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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

INITIAL POST-HEARING BRIEF OF ABC GAS REPAIR, INC.

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I. INTRODUCTION

Petitioner, Columbia Gas of Ohio ("Columbia") seeks to use the safety concerns presented by faulty Design-A risers as a pretext to grab a lucrative and unnecessary monopoly over the unrelated right to maintain, repair and ultimately own private customer service lines. The testimony at issue in this matter showed that there is no nexus whatsoever between these two components of Columbia's conflated IRP. Unlike Design-A risers, customer service lines have no propensity for sudden catastrophic failure. As a group, they represent no hazard to the public. There is no overriding safety concern mandating precipitous action.

To the contrary, an entire industry has arisen predicated on the notion that steel customer service lines slowly decay after decades in the ground. This gradual decay eventually results in pinpoint leaks, which are routinely identified and remediated in the ordinary course of business. These customer service lines are private property, and are conveyed with the land and homes that they serve. Columbia has no more right to appropriate this property than they would a consumer's gas furnace or interior gas line. When any of these customer service lines develops a leak, the consumer has the freedom to select a DOT OQ certified plumber of their choice in the marketplace. That freedom of choice includes the property owner's fundamental right to determine who is allowed to enter on their land and dig. It includes the right to decide what care, if any, must be given to existing landscaping or trees. It includes the right to determine whether trenching is hand-dug to protect the garden, or whether to go with the expediency of a backhoe. All of those choices would be stripped away from the landowner under the IRP.

Columbia has failed to demonstrate any compelling basis why it should be allowed to trump the rights of property owners, override the existing private contracts of the marketplace, and be given a monopoly to maintain, repair, and take ownership of customer service lines. While Columbia argues that its proposed taking will make service lines safe, it has not, and could not, testify that the lines are somehow unsafe as they are. The current system has worked well for the past 80 years, and all aspects of federal pipeline safety regulations are being complied with today. Indeed, the changes imposed under the IRP would provide for fewer safety checks than are required today. Under the current system, all repairs to customer service lines are subject to a third-party inspection by Columbia prior to resumption of service. Inasmuch as that third-party inspection would be discontinued under the IRP, Columbia's proposed taking would actually eliminate part of the existing safety protocol.

Worse yet, the IRP would create a class of gas leaks that Columbia would refuse to repair but that the property owner would be barred from remediating on their own. Under the IRP, so-called Class 3 leaks would merely be monitored until they got worse. Columbia would not be required to repair these Class 3 leaks, but the property owner would be stripped of their right to hire an OQ certified plumber of their own to fix the problem. Despite the odor of gas, or the resulting patches of dead lawn, and no matter how nervous or uncomfortable the property owner was with the fact of a gas leak of any magnitude, they would have no power to fix this problem on their land.

The converse problem would develop if the Commission instead adopted the Stipulation proposed by a minority of parties to this action.[1] Under the Stipulation,

[1] For most purposes of this brief, the same evidentiary and legal arguments demonstrate the impropriety of both the IRP and the proposed Stipulation. Accordingly, in the interests of brevity, ABC Gas Repair, Inc.

Columbia would take repair, maintenance and ownership rights for all customer service line leaks except for Class 3 leaks—where responsibility would remain with the homeowner. Not only would this create a fact-driven shifting of responsibilities that would baffle most consumers, but it would also create a perverse disincentive for customers to repair their leaking lines. If they instead wait just a bit longer, and let the leak get just a bit worse, Columbia will repair the leak at no incremental charge to the landowner. Whatever else can be said of a system that incentivizes customers to exacerbate their existing gas leaks, it cannot be said to promote public safety. Yet despite the deleterious effect of all of these changes, Columbia baldly argues that its taking under the IRP or Stipulation would do just that.

Columbia's other arguments in support of the IRP are equally insupportable. Thus, Columbia also seeks to justify its proposed taking as a means of eliminating customer confusion over responsibility for the service lines. Although the record includes anecdotal references to instances of alleged confusion, there is no testimony or evidence whatsoever to suggest systemic or widespread public confusion meriting a wholesale response of any kind—let alone the draconian measure of stripping individual property rights. Indeed, Columbia's own witnesses acknowledged that if there actually was significant confusion, Columbia could address the problem through routine education or notices in its bills—simple measures that Columbia has declined to undertake.

If anything, the changes imposed under the IRP would be a source for increased customer confusion. Under the current system, the customer is responsible for all facilities downstream of the curb, except for the meter itself. Whether the leak is inside, outside,

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will focus its attention primarily on the fundamental flaws of the IRP and ask that the Commission simply recognize that the Stipulation concordantly suffers from these same defects. In their treatment of Class 3 leaks, however, the IRP and Stipulation vary, and thus the failures of each shall be considered in tandem.

front yard or back, ownership and responsibility are clear and streamlined. Under the IRP, Columbia would take exclusive authority over, if not outright ownership of, just the customer service lines.[2] Columbia would assume no responsibility for interior lines, however, nor would they take responsibility for downstream lines, such as to the backyard barbecue pit. When portions of the lines were eventually repaired, Columbia would own the repaired section—but not the remainder of the line, or the soils around it, the vegetation over it or the points of access to reach it. Instead of the bright line delineation under the current system, the customer's responsibility would vary by whether the leak was in the front yard or the back, ahead of the meter or behind it. The intricacies of this system may well be lost on a customer that merely smells a faint whiff of gas and reports a leak somewhere near the house. Yet Columbia somehow argues that its new system post-taking would promote clarity.

Columbia's third justification for the IRP is equally flawed. Thus, Columbia argues that the IRP would give it greater control over the materials, processes and documentation of repairs in customer service lines. In fact, however, the testimony belied each of these assertions. Thus, for example, Columbia currently enjoys absolute control over the materials used to repair customer service lines. Equally, Columbia has the absolute authority to reject work not performed by an OQ certified plumber. Columbia currently has the obligation to inspect all repair work on service lines—specifically including visual inspections, joint checks and pressure tests. Columbia has unfettered discretion today to reject any work that does not conform to its standards on these tests. Finally, the testimony unequivocally established that Columbia has the ability today to document the materials,

[2] Of course, under the other portion of the IRP, Columbia may take responsibility for faulty Design-A risers as well.

laborers, and test results of any and all work done today on customer service lines. Nothing about the IRP would enhance Columbia's record-keeping authority over what it already enjoys (but chooses not to exercise) today.

Perhaps most astonishing, Columbia is seeking Commission authority to take control of customer service lines as soon as this coming spring, but has no plan in place as to how it would implement that authority if granted. Columbia has tendered no studies or analysis to show how many technicians it would need to add to satisfy this mandate. Nor has Columbia provided any assessment of whether those technicians would be hired as employees or contracted for from the existing pool of OQ certified plumbers. Columbia has provided no benchmark of the criteria it would use to determine which contractors it would permit to join in its monopoly of control over service lines. Nor has Columbia provided any estimate of how much these new personnel or contractors would cost or charge for their efforts. Yet Columbia essentially asks the Commission for a blank check—for all of its costs (whatever they work out to be) to be built into rate-base.

Thus, Columbia's arguments in favor of the IRP are not borne out by the facts adduced in this matter. Yet the proposed IRP is even more squarely refuted by the law. The essence of the proposal is that Columbia will appropriate a bundle of core private property rights—both without a showing of imminent harm necessitating use of a police power and without compensation for the taking in any event. Neither Columbia nor the Commission itself enjoys such raw power, which runs directly contrary to respective Takings Clauses of the U.S. and Ohio Constitutions. Equally, the proposed taking directly interferes with the 15,000 customer service contracts that ABC Gas and its customers have entered into in the marketplace. On that further ground, the proposed taking violates

federal and state constitutional prohibitions on laws impairing the obligations of private contracts.

For each of these reasons, the IRP is as legally unsound as it is factually insupportable. That portion of the IRP directed to the taking of privately held customer service lines should be flatly rejected by this Commission.

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. Customer Service Lines Present No Imminent Public Safety Concern.

Columbia has taken pains to conflate the notions of customer service lines with the public safety concerns implicated by Design A risers. In fact, however, no such confluence actually exists. Unlike Design-A risers, customer service lines have no propensity for sudden catastrophic failure. As Columbia's own witness was forced to concede:

> Q: You don't see those catastrophic failures in steel customer service lines that you see in Type A risers, do you.
>
> A: Not normally, no.
>
> Q: Ok. In fact, your testimony is you can't recall ever seeing an incident of a catastrophic failure of a customer service line, true?
>
> A: That is correct.

Ramsey, Tr. Vol. I, at 57 (emphasis added). As a group, customer service lines represent no hazard to the public. There is no overriding safety concern mandating precipitous action.

To the contrary, an entire industry has arisen predicated on the notion that steel customer service lines slowly decay after decades in the ground. Morbitzer Direct, ABC

Gas Ex. 3, at 2. This gradual decay eventually results in pinpoint leaks, which are routinely identified and remediated in the ordinary course of business. *Id.*

While Columbia argues that its proposed taking will make service lines safe, it has not, and could not, testify that the lines are somehow unsafe as they are. As one Columbia witness was forced to acknowledge:

> Q: Are you aware of any report or any study that identifies customer service lines as being . . . a safety concern to the people of the State of Ohio as it currently exists?
>
> A: No.

Brown, Tr. Vol. I, at 208. Indeed, the Commission's own Staff Report in Case No. 05-463-GA-COI directly contrasted the safety implications of the plastic Design A risers with metallic components of other buried gas delivery facilities. As the report explained:

> Laboratory testing focused exclusively on the performance of plastic risers because not only were they the cause of all of the incidents reported to staff, but the primary cause of metallic riser leaks is corrosion, which can be controlled and is less hazardous.

Id., at 3 (emphasis added). Thus, the report concluded that "the risk presented with metallic riser leaks is lower since they tend to have very slow leaks underground that do not result in an incident. In contrast, a failed plastic riser can blow full gas pressure against a structure and cause significant damage." *Id.* Although the staff report was specifically looking at the slow leaks of metallic risers, rather than metallic customers service lines, the dynamic is the same. Morbitzer Direct, ABC Gas Ex. 3, at 7. On this basis, the Commission staff distinguished Design-A risers from customer service lines, and acknowledged that the hazards of the former should not be a pretext for appropriating the latter:

Q: Do you agree [that] the potential problems associated with certain riser designs do not warrant changing the current system of customer ownership of customer service lines?

A: Yes.

Henry, Tr. Vol. IV, at 282.

The current system of private customer service lien ownership has worked well for the past 80 years, and all aspects of federal pipeline safety regulations are being complied with today. Morbitzer Direct, ABC Gas Ex. 3, at 2. Indeed, the changes imposed under the IRP would provide for fewer safety checks than are required today. *Under the current* system, all repairs to customer service lines are subject to a third-party inspection by Columbia prior to resumption of service. Columbia's witness explained this third-party inspection protocol under today's system:

Q: So you have got the original plumber and they are checking their own work, and you have got somebody else reviewing the quality, the workmanship, the materials, to make sure no corners were cut?

A: Yes.

Q: Ok. Now let's look at how it would work under the IRP, ok? Under the IRP proposal . . . is there a third party, neutral inspection by somebody that hasn't done the work themselves?

A: No.

Q: Ok. So under the IRP you are losing another mechanism for review, aren't you, an independent inspection?

A: Yes.

Ramsey, Tr. Vol. I, at 72 (emphasis added). Inasmuch as that third-party inspection would be discontinued under the IRP, Columbia's proposed taking would actually eliminate part of the existing safety protocol. Nor can the impact of such a loss be minimized. While

claiming not to know whether such third-party inspections make the process more safe, Columbia's witness conceded that:

> Q: Do you find there is value generally when you have someone other than yourself review your work?
>
> A: Yes.

Ramsey, Tr. Vol. I, at 24.

Worse yet, the IRP would create a class of leaks that Columbia would refuse to repair but that the property owner would be barred from remediating on their own. Under the IRP, so-called Class 3 leaks would merely be monitored until they got worse. Ramsey, Tr. Vol. IV, 12-13. Columbia would not be required to repair these Class 3 leaks, but the property owner would be stripped of their right to hire an OQ certified plumber of their own to fix the problem. *Id.* Despite the odor of gas, or the resulting patches of dead lawn, and no matter how nervous or uncomfortable the property owner was with the fact of a gas leak of any magnitude, they would have no power to fix this problem on their land. *Id.* Yet despite the deleterious effect of these changes, Columbia baldly argues that its taking under the IRP would somehow promote public safety.

The converse problem would develop if the Commission instead adopted the Stipulation proposed by a minority of parties to this action. Under the Stipulation, Columbia would take repair, maintenance and ownership rights for all customer service line leaks except for Class 3 leaks—where responsibility would remain with the homeowner. Ramsey, Tr. Vol. IV, at 141, 145-146. Not only would this create a fact-driven shifting of responsibilities that would baffle most consumers, but it would also create a perverse disincentive for customers to repair their leaking lines. If they instead wait just a bit longer,

and let the leak get just a bit worse, Columbia will repair the leak at no incremental charge to the landowner. Whatever else can be said of a system that incentivizes customers to exacerbate their existing gas leaks, it cannot be said to promote public safety. Yet despite the deleterious effect of all of these changes, Columbia baldly argues that its taking under the IRP or Stipulation would do just that.

2. There Is No Evidence Of Widespread Customer Confusion Regarding Private Ownership of Customer Service Lines.

Columbia's other arguments in support of the IRP are equally insupportable. Thus, Columbia also seeks to justify its proposed taking as a means of eliminating customer confusion over responsibility for the service lines. Although the record includes anecdotal references to supposed individual confusion, there is no testimony or evidence whatsoever to suggest systemic or widespread public confusion meriting a wholesale response of any kind—let alone the draconian measure of stripping individual property rights. Indeed, Columbia's own witnesses acknowledged that if there actually was significant confusion, Columbia could address the problem through routine education or notices in its bills—simple measures that Columbia has declined to undertake. Thus, as one Columbia witness acknowledged:

> Q: Would you agree with me that Columbia embarks on a variety of different types of customer education programs to eliminate customer confusion where it deems they exist?
>
> A: Yes.

Martin, Tr. Vol. IV, at 165 (noting that Columbia educates its customers when it believes they are confused about how to pay bills online, or confused about its tariff, or what to do if they smell a gas leak). Yet despite the plethora of available education regarding other

aspects of Columbia's service, Columbia has made no effort to alleviate the supposed widespread customer confusion regarding service line ownership:

> 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 imposed under the IRP would be a source for increased customer confusion. Under the current system, the customer is responsible for all facilities downstream of the curb except for the meter. If the leak is inside, outside, front yard or back, ownership and responsibility are clear and streamlined. Under the IRP, Columbia would take exclusive authority over, if not outright ownership of, just the customer service lines.[3] Columbia would assume no responsibility for interior lines, however, nor would they take responsibility for downstream lines, such as to the backyard barbecue pit. When portions of the lines were eventually repaired, Columbia would own the repaired section—but not the remainder of the line. Instead of the bright line delineation under the current system, the customer's responsibility would vary by whether the leak was in the front yard or the back, ahead of the meter or behind it.

> Q: So you are going to have customers if the leak is in one part of their front yard, it is a customer service line and it's Columbia's jurisdiction, and if it's in the back yard instead of the front yard, it's somebody else's jurisdiction, correct?
>
> A: If it is a house line, correct.

[3] Of course, under the other portion of the IRP, Columbia may take responsibility for faulty Design-A risers as well.

Tr. Vol. I, at 62. *See also id.*, at 67 (describing how under the IRP, you could have three similarly situated customers on the same block with three different outcomes in terms of ownership).

The intricacies of this system may well be lost on a customer that merely smells a faint whiff of gas and reports a leak somewhere near the house. Yet Columbia somehow argues that its new system post-taking would promote clarity.

3. Columbia Controls The Materials, Plumber Qualifications, Quality Of Work, And Documentation of Work Under The Existing System.

Columbia's third justification for the IRP is equally flawed. Thus, Columbia argues that the IRP would give it greater control over the materials, processes and documentation of repairs in customer service lines. In fact, however, the testimony belied each of these assertions. Thus, for example, Columbia currently enjoys absolute control over the materials used to repair customer service lines. Tr. Vol. I, at 68. Equally, Columbia has the absolute authority to reject work not performed by an OQ certified plumber. *Id.* Columbia currently has the obligation to inspect all repair work on service lines—specifically including visual inspections, joint checks and pressure tests. *Id.*, at 68-69. Columbia has unfettered discretion today to reject any work that does not conform to its standards on these tests. *Id.* Finally, the testimony unequivocally established that Columbia has the ability today to document the materials, laborers, and test results of any and all work done today on customer service lines. Tr. Vol. I, at 50; *Id.*, at 70-71. Nothing about the IRP would enhance Columbia's record-keeping authority over what it already enjoys (but chooses not to exercise) today.

4. The IRP Would Interfere With Fundamental Private Property Rights.

It is undisputed that customer service lines are private property, and have long been conveyed with the land and homes that they serve. Columbia has no more right to appropriate this property than they would a consumer's gas furnace or interior gas line. Indeed, Columbia itself has acknowledged as much in a previous filing. As Columbia explained:

> [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. Yet such a transfer of ownership rights is precisely what Columbia seeks under the proposed IRP.

Under the current system, when a privately held customer service line develops a leak, the consumer has the freedom to select a DOT OQ certified plumber of their choice in the marketplace. That freedom of choice includes the property owner's fundamental right to determine who is allowed to enter on their land and dig. It includes the right to decide what care, if any, must be given to existing landscaping or trees. It includes the right to determine whether trenching is hand-dug to protect the garden, or whether to go with the expediency of a backhoe. All of those choices would be stripped away from the landowner under the IRP. One Columbia witness underscored that loss of choice by contrasting the current system with the IRP:

> Q: Turning our attention specifically to customer service lines, would you agree with me that Columbia's inspectors do not have the authority to enter my property today and start digging under any circumstances?

A: Our tariff does not provide that authority.

Q: Ok. Thank you, sir. Now under the IRP if the IRP were to be enacted, would Columbia's inspectors have the ability upon discovering a leak in a customer service line on my front lawn to not only inspect, not only turn off the gas, but then start digging on my property to effect the changes?

A: Yes.

Q: And they could do that even with a backhoe, couldn't they?

A: Yes.

Q: Ok. So I as the property owner under the IRP have no ability to keep you from bringing heavy equipment onto my property to effectuate a change.

A: Not if that was what was required to repair the situation.

Brown, Tr. Vol. I, at 196-197 (emphasis added) (adding that he was unaware of whether private OQ certified plumbers in the marketplace will agree to hand-dig trenches to protect landscaping, rather than resorting to heavy equipment). Of course, under the IRP, Columbia is the sole arbiter of what is "required" in the course of remediation:

Q: Now under the IRP program, if this homeowner we have been talking about sees the spot of dead grass on his lawn and calls Columbia, and Columbia comes out, takes a look at it, and says "yeah, you've got a gas leak" and its your customer service line--under the IRP Columbia has got unfettered discretion. They can do whatever they want to fix it over the homeowner's objection. That was your testimony a little earlier. True?

A: Yes.

Ramsey, Tr. Vol. I, at 61-62 (emphasis added).

Columbia's witnesses admit, however, that the power to control what happens on one's private land is a fundamental aspect of property ownership. Thus, in the context of landscape remediation, one witness acknowledged:

> Q: As a residential property owner, don't I have the right to choose that I value the wisteria over he incremental cost of replacing the wisteria . . . [d]on't property owners get to make those decisions every day?
>
> A: Yes.
>
> Q: Is that one of the fundamental rights of property ownership?
>
> A: Yes.

Brown, Tr. Vol. I, at 202. Yet Columbia urges that it should have the raw power to cast such fundamental rights aside, in its "unfettered discretion:"

> 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).

5. The IRP Frustrates The Property Owner's Right To Choose Among OQ Certified Plumbers In The Marketplace.

Today, customers have the right to choose in the marketplace a DOT OQ certified plumber that will perform the work on the customer's property—in a manner that not only complies with safety regulations but also satisfies the customers aesthetic needs and work schedule. Tr. Vol. I, at 48; 59. Indeed, the customer has the right to choose the same OQ certified plumber that works on their furnace lines, interior lines, or the line going to their barbecue pit. *Id.*, at 59-60. Columbia, of course, provides none of those services either today or under the proposed IRP. *Id.*

Moreover, there are legitimate reasons why a customer may prefer to find a service-oriented OQ certified plumber in the free-market, rather than being forced to choose the employee of a protected monopoly. Thus, Columbia is no stranger to customer complaints even under the current system:

> Q: Isn't it true that you have seen more complaints coming back through the Commission about the timeliness of Columbia personnel than you have seen complaints coming back through the Commission about OQ certified plumbers?
>
> A: Yes.

Ramsey, Tr. Vol. I, at 39. Nothing in the record would suggest that Columbia might somehow become more responsive if given monopolistic powers over customer service lines.

Under the IRP, Columbia "is proposing restoration of gas service within three working days in the non-heating season." Ramsey Direct, at 13. *See also* Tr., Vol. I, at 39 (explaining that "working days" means Monday through Friday). Thus, if Columbia was in

charge of all customer service line repairs under the IRP, the most that they are willing to propose is that if gas service is shut off on a Friday afternoon, it should be back on by the following Wednesday evening! It is axiomatic that a competitive free market is capable of a more nimble and service oriented response.

In sum, the facts adduced at the evidentiary hearing in this matter militate against the IRP. There is no compelling reason –be it safety, reduction of confusion, or greater procedural control—that would justify the wholesale appropriation of private property rights contemplated by Columbia's proposal. Worse yet, as the following sections demonstrate, such a proposal would be wholly unconstitutional in any event--even if the evidentiary record didn't militate against the IRP as clearly as it does.

B. The IRP Would Violate The Takings Clauses of The U.S. and Ohio Constitutions.

The proposed IRP violates the 5th Amendment and the Ohio Constitution because it grants Columbia the right to a permanent physical occupation of private property without just compensation. The 5th Amendment to the United States Constitution, in what is commonly referred to as the "Takings Clause," provides: "nor shall private property be taken for public use, without just compensation." This prohibition against uncompensated takings of private property has been made applicable to the states by the 14th Amendment. *Penn Cent. Transp. Co. v. New York City* (1978), 438 U.S. 104, 122; *Chicago, B. & Q. R. Co. v. Chicago* (1897), 166 U.S. 226, 239 (1897). Article 1, Section 19 of the Ohio Constitution also prohibits the taking of private property for public use without just compensation being paid to the property owner.

For a compensable taking to occur, the state does not have to take title or transfer actual ownership of private property. *See Penn Cent. Transp. Co.*, 438 U.S. at 127-28. Certain governmental regulations will be considered "regulatory takings" if "an otherwise valid regulation so frustrates property rights that compensation must be paid." *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 425. In most situations, courts must decide whether a regulation rises to the level of a regulatory taking on a case by case basis. *State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Commissioners* (2007), 115 Ohio St.3d 337, 341. However, there are two types of regulatory actions which so frustrate individual property rights that they will be considered per se takings: (1) "those government actions that cause an owner to suffer a *permanent physical invasion of property*;" and (2) "government regulations that completely deprive an owner of all economically beneficial uses of the property." *Id.* at 341 (internal citations omitted) (emphasis added).

The U.S. Supreme Court has unequivocally affirmed "the traditional rule that a permanent physical occupation of property is a taking." *Loretto*, 458 U.S. at 440. This type of regulation "is perhaps the most serious form of invasion of an owner's property interest," because "the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Loretto*, 458 U.S. at 435, 440. The seriousness of this type of invasion stems from the fact that such an occupation takes away the property owner's power to exclude the occupier from occupied space. *Id.* at 435-36 (noting that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). When a permanent physical occupation occurs, courts "uniformly have found a taking...without regard to whether the action achieves an

important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. Regardless of whether the property is actually occupied by the government or by a private party, a permanent physical occupation is a per se taking. *Id.* at 432, fn. 9 (reiterating that "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the state, is the occupant").

The *Loretto* case is perhaps the most frequently cited example of how the Supreme Court has applied the Takings Clause to a situation in which a regulation has required private owners to submit to a permanent physical occupation of their property without receiving just compensation. At issue in *Loretto* was a New York statute that forced landlords to allow cable television companies to install cable television wiring on apartment buildings. *Id.* at 421. The statute permitted cable companies to install a one-half inch cable and two cable boxes on the buildings, even if the property owner objected. *Id.* Although the physical occupation mandated by the statute was small, the Court nonetheless found this physical occupation to be a taking. The Court based its holding on the fact that the cable and boxes affixed to the landlord's property gave the cable company the right to come onto the property and service the line any time it wanted. *Id.* at 435. As such, the landlord did not retain the power to exclude the cable company from this space, and therefore the regulation constituted a permanent physical occupation of his property. *Id.* at 435.

In reaching its conclusion, the Court in *Loretto* was careful to distinguish between temporary and permanent physical invasions. *Id.* at 430 citing *United States v. Causby*, 328 U.S. 256, 261. If the regulation is a mere temporary invasion of private property, courts need to examine each case on an ad hoc basis to determine whether a taking has occurred.

Id. citing *Penn Cent. Transp. Co.*, 438 U.S. at 127-28. Common examples of cases that are analyzed under this test are "flooding" cases, which arise when the government takes regulatory action that causes flooding of property for a time. *See Sanguinetti v. United States* (1924), 264 U.S. 146, 149. Conversely, permanent invasions are such a clear and egregious violation of the Takings Clause that no factual inquiry need be made when it becomes clear that the regulation constitutes a permanent physical occupation. *Loretto*, 458 U.S. at 435; see also *State ex rel. Horvath v. State Teachers Retirement Board* (1998), 83 Ohio St.3d 67, 70. Once a per se taking situation has been established, the court need not address any argument relating to how much the property has been devalued by the regulation. *Loretto*, 458 U.S. at 435. Such an argument simply affects how much compensation the government must pay. *Id.*

Based on the standard articulated in *Loretto* and the Ohio courts, the IRP is a clear violation of the 5th Amendment and the Ohio Constitution. The IRP would allow Columbia to enjoy a permanent physical occupation of private property by giving it the exclusive right to repair, replace, and assume ownership of customer service lines. Customers will no longer be able to exclude Columbia and its backhoes from their land.

In *Loretto*, cable companies were granted the unfettered right to permanently affix a cable and several boxes to apartment buildings the cable companies did not otherwise own. Private property owners would not be allowed to exclude Columbia Gas from their property, forfeiting one of the "most treasured strands" in their bundle of property rights. Accordingly, these facts indicate that current situation is nearly identical to *Loretto* and fits squarely within the definition of a permanent physical occupation of private property.

Once a permanent physical occupation has been established, it does not matter how large or small the size of the invasion is or whether the occupation serves an important public benefit. *Loretto*, 458 U.S. at 435. Such a permanent physical occupation simply is a per se taking for which compensation must be paid. While there may be arguments on the extent to which the taking will affect the value of the property, these arguments go to how much compensation should be paid, not whether a taking has occurred. Therefore, if the government does not provide compensation for each property owner upon which the regulation will affect a taking, the IRP will violate the Takings Clause and cannot be implemented.

C. The Proposed IRP Would Impair The Obligations Of Existing Contracts In Violation Of The Contract Clauses of The U.S. and Ohio Constitutions.

Besides amounting to an unconstitutional taking of private property without just compensation, the IRP would also impair the obligations of existing contracts and thus violate the Contract Clause of both the U.S. Constitution and the Ohio Constitution. The U.S. Constitution provides in Article I, Section 10 that "No state shall enter into any...Law impairing the Obligations of Contracts." Similarly, the Ohio Constitution provides in Article II, Section 28 that "[t]he general assembly shall have no power to pass...laws impairing the obligation of contracts." The principle behind these clauses is that "the laws which subsist at the time and place of the making of a contract...enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Home Building & Loan Assoc. v. Blaisdell* (1934), 290 U.S. 398, 429-30. Because of this principle, the Framers wanted to ensure that the government would be forbidden from passing laws which impair the obligations of contracts already in existence. *Id.*

The main inquiry a court must make when analyzing the Contracts Clause is to determine "whether the change in state law has operated as a substantial impairment of a contractual relationship." *Gen. Motors Corp. v. Romein* (1992), 503 U.S. 181, 186; *State ex rel. Horvath v. State Teachers Retirement Board* (1998), 83 Ohio St.3d 67, 76. Under this inquiry, there are three questions that must be examined: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 503 U.S. at 186.

Using the inquiry enumerated by the *Romein* court, ABC Gas clearly has contractual relationships that will be substantially impaired by the IRP in violation of the Contracts Clause. First, ABC Gas has an existing contractual relationship with some 15,000 customers across Ohio to service and repair natural gas lines. Morbitzer Direct, ABC Gas Ex. 3, at 3. The fact that these contracts form valid contractual relationships is beyond dispute.

Second, by creating a change in existing law, the IRP would undeniably impair these contractual relationships. Obviously, if Columbia assumes exclusive control over customer service lines, ABC Gas would no longer be able to perform that same service on behalf of its customers. This change in the law undisputedly impairs ABC Gas's existing contracts. Third, this impairment would be a substantial one because it would completely wipe out ABC Gas's contractual relationships. ABC Gas would not be able to perform the maintenance and service required by the contracts, and the customers would no longer be required to pay ABC Gas for its services. Under any definition of substantial impairment, this situation most certainly qualifies. Because it is clear that all factors of the substantial impairment test are met in this situation, the Court should find that the IRP violates the

Contracts Clause of both the U.S. Constitution and the Ohio Constitution and thus cannot be implemented.

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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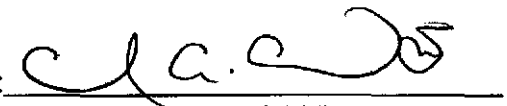
By: 

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of ABC Gas Repair, Inc. was served upon the following persons by electronic mail this 31st day of December, 2007:

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