

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

15
RECEIVED-DOCKETING DIV
2008 MAY 19 PM 2:45

PUCO

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

MEMORANDUM CONTRA
OF COLUMBIA GAS OF OHIO, INC.
THE APPLICATION FOR REHEARING OF
UTILITY SERVICE PARTNERS, INC.

I. INTRODUCTION

On May 9, 2008, Utility Service Partners, Inc. ("USP") filed an Application for Rehearing of the April 9, 2008 Opinion and Order ("Order"). USP submits numerous reasons as to why the Order is unreasonable and unlawful. For the reasons explained below, Columbia submits that the Commission should deny the Application for Rehearing of USP and reaffirm its Order to provide assurance to all of Columbia's customers that the safety concerns associated with natural gas risers and customer service lines will be addressed in the uniform and reasonable manner set forth in the Order.

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician Tm Date Processed 5/19/2008

II. ARGUMENT

A. The Commission Has the Requisite Authority to Supervise and Regulate Public Utilities and Prescribe Any Order Necessary for the Protection of Public Safety.

The Commission is vested with the necessary statutory authority to supervise and regulate public utilities and to require public utilities to render all services exacted by the Commission.¹ The Commission has statutory general supervision over public utilities, including the power to inspect utilities.² Within these statutory bounds, the Commission has the authority to examine the utilities' activities relating to adequacy of service and the safety and security of the public and the authority to prescribe any rule or order necessary for the protection of public safety.³ Despite these express statutory grants of authorization, USP contends the Commission lacks the statutory authority to direct Columbia to repair and replace prone to failure risers.

USP's contention that the Commission lacks such authority is unfounded and is directly contradicted by USP's counsel's opening statement:

[T]he Commission authority when it comes to the Design-A risers rests on a very solid predicate. The Commission has the authority under [Ohio] Revised Code Section 4905.93 – 96 to enforce the Federal Pipeline Safety Act ... in fact, there is a whole Section 4901:1-16 in which [the Commission has] ... codified federal rules. So on that basis the Commission [S]taff and the Commission need be enforcing the federal law ... On that the USP does not object. It does not object to the [September 12, 2007 Order] that was issued in this case on rehearing. Columbia can go ahead and repair the class A risers.⁴

Columbia agrees with USP that the Commission has statutory authority under clear directive from the General Assembly to carry out pipeline safety regulations⁵, which may consist of direct-

¹ R.C. 4905.04 and .05.

² R.C. 4905.06

³ Id.

⁴ Transcript Volume I (hereinafter Tr. Vol.) at 10.

⁵ R.C. 4905.91.

ing Columbia to install, repair, replace or service any and all facilities necessary for the safe provision of natural gas service to consumers.

USP asserts, however, that “the Commission should allow the property owner to replace Design-A risers now and into the future”.⁶ On the contrary, the Commission’s Order issues a clear directive that “[a]ny customer who does not wish to wait for Columbia to replace a prone-to-failure riser, or a prone-to-failure riser and associated service line that has a hazardous leak, may arrange for the replacement or repair through a DOT OQ plumber and be assured of reimbursement.”⁷

B. The Record Sets Forth Clear Evidence that Hazardous Customer Service Lines Present Public Safety Issues and that Public Safety is Enhanced By Columbia Assuming Responsibility for the Maintenance and Repair of Customer Service Lines.

The Commission found that “[e]vidence in the record reflects that ... [service line leaks] are often categorized as hazardous and can present significant safety hazards and do have potential to cause catastrophic damage to the customer’s property or neighboring properties.”⁸ However, USP contends that there has been no showing that a safety issue exists as to non-utility customer service lines not associated with prone to failure risers.⁹ Columbia has demonstrated that it has the responsibility under federal pipeline safety laws to conduct inspections and testing of service lines, but can only terminate service if a hazardous leak exists and request that the customer pay for unexpected repairs.¹⁰ Approval of Columbia’s assumption of responsibility for maintenance and repair of hazardous customer service lines ensures Columbia’s ability to main-

⁶ USP Application for Rehearing at 7 - 8.

⁷ Order at 23.

⁸ Id. at 29.

⁹ USP Application for Rehearing at 8.

¹⁰ 49 C.F.R. § 192.; Columbia’s Post-Hearing Brief (hereinafter Columbia’s Brief) at 12.

tain complete records on such lines and encourages customers to contact Columbia for repairs without concern for unanticipated repair bills.

Edward Steele, the chief of the Commission's Gas Pipeline Safety Section, Timothy Morbitzer, Vice President of ABC Gas Repair, Inc., Carter T. Funk, President of CKF Enterprises, and Michael Ramsey, Columbia's Operations Compliance Manager, all offered support on the record that leaking customer service lines can present safety hazards.¹¹ Mr. Steele further testified that Columbia's Infrastructure Replacement Program ("IRP") will improve quality control and documentation, streamline repairs, eliminate decisions by customers unfamiliar with natural gas infrastructure, and provide verification of materials and consistency in repairs.¹²

The record supports the Commission's finding that leaks in customer service lines can be a safety hazard and that,

[P]roper maintenance of such lines and full compliance with federal and state safety regulations is made more difficult by ownership and responsibility being held by different entities, as, among other things, Columbia, under the existing approach, has no ability to train the repair personnel, supervise the actual repair process, or to ensure uniformity in the approach to repair and maintenance.¹³

Mr. Phipps, Owner, Operator and President of Utility Solutions of Ohio, Inc., confirmed this finding when he testified that independent plumbers lack motivation to do a quality and thorough job,¹⁴ which undoubtedly produces grave safety concerns. These numerous safety concerns support Staff and Columbia's contention that Columbia's assumption of responsibility for repair and replacement of hazardous service lines will increase public safety by promoting managerial over-

¹¹ Post-Hearing Brief Submitted On Behalf of the Staff of the Public Utilities Commission of Ohio (hereinafter Staff Brief) at 11-12, citing Staff Ex. 2 at 8-9; Tr. Vol. III at 26; Tr. Vol. IV at 93; Tr. Vol. I at 107.

¹² Id.

¹³ Order at 19.

¹⁴ Tr. Vol. IV at 117.

sight, contractual control and greater uniformity.¹⁵ Thus, the Commission reasonably and lawfully entered a finding that it is “entirely reasonable that public safety will be improved by assigning maintenance responsibility to the party who carries the legal responsibility for complying with safety regulations.”¹⁶

C. The Commission Lawfully and Reasonably Found that Columbia’s Assumption of Responsibility for the Replacement of Prone to Failure Risers and the Repair and Replacement of Hazardous Customer Service Lines Does Not Constitute an Impairment of Contracts.

USP asserts that the action of the Commission was *ultra vires*.¹⁷ As discussed above in Section II, A of this Memorandum Contra, it is well settled that the Commission has broad authority to regulate the natural gas industry, including “the safety and security of the public.”¹⁸ Therefore because the Commission’s order is deemed to further public safety,¹⁹ it is not *ultra vires* and wholly within the powers granted to the Commission by the General Assembly.

USP’s next argument, that the Commission acted unlawfully in finding no substantial contractual impairment under the first prong of the Energy Reserves Group test, “where the contracts themselves were not made available for [their] review,” neglects to recognize that this was only one of several reasons that the Commission did not find a substantial impairment. The other reasons include the terms of the contracts, their coverage, and the fact that the natural gas industry’s level of regulation was no surprise to USP.²⁰ Finding a substantial impairment of contract is only the first prong of a three prong test, and the contracts not being made available for review is only one reason of several offered by the Commission for not finding a substantial im-

¹⁵ Columbia Brief at 15-20; Post-Hearing Reply Brief Submitted On Behalf of the Staff of the Public Utilities Commission of Ohio (hereinafter Staff Reply Brief) at 16-17.

¹⁶ Order at 20.

¹⁷ USP Application for Rehearing at 11.

¹⁸ O.R.C. § 4905.06. See also *City of Cleveland v. Pub. Util. Comm’n of Ohio*, 189 N.E. 5, 7 (Ohio 1934).

¹⁹ E.g. Order at 20, 25, 29, 34.

²⁰ Order at 17-18.

pairment. Having the contracts made available to the Commission is unlikely to have changed its decision on this matter. The Commission based its finding on numerous other factors, including that customers can cancel USP contracts at any time, USP offers numerous other warranties that are not affected by the IRP and the state's regulatory power with regard to pipeline safety must be implied in any contract relating to pipeline warranties.²¹

Next USP argues that the Commission erred in applying a "deprivation entirely of potential business test."²² This is not the test that was applied by the Commission. The test applied was the correct substantial impairment test.²³ The fact that USP would "not be deprived entirely of potential business with their current customers" was only one factor the Commission looked to in analyzing the coverage of the contracts in order to determine how substantial any impairment would be.²⁴ The fact that USP would "not be deprived entirely of potential business with their current customers" was merely a factor within a factor in the Commission's analysis of whether the impairment was substantial. The same can be said regarding the consideration of the term of the existing contracts. The Commission considered many factors in determining whether the impairment was substantial and did not rely on any single one as a test of the substantiality of the impairment.

USP repeatedly argues that in order to properly apply the second prong of the Energy Reserves Group test "the Commission *must* find that there currently exists a broad and general social or economic problem."²⁵ On the contrary, the Energy Reserves Group test only uses a "broad and general social or economic problem" as an *example* of a significant and legitimate public purpose. USP completely disregards the Court's use of the words "such as" before "the

²¹ *Id.*

²² USP Application for Rehearing at 12–13.

²³ *See* Order at 16–18.

²⁴ *Id.* at 18.

²⁵ USP Application for Rehearing at 13 (emphasis added).

remedying of a broad and general social or economic problem.²⁶ There simply is no requirement of a broad social or economic problem. What *must* be found under the second prong is a significant and legitimate public purpose, and here the Commission found exactly that in its order.²⁷

USP cites to Allied Structural Steel Co. v. Spannaus²⁸ in support of its argument that the Stipulation will operate as a substantial impairment of a contractual relationship.²⁹ However, this citation is not appropriate here and is easily distinguishable from the case at hand. In Allied, the area of worker's pensions was not previously subject to regulation by the state at the time the contracts were undertaken.³⁰ That is far from the case here. Public utilities have been subject to heavy regulation in Ohio for close to a century, far longer than the existence of USP's contracts with its customers. Because the Commission is not attempting to regulate a new area of business, but rather one that has been subject to intensive state and federal regulation for decades, an analogy to the Allied case is not appropriate.

USP asserts that the third prong of the Energy Reserves Group test requires an analysis of "the rights and responsibilities of the contracting parties."³¹ But this part of the test only requires an analysis of whether the *adjustment* of those rights and responsibilities is based upon reasonable conditions and whether the adjustment is "of a character appropriate to the public purpose justifying [the legislation's] adoption."³² The rights and responsibilities of the contracting parties have already been extensively addressed in the Commission's analysis of the substantiality of the impairment and in determining whether the public purpose behind the regulation is signifi-

²⁶ USP Application for Rehearing at 13.

²⁷ Order at 19.

²⁸ 438 U.S. 234 (1978).

²⁹ USP Application for Rehearing at 14-16.

³⁰ *Id.* at 249.

³¹ USP Application for Rehearing at 18.

³² Energy Reserves Group, Inc. v. Kan. Power and Light Co., 459 U.S. 400, 412 (1983) (quoting U.S. Trust Co. of N. Y. v. N. J. 431 U.S. 1, 22 (1977)).

cant and legitimate.³³ Here, the Commission deferred to the expertise of Staff witness Steele's conclusion that the IRP was a reasonable way to improve public safety,³⁴ and that public safety is the purpose behind adopting the IRP. Therefore, the Commission did not err in its application of the third Energy Reserves Group test.

D. The Commission Lawfully and Reasonably Found that Columbia's Assumption of Responsibility for the Replacement of Prone to Failure Risers and the Repair and Replacement of Hazardous Customer Service Lines Does Not Constitute a Taking of Property.

USP argues that, under the Amended Stipulation and Recommendation filed on December 28, 2007 ("Stipulation"), a right is being taken away from property owners.³⁵ Yet "the denial of one traditional property right does not always amount to a taking. . . . [W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."³⁶ The Commission found that there was no compensable taking here and, even if there were a taking, the customer was being adequately compensated by receiving a functional service line.³⁷ Further, the Commission correctly concluded that a customer is not required to allow Columbia to enter his or her property or to effectuate repairs on service lines. Customers only need to allow such repairs as a condition of service. Because of the de minimis intrusion on the property rights of property owners, the Commission reasonably and lawfully found that there was no taking at all. USP has offered no argument not already considered by the Commission, and USP's argument should therefore be denied.

³³ See Order at 16–19.

³⁴ Id. at 19–20.

³⁵ USP Application for Rehearing at 20.

³⁶ *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

³⁷ Order at 21–22.

E. The Commission Lawfully and Reasonably Found Columbia's Service Line Proposal Under the IRP Was Prudent and Reasonable.

USP argues that the Stipulation sacrifices safety for convenience because not having Columbia review the work done by plumbers has unreasonably and unlawfully diminished verification of such repairs.³⁸ USP has already made these very same arguments to the Commission in its Reply Brief.³⁹ The Commission, after fully considering these arguments, found that the lack of inspection of every repair would not be problematic because of Columbia's managerial control, training, education and supervision of the workers.⁴⁰ Therefore, because USP's concerns and objections were fully considered by the Commission before issuing its Order and because the Commission found the transfer of service lines to Columbia to be appropriate and in the interest of public safety, the Commission's approval of the Stipulation was reasonable and lawful. Thus, USP's request for rehearing should be denied.

F. The Commission Lawfully and Reasonably Found that the Stipulation was a Product of Serious Bargaining Among Capable, Knowledgeable Parties.

Contrary to USP's assertion, there is no requirement that the Commission address the timing of a stipulation agreement when determining whether serious bargaining occurred. In considering whether a stipulation is the product of serious bargaining among capable, knowledgeable parties the Commission looks to factors including "the level of detail contained in the stipulation,"⁴¹ and whether the parties represent diverse interests.⁴² The Stipulation is extremely thorough, addressing issues related to customer safety, customer communication, customer reimbursement, costs, accounting treatment, tariff proposals, accounting audits, accounting filings,

³⁸ USP Application for Rehearing at 24-25.

³⁹ USP Reply Brief at 10-11.

⁴⁰ Order at 27-30.

⁴¹ In re Cincinnati Gas & Electric Co., Case No. 91-410-EL-AIR (Apr. 14, 1994).

⁴² In re Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters, Case No. 07-220-GA-GCR, Opinion and Order at 6 (Apr. 23, 2008).

and materials. The Commission also found that the signatory parties represent the diverse interests of “buyers, sellers, and regulators.”⁴³ USP does not agree with the stipulation, but “[l]ack of agreement . . . should not cause the entire stipulation to be rejected as if serious bargaining had not occurred. To do so would be to give those parties, in effect, veto power over the result.”⁴⁴ The Commission has found that serious bargaining has occurred and also fully considered USP’s arguments and positions on the issues.⁴⁵ Therefore, the Commission’s finding that the Stipulation is a product of serious bargaining among capable, knowledgeable parties was not unreasonable or unlawful.

G. The Commission Lawfully and Reasonably Found that the Stipulation will Benefit Rate Payers and the Public.

USP contends that there was no evidentiary basis for the Commission’s determination that Columbia would be able to more effectively control the work product of plumbers making repairs to the system. However, this assertion ignores the testimony of Mr. Steele, the chief of the Commission’s Gas Pipeline Safety Section, which clearly supports the Commission’s determination. Specifically, Mr. Steele testified that the Stipulation results in Columbia obtaining better control over the quality of work being performed on riser and service installation; more efficient repair and replacement of hazardous customer service lines and risers; and verification of materials and replacement of risers and service lines by Columbia personnel.⁴⁶

USP also contends that customers are in a better position than the Commission to make appropriate determinations as to safety and that competition is increased when customers make

⁴³ Order at 32.

⁴⁴ *In re Duke Energy Ohio, Inc.*, Case No. 05-724-EL-UNC (Nov. 20, 2007).

⁴⁵ Order, at 32.

⁴⁶ Staff Ex. 2 at 8-9.

such determinations.⁴⁷ This argument is without merit. Section 4929.02 of the Revised Code promotes competition in natural gas services and pricing, but is notably silent on the aspect of safety. Customers should have choices in a competitive market for natural gas goods and services. However, that does not mean that public safety decisions should be left exclusively to the individual customer, especially when such decisions could greatly impact surrounding neighbors.

The Commission is statutorily charged to examine public utilities' activities relating to adequacy of service and the safety and security of the public and is granted the authority to prescribe any rule or order necessary for protection of public safety.⁴⁸ Further, the Commission's stated purpose, among other things, is to monitor and enforce PUCO rules and state laws against unfair, inadequate and unsafe public utility and transportation services and to assure the availability of adequate, safe and reliable services to all residential customers.⁴⁹ After considering the arguments of all of the parties including USP, the Commission has determined that the Stipulation will benefit ratepayers and the public.⁵⁰ The Commission upheld this statutory obligation in finding that the Stipulation benefits rate payers and is in the public interest. Therefore, USP's request for rehearing on this issue should be denied.

H. The Commission Lawfully and Reasonably Found that the Stipulation Does Not Violate State Policy.

USP argues that the Stipulation's provisions giving Columbia responsibility for customer service lines violate state policy.⁵¹ In support of this contention, USP cites R.C. § 4905.91, which states that the Commission shall adopt rules "concerning pipeline safety." USP is correct

⁴⁷ USP Application for Rehearing at 27-28.

⁴⁸ R.C. 4905.06

⁴⁹ The Public Utilities Commission of Ohio, Section on About the PUCO, *5 Ways The PUCO Works for You*, available at <http://www.puco.ohio.gov/PUCO/About/index.cfm?navitem=leftsidebar> (last visited May 19, 2008).

⁵⁰ *Id.* at 35.

⁵¹ USP Application for Rehearing at 28.

that this statute does not *specifically* address the transfer of responsibility of customer service lines. However, this statute provides no support for USP's position that the Stipulation violates public policy. The fact that a particular statute is silent as to whether the Commission is empowered to take specific action does not make that act in violation of public policy. Had the statute expressly stated that the Commission may not transfer responsibility over intrastate gas lines then USP's argument would have some merit, but that is not the case here. R.C. § 4905.91 obligates the Commission to adopt rules relating to pipeline safety and if this section supports any position, it is that the Commission appropriately determined that Columbia's assumption of responsibility of customer service lines is in the interest of public safety. Because no statute was violated and the state policy is to improve pipeline safety, the Stipulation does not violate state policy. Therefore, USP's Application for Rehearing on this issue should be denied.

I. The Commission Properly Determined that Columbia has the Managerial Ability and Experience to Manage the Repair and Replacement of Hazardous Customer Service Lines.

USP contends the record lacks any evidence that Columbia has the managerial ability or experience to manage the repair and replacement of hazardous customer service lines.⁵² USP even goes so far as to assert that Mr. Ramsey failed to offer any testimony on this issue.⁵³ A thorough review of the record undermines USP's argument. Mr. Ramsey testified that in 2006 alone Columbia had 1,652 leaks on its bare steel service lines.⁵⁴ In fact, Columbia has repaired and replaced company service lines for decades and, thus, has significantly greater experience and managerial ability than USP with regard to repairing and replacing hazardous service lines.

⁵² Id. at 29.

⁵³ Id.

⁵⁴ Columbia Ex. 5 at 2.

Perhaps an even more compelling demonstration of Columbia's ability and experience to manage the repair and replacement of hazardous customer service lines is USP's admission that Columbia, prior to the Order, conducted on-site inspections after plumbers effectuated repairs on service lines⁵⁵. It is difficult to comprehend how USP can maintain that Columbia is able to and should sign off on plumbers' repairs of customer service lines, yet in the same pleading argue that Columbia lacks the requisite managerial ability or experience to manage and effectuate these same repairs.

J. The Commission's Order is Supported by the Manifest Weight of the Evidence.

USP's contention that the Commission ignored the direct testimony of its witnesses is without merit.⁵⁶ The Commission's decision is supported by the manifest weight of the evidence. In its Order, the Commission stated that it had considered all of the arguments of all of the parties,⁵⁷ devoted two pages to consideration of the arguments opposing the transfer of responsibility of service lines,⁵⁸ and specifically mentions the testimony of USP's witnesses numerous times. Additionally, the Commission found that USP failed not one, but all three prongs of the test for impairment of a contract.⁵⁹ The Commission objectively took into account all available evidence and thoroughly explained its decision and the process used to reach that decision. Therefore, the Commission's decision is supported by the evidence.

⁵⁵ USP Application for Rehearing at 24.

⁵⁶ Id. at 30.

⁵⁷ Order at 35.

⁵⁸ Id. at 27-29.

⁵⁹ Id. at 14-20.


III. CONCLUSION

In summary, USP has not proposed new arguments that would enable the Commission to arrive at a different conclusion than of that espoused in the Order. The Commission considered all arguments of all parties and lawfully and reasonably found that the Stipulation, to the extent adopted in the Order, promotes public safety and ensures that Columbia is able to provide adequate, safe and reliable services to all residential customers.

For the reasons discussed herein, the Commission's Order is reasonable and lawful, therefore, USP's Application for Rehearing should be denied.

Respectfully submitted,

COLUMBIA GAS OF OHIO, INC.




Daniel A. Creekmur
Trial Attorney

Mark Kempic, Assistant General Counsel
Kenneth W. Christman, Associate General Counsel
Stephen B. Seiple, Lead Counsel
200 Civic Center Drive
P.O. Box 117
Columbus, OH 43216-0117
Telephone: (614) 460-4680
Fax: (614) 460-6986
Email: dcreekmur@nisource.com

Attorneys for
COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Columbia Gas of Ohio, Inc. the Application for Rehearing of Utility Service Partners, Inc. was served upon all parties of record by regular and electronic mail this 19th day of May 2008.



Daniel A. Creekmur
Attorney for
COLUMBIA GAS OF OHIO, INC.

SERVICE LIST

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima St., P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com

Vincent A. Parisi
5020 Bradenton Avenue
Dublin, Ohio 43017
vparisi@igsenergy.com

Carl A. Aveni, II
Carlile, Patchen & Murphy LLP
366 E. Broad St.
Columbus, OH 43215
caa@cpmlaw.com

Stephen M. Howard
Vorys Sater Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
smhoward@vssp.com

Joseph P. Serio
Associate Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215
serio@occ.state.oh.us

Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
jclark@mwncmh.com

Anne L. Hammerstein
Stephen B. Reilly
180 East Broad St., 9th Floor
Columbus, Ohio 43215-3793
Anne.hammerstein@puc.state.oh.us
Stephen.reilly@puc.state.oh.us

John W. Bentine
Chester, Wilcox & Saxbe LLP
65 East State St., Suite 1000
Columbus, OH 43215-4213
jbentine@cwslaw.com