

**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 Infra-)
structure Replacement Program and for Approval)
of Certain Accounting Treatment)

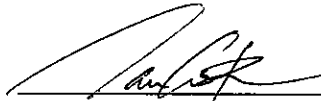
Case No. 07-478-GA-UNC

**COLUMBIA GAS OF OHIO, INC.'S
MEMORANDUM CONTRA
UTILITY SERVICE PARTNERS, INC.'S
MOTION FOR STAY**

The Public Utilities Commission of Ohio ("Commission") issued its Opinion and Order ("Order") in this case on April 9, 2008. On April 23, 2008, Utility Service Partners, Inc. ("USP") filed a Motion for Stay of Implementation of the April 9, 2008 Opinion and Order, the Entry Approving the Tariffs and Request for an Expedited Ruling ("Motion"). Columbia Gas of Ohio, Inc. ("Columbia") files this Memorandum Contra USP's Motion. For the reasons discussed in the attached Memorandum in Support, Columbia respectfully requests that the Commission deny USP's Motion.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

The Commission issued its Opinion and Order in this case on April 9, 2008. On April 23, 2008, USP filed a Motion for Stay of Implementation of the April 9, 2008 Opinion and Order, the Entry Approving the Tariffs and Request for an Expedited Ruling. USP's Motion should be denied.

USP claims that in determining whether to grant a motion for stay the most important factor to be considered is the harm suffered by the moving party should the relief not be granted. USP's Motion for Stay at 5. In support of its contention, USP cites to *In the Matter of the Complaint of David Francis Surber v. Cellular One of Cincinnati*, Case No. 89-889-RC-CSS, 1989 Ohio PUC LEXIS 748, at 4. However, fourteen years after *Surber* the Commission adopted a revised four-part test for determining whether to grant a stay of its own orders. See *In re Comm'n's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, 2003 Ohio PUC Lexis 62, at 9-10.

In that case the Commission adopted a balancing test in which the most important factor is not the harm to the moving party if relief is not granted, but rather the most important factor to be considered is "where lies the interest of the public." *Id.* See also *MCI Telecomm. Corp. v. Pub. Util. Comm'n.*, 510 N.E.2d 806, 807 (Ohio 1987) (Douglas, J., dissenting). The other factors to be considered are: "whether there has been a *strong showing* that the party is likely to prevail on the merits; whether the party seeking the stay has shown that it would suffer *irreparable* harm absent the stay; [and] whether the stay would cause substantial harm to *other parties*." *In re Comm'n's Investigation*, at 10 (emphasis added).

As previously noted, the most important factor to consider is where the public interest lies. *Id.* at 10. In the instant case, the question of where the public interest lies can be answered by an analysis of the Commission's immediate implementation¹ of the Order, which approved, in virtually its entirety, the Amended Stipulation and Recommendation as filed on December 28, 2008. The Commission has made expressly clear where the public interest lies by stating that its "primary concern is with ensuring public safety," that "public safety will be enhanced by allowing Columbia to take responsibility for repair of the hazardous customer service lines," and the amended stipulation will, as a package, benefit ratepayers and the public interest." Order at 34. USP argues that "the same safety concerns associated with . . . risers do not exist for customer service lines." USP's Motion for Stay at 8. But after careful consideration the Commission determined otherwise, agreeing with Columbia in finding that service lines leaks "can present significant safety hazards and do have the potential to cause catastrophic damage to the customer's property or neighboring properties," and therefore it is "appropriate and reasonable, in an effort to improve the level of public safety, to shift responsibility for . . . service lines to Columbia." Order at 29.

Contrary to USP's position, the Commission requires more than a mere likelihood of success. A *strong showing* of the likelihood of success that the movant will prevail on the merits is required. *In re Comm'n's Investigation*, at 10 (emphasis added). USP mentioned this factor in its Motion, but did not present any argument to the Commission as to why it is likely to succeed on the merits. In failing to address the likelihood of its success on rehearing, USP has not demonstrated how it could prevail on the merits, nor how the Commission could conclude that the Order is unreasonable or unlawful.

¹ Under R.C. § 4903.15, every order made by the Commission shall become effective immediately upon entry thereof upon the journal of the Commission unless a different time is specified therein or by law.

A specific analysis of USP's claims, and Commission treatment of those claims in the Order, produces further evidence that USP is unable to demonstrate any showing, let alone a strong showing, of the likelihood of success that it will prevail on the merits. First, with regard to USP's impairment of contracts argument, the Commission found that USP's claim not only failed the first prong, but *failed all three prongs* of the test for finding an impairment of contract. Order at 16-20 (emphasis added). Second, with regard to USP's argument that the IRP would constitute an unlawful taking, the Commission found that the IRP "would not result in a compensable taking of private property." *Id.* at 21. In fact, the Commission found there to be "no taking at all" and even stated, for the sake of argument, that even if there was a taking here, "the customer is being adequately compensated." *Id.* at 21-22. To prevail on the merits in rehearing of the takings determination, the Commission would have to find not one, but two errors regarding these questions of fact. Given the Commission's consideration of USP's arguments in conjunction with the fact that USP completely failed to address the likelihood of success that it will prevail on the merits, it can be presumed that USP has not met this factor.

USP has also not demonstrated that it would suffer any harm, let alone irreparable harm, absent the stay. *In re Comm'n's Investigation*, at 10. Rather, USP makes a blanket assertion that transferring customer service lines to Columbia will cause USP harm by making its existing warranty contracts worthless. USP has made no showing that any of its customers have cancelled their warranty contracts, nor has USP addressed the fact that its contracts also provide warranty services for numerous other products such as in-home water line warranties, in-home sewer warranties, in-home gas line warranties, external water line warranties and landscape services. Moreover, USP failed to address the fact that it has offered to switch its customers' coverage of external gas lines to other lines. Order at 17-18. In fact, the Commission has already opined that

“warranty companies will not be deprived entirely of potential business with their current customers.” *Id.* at 18. USP has offered no new evidence that could lead the Commission to a different conclusion this time around.

The third factor requires the Commission to determine whether the stay may cause substantial harm to *other* parties. *In re Comm’n’s Investigation* at 10 (emphasis added). The Commission has made clear that its “*primary concern* is with ensuring public safety,” and determined that “public safety will be enhanced by allowing Columbia to take responsibility for repair of the hazardous customer service lines.” Order at 34 (emphasis added). Staying the Order would be in contravention of the public interest and only serve to harm Columbia’s 1.4 million customers by jeopardizing public safety and depriving them of the numerous benefits inherent in the Amended Stipulation. *Id.* at 34-35. The Order’s purpose is to prevent harm to the public and staying the order would only result in staying the beneficial effects to the public’s safety.

USP also states it is “concerned with communication issues related to transferring the metal service line repair business to Columbia.” USP Motion to Stay at 7. However, throughout this proceeding Columbia has maintained a constant level of communication between it and customers and will continue to broadcast communications to its customer base as a whole. The Commission, Commission Staff and Columbia have also disseminated a consistent message that customers should contact Columbia first should questions arise. (Even USP’s customer assistance telephone system encourages customers to contact Columbia immediately if the customer smells gas, as does Columbia’s bill to customers.) Columbia has ensured its Customer Service Representatives are able to properly handle customer inquiries regarding service line responsibility. Further, the process of discovering service line leaks has not changed. Service line leaks are discovered by a customer who smells gas and contacts Columbia or by Columbia’s field person-

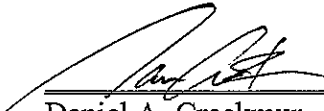
nel conducting leakage inspections. Columbia is immediately involved in either situation and can effectively communicate this transfer of responsibility on a case-by-case basis where necessary.

In summary, an analysis of the four factors to be weighed when determining whether to grant a stay of a Commission order reveals that USP has failed to adequately address all of those factors. USP has not made the necessary strong showing that it is likely to prevail on the merits of its claims; USP has not demonstrated any harm or that such harm would be irreparable; granting USP's Motion for Stay may cause substantial harm to homeowners and their neighbors by delaying the IRP, a program designed to promote public safety; and denying the stay is in the public's interest because the Commission has already determined that "the amended stipulation will, as a package, benefit ratepayers and the public interest." *Id.* at 34.

WHEREFORE, for the reasons discussed above Columbia respectfully requests that the Commission deny USP's Motion for Stay.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Columbia Gas of Ohio, Inc.'s Memorandum Contra Utility Service Partners, Inc.'s Motion to Stay of Implementation of the April 9, 2008 Opinion and Order, the Entry Approving the Tariffs and Request for Expedited Ruling by electronic mail on all parties of record this 28th day of April, 2008.



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Summary: Memorandum Columbia Gas of Ohio's Memorandum Contra Utility Service Partners Motion to Stay electronically filed by Mr. Daniel A Creekmur on behalf of Columbia Gas of Ohio, Inc.