5. This gradual decay results in pinpoint leaks, which are routinely identified and planned for in the ordinary course of business. *Id.* at 5-6. Even when such leaks occur, customer service lines are not repaired on an imminent basis, because there is not an immediate public danger. *Id.* Instead, repairs are often scheduled at a time convenient for the homeowner. *Id.* at 6-7.

Tellingly, Columbia does not really dispute the relative safety of customer service lines in its trial brief. Nor does it explain how under the IRP the repair process for customer service lines will actually be different and thus lead to increased safety. Instead, Columbia argues that since it has responsibility for ensuring the overall safety of customer service lines, it needs to take control of the customer service lines so that it can better manage the repair process. By having this consolidated managerial authority, Columbia argues, customers will be made safer.

However, it is clear that the only thing that will be improved in this regard by the IRP is Columbia's bottom line, not customer safety. For one, if the IRP were adopted, the current independent safety checks which occur for customer service lines will be eliminated, not enhanced. Ramsey, Tr. Vol. I, at 72. Under the current system, a DOT OQ certified plumber first repairs the service line, and afterwards Columbia performs a third-party inspection to ensure that the repair was done correctly and in a quality manner. *Id.* Under the IRP, as Columbia's own witness conceded, this layer of independent review would be lost. *Id.* Columbia would identify and repair the leak, and no other review would take place, as is currently the case. *Id.* Not only does the IRP fail to make customers service

lines safer, it actually eliminates a safety mechanism, thereby making the customer service line repair process and customers less safe.

Even worse, the IRP would create a class of leaks that Columbia would refuse to repair but that the property owner could not fix on his or her own. The IRP would exempt Columbia from having to repair so-called Class 3 leaks, which would instead only be monitored until they got worse. Ramsey, Tr. Vol. IV, at 12-13. Conversely, under the Stipulation, Columbia would take repair, maintenance, and ownership rights for all but Class 3 leaks, where responsibility would remain with the homeowner. *Id.* at 141, 145-46. Accordingly, it is plain that if either plan is adopted, public safety will be decreased, not enhanced. The IRP would prevent homeowners from being able to fix leaks that they can currently hire OQ certified plumbers to fix. The Stipulation would encourage homeowners not to fix Class 3 leaks and instead hope they get worse so Columbia would have the responsibility to pay for the repair. Obviously, neither situation represents an improvement in customer safety.

If Columbia cannot make a compelling argument regarding increases in public safety, it simply cannot meet its burden to show why the IRP is necessary--given the dramatic intrusion upon property rights the IRP would require. Rather than provide concrete examples of how customer service lines are dangerous and how the IRP is necessary to increase public safety, Columbia merely states that customer service lines can constitute a hazard and therefore Columbia is the best party to control the repairs process. Because the record is clear the current system of repairs for customer service lines presents no immediate danger to customers, Columbia does not carry its burden of showing that the IRP is in the interest of public safety.

2. The IRP will eliminate the current bright-line situation and replace it with a system that promotes customer confusion.

While Columbia argues that the IRP will reduce customer confusion, the testimony has established that no widespread confusion exists about the current system. One aspect of the current system is that it provides a bright line between what the customer owns and does not own—the customer simply owns everything downstream of the curb except for the meter. Any leak that occurs on the customer's property is his responsibility. This situation is straightforward and squarely in line with common sense. If, under the current system, confusion regarding customer service line ownership did exist, Columbia could engage in any number of customer education programs to alleviate the confusion. But Columbia has not done so:

> Q: Columbia could embark today on a similar program of customer education to explain the current standards of ownership of customer service lines, couldn't they?
>
> A: Yes.
>
> Q: Has Columbia decided to do that?
>
> A: No.

Brown, Tr. Vol. IV, at 164 (emphasis added).

If anything, the changes proposed under the IRP would be a source of increased customer confusion. Under the IRP, Columbia would take authority over only the customer service lines, and nothing else. Columbia would not have responsibility for interior or lines downstream of the meter—these lines would still be the responsibility of the customer. This leaves customers in the confusing position of having to determine whether

they are responsible, or even have the authority, to fix a leak occurring on their own property.

Under the current system, customers are benefited by having a bright-line delineation of what is their responsibility. Customers are not left wondering whether a leak on one part of their property will be treated differently than a leak on another part of their property. Conversely, under the IRP, similarly situated property owners could have three different outcomes in terms of customer service line ownership. Ramsey, Tr. Vol I. at 67. Imagine if one of the neighbors suffered a leak, and was told that he did not own the line and could not do anything about it. Now imagine that he went and told his neighbor about this situation, and the neighbor later experienced a leak, only his leak was in his backyard. This neighbor would understandably be surprised and confused to learn that he was responsible for the repair of the leak when his neighbor had not.

As one might expect, under the current system's bright line rule, such confusion has not occurred, because customers are responsible for everything downstream of the curb but the meter. This system is simple and has worked for the past 80 years. Columbia has not shown why it is in the public interest to upset the straightforward treatment of customer service lines and replace it with a system that would produce a variety of different outcomes for similar situated customers.

B. The IRP constitutes a fundamental invasion of customers' property rights and violates the U.S. and Ohio Constitutions

1. Columbia cannot justify the fundamental invasion of property rights that the IRP would cause

Columbia does not attempt to dispute in its trial brief that customer service lines are private property which are conveyed with the land and homes they serve. Rather than address this important issue, all Columbia can muster is righteous condemnation of the arguments of ABC and USP regarding property rights as motivated by their own economic self-interest. In doing so, Columbia fails to realize that it, not ABC and USP, has the burden of showing why such a drastic invasion of property rights is appropriate. Columbia makes no effort to explain the disconnect between its previous statements and the invasion that would occur under the IRP. In a previous filing, Columbia stated:

> [N]o statute even arguably empowers the Commission to appropriate the private property of a utility's customers and transfer that property to the utility.

Initial Comments of Columbia Gas of Ohio, Inc., No. 05-463-GA-COI, Feb. 2, 2007, at 5. However, under the IRP, this is exactly what would occur. Columbia would be given ownership of private property that does not currently belong to it.

Perhaps the most breathtaking part of the IRP is the unfettered discretion Columbia would have over how the repairs are made. Customers would have no ability to dictate how a repair was made, or even the ability to pay more for Columbia to do the repair in a way more suitable to their liking:

> Q: [Under the IRP] does Columbia have the ability to not only shut off the gas, but say: "we are doing this fix and we are going to do it right now and there is nothing you can do to stop us?"

A: Columbia has the ability to make the repair.

Q: Whether or not over the objection of the actual homeowners who own the property?

A: That is correct.

Q: Ok. And that's true in nonhazardous situations as well as hazardous situations, is it not?

A: That is correct.

Ramsey, Tr. Vol. I, at 60-61 (emphasis added). While such a sweeping disregard of property rights is the stuff people may be used to seeing in far-away lands on CNN, it certainly has no place right here in quite literally our own front yards.

Moreover, Columbia only addresses these concerns by stating that customers will be better off under the new system, and thus should not mind the property rights invasion. First, Columbia argues that customers will receive piece of mind because they will not have unexpected or substantial repair bills incurred if something should happen to their customer service line. Columbia Br. at 20. Of course, the same argument could be made in regards to any number of personal property items, yet our system protects people from such invasions of property who do not wish the invasion to occur. One could imagine that if customers were provided the choice of giving Columbia an easement to own and fix their customer service lines or retaining their property rights but made to face the risk of repair costs, many people would choose to retain control of who they allow to access to their property. Mandating that those homeowners submit to the taking imposed by the IRP violates fundamental property rights.

Second, Columbia argues that the lower cost that customers will pay under the IRP should outweigh privacy concerns. See *id.* at 20-21. Again, the same analysis as above

applies to this situation. Many customers would rather pay slightly more to retain control over their private property, and they should not be forced to submit to a plan whose mandate is otherwise. While Columbia argues that the public good must triumph over property rights in this situation because the public benefits from knowing that the natural gas system is safe, this argument presents a false choice. Customer service lines under the current system are already safe, as discussed previously, so the choice is not between safe and unsafe. Rather, the choice is between safe customer service lines under the current system and safe customer service lines coupled with a taking of private property under the IRP. When viewed in this light, the choice is obvious.

2. Columbia makes no attempt to refute the fact that the taking of private property without compensation under the IRP is a violation of the 5th Amendment and the Ohio Constitution

Columbia seems equally unconcerned that the IRP would violate the Takings Clause of the 5th Amendment and the Ohio Constitution. Nowhere does Columbia point to case law that would suggest that taking private property as the IRP proposes somehow is acceptable under the Takings Clause. Columbia merely hopes that it has pointed out enough public benefits to override any constitutional concerns. Unfortunately for Columbia, the Constitution does not allow utilitarian considerations regarding the public good to override the protection of individual rights.

The Takings Clause provides that private property shall not be taken for public use without just compensation. U.S. CONST. Amend. V. Found within this provision are two prohibitions on the government's power to take private property: the taking must be compensated, and it must be for public use. Without explicitly addressing either argument,

Columbia skips right over the compensation issue and focuses all of its energy on whether there is a public benefit associated with the IRP. While the merits of the relative benefits of the IRP have been discussed elsewhere, it is undisputed that compensation would not be paid to homeowners for the taking of customer service lines. Such an action is clearly an appropriation of private property under the 5th Amendment. Columbia cannot dispute this point so it simply ignores it.

Moreover, the type of taking proposed here, an actual physical invasion of private property, is the most fundamental and egregious types of taking. *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 425. When property owners lose the right to exclude people from their property, they give up one of the "most treasured strands" in their bundle of property rights. *Id.* at 435-36. Because of this forfeiture, such an invasion constitutes a per se taking, and must be compensated. *Id.* The relative size of the taking does not affect the analysis of whether a taking has actually occurred. Such an argument merely goes to how much compensation should be paid. *Id.* For instance, the U.S. Supreme Court has found that a state regulation requiring landlords to allow cable companies to affix a cable to their buildings constitutes a taking which must be compensation. *Id.* While such an invasion might only devalue the property a small amount, the applicable regulation did not provide for compensation and thus could not stand. *Id.*

Similarly, taking customer service lines from private property owners and handing them over to Columbia gives Columbia a permanent invasion of every piece of private property with a customer service line. As Columbia's witness admitted, homeowners would not have the ability to exclude Columbia from their property if the IRP is enacted. Brown,

Tr. Vol. I, at 196-97. Accordingly, the IRP forces homeowners to give up one of the most treasured strands in their bundle of property rights. While in this situation the public benefits associated with the IRP is dubious, there is no amount of public benefit that can rewrite the individual guarantees of the Constitution—individual property owners must be paid just compensation for takings of their property. Therefore, it is clear that the IRP cannot be adopted because it does not compensate homeowners for such a taking.

III. CONCLUSION

WHEREFORE, for each of the foregoing reasons, ABC Gas Repair, Inc. respectfully requests that the Commission reject that portion of Columbia's IRP and the proposed Stipulation as provides for Columbia Gas of Ohio to assume either responsibility or ownership of privately held customer service lines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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