No. _____

In The Supreme Court of the United States

MONICA J. SADLER,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, Second District

---

PETITION FOR WRIT OF CERTIORARI

Evan C. McKenzie
Law Offices of Evan C. McKenzie
Suite 215
95 West Grand Avenue
Lake Villa, Illinois 60046
(847) 265-5650

Counsel of Record for Petitioner

QUESTION PRESENTED

Was the state court's refusal to consider the Petitioner's constitutional due process and impairment of contracts challenges to the rate-increase proceeding before the Illinois Commerce Commission, allegedly for failure to preserve the constitutional claims at the administrative level, a violation of the Supremacy and/or Due Process Clauses of the United States Constitution, as an untenable nonfederal ground that blocked consideration of the federal claims without any fair or substantial support in state law?

PARTIES TO THE PROCEEDING BELOW

The Woodhaven Association—Appellant

Monica J. Sadler—Appellant

Illinois Commerce Commission—Respondent

Aqua Illinois, Inc.—Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS IN CASE

Rule 23 Order of Third District Appellate Court in *Sadler v. ICC*, dated March 2, 2007 (unreported)

Judgment entered by Illinois Supreme Court, dated May 31, 2007 (unreported)

Order entered by Illinois Commerce Commission, dated November 8, 2005

STATEMENT OF JURISDICTION

The date of the judgment of the Illinois Supreme Court denying discretionary leave to appeal the Appellate Court's Order is May 31, 2007, and the date of order of the Appellate Court of Illinois, Second District, which is, therefore, the highest court of Illinois in which a decision could be had and which is the order sought to be reviewed by this Court, is March 2, 2007.

The statutory provision conferring jurisdiction upon this Court is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. art. I, § 10, cl. 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Material Facts

In December 2004, Aqua Illinois filed revised tariff sheets with the Illinois Commerce Commission (the "Commission"), seeking general increases in water and sewer rates for its Woodhaven Division and general increases in its water rates for its Oak Run Division, which supplies water service to the Oak Run development in Knox County, Illinois. (Rule 23 Order at 2.)

The Oak Run development consists of 2,600 single-family residential lots in 8 subdivisions, each with its own name and its own separate Declaration of Restrictive Covenants. There is no Declaration of Restrictive Covenants that applies to the entire Oak Run development. The Oak Run Property Owners' Association ("ORPOA") administers the eight separate Declarations, with each Declaration being enforceable only in the applicable subdivision. (Rule 23 Order at 3.)

ORPOA petitioned to intervene in this action on April 8, 2005, and that petition was granted. ORPOA contested the

proposed rate increase on various grounds. Petitioner Monica J. Sadler is an owner of multiple lots in the Oak Run Division and an "availability" customer, as described below. (R. C-6166 through C-06175.)[1] Sadler filed her Petition to Intervene on September 23, 2005, after learning that the ORPOA was not pursuing the issues she wished to see addressed (R. C-06166 through C-06167), and after being advised by an ICC employee to intervene in the proceeding. (R. C-06163 through C-06164.) Sadler's Petition raised a different set of issues than ORPOA and asserted that her interests were not represented by ORPOA, and was granted on the basis of such interest. (R. C-6166 through C-06175.)

Approximately 80% of the lots in Oak Run (over 2,000) are undeveloped and are not connected to Aqua Illinois' water system. Aqua Illinois charges these owners an "availability charge" on the theory that water service would be available to these owners should they develop their lots and pay additional charges to have their lots connected to the main water supply.

Sadler's position was that the permissible water charges for the Oak Run Division are established by contracts between the affected property owners and the utility, which are contained within the Declarations of Restrictive Covenants between the property owners and Aqua Illinois' predecessor in interest, and within Amendments to certain of those Declarations. These Declarations and Amendments would, therefore, be determinative of Aqua Illinois' request to impose and/or raise the "availability charges" at Oak Run. Sadler sought to show that the availability charges were entirely precluded by the express terms of these contracts, and that,

---

[1]All Record references are to the Record from the Illinois Commerce Commission, which was the Record before the Illinois Appellate Court.

therefore, no increase in those charges could be granted without further contravening the terms of the contracts.

The ALJ had reopened the record on September 15, 2005, at Aqua Illinois' request, to permit them to show compliance with the publication requirement. Aqua Illinois was given a deadline of September 23, 2005, to supply that evidence. (Index at 10.) Sadler's Petition to Intervene was filed on September 23, 2005. Aqua Illinois' evidence was not submitted until September 26, 2005. (R. C-06425.) On October 4, 2005, the ALJ marked the record "heard and taken" as of October 3, 2005, and granted Sadler's Petition to Intervene as of October 4, 2005. (R. C-06207.) Sadler sought to introduce the Declarations and Amendments into the record of the Commission proceeding and contended that Aqua Illinois was required by statute to file the relevant contracts with the Commission and that the ALJ was required by statute to compel their production. However, Sadler was not allowed to submit evidence into the record on the grounds that to do so would unduly delay the proceeding and none of the Declarations or Amendments were ever placed in evidence. (Rule 23 Order at 3.)

On October 5, 2005, one day after granting Sadler's Petition to Intervene, the ALJ issued the Proposed Order recommending granting the increase. (R. C-06425, C-06533.) Sadler filed a Brief on Exceptions on October 13, 2005 (R. C-06425 through C-06435) in which she claimed that the proposed increases violated Article I, § 10, Clause 1 of the United States Constitution, known as the Contracts Clause. She quoted the text of the constitutional provision verbatim. (R. C-06427 through C-06428.) The Final Order was entered on November 8, 2005. (R. C-06624 through C-06687.) Following the recommendation of the ALJ, the Commission granted an increase in the Oak Run water division to produce annual base rate revenues of about $489,000, an increase of about 50% over the previous rate. (Rule 23 Order at 5.)

Sadler filed a Motion to Hold Oral Argument, Motion for Additional Hearing, and Motion to Admit Post-Record Data on November 10, 2005. (R. C-06710 through C-06723.) She called for "the Illinois Commerce Commission not to further interfere with the private contracts of each Oak Run availability customer." (R. C-06720.) She objected to "unlawful approval of increases in water availability fees, by the Illinois Commerce Commission, which had no basis in law, or in fact, and appear to violate the Constitutional Rights of an entire class of Oak Run Property Owners." (R. C-06721.)

Sadler filed an Application for Rehearing on December 8, 2005. (R. C-06825 through C-06839.) The ALJ recommended that the Commission deny this application. In so doing, he said, "Ms. Sadler's underlying argument is that the covenants applicable to Aqua's customers in the Oak Run Water Division limit what they can be charged for water service. For a better understanding of Ms. Sadler's arguments, I encourage the Commission to review the November 10 filing." (R. C-06858.) These motions and petition were denied by the Commission. (R. C-06860.)

On appeal, Sadler argued to the Illinois Appellate Court that the rate increases were not supported by substantial evidence because the contracts were not allowed in evidence; that the ALJ abused his discretion by disallowing Sadler's proffered evidence and marking the record "heard and taken" one day before allowing her to intervene; and that the ICC's decision to grant the rate increase violates the United States and Illinois prohibitions against impairment of contracts. (Brief of Intervenor-Appellant Monica J. Sadler; Reply Brief of Monica J. Sadler; Petition for Rehearing [of Monica J. Sadler].) After an adverse decision by the Appellate Court, Sadler petitioned for leave to appeal to the Illinois Supreme Court, and her petition was denied. (Rule 23 Order; Illinois Supreme Court Judgment, dated May 31, 2007.)

B. When And How The Federal Questions Were Raised

Sadler raised her federal constitutional questions both before the Illinois Appellate Court and earlier to the Illinois Commerce Commission. Sadler specifically argued to the Illinois Appellate Court that the decision not to allow her to present any evidence in support of her claims deprived her of her fundamental, constitutional due process right to a fair hearing and of the opportunity to have her federal claim under the Contracts Clause of the United States Constitution considered. (Brief of Intervenor-Appellant Monica J. Sadler at 15, 24-27.)

As Sadler explained to the Illinois Appellate Court, she had earlier raised these federal constitutional issues before the Illinois Commerce Commission. She pointed out to the court her repeated references to the contracts evidence issue, as well as to the impairment of contracts issue, before the Commission. (Brief of Intervenor-Appellant Monica J. Sadler at 14, 18-19, 20, 22-23, 24-27; Reply Brief of Monica J. Sadler at 12, 15, 19-20; Petition for Rehearing [of Monica J. Sadler] at 7-8.)

Before the Commission, immediately following the ALJ's Proposed Order recommending that the Commission grant the rate increase, Sadler had filed a Brief on Exceptions (R. C-06425 through C-06435) in which she expressly argued that the proposed rate increases violated the Contracts Clause of the United States Constitution. She quoted the text of the constitutional provision verbatim. (R. C-06427 through C-06428.) Shortly thereafter, Sadler had filed a Motion to Hold Oral Argument, Motion for Additional Hearing, and Motion to Admit Post-Record Data (R. C-06710 through C-06723) in which she called for "the Illinois Commerce Commission not to further interfere with the private contracts of each Oak Run availability customer" (R. C-06720) and objected to the "unlawful approval of increases in water availability fees, by

the Illinois Commerce Commission, which had no basis in law, or in fact, and appear[ed] to violate the Constitutional Rights of an entire class of Oak Run Property Owners." (R. C-06721.) Finally, Sadler had filed an Application for Rehearing (R. C-06825 through C-06839), in which she, again, referenced the governing contractual provisions, the Commission's "interference with enforcement of the provisions of [the] governing documents," the evidentiary deficiencies in the record, and the interference with private contracts (R. C-06827, C-06828, C-06829, C-06830, C-06832, C-06834, C-06837).

C. Court's Treatment Of The Federal Questions

The Illinois Appellate Court concluded that Sadler's evidence came within an exception to the due process-based rule that a party may present evidence in support of its position because "she attempted to intervene after the evidence had been closed. (Rule 23 Order at 19.) The court further found "nothing in the record or her arguments that suggest why she could not have made her concerns known to ORPOA, the body charged with representing the interests of the Oak Run property owners." (Rule 23 Order at 20.) Finally, it found that Sadler had forfeited consideration by the court of the Contracts Clause issue by not "adequately" raising it before the Commission. (Rule 23 Order at 21.) The Illinois Supreme Court simply avoided these issues by denying leave to appeal. (Illinois Supreme Court Judgment, dated May 31, 2007.)

REASONS FOR GRANTING THE PETITION

The Illinois Appellate Court decided this case in disregard of principles established by this Court for the consideration of federal constitutional claims, and in effect disregarded the federal constitutional claims that Sadler had raised before the Illinois Commerce Commission by relying on untenable state procedural grounds to dispose of the case.

The court declined to determine Sadler's federal constitutional claim based on impairment of contracts by concluding, based on an inappropriately stringent construction standard, that she had not properly raised the issue in her Petition for Rehearing. The court also avoided her federal constitutional claim based on violation of due process by concluding that the Commission had acted consistent with state law. (Rule 23 Order at 15-21.)

These conclusions are contrary to both the law and the facts and depart from this Court's precedents. First, Sadler's submissions should have been liberally construed since she was proceeding pro se. Second, Sadler did adequately raise her constitutional impairment of contracts issue before the Commission, but even if she had not, the court was obligated to consider it. Finally, the Commission did not act consistent with state law, but even if it had, the court should have determined Sadler's due process challenge based on the constitutional requirements imposed, not on the basis of state law.

This Court, in recognizing that it has jurisdiction to review state decisions that foreclose federal claims on inadequate state procedural grounds and rejecting the argument that the asserted state grounds were adequate, has explained:

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court." *First*

> *National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 346, 46 S.Ct. 135, 137, 70 L.Ed. 295, and cases cited. . . . Whether the constitutional rights asserted by the appellant were "* * * given due recognition, by the (court of appeals) is a question as to which the (appellant is) entitled to invoke our judgment, and this (she has) done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward v. Board of Com'rs of Love County*, 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751, and cases cited.

Staub v. City of Baxley, 355 U.S. 313, 318-19 (1958) (lack of standing for failure to seek permit under ordinance being challenged on constitutional grounds was not an adequate nonfederal ground).

In an early case, in making it clear that while state courts may deal with local matters as they think proper they cannot defeat the assertion of federal rights through state procedural rules, this Court explained:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . If the Constitution and laws of the United States are to be enforced, this Court

> cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); *see also Davis v. Corona Coal Co.*, 265 U.S. 219, 222-23 (1924) (power of state over its own courts cannot be used to defeat a federal constitutional right).

In more recent cases, this Court, citing numerous previous decisions, has noted that the adequacy of state-law grounds to preclude litigation of federal claims is itself a federal question and that grounds that are inconsistent with or violate federal law, or have not been strictly or regularly followed, are not valid ones, given the Supremacy Clause in the federal Constitution. *E.g.*, *Howlett v. Rose*, 496 U.S. 356, 366, 371 (1990); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63, *reh'g denied,* 458 U.S. 1131 (1982).

This court went on to explain that the fact that a given state rule is denominated as jurisdictional does not provide state courts with a valid excuse to avoid their obligation to enforce federal law if the rule does not reflect the concerns that jurisdictional rules are designed to protect—that is, power over the person and the subject matter. *Howlett*, 496 U.S. at 381-83 (state sovereign immunity rules not a proper ground for refusing to hear § 1983 claims against local governmental entities).

The state rules upon which the Illinois Appellate Court relied in this case did not provide a valid excuse for avoiding enforcement of the federal Constitution. This case, therefore, presents a powerful justification for review of the state court decision by this Court on the basis that the state court blocked consideration of important federal constitutional questions by

means of the misapplication of state procedural rules and in departure from this Court's precedents on the federal law.

I. THE ILLINOIS COURTS DEPARTED FROM THIS COURT'S PRECEDENTS CONCERNING PRO SE PARTIES.

Sadler was proceeding before the Illinois Commerce Commission pro se. The Illinois Appellate Court, however, applied an extremely stringent standard to the grounds for her appeal, finding that she had not adequately raised the impairment-of-contracts issue to the Commission in her Petition for Rehearing. (Rule 23 Order at 21.) As should be clear from the references, *supra*, on how and when her issues were raised, she did, in fact, adequately raise the issue before the Commission. As this Court has repeatedly stated, moreover, documents from parties proceeding pro se are to be liberally construed and must be held to less stringent standards. *See, e.g.*, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). This principle should, if anything, apply with even greater force in administrative hearings, which are supposed to be more informal to begin with—precisely because the parties often are not represented by lawyers.

Accordingly, even if Sadler's Petition for Rehearing was technically inadequate, the court should not have refused to consider the issue when the purpose of the technical requirements under state law had been fully satisfied. By applying a stringent standard, and even then applying it incorrectly, as outlined *infra*, the Illinois Appellate Court evaded consideration of Sadler's federal constitutional claim for impairment of contracts.

II. THE ILLINOIS COURTS DEPARTED FROM THIS COURT'S PRECEDENTS, AS WELL AS THOSE OF ILLINOIS, CONCERNING WAIVER OF CONSTITUTIONAL CLAIMS.

The Illinois Appellate Court concluded that Sadler failed to properly raise her impairment-of-contracts claim before the Commission, relying on the provision under 220 Ill. Comp. Stat. 5/10-113 that limits the scope of appeal to the issues raised in a petition for rehearing. (Rule 23 Order at 21.) However, as this Court has clearly stated in another case in which review was sought of an Illinois decision in which the state court, likewise, based its refusal to review a federal constitutional question on a state procedural rule,

> [w]hen federal rights are involved, it is of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them.

Parker v. Illinois, 333 U.S. 571, 574, *reh'g denied*, 334 U.S. 813, *petition denied*, 335 U.S. 856 (1948).

Under Illinois law at the time *Parker* was decided, review of constitutional issues was directly to the state supreme court, and the choice to seek review in the appellate court, instead, constituted an abandonment of the constitutional issues. *See* 333 U.S. at 574-75. Under the currently applicable law, review of Commission decisions is by the Appellate Court, and any review of that court's decision by the state supreme court is entirely discretionary. 220 Ill. Comp. Stat. 5/10-201(a), 5/10-202; Ill. Sup. Ct. R. 315(a) (except as provided under Rule 317, appeals to the Supreme Court from the Appellate Court are within the court's sound judicial discretion), 317 (appeals as of right allowed only where statute has been held invalid or where constitutional

question arose for the first time in and as a result of action of appellate court).

The Illinois Appellate Court concluded that, under state-required procedures, Sadler had not properly preserved her constitutional claims for its review. (Rule 23 Order at 21.) As an initial matter, Sadler *did* raise the impairment of contracts question in her Petition for Rehearing before the Commission, as outlined *supra*. Even if she had not, however, she had repeatedly raised the issue throughout the proceedings, as well as in her other postdecision motions, such that the purpose of the rule—which is to give the Commission the initial opportunity to pass on an issue—was clearly satisfied. *See, e.g., Scherer Freight Lines, Inc. v. Ill. Commerce Comm'n*, 24 Ill. 2d 359, 364, 181 N.E.2d 134, 137-38 (1962) (purpose of rehearing requirement is to give Commission opportunity to correct its alleged errors before resort to courts) (superseded by statute on other grounds); *Chicago Area Recycling Group v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 769, 774, 374 N.E.2d 1008, 1012 (1978) (same).

The Commission was fully aware of Sadler's constitutional challenge, had every opportunity to pass on the issue, and had no reason to think that Sadler had abandoned the issue. It simply evaded the necessity for reaching the constitutional issue raised by Sadler by refusing to allow her to offer any evidence. *See Citizens Utils. Co. of Ill. v. Ill. Commerce Comm'n*, 124 Ill. 2d 195, 206, 529 N.E.2d 510, 515 (1988) (considering plaintiff's claim, despite its failure to articulate it in its application for rehearing, where grounds for Commission's decision were not apparent from its order, since meaningful review would otherwise be thwarted by Commission's failure to express basis for its decision). To foreclose review by the courts based on Sadler's failure to rearticulate the issue in her Petition for Rehearing as precisely as she might have—in effect to find the issue waived—would clearly elevate form over substance. This the more so, given

that, as explained *supra*, Sadler was proceeding *pro se* and her submissions should have been liberally construed.

As this Court has made clear, the principle is well-established that when constitutional questions are in issue, the availability of judicial review is presumed, given that access to the *courts* is essential to the decision of such questions because they are obviously unsuited to resolution in administrative proceedings, the Court will not generally interpret even a federal statutory scheme as taking the "extraordinary" step of foreclosing jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 108-09 (1977). In the context of state law, this Court has stated that

> when the waiver is founded on a failure to comply with the appellate practice of a State the question turns on whether that practice gives litigants "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the state court.

Parker, 333 U.S. at 574-75 (quoting *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194, 195 (1925)). Sadler's claim to this Court is, precisely, that the asserted state practices foreclosed her from any reasonable opportunity to have her claimed contract rights heard and determined, either by the administrative body or by the Illinois courts, and that the foreclosure violates federal due process requirements and/or the Supremacy Clause of the federal Constitution.

Importantly, Illinois courts have consistently held that the waiver rule—that issues and arguments not raised before the administrative body cannot be considered by a reviewing court—is not absolute and is not a limitation on the jurisdiction of a reviewing court, but rather is only an admonition to litigants. *See, e.g.*, *Hunt v. Daley*, 286 Ill. App. 3d 766, 768, 677 N.E.2d 456, 459-60 (1997) (finding that court

hearing administrative appeal was well within the latitude of its discretion to entertain constitutional issue, notwithstanding any waiver contentions); *Freedom Oil Co. v. Ill. Pollution Control Bd.*, 275 Ill. App. 3d 508, 513, 655 N.E.2d 1184, 1188-89 (1995) (issue related to public meetings by telephone conference came within exception to waiver rule because of the likelihood of recurrence); *Miller v. Pollution Control Bd.*, 267 Ill. App. 3d 160, 170, 642 N.E.2d 475, 484 (1994) (court may elect to consider matters not raised in original proceedings where issue of public importance is presented), *appeal denied*, 159 Ill. 2d 570, 647 N.E.2d 1011 (1995). Further, notwithstanding the 220 Ill. Comp. Stat. 5/10-113 limitation, the Illinois provision on review of administrative decisions specifically mandates that the hearing and determination before the court shall extend to "all questions of law and fact presented by the entire record before the court." 735 Ill. Comp. Stat. 5/3-110.

In keeping with 735 Ill. Comp. Stat. 5/3-110, as well as *Califano*, Illinois courts have also consistently held that constitutional issues may be raised for the first time in a complaint for administrative review. *See, e.g.*, *Howard v. Lawton*, 22 Ill. 2d 331, 333-34, 175 N.E.2d 556, 557-58 (1961); *Head-On Collision Line, Inc. v. Kirk*, 36 Ill. App. 3d 263, 268, 343 N.E.2d 534, 538 (1976); *Murray v. Bd. of Review of Peoria County*, 237 Ill. App. 3d 792, 796, 604 N.E.2d 1040, 1043 (1992). In rejecting the argument that constitutional issues cannot be first raised on review, the Illinois Supreme Court acknowledged that

> [t]o hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision.

Howard, 22 Ill. 2d at 333, 175 N.E.2d at 557.

One of the very purposes of administrative review is, after all, to safeguard the constitutional rights of those involved in administrative proceedings. *See Murray*, 237 Ill. App. 3d at 796, 604 N.E.2d at 1043 (finding it entirely proper for plaintiffs to allege violations of their constitutional rights in their complaint for review). In fact, the statute governing review provides that the appellate court

> *shall* reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:
>
> . . . .
>
> C. The rule, regulation, order or decision is in violation of the State or federal constitution or laws; or
>
> D. The proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant.

220 Ill. Comp. Stat. 5/10-201(e)(iv) (emphasis added). Although no new evidence may be introduced in the appellate court, if it appears that the Commission failed to receive evidence properly proffered, the court may remand the case to the Commission with instructions to receive the evidence and to enter a new order based on all the evidence, unless the evidence at issue would not be controlling. 220 Ill. Comp. Stat. 5/10-201(d), (e)(ii); 735 Ill. Comp. Stat. 5/3-111(a)(7), (b) (remand for additional evidence in the interest of justice proper).

In the present case, Sadler clearly informed the Commission of her position that the rates at issue would violate the Contracts Clause of the federal Constitution and that the Commission's refusal to allow her to offer the governing contracts as evidence would violate her basic due process rights to a fair hearing. She also clearly argued both points to the state courts on review. It was error for the court to decline to entertain these questions. *See, e.g., Puffer-Hefty Sch.. Dist. No. 69 v. Du Page Reg'l Bd. of Sch. Trustees of Du Page County*, 339 Ill. App. 3d 194, 199, 789 N.E.2d 800, 806-07 (error for court, which is vested with original jurisdiction over constitutional issues on administrative review, to decline to rule on those issues where given an opportunity to consider them), *appeal denied*, 205 Ill. 2d 644, 803 N.E.2d 500 (2003), *cert. denied*, 540 U.S. 1219 (2004). Certainly, the Appellate Court should have entertained the constitutional issues at least to the extent of determining the due process issue and remanding the case to the Commission with instructions to receive Sadler's evidence and to enter a new order, as appropriate, consistent with the dictates of the Contracts Clause.[2]

The Appellate Court concluded, however, based on state procedural law, that the Commission did not err in

---

[2]Setting utility rates is a legislative function, under Illinois law, delegated to the Commerce Commission. *E.g., In re Ill. Bell Switching Station Litig.*, 161 Ill. 2d 233, 247, 641 N.E.2d 440, 447 (1994); *Bus. & Prof'l People for Public Interest v. Ill. Commerce Comm'n*, 146 Ill. 2d 175, 196, 585 N.E.2d 1032, 1039 (1991). Accordingly, the Commission's determination was clearly subject to the Contracts Clause. *See, e.g., Ross v. Oregon*, 227 U.S. 150, 161-63 (1913) (Contracts Clause reaches all legislative action, including a regulation or order of a state instrumentality exercising delegated authority); *New Orleans Waterworks Co. v. La. Sugar-Refining Co.*, 125 U.S. 18, 30-31 (1888) (same).

refusing to reopen the record because Sadler's intervention and attempt to introduce evidence was not timely, given that she became involved in the proceedings "in the final stages, after evidence and arguments had been finalized," because she had failed to show why ORPOA could not have raised her issues for her, and because she attempted to intervene after the evidence had been closed. (Rule 23 Order at 17-19.) The court's conclusions are simply not supportable, given the facts of the case, even under state law, and certainly not under federal law.

As a preliminary matter, the very basis for Sadler's intervention was that she had discovered that ORPOA was not representing her interests, despite her communications with it concerning those interests, because the interests that ORPOA was representing were in conflict with the interests of Sadler and others like her. That the Commission granted Sadler's request to intervene clearly shows that it understood and acknowledged the conflict and entirely undermines the court's contrary conclusion on that matter. (*See* C-06166 through C-01667, C-06207.)

Additionally, the record clearly shows that the evidence had, in fact, been reopened before Sadler intervened, that the Commission sat on her application while the evidence remained open and then allowed her to intervene literally the day before it marked the evidence heard and closed. The Commission then relied on the fact that the evidence was closed to deny her the opportunity to offer the evidence in support of the claims which were the very basis for her intervention. (*See* C-06207.) It is clear that the Commission simply had no intention of being constrained by the facts. More importantly, the reasons put forth by the Commission—not really addressed by the court—for needing to proceed to decision so immediately that it could not consider Sadler's evidence do not hold water under state law.

Under the governing law, once a rate schedule is submitted to the Commission, the rate may be suspended, pending a hearing and decision, for no more than 105 days plus six months, after the time that it would otherwise go into effect—which is 45 days from its filing with the Commission. 220 Ill. Comp. Stat. 5/9-201(b). The Commission argued that it was bound to make its determination within that approximately eleven-month suspension period and, therefore, did not have time to consider Sadler's evidence, and the court characterized the end of the suspension period as the "deadline for the Commission's final decision." (Rule 23 Order at 18.)

As the Illinois Supreme Court explained in directly and emphatically rejecting the very same contention in another case,

> [t]he contention that the Commission must conclude its inquiry into the proposed rate within a ten-month period confuses the power of the Commission to suspend with its power to determine the reasonableness of the rate. The ten-month period applies only to the former. If that period has expired before the Commission has concluded its inquiry, then the utility may begin collecting charges under the new rate, so far as pre-existing contractual obligations permit. The running of the period does not terminate the Commission's inquiry, however, and the new rate remains subject to permanent cancellation by the Commission's final order in the proceedings.

Central Ill. Pub. Serv. Co. v. Ill. Commerce Comm'n, 5 Ill. 2d 195, 206, 125 N.E.2d 269, 274-75 (1955); *see also Antioch Milling Co. v. Pub. Serv. Co. of N. Ill.*, 4 Ill. 2d 200, 204-05, 123 N.E.2d 302, 305 (1954) (Commission has authority to

either suspend new rate or let it go into effect); *City of Edwardsville v. Ill. Bell Tel. Co.*, 310 Ill. 618, 622-23, 142 N.E. 197, 199 (1923) (new rates go into effect on expiration of suspension period, subject to Commission's power to alter or change them as necessary to establish just and reasonable rates); *see also* 220 Ill. Comp. Stat. 5/9-202 (Commission also authorized to enter a temporary order fixing a temporary schedule of rates).

In an Illinois case involving a different administrative body, which had denied a continuance of the proceeding for the purpose of allowing additional evidence, the court, in reversing and remanding for a new hearing, explained:

> We sympathize with the inconvenience caused by the taxpayer's conduct, and with the Department's goal of attempting to achieve a prompt and economical determination on the merits. However, this alone does not justify denial of a continuance under the unique facts presented here. Where an administrative body must choose between justice and speed, it must pick the side of justice.

Six-Brothers King Drive Supermarket, Inc. v. Dep't of Revenue, 192 Ill. App. 3d 976, 984, 549 N.E.2d 586, 591 (1989), *appeal denied*, 132 Ill. 2d 554, 555 N.E.2d 385 (1990). The court in that case did what the court in the present case declined to do, deciding the due process question.

The court's refusal to consider Sadler's constitutional impairment of contracts claim on a basis that does not even conform to Illinois law is certainly an untenable basis under this Court's holdings.

III. THE ILLINOIS APPELLATE COURT DEPARTED FROM THIS COURT'S PRECEDENTS CONCERNING THE REQUIREMENTS OF DUE PROCESS.

It is well established by this Court's decisions that due process requires an opportunity to be heard at a reasonable time and in a reasonable manner, which includes the right to present evidence, and a *pro forma* opportunity will not do. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 182, *reh'g denied*, 518 U.S. 1047 (1996); *see also Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 1722 (2006). It has also long been established that due process requirements extend to administrative, as well as judicial proceedings. *See, e.g., Spencer v. Merchant*, 125 U.S. 345, 358-61 (1888); *see also Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976) (whether administrative procedures are constitutionally sufficient requires analysis of private interest affected, risk of erroneous deprivation under procedures, probable value of other procedures, and government's interest). In *Spencer*, the Court explained that the state

> can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property, without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitutions. It is a limitation upon an arbitrary power, and is a guaranty against arbitrary legislation.

125 U.S. at 358-59 (quoting *Stuart v. Palmer*, 74 N.Y. (29 Sickels) 183, 190, 1878 WL 12642 (1878) (where owners of land were deprived of opportunity to be heard on issue whether assessment was equitable and fair, their due process rights were violated)).

Setting utility rates, like the provision challenged in *Spencer*, is an act by the state which is subject to the requirements of due process. As this Court has pointed out, it has been clear from more than a century that due process requires that parties whose rights are to be affected are entitled to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80, *reh'g denied*, 409 U.S. 902 (1972). At a minimum, due process requires that those who are entitled to be heard be given a meaningful opportunity to present their case. *Mathews*, 424 U.S. at 349.

The Illinois Administrative Procedure Act, which is specifically made applicable to Commission ratemaking proceedings by 220 Ill. Comp. Stat. 5/10-101, codifies the federal Due Process Clause requirement that all parties before the Commission have an opportunity to present evidence and argument. 5 Ill. Comp. Stat. 100/10-25(b). In *Six-Brothers King Drive Supermarket*, the court explained:

> Illinois courts have a duty to ensure that due process and impartial hearings were afforded in administrative hearings. . . . Under the Fourteenth Amendment, the opportunity to be heard should not be arbitrarily limited and fair consideration of an individual's objections should be included. *Mahonie v. Edgar* (1985), 131 Ill.App.3d 175, 87 Ill.Dec. 13, 476 N.E.2d 474.
>
> . . . .

. . . [T]he refusal to continue the hearing meant that the Department could not review the books and records which were now available. Hearings before an administrative agency should be investigatory proceedings instituted for the purpose of ascertaining and making findings of facts. (*Lavin v. Civil Service Com.* (1974), 18 Ill.App.3d 982, 310 N.E.2d 858.) Hearings are not meant to be partisan, with the agency pitted against the individual. (*Goranson v. Dept. of Registration & Education* (1980), 92 Ill.App.3d 496, 47 Ill.Dec. 936, 415 N.E.2d 1249.) In effect, the taxpayer handed the Department the documents which would best serve the Department's function of ascertaining the truth, and the Department refused to look at the documents. . . .

. . . The Administrative Review Act provides that a party has the right to be represented by counsel and the right to respond to and present evidence and argument. (Ill.Rev.Stat.1987, ch. 127, par. 1010(b).) Due process of law presupposes a fair and impartial hearing. (*Brown v. Air Pollution Control Board.*) Procedural due process requires that every person be given the opportunity to be heard before being deprived of his property. (*George J. Priester Aviation Service, Inc. v. American School of Aviation, Inc.* (1981), 95 Ill.App.3d 703, 51 Ill.Dec. 201, 420 N.E.2d 615.) Here, the Department denied the taxpayer the opportunity . . . to offer any witnesses or documentary evidence . . . .

> Thus, the . . . hearing became an *ex parte* proceeding, with Sweilem required to sit mute and watch.

192 Ill. App. 3d at 982, 549 N.E.2d at 589-90.

As this Court explained in an analogous case to the present one, in which judgment was entered against a party the moment he was added,

> Procedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process.[2]

---

[2]A well-known work offers this example:

> "'Herald, read the accusation!' said the King. On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:
>
> > *'The Queen of Hearts, she made some tarts,*
> > *All on a summer day:*
> > *The Knave of Hearts, he stole those tarts,*
> > *And took them quite away!'*
>
> 'Consider your verdict,' the King said to the jury.
>
> 'Not yet, not yet!' the Rabbit interrupted. 'There's a great deal to come before that!'" L. Carroll, Alice in Wonderland and Through the Looking Glass 108 (Messner 1982) (emphasis in original).

Nelson v. Adams USA, Inc., 529 U.S. 460, 468 & n.2 (2000).

In the present case, similarly, the decision was rendered when there was still a great deal to come—in this case, the evidence and argument on an important federal impairment of contracts claim that affects thousands of property owners. The Commission placed the alleged need to render an immediate decision above the state legislature's mandate that rates be reasonable and just. Moreover, this Court has required a reliable determination on the merits, however long it takes, for a hearing on revision of rates that requires time beyond the rate suspension period. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979) (no state interest in delaying full hearing).

Finally, although the court also relied on the availability of formal complaint procedures (*see* Rule 23 Order at 18), those procedures are clearly aimed at violations by others than the Commission, *see* 220 Ill. Comp. Stat. 5/10-108 (on filing of complaint, Commission to have copy served on person or corporation complained about with notice of requirement that complaint be answered), and would certainly not provide due process, in any case. As this Court has made clear, except in extraordinary situations where the government's interest justifies postponing the hearing, due process requires that the opportunity to be heard be given *before* a person is deprived of a property interest. *Fuentes*, 407 U.S. at 81-82.

This Court has granted certiorari in cases similar to this because of the importance of the constitutional question, where the state court avoided the question by holding that the petitioner should have pursued its constitutional claims by way of mandamus. This Court explained:

> We are unable to reconcile the procedural holding of the Alabama Supreme Court in the

present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment.

National Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson, 357 U.S. 449, 456 (1958) (holding that the Court had jurisdiction over the federal claims because the nonfederal ground relied on by the state court was without any fair or substantial support). In the present case, similarly, the procedural holdings of the Illinois Appellate Court cannot be reconciled with unambiguous past holdings by the state's courts concerning court review of constitutional questions.

Accordingly, this Court clearly has jurisdiction over Sadler's constitutional claims because the nonfederal grounds relied on by the Illinois Appellate Court is without any fair or substantial support, and it is urged that the Court grant certiorari because of the importance of making sure that state courts do not ignore the supremacy of the federal Constitution. It is further urged that the petition be granted because of the importance of protecting the property and due process rights of utility customers who are in the role of David against Goliath—except without the sling or the stone.

Monica Sadler took it upon herself to protect the financial interests of thousands of water consumers when nobody else would. Acting pro se, she sought to intervene and bring to the attention of the Illinois Commerce Commission the fact that the pending rate increase for water availability customers was precluded by the terms of contracts between the developer and the owners. The Commission allowed her to intervene, but made a mockery of that intervention by denying her the opportunity to introduce the contracts that constituted her entire rationale for intervening. The Commission did not require Aqua Illinois to live up to its statutory duty to produce the contracts. Instead, it awarded

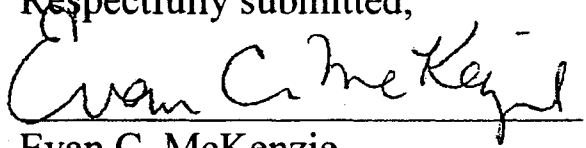
the utility the multi-million dollar rate increase it sought, even after having been advised of the manifest injustice it was perpetrating.

Sadler then turned to the Illinois courts, but found yet again that the door was closed to a full and fair consideration of her constitutional claims. Incredibly, the Illinois courts took the position that she had not actually raised the claims at all. Sadler is now in the remarkable position of petitioning this Court for an opportunity to have her constitutional claims, and by extension those of thousands of other consumers, considered on their merits for the first time in this entire proceeding.

Granting this petition would reaffirm the importance of the United States Constitution as a shield for utility consumers in the State of Illinois and across the nation. It would demonstrate that this Court recognizes the importance of due process of law in the setting of utility rates, and of the sanctity of private contracts. It would send a clear statement that the rights of the individual under the United States Constitution take precedence over the cozy relationship between a powerful private utility and state regulators.

For all the foregoing reasons, Monica Sadler respectfully asks this Court to grant her petition for a writ of certiorari.

Respectfully submitted,



Evan C. McKenzie
Law Offices of Evan C. McKenzie
Suite 215
95 West Grand Avenue
Lake Villa, IL 60046
(847) 265-5650
Counsel of Record for Petitioner