

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BRYAN TATE :
 :
v. : **C-2020-3018966**
 :
COLUMBIA GAS OF PA INC. : **FILED ELECTRONICALLY**

MEMORANDUM OF LAW OF COMPLAINANT, BRYAN TATE

I. FACTUAL AND PROCEDURAL BACKGROUND.

The property in question is located at 52 South Pine Street, York, Pennsylvania 17403 (hereinafter sometimes the “Property”), within the “Historic York” historic district created pursuant to the Pennsylvania Historic District Act of 1961, 53 P.S. §8001-8006, known as Act 167.

On or about August 23, 2019, the Complainant-homeowner, Bryan Tate (“Tate”), received written notice from Respondent, Columbia Gas (“Columbia Gas”), under 52 Pa. Code 59.18(a), specifically acknowledging that the Property was located within the “Historical District of York”,¹ but advising of a project requiring relocation of the gas meter from inside of the home to the outside, “consistent with contemporary standards for gas meters”. The notice included a form letter that stated, in part:

a recently approved change to Section 59.18 of the [Pa] Code now requires that gas meters and pressure regulators be located outside. An exception may be granted if we can readily confirm that the building is, or is eligible to be, listed on the national register of historic places, or is located within a historic district that is listed in the national register of historic places. Please contact Columbia Gas using the contact information below as soon as possible if you believe

¹ The letter stated that “Our records indicate you are the owner of a property located within the Historical District of York.”



that your home may qualify for an exemption from the PUC's meter relocation requirements.

Tate thereafter filed a "Columbia Gas Meter Relocation Reconsideration Form" with the utility. The Form requested an exemption on the following grounds: 1) the house is located in a designated historic district; 2) the house is located in an area where the homeowner has concerns that an outside meter is at a high risk of being subject to tampering or vandalism; and 3) the sidewalk is shallow on South Pine Street and the home's porch and stairs are where gas enters the property.

On or about December 12, 2019, Columbia Gas denied the meter relocation reconsideration request by e-mail from Russell Bedell, Communications Manager of Columbia Gas of Pennsylvania and Maryland. The email cited general safety concerns applicable to all gas meters and stated that "[w]e have not experienced tampering and vandalism on gas meters that have been moved outside as part of this safety program, and if a meter were accidentally damaged, the excess flow valve installed with the new service line would minimize or shut off the flow of gas. Additionally, the new service line and meter would be installed further away from the porch stairs than the current service line to address the shallow sidewalk concern." The e-mail requested that Tate make arrangements to have the new meter and service line installed by December 16, 2019.

Importantly, the denial did not address the historic nature of the building or the historic values subject to protection in Pennsylvania. Further, while the denial stated that Columbia Gas had not experienced tampering and vandalism with other meters *that had been moved outside as part of this particular relocation project*, the denial did not specify the location of these relocated meters or when the



meters had been moved, or otherwise address the risk of tampering or vandalism *in the area of Tate's house.*

Tate filed a timely Informal Complaint with the Pennsylvania Public Utility Commission ("PUC") on December 13, 2019. Tim Clark, PUC Investigator, wrote to Tate on December 20, 2019 requesting that Tate call him within ten (10) days of December 20, 2019 to discuss the Informal Complaint. Tate attempted to contact Mr. Clark several times, to no avail. Nevertheless, by letter of January 23, 2020, Inspector Clark summarized the positions of Tate as follows:

The York City Historic Districts appear on the National Register of Historic Places. . . . Columbia Gas refuses to understand that one of the only economic opportunities that York City has is its historic properties and that by moving unattractive meters (in some cases many meters) to the fronts of properties it is destroying the historic nature of the property and the economic viability of the property. The Company has ignored citizen and York City concerns with outside meter placements blocking ADA passage on narrow sidewalks and safety issues in neighborhoods where criminals can easily tamper with meter shut offs. Residents of the City of York have requested Columbia Gas, in a meeting at City Hall last year, and again at a Town Hall Meeting set up by Mayor Helfrich this year, as well as during individual meetings by individual property owners, to either mirror UGI's work in Harrisburg's Historic District placing regulators only on the outside of Historic District properties with meters remaining in basements, or by placing new outside meters only on the side or rear of properties.

January 23, 2020 letter, page 1.

Inspector Clark wrote that Columbia Gas "offered to locate the meter on the outside front right of the home. The company has offered to paint the meter to match the paint of the exterior of the home. The company has also offered to put a cage screening around the meter and paint the screen." January 23, 2020 letter,



page 1. The letter further indicated that the “company’s position is that the relocation of meters as directed by the PUC at the time of the company’s pipeline upgrades is an important part of construction timeline. The location of the meter is at the determination of the utility company and Columbia believes that the location for the meter at 52 S Pine Street, York, PA is best located at outside front right.”

January 23, 2020 letter, page 2.

Mr. Clark did **not** indicate that Columbia Gas offered to move the meter to the side or rear of the property or to place a pressure regulator outside the property with the meter remaining in the basement. Inspector Clark indicated that the PUC’s Bureau of Consumer Services could not decide where a utility company should place their meter as long as the utility is not in violation of Pennsylvania law. Accordingly, “BCS cannot issue a legally binding decision on this complaint. Therefore, this informal complaint has been closed without a decision.” January 23, 2020 letter, page 2.

Tate subsequently received a letter on February 24, 2020, dated February 21, 2010, notifying him of Columbia Gas’ intent to complete the meter relocation project by March 2, 2020. The letter asked Tate to call to schedule the work on February 26, 27 or 28, 2020. In response, Tate filed a Formal Complaint with the PUC, signed and dated February 28, 2020, through the PUC’s e-filing system on February 28, 2020. The Formal Complaint was also sent by certified mail to the PUC on February 29, 2020 and was e-filed a second time on March 2, 2020.

The Formal Complaint states that Columbia Gas is threatening to shut off the supply of gas to 52 South Pine Street, which Tate rents to a third party, and





further that Columbia Gas seeks to move the gas meter at 52 South Pine Street to the front of the property. “They said it must be moved, even though the PUC allows for an historic exemption, and my historic property resides in the York City Historic District, which is on the National Register of Historic Places. I want my gas meter to remain in the basement of the property, which is safer for my tenants so that it is not tampered with, so that the gas is not turned off by a wrench, so that it is not sitting out on the sidewalk where cars regularly drive up over the curb and onto the sidewalk, and so it does not reduce the already small sidewalk size to violate ADA and block neighbors with disabilities from being able to pass.” Formal Complaint, Section 4, page 2.

The Complaint further argued that Columbia Gas should utilize the historic exemption contained in Code Section 59.18 so that Third Class Cities such as York can effectively combat issues such as concentrated poverty, struggling schools, a declining tax base, deteriorating infrastructure, the pension crisis, declining property values and the relocation of businesses away from Pennsylvania and its cities. “The single greatest asset named regularly by visitors to third class cities across PA—beautiful historic architecture! Both institutional and residential! Yet Columbia Gas wants to ignore the PUC historic exemption and further degrade cities like York by moving hideous and unsafe gas meters to the front exterior of properties throughout nationally designated historic districts.” Formal Complaint, Section 5, page 3. The Complaint noted that Columbia Gas had installed front exterior gas meters at numerous prominent historic properties in downtown York City without providing homeowners the PUC regulations or information about the

historic exemption. The Complaint further noted that Columbia Gas kept the gas meter at 257 East Market Street in the basement, installing only a pressure regulator near the front of the property; 257 East Market Street is only 500 feet from 52 South Pine Street.

The Office of Administrative Law Judge, Presiding Officer Steve Haas, scheduled a telephonic hearing for Wednesday, May 27, 2020. The undersigned counsel entered their appearance and filed a Motion for a Continuance on May 18, 2020. Presiding Officer Haas e-mailed on May 18, 2020 indicating that both Tate's counsel and Columbia Gas requested a continuance. Accordingly, the telephonic hearing was rescheduled for Wednesday, July 15, 2020 at 10:00 a.m.

II. ARGUMENT.

The Public Utility Code, 66 Pa. C.S.A. §101, et seq., “vests exclusive authority over the regulation of public utility facilities in the PUC.” UGI Utilities, Inc. v. City of Reading, 179 A.3d 624, 629 (Pa. Commw. 2017). Under Section 501 of the Code, the Pennsylvania Legislature delegated to the PUC the authority to “make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties”. (emphasis added). 66 Pa. C.S.A. §501(b). Relative to proposed rules and regulations, they are “printed in the Pennsylvania Bulletin for public comment and are reviewed by the Independent Regulatory Review Commission, House Consumer Affairs Committee, Senate Consumer Protection and Professional Licensure Committee, Attorney General’s Office, and Governors Budget Office.” www.puc.state.pa.us.





Columbia Gas takes the position that Pennsylvania regulations and Section 4.6 of its PUC approved tariff provide them with the sole and exclusive right to determine the location of its gas meters. In that regard, the Pennsylvania Code, Section 59.18, provides that “[u]nless otherwise allowed or required in this section, meters and regulators must be located outside and aboveground.” 52 Pa. Code §59.18(a)(1) and Section 4.6 of the Columbia Gas Tariff effective June 5, 2017. Gas meters may be located inside a property pursuant to Section 59.18(d) and Tariff Section 4.6.2.

Section 59.18(d) provides, in applicable part, that:

(d) Inside meter locations.

(1) Inside meter locations shall be considered only when:

(i) The service line pressure is less than 10 psig.

(ii) A meter is located in a building that meets one of the following criteria:

(A) A building is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the building is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(B) A building is located within a historic district that is listed in the National Register of Historic Places or the customer or building owner notifies the utility that the historic district is eligible to be listed in the National Register of Historic Places and the eligibility can be readily confirmed by the utility.

(C) A building has been designated as historic under the act of June 13, 1961 (P. L. 282, No. 167) (53 P.S. §§ 8001-8006), known as the Pennsylvania Historic District Act, the Pennsylvania Municipalities Planning Code (53 P.S. §§ 10101-11202) or a municipal home rule charter.

(D) A building is located within a locally designated historic district or is eligible for the listing, or a building is individually designated under a local ordinance as a historic landmark or is eligible for the listing.

(iii) Protection from ambient temperatures is necessary to avoid meter freeze-ups.

(iv) A utility determines that a meter is subject to a high risk of vandalism based on the utility's prior experience.

(v) A utility determines that an outside meter location is neither feasible nor practical.

(2) Except for low pressure systems with service line pressure less than 10 psig, regulators must be located outside when a meter is located inside.

(3) Installed inside meters must be attached to an operable outside shut off valve.

(4) Meters installed within a building must be located in a ventilated place not less than 3 feet (914 millimeters) from a source of ignition or source of heat which may damage the meter.

52 Pa. Code §59.18(d). Thus, while a utility must consider locating gas meters inside of certain “historic” properties,² the Pennsylvania Code and Columbia Gas’s Tariff vest total, unfettered discretion in Columbia Gas as to the placement of same, with no established guidelines relating to the values of historic preservation and the protection of historic properties from degradation, diminution, and depletion.³ As

² See *City of Lancaster v. PUC*, 224 A.3d 460 (Pa. Commw. 2020) (the “mere fact that a structure has been designated under the [Historic District] Act as being a historical resource automatically and unconditionally mandates that the NGDC [Natural Gas Distribution Company] consider keeping the meter line inside”).

³ Article II, Section 1 of the Pennsylvania Constitution states that the “legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” Pa. Const. art. II, § 1. Section 59.18 is violative of this clause in that it contains no ERA or historical guidelines to safeguard against the arbitrariness of ad hoc decision making on the part of private, non-governmental natural



such, the regulation is “inconsistent with law”, and essentially treats historic properties the same as non-historic properties. *See* 66 Pa. C.S.A. §501(b).

A. Columbia Gas has Unconstitutionally Applied Section 59.18 to Tate’s Historic Property.

It is anticipated that Columbia Gas will argue that the intent of Section 59.18 is not to detract from the aesthetic of historic buildings, but rather to protect those structures from the risk of gas leaks and explosions therein. *See UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624, 626 (Pa. Commw. 2017). At the same time, however, the Pennsylvania Constitution’s “Declaration of Rights” protects Pennsylvanians from governmental actions that unreasonably cause actual or likely degradation, deterioration or impairment of public natural resources such as historic buildings. Specifically, Article I, Section 27 of the Pennsylvania Constitution, titled “Natural resources and the public estate”, also known as the Environmental Rights Amendment (“ERA”), provides the following:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27.

The Pennsylvania Supreme Court has held that the third clause of Article I, Section 27 “establishes a public trust, pursuant to which the natural resources are

gas utility companies such as Columbia Gas. *See, e.g., Protz v. Workers’ Compensation Appeals Board*, 161 A.3d 827 (Pa. 2017).





the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.” Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 931-932 (Pa. 2017). The ERA’s trustee provisions are obligations of all agencies and entities of the Commonwealth government, both state and local, and impose a “fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.” Id. at 931, n. 13.

The Supreme Court described the ERA’s Commonwealth trust obligations as a “duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties” and a duty to “act affirmatively via legislative action to protect the environment”. Id. at 933. The Commonwealth must act as a fiduciary, not an “arm’s length proprietor”, and must “exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” Id. at 932.

Importantly, the Pennsylvania Supreme Court has recognized historic and aesthetic resources (such as historical sites) as “public natural resources” protected by the ERA and subject to the same Constitutional considerations as purely environmental resources such as rivers and streams. United Artists’ Theater Circuit v. City of Philadelphia, 635 A.2d 612, 620 (Pa. 1993), *quoting* Commonwealth v. National Gettysburg Battle Tower, Inc., 311 A.2d 588, 595 (Pa. 1973).

Thus, the ERA “imposes upon the PUC ‘a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.’” City of Lancaster v. PUC, 224 A.3d 460 (Pa. Commw. 2020), *quoting*



Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 933 (Pa. 2017). And when a government agency such as the PUC “acts, the action must, on balance, reasonably account for the environmental features of the affected locale” in order to pass constitutional muster. Robinson Township v. Commonwealth, 83 A.3d 901, 953 (Pa. 2013). The Commonwealth of Pennsylvania, via the Pennsylvania Legislature and the PUC, essentially shifted its Constitutional obligations under the ERA to private natural gas utility companies such as Columbia Gas.

Tate recognizes that public safety is an important and legitimate state interest. Tate further recognizes that Section 59.18 seeks to address safety concerns involving the placement of gas meters and regulators. However, Section 59.18 also **mandates** that utilities consider the historic nature of a structure when determining the location of gas meters and regulators. Tate believes that safety and historical concerns can be addressed simultaneously. The parties do not dispute that Tate’s Property is located within the “Historic York” historic district and that Columbia Gas must consider the exception contained in Section 59.18(d) relative to same. Tate has raised numerous visual and negative impacts that would, or could, result from relocation of his gas meter to the right front of 52 South Pine Street. Unfortunately, Section 59.18 has been unconstitutionally applied due to the failure of Columbia Gas and the PUC to consider these visual and other negative impacts to Tate’s historic Property.

One such visual and negative impact involves the aesthetic value of Tate’s building. It goes without saying that the meter is unattractive and unsightly



and will detract from the historic nature of Tate's Property and the character of the neighborhood in general. Second, the City of York's greatest asset is its historic architecture; relocating unsightly, displeasing and visually and aesthetically objectionable gas meters to the front of Tate's Property and many other homes in the Historic York district---plainly visible from the street and affecting the façade of these homes---will negatively impact property values and result in declining tourism, thereby making it more difficult for York and other Third Class Cities to secure the revenues needed to grapple with increasingly common problems such as poverty, struggling schools, a shrinking tax base and a deteriorating infrastructure, to name a few.

Columbia Gas has agreed to keep gas meters inside other York City historic properties by installing only a regulator near the facade, evidencing the fact that Columbia Gas is treating similar property owners differently, for no apparent reason or purpose. In Tate's case, Columbia Gas has referred only to generalized safety concerns applicable to historic and non-historic homes alike. Given that Columbia Gas has installed outside regulators, only, at other Historic York properties, it clearly has the ability to do what UGI Utilities, Inc. did in the historic Harrisburg district—and that is to leave the gas meters inside and place regulators outside unless there is a specific, valid safety reason applicable to a particular property that cannot be addressed other than through a front side meter relocation. No such safety reason has been provided in this case, evidencing that Columbia Gas has acted in an arbitrary and capricious manner vis-à-vis Tate.



Placing a gas meter near the right front of 252 South Pine would reduce the already small sidewalk size and width, thereby making it more difficult for disabled neighbors and other citizens to pass by and creating ADA (the Federal Americans with Disabilities Act, 42 U.S.C. §12101, et seq.) and safety concerns. Importantly, Federal regulations require that “[e]ach meter and service regulator, whether inside or outside a building, must be installed in a readily accessible location and be protected from corrosion and other damage, including, if installed outside a building, vehicular damage that may be anticipated.” 49 CFR §192.353. Cars regularly drive up over the curb and onto the narrow sidewalk on South Pine, thereby increasing the possibility that a gas meter could be hit and cause an explosion or leak. Outside gas meters would be exposed to the elements, including ice and snow buildup, and subject to the possibility of corrosion and other damage. Gas meters also collect and trap trash and rubbish, creating a potential fire hazard and increasing the risk of an explosion. Finally, there exists a real danger that an outside gas meter---especially one located in downtown York City---would be tampered with and/or vandalized, or the gas shut off with a wrench. This raises additional safety and habitability concerns for Tate’s tenants.

Despite this mountain of aesthetic, safety and legal issues that will unreasonably cause actual or likely degradation, deterioration and impairment of historical values at Tate’s Property, Columbia Gas has baldly taken the position that Tate’s gas meter is “best located outside right front”. As stated, Columbia Gas has given no specific safety reason for this, and while Columbia Gas offered to paint the meter to match the exterior paint and/or to install a cage screening around



the cage and paint the screen, such measures would not adequately address the issue of aesthetics and Columbia Gas simply ignored other viable concerns, including the issues of declining property value, snow and ice accumulation, equipment corrosion and the danger of vehicular damage. Importantly, even though Columbia Gas installed an outside regulator, only, at nearby 257 East Market Street, the company did **not** offer to move Tate’s meter to the side or rear of the Property or to place a regulator outside the Property with the gas meter remaining in the basement.

Clearly, Columbia Gas has not reasonably accounted for the environmental features of Tate’s Property and the “Historic York” historic district. Relocating the gas meter from the basement to the front of Tate’s Property will unreasonably cause actual or likely degradation, deterioration and impairment of a public natural resource—that of 52 South Pine Street. Accordingly, Columbia Gas has unconstitutionally applied Section 59.18 to Tate’s Property.

B. Section 59.18 Unconstitutionally Commands Municipalities to Ignore Their Pennsylvania Constitutional Obligations By Delegating All Authority Regarding the Placement of Gas Meters to Private Gas Utility Companies.

The Pennsylvania Legislature derives its power from Article III, Sections 1-27 of the Pennsylvania Constitution. “The Constitution grants the General Assembly broad and flexible police powers embodied in a plenary authority to enact laws for the purposes of promoting public health, safety, morals, and the general welfare.” Robinson Township v. Commonwealth, 83 A.3d 901, 946 (Pa. 2013). The Legislature’s police power to legislate for the general welfare



encompasses regulations that “promote the public convenience or the general prosperity.” *Id. quoting Best v. Zoning Board of Adjustment*, 141 A.2d 606, 611 (Pa. 1958). The police powers are not absolute though. For example, all Article III powers are subject to those fundamental rights reserved for the people of Pennsylvania in Article I, “Declaration of Rights”, **including those contained in Article I, Section 27, the ERA.** *Robinson Township*, 83 A.3d at 946-947. Such rights are “inviolable” and cannot be infringed upon. *See* Pa. Const. art. I, Preamble and § 25 (“To guard against transgressions of the high powers which we have delegated, we declare that everything in this article [I] is excepted out of the general powers of government and shall forever remain inviolable”).

The third clause of the ERA (“As trustee of these [public natural] resources, the Commonwealth shall conserve and maintain them for the benefit of all the people”) establishes the Commonwealth’s duties and obligations as trustee with respect to public natural resources. Under the ERA, the “Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct. The explicit terms of the trust require the government to ‘conserve and maintain’ the corpus of the trust.” *Robinson*, 83 A.3d at 957. Moreover, the “plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *Id.*

It is important to note that the ERA’s trustee clause does not name the Pennsylvania Legislature as trustee, but rather the “Commonwealth”. As a result, “all existing branches and levels of government derive constitutional duties and

obligations with respect to the people” and the ERA. Robinson, 83 A.3d at 977.

The Pennsylvania Supreme Court has held that:

The constitutional command respecting the environment necessarily restrains legislative power with respect to political subdivisions that have acted upon their Article I, Section 27 responsibilities: the General Assembly can neither offer political subdivisions purported relief from obligations under the Environmental Rights Amendment, nor can it remove necessary and reasonable authority from local governments to carry out these constitutional duties.

Id. Moreover, “all branches and levels of government [act as trustee] in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people’s rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.” Id. at 963.

In Robinson Township v. Commonwealth, 83 A.3d 901, 946 (Pa. 2013), the Pennsylvania Supreme Court addressed a citizens’ challenge to the constitutionality of the Pennsylvania Oil and Gas Act, 58 Pa. C.S. §2301-3504, known as Act 13. One of the challenged provisions, Section 3303, provided that local ordinances regulating oil and gas operations were preempted by statewide environmental acts regulating oil and gas operations contained in the statute. The Supreme Court wrote that:

The Commonwealth, by the General Assembly, declares in Section 3303 that environmental obligations related to the oil and gas industries are of statewide concern and, on that basis, the Commonwealth purports to preempt the regulatory field to the exclusion of all local environmental legislation that might be perceived as affecting oil and gas operations. Act 13 thus commands municipalities to ignore their obligations under Article I, Section 27 [the ERA] and further directs municipalities to take affirmative actions to undo existing protections of the environment in their localities.





Id. at 978. Moreover, the Court emphasized that “municipalities affected by Act 13 all existed before that Act was adopted; and most if not all had land use measures in place. Those ordinances necessarily addressed the environment, and created reasonable expectations in the resident citizenry.” Id. at 977. Accordingly, the Court held that the Legislature exceeded its police powers by failing to satisfy and address applicable Constitutional requirements in Section 3303, including the obligation of local municipalities to fulfill their Constitutional duties under the ERA.

As stated, the Commonwealth, including the Legislature and governmental agencies such as the PUC, have a Constitutional duty to “prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private parties.” City of Lancaster v. PUC, 224 A.3d 460 (Pa. Commw. 2020), *quoting* Pennsylvania Environmental Defense Foundation v. Commonwealth, 161 A.3d 911, 933 (Pa. 2017). The PUC failed to address these important Constitutional considerations by granting unfettered authority and discretion to private gas utility companies---under Section 59.18---to, among other things, account for and protect environmental features of affected locales as required by the ERA, with no guidelines in place.

Moving to the merits of this case, the City of York acted on its responsibilities under the ERA and the Historic District Act with passage of Article 1731 on September 2, 2014. The City of York was incorporated as a city on January 11, 1887. Thus, both the City itself and Article 1731 predated the effective



date of Section 59.18, September 13, 2014. Article 1731 addressed historic, public natural resource issues and “created reasonable expectations” in the residents of the “Historic York” historical district. By placing all discretion regarding the location of gas meters in historic districts into the hands of public utility companies such as Columbia Gas, Section 59.18 “fundamentally disrupted those expectations” and essentially eviscerated York’s ability to protect its own public natural resources with the requirements set forth in Article 1731. Section 59.18 “thus commands municipalities to ignore their obligations” under the ERA. The police power of the Legislature, “broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment.” *See Robinson Township v. Commonwealth*, 83 A.3d 901, 977-978 (Pa. 2013). In short, the Legislature’s police powers are expressly limited by the Constitutional mandates of Article I, and the Commonwealth, via the Legislature and PUC, cannot transfer these Constitutional obligations away from itself and municipalities to private gas companies with no ERA or historical guidelines in place.

As currently drafted, Section 59.18 contains no safeguards against the arbitrariness of ad hoc decision making on the part of Columbia Gas and other private, non-governmental natural gas utility companies. Unfortunately, Columbia Gas has made such an arbitrary, ad hoc decision relative to Tate’s Property. Based on the foregoing, the Legislature’s and PUC’s grant of absolute, unfettered discretion to private public utility companies regarding the location of gas meters in historic districts, to the exclusion of the City of York and other municipalities obligated to act under the ERA and statutory law with regard to public natural

resources, impermissibly and improperly exceeded the Legislature's police powers and should be rendered invalid.⁴ The placement of gas meters in York City, including the meter at Tate's Property, should be subject to the requirements of Article 1731 of York's Codified Ordinances.



C. Columbia Gas Must Comply with Article 1731 of the City of York's Codified Ordinances and Apply for a Certificate of Appropriateness.

As stated, while the ERA imposes upon the Commonwealth government and its agencies, such as the PUC, affirmative duties and obligations to account for and protect public natural resources such as historic properties, the ERA imposes like duties and obligations upon all levels of government, including municipalities such as the City of York. We reiterate that "all existing branches and levels of government derive constitutional duties and obligations with respect to the people." Robinson Township v. Commonwealth, 83 A.3d 901, 977 (Pa. 2013).

In addition to State Constitutional considerations, municipalities such as the City of York are required to consider preservation of historic resources in zoning ordinances and comprehensive plans under the Pennsylvania Municipalities Planning Code ("MPC"). The City of York, as a Third-Class City in Pennsylvania, is governed by the MPC. 53 P.S. §10107. The MPC requires that "**Zoning ordinances shall provide for protection of natural and historic features and**

⁴ It should be noted that there is a similar challenge currently pending before the Commonwealth Court in City of Lancaster v. PUC, 224 A.3d 460 (Pa. Commw. 2020) (Count II of a Declaratory Judgment action brought by the City of Lancaster and the Boroughs of Carlisle and Columbia argues that Section 59.18 constitutes an improper sub-delegation of legislative authority to private gas utility companies).

resources.” 53 P.S. §10603(g)(2).⁵ However, Section 59.18 impermissibly requires the City of York to ignore legal requirements embedded in the ERA, the MPC and other statutes addressing public natural resources.

The City of York fulfilled its legal obligations under the ERA, the MPC and the Pennsylvania Historic District Act with enactment of Article 1731 on September 2, 2014. There is no dispute that Tate’s Property is located within the City of York’s historic district, officially known as “Historic York”. Historic York was created under the auspices of Pennsylvania’s Historic District Act, 53 P.S. §8001-8006, Act 167 of 1961, pursuant to Article 1731 of the City of York’s Codified Ordinances. Article 1731 established a seven-member Board of Historical Architectural Review (“HARB”). Under Section 1731.07 of Article 1731, “[a]ny exterior work that can be seen from the public way must be approved by HARB prior to the start of work whether a building permit is required or not.” It is therefore the duty of HARB to review planned work affecting a historic property in Historic York and to make a recommendation to the York City Council relative to same. *See* Section 1731.11 (written report of HARB to City Council must contain 8 separate categories of information).

It is anticipated that Columbia Gas will argue that Article 1731 is preempted by Code Section 59.18. In UGI Utilities, Inc. v. City of Reading, 179 A.3d 624 (Pa. Commw. 2017), the Commonwealth Court held that Section 59.18

⁵ York City maintains a Zoning Hearing Board governed by Articles IX (Sections 10901-10918, titled “Zoning Hearing Board and Other Administrative Proceedings”) and X-A (Sections 11001-a through 11006-a, titled “Appeals to Court”) of the MPC.





preempted a City of Reading Ordinance prohibiting gas meters from being placed in the front yards or along the facades of buildings within the Reading historic district. The Court wrote that “[l]ocal ordinances that conflict with PUC regulations or orders are preempted and cannot be applied to the regulated utility.” UGI, 179 A.3d at 629. However, the Court also wrote that the Reading Ordinance “does not merely impose historic district requirements of general applicability on utilities. It specifically regulates the very same subject regulated by the PUC, the location of gas meters, and provides for local enforcement of its restrictions by orders that gas meters be removed or altered and by imposition of penalties.” Id. at 630.

Conversely, the City of York’s Article 1731 does not expressly prohibit gas meters from being placed along the façade of buildings within Historic York, it merely mandates that those seeking to engage in exterior work must first obtain a Certificate of Appropriateness from the York City Council following consideration of historical values by HARB and the City Council. Importantly, while Section 59.18(d) requires utilities to consider keeping the gas meter line inside of historic properties, the regulations provide zero guidance to utilities as to what factors should be taken into account vis-à-vis the historic nature of a property. *See City of Lancaster v. PUC*, 224 A.3d 460 (Pa. Commw. 2020). Fortunately, Article 1731 fills the void. During the review process, HARB is required to look at the following:

- (a) The effect of the proposed change upon the general historic and architectural nature of the district.
- (b) The appropriateness of exterior architectural features which can be seen from a public street or way only.

(c) The general design, arrangement, texture, material and color of the building or structure and the relation of such factors to similar features of buildings or structures in the district.

Article 1731, Section 1731.09. The York City Council is required to consider the same factors following receipt of a report from HARB under Section 1731.11, and the City Council “shall not consider any matter not pertinent to the historical aspect and nature of the district.” Article 1731, Section 1731.12.

It should be noted that various types of work and construction are not subject to HARB review. These include “any work not visible from a public right-of-way (street or alley)” and “[u]tility work including telephone, water, gas, and electric lines and boxes unless the proposed location would adversely affect a building’s main façade.” (emphasis added). *See* HARB exemptions, www.yorkcity.org. However, the installation of a gas meter at the right front of Tate’s historic Property would be visible from the street and “affect the building’s main façade”, and thus is inapplicable to Columbia Gas herein.

Accordingly, Columbia Gas should have to apply for a Certificate of Appropriateness from the York City HARB.



III. CONCLUSION.

The Tri-County Regional Planning Commission has written that “[h]istoric resources do more than just preserve the past; they provide a community a link with its heritage, promote a sense of community cohesion and can enhance property values. . . . Since 1961, Pennsylvania’s Historic District Act (Act 167) has enabled municipalities (including counties) to identify geographically bounded areas with unique or important historical value as Historic Districts.” www.tcrpc-pa.org/historic-preservation. One such district is Historic York. Tate has identified numerous economic, safety and legal reasons why relocating the gas meter to the right front of 52 South Pine Street will unreasonably cause actual or likely degradation, deterioration and impairment of his historic Property. Moreover, Section 59.18 improperly exceeds the Pennsylvania Legislature’s police powers by eliminating the City of York’s ability to protect its own public natural resources as required by Article I, Section 27 of the Pennsylvania Constitution and by applicable statutory law. There are simply no regulatory safeguards in place to protect against arbitrary, ad hoc decision making on the part of Columbia Gas.

Section 59.18(a)(3) of the Pennsylvania Code, which requires that gas utility companies provide certain information to homeowners---including how to contact the PUC’s Bureau of Consumer Services---implies that the utility and the homeowner will work together relative to relocation of a gas line “based upon subjective and intangible factors related to the aesthetic value of the building.” City of Lancaster v. PUC, 224 A.3d 460 n. 12 (Pa. Commw. 2020). In that regard,



Columbia Gas has kept gas meters inside of other properties within Historic York and there is no reason why it can't do the same at Tate's Property.

Based on the foregoing, Columbia Gas should only install a pressure regulator outside of 52 South Pine Street and leave the gas meter inside, or move the regulator and gas meter to the side or rear of 52 South Pine Street. Doing so will address safety concerns while simultaneously preserving the character, context, and architecture of a historic property within Historic York. In the alternative, Columbia Gas should be required to seek a Certificate of Appropriateness from the York City Council prior to moving forward with the relocation of Tate's gas meter.

Respectfully submitted,
BENNLAWFIRM

By: 

Niles S. Benn, Esquire
Attorney I.D. #16284
Terence J. Barna, Esquire
Attorney I.D. #74410
103 E. Market Street
P.O. Box 5185
York, PA 17405-5185
Phone: (717) 852-7020
Fax: (717) 852-8797
nbenn@bennlawfirm.com
tbarna@bennlawfirm.com
Attorneys for Complainant
Bryan Tate

CERTIFICATE OF SERVICE

I, Terence J. Barna, Esquire, hereby certify that on this 7th day of July, 2020, I served a true and correct copy of the foregoing "Memorandum of Law" that was filed electronically on the Commission's eFiling system to the following individual(s) via U.S. First Class Mail and E-Service through the Commission's eFiling system, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party):

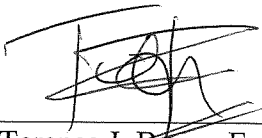


Presiding Officer Steve Haas
Commonwealth of Pennsylvania
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
400 North Street
Harrisburg, PA 17120

Amy E. Hirakis, Esquire
800 North 3rd Street, Suite 204
Harrisburg, PA 17102

Respectfully submitted,
BENNLAWFIRM

By: _____


Terence J. Barna, Esquire
Attorney I.D. #74410
103 E. Market Street
P.O. Box 5185
York, PA 17405-5185
(717) 852-7020