IN THE SUPREME COURT OF OHIO

ROVER PIPELINE LLC C/O ENERGY TRANSFER L.P.,	:	CASE NO. 2024-0484
Appellant,	:	On Appeal from the Board of Tax Appeals
v.	:	BTA Case No. 2020-1540
PATRICIA HARRIS, TAX COMMISSIONER OF OHIO,	:	
Appellee.	:	

MERIT BRIEF OF *AMICUS CURIAE* THE OHIO CHAMBER OF COMMERCE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1893, the Ohio Chamber of Commerce (the "Chamber") has represented Ohio businesses ranging from small sole proprietorships to some of the largest companies in the United States. With over 8,000 member businesses, the Chamber is Ohio's largest and most diverse business advocacy organization. The Chamber promotes and protects its members' interests and advocates to make Ohio's business environment more favorable. By promoting its pro-growth agenda with policymakers and in the courts, the Ohio Chamber seeks a stable and predictable legal system that fosters a business climate where enterprise, and therefore Ohioans, prosper. The Ohio Chamber regularly files amicus briefs in cases important to its members.

Making Ohio the best place to do business anywhere in the world—a mission of the Chamber—requires access to reliable, affordable, and sustainable energy. In 2022, Ohio was the fourth-largest electricity consumer among the states and ranked among the top 10 states in electricity net generation. U.S. Energy Information Administration, *Ohio State Profile and Energy Estimates*, https://tinyurl.com/y6cey7n2 (accessed Sept. 17, 2024). Ohio businesses need reliable electricity to support their operations, and Ohio families need reliable electricity to power their homes—not to mention natural gas keeps nearly 2/3 of Ohio families warm in the winter and is a preferred cooking fuel. As the largest share of this demand is met in-state by natural gas-fired power generation, the Chamber believes it is critical to improve Ohio's energy infrastructure and shore up grid resiliency.

Several of the Chamber's members are subject to Ohio's public utility personal property tax, and thus have an interest in the utility personal property tax being applied in a way that is fair and predictable, and consistent with the plain language of the statue and Ohio policy. Moreover, all of Ohio's businesses need and enjoy such public utility personal property tax taxpayers to provide the resources necessary to conduct their businesses. The Tax Commissioner's position in this case—and the Board of Tax Appeals ("Board") decision upholding that position—undermines that goal. The Board adopted the Commissioner's expert's admittedly-flawed appraisal opinion to value a pipeline owned by Appellant Rover Pipeline LLC ("Rover"), which resulted in the Board incorrectly considering the value of unanticipated regulatory and construction expenses that provide no value to Rover in determining the "true value" of its pipeline asset. The Board also mistakenly relied on a capital contribution to Rover's parent to establish an imputed floor on value. Although not discussed below in the interest of brevity, the Board also appeared to make multiple legal errors when considering the testimony of each appraiser. The Board's approach results in a host of challenges for Ohio businesses, erodes confidence in the Ohio tax system, and is otherwise inconsistent with state policy.

The Chamber asks this Court to reverse the Board's decision.

STATEMENT OF THE CASE AND FACTS

The Chamber incorporates Rover's statement of the case and facts.

LAW AND ARGUMENT

I. By Failing to Account for Excess Capital Costs That Add No Value, the Board Overstated the True Value of the Rover Pipeline.

The Board reached the wrong result because it erroneously included capital costs that added no value to Rover in determining the true value of the Rover pipeline. Rover, like any public utility in Ohio, files annual reports that include information necessary for the Tax Commissioner (the "Commissioner") to assess the tax according to the property's "true value." *See* R.C. 5727.08; R.C. 5727.10. Pipeline taxable property—like the Rover pipeline—is then assessed at 88% of its true value. R.C. 5727.111(D). In determining the true value of utility property, the Commissioner may employ the so-called "statutory method," which is a cost-based method defined as the "costs as capitalized on the public utility's books and records less composite annual allowances." R.C.

5727.11. The Commissioner, however, is not bound to the statutory method. Instead, the Commissioner may use "another method of valuation" and may consider "other evidence" to determine true value. *See Texas E. Transmission Corp. v. Tracy*, 78 Ohio St. 3d 83, 86, 676 N.E.2d 523 (1997) (citing R.C. 5727.11). Regardless of the method employed, however, "[t]he ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed." *Id*. (citing *R.H. Macy Co., Inc. v. Schneider*, 176 Ohio St. 94, 97, 197 N.E.2d 807 (1964)) (emphasis in original).

Here, although the Commissioner's Final Determination adopted the statutory method, both the Commissioner and Rover agreed in their respective appraisal reports and testimony presented to the Board that the statutory method was not the correct method to value the property. The Board reversed and remanded the Commissioner's Final Determination with instructions for the Commissioner to apply her expert's alternative appraisal methodology to determine the Rover pipeline's true value. BTA Decision and Order at 164. Although the Board's decision allowed what amounts to a very small deviation from the statutory method's conclusion of value, as permitted under *Texas E. Transmission Corp*., it did not appropriately perform its duty to adjust for errors made in the Commissioner's expert appraisal report. For example, Rover presented uncontroverted evidence that extreme weather conditions and regulatory delays caused it to incur significant excess construction and inspection costs that added no value to the Rover pipeline. The Board considered these and other excessive costs as relevant to the true value of the pipeline, thereby resulting in a substantially and incorrectly inflated true value upon which the tax is based. In doing so, the Board appears to have adopted the theory that the Rover pipeline is more valuable than it is just because the pipeline cost more to build. The Board's theory—that there is always a positive relationship between cost and true value—disregarded the substantial evidence provided by Rover that its excess costs provided no value to the company or to the pipeline. Willing buyers don't pay for cost overruns.

The Board's decision takes an already high assessment rate—i.e., assessing the Rover pipeline at 88% of its true value—and inflates that true value by the excess costs incurred by Rover, which provide no value to the pipeline. This approach overstates the true value of the Rover pipeline and harms businesses generally by indicating that the Commissioner will include excess costs in the value of utility property regardless of whether those costs provide any benefit.

The Board's approach sets a dangerous precedent of penalizing companies that incur excess costs with higher tax liabilities, even when those costs provide no corresponding value. Indeed, an unwarranted tax valuation drives down the true value of utility assets. The Revised Code and applicable case law require the Board to independently find true value, regardless of whether one appraisal is seen as superior to another, especially where the Board acknowledged errors in the Commissioner's expert's appraisal report.

II. The Board Erred in Relying on a Capital Contribution to a Parent – the Blackstone Transaction – to Establish a "Floor" on Value.

While both appraisers in this appeal attempted to follow R.C. 5727.11(A) by using an alternative method of valuation to determine the true value of Rover's taxable personal property, the Board decided to stray from this path by relying on non-appraisal evidence as a "floor" for value. BTA Decision and Order at 110. That non-appraisal evidence is a going concern value estimated – "imputed" according to the Board – based on Blackstone's acquisition, through a subsidiary, of a 49.9 percent interest in ET Rover Pipeline LLC, which owns 65 percent of the taxpayer: the equity investment constituted an indirect 32.43 percent interest in the taxpayer (the "Blackstone transaction"). Although both appraisers initially agreed that this transaction was irrelevant to their opinions of value, the Board wrongfully characterized this acquisition as a sale of the pipeline that must be considered as establishing a floor on value.[1] The Court should direct the Board to refrain from supporting its decisions with irrelevant evidence, as such extra-statutory activity will only increase uncertainty for Ohio businesses.

Because the Board reached its mistaken result by relying on this Court's decision in *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353 ("*Palmer House*"), the Chamber invites the Court to clearly explain in its opinion the obvious limits of *Palmer House*. That case involved the sale of an apartment complex via a purchase and sale agreement that permitted the buyer to elect to structure the sale as a "Drop Down LLC Sale." *Id.* ¶¶ 8-9, 38. *Palmer House* involved the sale of a corporate entity that was created for the sole purpose of transferring real estate, while the Blackstone transaction involved a capital contribution to acquire a minority interest in a parent company that included several intangible assets, including limitations on liability for Blackstone's benefit. The Court affirmed the BTA's conclusion in *Palmer House* that the real estate purchase and sale was presumptive evidence of real-estate value under R.C. 5713.03 because the creation and transfer of the entity was nothing more than fulfillment of a contractual provision of the real-estate sale agreement. By contrast, in this case Blackstone's subsidiary was investing in a going concern rather than acquiring the pipeline asset, with both appraisers agreeing that such a transaction was not presumptive evidence of the value of personal property under R.C. 5727.11. *See, e.g., Salem Medical Art & Dev. Corp. v. Columbiana Cty. Bd. of Revision*, 82 Ohio St.3d 193, 195 (1997) ([s]tock value represents the company's value" involving "many variables associated with a going concern"). Moreover,

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[1] The Board went so far as to chastise the Tax Commissioner's appraiser for "failing to do a more thorough analysis of the transaction" (BTA Decision and Order at 110), ignoring that, under USPAP, any such analysis was irrelevant.

nothing in *Palmer House* suggests that an asset sale price establishes a "floor" for the value of the asset that was sold; instead, the case law calls for the sale price to be regarded as the presumptive value of the asset. The Court should find that *Palmer House* is not applicable here as a matter of law.

Further complicating matters, after determining that the Blackstone transaction established a value floor, the Board shifted the burden of proof to Rover to demonstrate the exact dollar amount that should be subtracted from the purported "floor" because of the negotiated terms in the membership purchase agreement that were inconsistent with the Board's conclusion that the Blackstone transaction was simply a pipeline purchase. BTA Decision and Order at 121. If the sale of a membership interest is ever appropriate to be used as a floor on value (it wasn't here), a basic requirement of the factfinder should be to determine what the actual value of the transaction was after taking all elements of the transaction into account. And in this context the Board ought to have regarded the burden of proving the actual value, based on an equity contribution rather than an asset agreement, as incumbent on the state, not the taxpayer. The Board's failure to conduct a proper analysis is evidence of a rush to judgment against Rover.

III. The Board's Decision Disincentivizes Investment in Ohio's Energy Infrastructure when the State Needs that Investment.

The Board's decision not only sets a dangerous precedent, but also threatens energy infrastructure development in Ohio. R.C. 4929.02 provides that it is state policy to "[p]romote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods" and to "[f]aciliate the state's competitiveness in the global economy[.]" R.C. 4929.02(A)(1), (10). The reality is that demand for energy—including natural gas—is growing and will continue to grow. *See, e.g.*, U.S. Energy Info. Admin., *Annual Energy Outlook 2023*, at 14-15 (Mar. 2023), https://tinyurl.com/y6tjzm9v (accessed Sept. 17, 2024); N. Am. Elec.

Reliability Corp., *2023 Long-Term Reliability Assessment*, at 16, 33 (Dec. 2023), https://tinyurl.com/5cu6unx7 (accessed Sept. 17, 2024). Indeed, natural gas use at Ohio's power plants has surged in recent years and was nearly three times greater in 2022 than it was a decade earlier. *Ohio State Profile and Energy Estimates*, https://tinyurl.com/37jv94pp (accessed Sept. 17, 2024). Energy infrastructure development is critical to meeting that growing energy demand and to meet the state's goal of promoting the availability of adequate, reliable, and reasonably priced natural gas. By tethering the true value of utility personal property to the money spent on a project, the Board's decision drives up the cost of natural gas by disincentivizing companies from investing in energy infrastructure. Ultimately, if utilities face the risk of substantially increased tax liabilities because they encountered unexpected costs, environmental conditions, regulatory hurdles, and the like—i.e., the same issues Rover encountered—those utilities will slow their investment decisions and delay necessary infrastructure when the state needs that development.

IV. The Board's Decision Inspires a Lack of Confidence in the Tax System.

A. The Board's decision to adopt the Commissioner's admittedly-flawed determination of true value is problematic for Ohio businesses.

The Board's decision also erodes confidence in the Ohio tax system because it acknowledged errors in the Commissioner's approach, but nevertheless remanded with instructions to apply that same flawed approach. The Board's decision is quite clear that the Commissioner's evidence of the pipeline's value suffered from shortcomings: "None of this is to say that Rover has not articulated persuasive arguments undermining the Commissioner's appraisal. There are shortcomings." BTA Decision and Order at 3. Nevertheless, the Board found "the Commissioner's appraisal to be the best evidence of value" and "reverse[d] and remand[ed] to the Commissioner to assess the pipeline consistent with her expert's appraisal." *Id*.

The Board's decision to remand with instructions to the Commissioner to follow her expert's admittedly-flawed approach is troubling for two primary reasons. First, it is unclear how the Commissioner can determine the true value of the Rover pipeline when the Board has admitted that her methodology is flawed. *See* R.C. 5727.10 (requiring the Commissioner to determine the "true value" of utility property); *Texas E. Transmission Corp.*, 78 Ohio St.3d at 86 ("The ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed."); *R.H. Macy Co.*, 176 Ohio St. at 97 ("As pointed out, the ultimate goal is a determination of the true value of the property taxed.").

Second, the Board's approach suggests that the Board has either two options—it can either select the Commissioner's approach to calculating true value (regardless of whether it is flawed) or it can select the taxpayer's. This approach is akin to a "baseball arbitration" where each party submits a proposed value and the Board must select one of the proposed values as the final number. *See Rain CII Carbon, LLC v. ConocoPhillips Co.*, No. 09-CV-4169, 2011 WL 2565345, at *1 (E.D. La. June 27, 2011), *aff'd*, 674 F.3d 469 (5th Cir. 2012) ("'Baseball' arbitration requires that each party submit a proposal and the arbitrator is to select one of the two."); *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046, 1066 (C.D. Cal. 2007) (discussing "baseball arbitration"). Adopting the baseball arbitration approach, as the Board did here, risks over- or under-valuing property by accepting a party's proposed value, rather than a value determined by the Commissioner and the Board after an independent review of the facts Put differently, this approach risks the Board deciding which of the parties has the *better value* of property, rather than determining the *true value* of property, because the Board is selecting among two alternatives instead of exercising its own independent judgment.

The role of the Board in a property-valuation case is to determine the true value of the property *de novo* exercising its own independent judgment. *Columbus Bd.. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 15 (1996); *Texas E. Transmission Corp.,* 86-87. This Court has rejected Board decisions predicated on the board's finding "sufficient evidence" of one party's proposed value, insisting instead that the Board perform an independent valuation of the property that is not bound by the values advocated by the parties and their appraisers. *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 2011-Ohio-5078, ¶ 20-21, 26-27; *Sapina v. Cuyahoga Cty. Bd. of Revision*, 2013-Ohio-3028, ¶ 28. To expect Rover to pay tax based on an appraisal report that is admittedly incorrect is fundamentally unfair, and adopting that report constitutes a dereliction by the Board of its legal duties.

B. The Board's decision injects needless uncertainty and risks into utility property investment decisions.

The Board's decision injects uncertainty into the utility industry such that companies are forced to guess as to their expected tax liability, and may not resolve their tax liabilities except through years of litigation. In the recent NEXUS gas pipeline case, the Commissioner followed the statutory approach and concluded that the true value of a natural gas pipeline was $1,620,358,699 for tax year 2019. *See Snodgrass v. Harris,* 2024-Ohio-3130, ¶ 5. After years of litigation, the parties reached a settlement in which they agreed that the value of the pipeline was $950,000,000 for tax year 2019. *Id*. Thus, the taxpayer was required to incur great time and expense before the Tax Commissioner was willing to recognize that the statutory method – which included hundreds of millions of dollars in cost overruns and scope reductions – produced a "value" that was at least 70% above true value. In the current appeal, which involves similar pipeline assets, the Board relied on a flawed appraisal that effectively included, in the tax base, hundreds of millions of dollars in cost overruns by failing to make an adjustment to appropriately account for those costs that did not add to the true value of the asset. Yet the taxpayer here, absent this Court's reversal of the Board's decision, will suffer much more burdensome and unjustifiable treatment than the taxpayer in the NEXUS appeal.

While the Chamber is not opposed to settlements—indeed, the Chamber recognizes that settlement can be a valuable tool to resolve disputes—the result of the NEXUS case raises troubling questions when compared to this appeal. How will a utility know the true value of its property except through years of litigation? When and under what circumstances, and to what extent, will the Tax Commissioner diverge from statutory method when valuing pipeline assets? If a company decides to litigate, will a settlement be offered? How much time and expense must be incurred to compel the Tax Commissioner to value pipeline assets at their actual true value? And is all that time and expense worth a multi-billion-dollar investment in Ohio when the outcome of any tax appeal is so unpredictable that the valuation for tax purposes can vary by hundreds of millions of dollars?

Making Ohio the best place to do business requires certainty—or at least not guaranteed uncertainty—for businesses in determining their tax liability and fair treatment between litigants. Businesses should not be forced to guess as to the value of their property, and they should not be forced to litigate for years before resolving the question of the true value of their property. These concerns are all the more acute when the Rover case is compared to the NEXUS case, where NEXUS received a substantial reduction in its true value through settlement and Rover is embroiled in years of litigation.

V. The Board's Decision Gives Utilities and Other Parties the Wrong Incentives.

While the Board's decision focuses on the value of Rover's property, it ripples across the statewide business ecosystem and harms businesses and consumers of electricity and gas in Ohio. For example, utilities may be concerned that the Board will apply the same formulaic, "one size fits all" approach it applied to Rover to other utility property in the state. This approach would drive up tax liabilities without any corresponding increase in the true value of those assets. It could also be significantly more difficult for a utility to get financing for its operations. Any attempt to sell utility business or assets would likely result in a lowered valuation due to the existence of the Board's decision, given the potential negative effects on business operations.

The Board's decision also risks impacts to future business that are challenging to quantify but nevertheless real. As discussed above, utility businesses may be incentivized to avoid spending on infrastructure development in Ohio for fear of cost overruns that would result in the same unanticipated tax liabilities the Board's decision will impose upon Rover. Local actors – both governmental and non-governmental – are perversely incentivized to delay future projects as much as possible, thereby driving up purported "true value" and the utility's long-term operating expenses. Utility businesses would also be incentivized to invest less heavily in environmental and safety controls during construction because those investments would count against their annual tax liabilities under the Board's rationale. Penalizing a utility for investing in prudent environmental controls and worker safety during construction would set a concerning precedent. In contrast, reversing the Board's decision prompts confidence in the tax system and allows businesses to continue investments in environmental and worker safety programs without fear of unforeseen tax consequences.

CONCLUSION

This Court should reverse the decision of the Board of Tax Appeals.

Dated: October 7, 2024

Respectfully submitted,

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I certify that under S.Ct.Prac.R. 3.02(A)(3) and S.Ct.Prac.R. 3.11(C)(1), the foregoing, *Merit Brief of Amicus Curiae*, was filed electronically on October 7, 2024 with the Ohio Supreme Court via the Court's E-Filing Portal and served via email on October 7, 2024 on the following:

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