NO. 2024-0484

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE OHIO BOARD OF TAX APPEALS
BTA CASE NO. 2020-1540

ROVER PIPELINE LLC C/O ENERGY TRANSFER L.P.,
Appellant

v.

PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, ET AL.,
Appellees

BRIEF OF AMICI CURIAE OHIO OIL & GAS ASSOCIATION AND THE OHIO MANUFACTURERS' ASSOCIATION IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF FACTS 1

ARGUMENT 2

I. Natural gas pipeline infrastructure is essential to Ohio's (and the rest of the country's) energy independence. 2

II. The BTA's decision will deter natural gas infrastructure investment in Ohio. 3

III. Allowing the deduction of unanticipated cost overruns from the taxable value of a pipeline is consistent with Ohio law. 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Brockway Glass Co. v. Freehold Twp.,
10 N.J.Tax 356 (1989) 7

Columbia Gas Transm., LLC v. 171.54 Acres of Land,
2017 U.S. Dist. LEXIS 30667 (S.D.Ohio Mar. 3, 2017) 6

Higbee Co. v. Cuyahoga Cty. Bd. of Revision,
2006-Ohio-2 7

McLean Trucking Co. v. Lindley,
70 Ohio St.2d 106, 435 N.E.2d 414 (1982) 3

Merrill Creek Reservoir v. Harmony Twp.,
461 N.J.Super. 32 (2019) 7, 8

Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum Ohio,
62 Ohio St.3d 387 (1992) 2

Nexus Gas Transm., LLC v. City of Green,
757 Fed.Appx. 489 (6th Cir.2018) 5

Oklahoma Tax Comm. v. Chickasaw Nation,
515 U.S. 450 (1995) 3

Rover Pipeline LLC v. Kanzigg,
2017 U.S. Dist. LEXIS 215354 (S.D.Ohio Mar. 1, 2017) 5

Standard Oil Co. v. Glander,
155 Ohio St. 61 (1951) 7

Standard Oil Co. v. Peck,
342 U.S. 382 (1952) 7

Texas E. Transm., LP v. 3.2 Acres Permanent Easement,
2015 U.S. Dist. LEXIS 3252 (S.D.Ohio Jan. 12, 2015) 5

Thor Power Tool Co. v. Commissioner,
439 U.S. 522 (1979) 3

United States v. Carlton,
512 U.S. 26 (1994) 4

United States v. Generes,
405 U.S. 93 (1972) 3

Other Authorities

2023 – All Quarters Production Report, Ohio Dep't of Natural Res. 3

Building Business Resilience to Tax Complexity and Uncertainty, Kenan Inst. Of Private Ent. (Mar. 28, 2024) 4

Jamison Cocklin, *Natural Gas Has Friend, Ohio Gubernatorial Candidate DeWine Says*, Natural Gas Intelligence (Mar. 16, 2018) 3

Ohio Const. Art. XII, § 2 7

Ohio State Energy Profile, U.S. Energy Information Administration, (last updated Sept. 21, 2023) 2

Paul Ciampoli, *Natural Gas Could Play Key Role in Helping to Meet Rise in Power Demand from Data Centers*, Am. Pub. Power Assn. (Aug. 14, 2024) 2, 3

Spencer Kimball, *AI Could Drive a Natural Gas Boom as Power Companies Face Surging Electricity Demand*, CNBC (May 5, 2024) 2

Steven J. Davis, Scott R. Baker, & Nicholas Bloom, *Business Class: Policy Uncertainty Is Choking Recovery*, Am. Ent. Inst. (Oct. 6, 2011) 4

STATEMENT OF INTEREST

Amicus Curiae Ohio Oil and Gas Association ("OOGA") is a statewide trade association whose members engage in the exploration, development, and production of oil and natural gas in Ohio. OOGA's membership includes small independent producers and major energy companies, along with companies involved in midstream and downstream operations, including pipelines, processors, and refineries. Its mission is to protect, promote, foster, and advance the common interest of those engaged in all aspects of the Ohio crude oil and natural gas industry. It believes that the local oil and gas industry plays a vital role in continued economic growth and development of this geographic area and nationwide. OOGA monitors Ohio litigation involving oil and gas law and occasionally participates as amicus curiae in select cases that address issues of special importance to its members. OOGA believes this to be one of those cases.

The Ohio Manufacturers' Association ("OMA") is a statewide association of approximately 1,300 manufacturing companies which collectively employ over 700,000 men and women who work in manufacturing in the State of Ohio. OMA's members have a vital interest in ensuring that Ohio remains a desirable place to do business.

Ohio needs pipeline companies to continue building infrastructure in Ohio to meet the rising demand for power generation throughout the country and provide a market for oil and gas produced in Ohio. Unforeseeable tax liabilities have a chilling effect on such investment. If left to stand, the BTA's decision will create a maelstrom of uncertainty for those who wish to increase Ohio's natural gas export capacity. For that reason, OOGA supports the challenge of Appellant Rover Pipeline LLC c/o Energy Transfer ("Rover") to the BTA's decision, and especially the BTA's erroneous analysis of cost overruns.

STATEMENT OF FACTS

OOGA fully adopts and incorporates the statement of facts included in Rover's merit brief.

ARGUMENT

I. Natural gas pipeline infrastructure is essential to Ohio's (and the rest of the country's) energy independence.

It has long been the public policy of Ohio to encourage oil and gas production. *Newbury Twp. Bd. of Twp. Trustees v. Lomak Petroleum Ohio*, 62 Ohio St.3d 387, 389 (1992). In furtherance of this public policy, Ohio must encourage investment in critical infrastructure that enables natural gas producers to export this state's valuable natural resource to meet the nation's rising energy demands.

In May of this year, Goldman Sachs estimated that data centers alone "will drive around 3.3 billion cubic feet per day of new natural gas demand by 2030." Paul Ciampoli, *Natural Gas Could Play Key Role in Helping to Meet Rise in Power Demand from Data Centers*, Am. Pub. Power Assn. (Aug. 14, 2024), https://www.publicpower.org/periodical/article/natural-gas-could-play-key-role-helping-meet-rise-power-demand-data-centers. Likewise, Wells Fargo estimates that "AI data centers alone are expected to add about 323 terawatt hours of electricity demand in the U.S. by 2030," which is "seven times greater than New York City's current annual electricity consumption." Spencer Kimball, *AI Could Drive a Natural Gas Boom as Power Companies Face Surging Electricity Demand*, CNBC (May 5, 2024), https://www.cnbc.com/2024/05/05/ai-could-drive-natural-gas-boom-as-utilities-face-surging-electric-demand.html. "Natural gas is expected to supply 60% of the power demand growth from AI and data centers," according to Goldman Sachs. *Id.*

Ohio is uniquely situated to meet this surging demand with natural gas produced from the Utica Shale. In 2015, because of the Utica Shale, Ohio's natural gas supply surpassed in-state demand for the first time. *Ohio State Energy Profile*, U.S. Energy Information Administration, https://www.eia.gov/state/print.php?sid=OH#25 (last updated Sept. 21, 2023). By 2017, Ohio was producing approximately 1.7 trillion cubic feet of natural gas from the Utica Shale. Jamison Cocklin, *Natural Gas Has Friend, Ohio Gubernatorial Candidate DeWine Says*, Natural Gas Intelligence (Mar. 16, 2018), https://www.naturalgasintel.com/news/natural-gas-has-friend-ohio-gubernatorial-candidate-dewine-says. In 2023, Ohio produced 2.1 trillion cubic feet from Utica Shale wells. *2023 – All Quarters Production Report*, Ohio Dep't of Natural Res., *available at* https://ohiodnr.gov/discover-and-learn/safety-conservation/about-odnr/oil-gas/oil-gas-resources/production.

To meet the energy demands in the rest of the country, however, Ohio's natural gas producers must be able to export the gas to those markets, which requires "new pipeline capacity to be built." Ciampoli, *supra*. Indeed, the BTA acknowledged this in its decision, observing that before Rover built its pipeline, "[t]he limited pipeline capacity in the area effectively kept immense volumes of gas and its value stuck underground and away from markets that were otherwise willing to pay for it." BTA Decision & Order at 8. Pipelines will not invest in such infrastructure in Ohio if they face major unexpected tax liabilities for doing so.

II. The BTA's decision will deter natural gas infrastructure investment in Ohio.

A fundamental tenet of tax law is that "certainty is desirable." *United States v. Generes*, 405 U.S. 93, 105 (1972). *See also McLean Trucking Co. v. Lindley*, 70 Ohio St.2d 106, 112, 435 N.E.2d 414 (1982) (discussing the importance of "certainty and finality in tax planning and tax collection—for both the taxpayer and the Tax Commissioner"); *Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 459–60 (1995) ("[T]ax administration requires predictability."); *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 543 (1979) ("[T]ax law . . . can give no quarter to uncertainty.").

As the late Justice Sandra Day O'Connor aptly observed, "[t]he tax consequences of commercial transactions are a relevant, and ***sometimes dispositive***, consideration in a taxpayer's decisions regarding the ***use of his capital***." *United States v. Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring in the judgment) (emphasis added). "The sum that a private enterprise forfeits to the government every year is a major liability on any firm's accounting ledger and can mean the difference between profitability and stagnation, growth and downsizing." *Building Business Resilience to Tax Complexity and Uncertainty*, Kenan Inst. Of Private Ent. (Mar. 28, 2024), https://kenaninstitute.unc.edu/kenan-insight/building-business-resilience-to-tax-complexity-and-uncertainty. Accordingly, "[w]hen businesses are uncertain about taxes . . . they adopt a cautious stance" and will often "wait for calmer times to expand." Steven J. Davis, Scott R. Baker, & Nicholas Bloom, *Business Class: Policy Uncertainty Is Choking Recovery*, Am. Ent. Inst. (Oct. 6, 2011), https://www.aei.org/articles/business-class-policy-uncertainty-is-choking-recovery.

The BTA's decision, if left to stand, will make pipelines' tax liabilities unpredictable by imposing liability for unforeseen excess construction costs that add no value to the property. As the record from this case demonstrates, those costs (and the resulting tax liability if they are included in the taxable value) can be substantial. Rover experienced cost overruns of $1.359 billion. BTA Decision & Order at 42. However, as the BTA acknowledged in its decision, Rover's income from the pipeline is derived from long-term fixed-rate transportation contracts with natural gas producers, which were already in place before construction began and which prevent excess-cost recovery from the operation of the pipeline. *Id.* at 10–11. Accordingly, those unanticipated excess costs added ***no value*** to the pipeline, nor would a pipeline purchaser regard those costs as part of a price it would be willing to pay to acquire the pipeline. It should go without saying that a ***loss*** due to unforeseen events should not be taxed. Yet, that is exactly what the BTA did. By factoring Rover's unanticipated and unrecoverable costs into the pipeline's taxable value, the BTA compounded the losses Rover already suffered by taxing them.

Unanticipated construction costs are already a major concern for pipeline companies seeking to invest in Ohio. Constructing a pipeline that traverses hundreds of miles is no easy task. As the BTA itself recognized, there are several "moving parts necessary to develop and install such a large pipeline successfully." *Id.* at 9. In addition to the costs associated with obtaining the necessary property rights, pipelines must engage contractors to excavate, weld, install, and bury each section of pipe along the several-hundred-mile path of the pipeline. *Id.* at 18–23. Because of the "coordination required to manage the numerous moving parts," *id.* at 9, unexpected delays have a domino effect, impacting each subsequent phase of the project and, in many cases, triggering monetary penalties under the pipeline's construction contracts.

Courts in Ohio have repeatedly emphasized the financial impact that such delays have on pipeline companies. For example, in a case involving a pipeline project much shorter than the Rover project at issue here, *compare Texas E. Transm., LP v. 3.2 Acres Permanent Easement*, 2015 U.S. Dist. LEXIS 3252, *6 (S.D.Ohio Jan. 12, 2015) (action involving "seventy-six mile natural gas pipeline), *with* BTA Decision & Order at 14 ("The Rover Pipeline will consist of approximately 711 miles . . . ."), the court described "the careful coordination of multiple teams performing various stages of work on a rolling basis" and noted the "significant monetary penalties" the pipeline company would incur if tree-clearing in a portion of the pipeline's path was delayed. *Texas E. Transm.* at *19, 21. *See also Nexus Gas Transm., LLC v. City of Green*, 757 Fed.Appx. 489, 494 (6th Cir.2018) (describing the "significant harm" the pipeline company would suffer due to costs "to retain its construction crew during any associated delays"); *Rover Pipeline LLC v. Kanzigg*, 2017 U.S. Dist. LEXIS 215354, *47 (S.D.Ohio Mar. 1, 2017) (describing harm resulting from "contractual penalties from the tree-felling companies and other construction crews that Rover already hired to complete the work, which could cost hundreds of thousands of dollars per day"); *Columbia Gas Transm., LLC v. 171.54 Acres of Land*, 2017 U.S. Dist. LEXIS 30667, *20 (S.D.Ohio Mar. 3, 2017) (explaining that "pipelines are constructed in sequential phases, and a delay at one stage necessarily delays the entire project" resulting in "significantly higher costs" associated with "demobiliz[ing] and remobiliz[ing] crews to construct the Pipeline in a non-linear fashion").

Unexpected events, such as the unusually heavy rainfall that occurred in this case, cause delays because "it can inhibit some of the tasks associated with pipeline construction, including welding." BTA Decision & Order at 26. Heavy rainfall also "makes digging and placing heavy equipment more difficult." *Id.* After Rover already suffered loss from these delays, the BTA poured salt in the wound by ***including*** those costs in the "taxable value" of the pipeline. As explained in the next section, this is inconsistent with the constitutional requirement that property be taxed according to its "true value." Furthermore, other pipeline companies faced with the prospect of such double liability will think long and hard before deciding to invest their capital in Ohio. The Court must reverse the BTA's decision to avoid this chilling effect on investment in critical energy infrastructure.

In addition to failing to adjust the cost approach value of the pipeline by subtracting excess construction costs, the BTA adopted an income approach that effectively assumed that the pipeline will have an infinite useful life without any increased costs incurred in the future to maintain the pipeline. *See id.* at 162. OOGA and OMA want to emphasize that the BTA's assumption of infinite useful life is a false one: pipelines in fact wear out, and absent increased maintenance and capital expenditures will cease to be functional over time.

III. Allowing the deduction of unanticipated cost overruns from the taxable value of a pipeline is consistent with Ohio law.

The Ohio Constitution provides that "[n]o property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes." Ohio Const. Art. XII, § 2. In an earlier case this Court has decided involving the taxation of a pipeline, the Court approved the deduction of cost overruns. *See Standard Oil Co. v. Glander*, 155 Ohio St. 61, 78 (1951), *rev'd on other grounds sub nom*, *Standard Oil Co. v. Peck*, 342 U.S. 382, 383 (1952).

The BTA cited *Higbee Co. v. Cuyahoga Cty. Bd. of Revision,* 2006-Ohio-2, ¶ 52, in its decision for a general definition of "functional obsolescence" in real estate valuation. BTA Decision & Order at 128–29. According to the BTA, because that definition does not expressly reference construction cost overruns, they cannot be deducted from taxable value. BTA Decision at 129. However, *Higbee* did not involve the unique challenges associated with constructing a pipeline, nor did it reject the deduction of excess construction costs as a component of functional obsolescence.

In addition, at least one court outside Ohio, relying on the same definition of "functional obsolescence" from *The Appraisal of Real Estate* quoted in *Higbee*, has held that "functional obsolescence" ***includes*** "excess construction costs and/or excess operating expenses." *Brockway Glass Co. v. Freehold Twp.*, 10 N.J.Tax 356, 367 (1989). Based on that definition, a New Jersey appellate court upheld the deduction of "excessive construction costs" as functional obsolescence in another tax valuation case. *Merrill Creek Reservoir v. Harmony Twp.*, 461 N.J.Super. 32, 56 (2019). In *Merrill Creek Reservoir*, the taxpayer—like Rover in this case—incurred additional construction costs due to, among other things, "over a month of rain at the start of construction." *Id.* Even though "the project came in ***within budget***," the court nonetheless concluded that "the taxpayer was entitled to a fifteen percent deduction to value for functional obsolescence due to increased costs of construction." *Id.* (emphasis added). There is even more reason to deduct excess construction costs in cases where, as occurred with Rover, the excess construction costs caused the taxpayer to ***exceed*** its budget for the project. By including those costs in the taxable value of the pipeline, the BTA unreasonably and unlawfully punished Rover for incurring unforeseen costs, contrary to the Ohio Constitution.

CONCLUSION

The BTA's decision was unreasonable and unlawful and will deter future pipeline infrastructure investment by punishing pipelines for incurring unexpected costs. For those reasons, the Court should reverse the BTA's decision.

Respectfully submitted,

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