

**IN THE SUPREME COURT OF OHIO**

Utility Service Partners, Inc. : No. 08-1507  
: :  
Appellant, : Appeal from the Public  
: Utilities Commission of Ohio  
v. : :  
: Public Utilities Commission  
The Public Utilities Commission of Ohio, : of Ohio  
: Case No. 07-478-GA-UNC  
Appellee. : :

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**MERIT BRIEF OF APPELLANT UTILITY SERVICE PARTNERS, INC.**

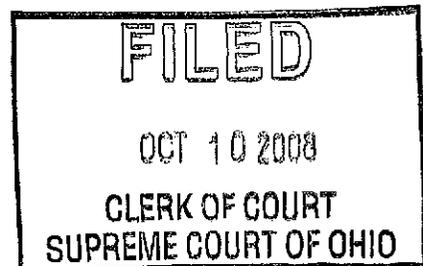
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## I. STATEMENT OF FACTS

### Operable Facts

Utility Services Partners, Inc. (“USP”, “Utility Service Partners”, or the “Appellant”), repairs and replaces faulty customer gas service lines. The customer service line is a length of pipe buried beneath the ground that connects the utility company’s distribution system to the utility gas service meter<sup>1</sup>. For most customers, the customer service line commences at the street with a tap to the utility distribution line and crosses the landowner’s property to the building where the gas service is used, at which point it “rises” out of the ground and goes through the utility meter and then into the building receiving service. In Ohio, the customer service line is owned by the landowner, not the utility company. Thus, it is the owner of the property who installs the customer service line initially and up until the Public Utilities Commission of Ohio's ("Commission's") April 9, 2008 Opinion and Order in 07-478-GA-UNC it was the property owner who arranged for all repairs and replacement of the service line. In time, all service lines deteriorate to the point where they must be repaired or replaced. Since such repairs can be costly, many property owners, particularly of properties with service lines that have been in the ground many years, simply contract with a service line repair company to repair or replace the service line when needed in exchange for a service fee (“warranty service”). The repair and replacement of customer service lines is very competitive. At the time of the April 9, 2008 Order (“Order”), the Appellant had over 100,000 customers with gas warranty contracts. In addition to the Appellant, and the two other service warranty providers who intervened and opposed the

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<sup>1</sup> USP Ex. 4, p. 2. Supplement to Appellant’s Merit Brief, at S-021.

Commission Order<sup>2</sup>, there are many independent certified<sup>3</sup> plumbers offering repair and replacement service<sup>4</sup>.

On April 9, 2008 the Commission issued an Order which adopted a non-unanimous Amended Stipulation granting Columbia Gas of Ohio, Inc. ("Columbia") a monopoly over the repair and replacement of all customer service lines in its service area – even though Columbia does not own the service line. The Amended Stipulation specifically prohibited the Appellant and the hundreds of contractors properly licensed to repair gas lines from repairing or replacing customer service lines owned by property owners<sup>5</sup>. This included those who had existing warranty contracts for repair. The Order then went on to grant Columbia the right to charge all customers, even renters who do not own a service line, a monthly fee that in essence is a warranty program with Columbia as the sole provider of plumbing and contracting. The payment of the fee for service line repair with the exclusive use of Columbia as the repairer is mandatory.

The Commission's Order in 07-478-GA-UNC effectively put the Appellant and similarly situated plumbers and contractors out of business in Columbia Gas Service territory which covers 33 counties in Ohio.

#### Procedural History

This appeal has its genesis in the Public Utilities Commission of Ohio ("The Commission") ordered investigation of natural gas risers which was a response to the Commission Staff's recommendations in Case No. 00-681-GA-GPS, *In the Matter of the*

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<sup>2</sup> ABC Gas Repair, Inc. and Interstate Gas Supply, Inc.

<sup>3</sup> The United States Department of Transportation has a licensing program and every plumber who repairs gas pipelines must meet the requirements and pass examinations before they can work on gas lines. The licensing system is tiered so that higher pressure pipelines require additional certification.

<sup>4</sup> TR II, 58-62. Supplement to Appellant's Merit Brief, at S-055-S-059.

<sup>5</sup> Amended Stipulation, at 16. Supplement to Appellant's Merit Brief, at S-014.

*Investigation of The Cincinnati Gas and Electric Company relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters.*<sup>6</sup> A riser is the vertical portion of the customer service line that connects directly into the utility meter. While the natural gas companies own the meter, for all major natural gas companies in Ohio the customer service line is owned by the property owner. In the above cited investigation, the Commission Staff recommended opening a statewide investigation because of a series of natural gas incidents reported to the Commission Staff by the local distribution companies (LDC).<sup>7</sup> An “incident” under Rule 4901:1-16-01(I) of the Ohio Administrative Code (OAC), is an event that must be reported to the Commission.<sup>8</sup> It involves the release of gas from an intrastate gas pipeline facility and results in death, personal injury, requiring inpatient hospitalization, or estimated property damage of \$50,000 or more.<sup>9</sup> Since 2000, four reportable incidents have occurred in Ohio (Willowville in 4/2000, Medina in 12/2000, Princeton in 10/2002, and in Avon in 5/2003).<sup>10</sup> The Staff also received a number of “non-incident” riser failure reports.<sup>11</sup> No evidence was submitted in the record indicating any incident after 2003.

On April 13, 2005, the Commission initiated Case No. 05-463, *In the Matter of the Investigation of the Installation, Use and Performance of Natural Gas Service Risers, Throughout the State of Ohio and Related Matters.*<sup>12</sup> The Commission opened Case No. 05-463 to examine riser types, installation and overall performance because of the potential risk posed

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<sup>6</sup> See the November 24, 2006 Staff Report (“Staff Report”) in Case No. 05-463-GA-COI, at Supplement to Appellant’s Merit Brief, S-005.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

by risers as a link between the gas distribution service line and the meter located near or within a customer's premises.<sup>13</sup>

To assist in its investigation, the Commission employed consultants through the University of Akron, Departments of Polymer and Mechanical Engineering and hired a testing laboratory.<sup>14</sup> The consultants were hired to develop investigative procedures, testing methods as well as to provide ongoing consultation including conclusions and recommendations.<sup>15</sup> In addition to the consultants, the Commission hired the Akron Rubber and Development Laboratory, Inc. (ARDL) for its expertise in rubber and gaskets.<sup>16</sup>

The focus of the consultants' and laboratory's work was on plastic risers.<sup>17</sup> Risers can be made of plastic or metal. Metallic risers are used largely in non-residential establishments, while for the past 20 years plastic risers have been used primarily in residential applications.<sup>18</sup> As an initial step, the Commission ordered the four largest LDCs (CG&E, Columbia, DEO, and VEDO) to conduct a statistically valid "sampling study of inventory risers to determine the manufacturer of each gas service riser and collect associated data."<sup>19</sup>

Laboratory testing focused exclusively on the performance of plastic risers because not only were they the cause of all the incidents reported to the Staff, but, according to the Staff Report, the "primary cause of metallic riser leaks is corrosion which can be controlled and is less

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Staff Report, pp. 1-2. Supplement to Appellant's Merit Brief, at S-005 and S-006.

<sup>19</sup> Staff Report, p. 2. Supplement to Appellant's Merit Brief, at S-006.

hazardous.”<sup>20</sup> By contrast, a failed plastic riser can blow full gas pressure against a structure and cause significant damage.<sup>21</sup>

In order to investigate the conditions of riser installation and the overall performance and cause of riser failures, the Commission’s consultants designed an investigative procedure which divided risers into three categories: removed in service no-fail riser (no-leak), new risers, and removed from service leaking risers.<sup>22</sup> Within each category, risers were classified either as Design-A (riser assembled in the field) or Design-B (riser assembled in the factory).<sup>23</sup>

After reviewing the consultants’ analysis, the Staff advised the Commission to consider the following recommendations at pages 14-15 of the Staff Report:<sup>24</sup>

(1) Put distribution operators on notice that proper installation of Design-A risers (assembled in the field), is critical and that Design-A risers with a low gasket force retention that are subjected to certain tensile loading and low temperature cycling are more prone to failure.

(2) Require the distribution operators to continue to track and monitor riser leak failures in their pipeline systems and report semi-annually all riser failures to the Commission Staff. Additionally, require those operators who have experienced riser failures to keep records on failure investigation and report in their semi-annual report to the Commission Staff what steps have been taken to prevent recurrence as required under 49 CFR §192.617.

(3) Require the distribution operators to conduct a riser inventory of their systems so that they have knowledge of the types and locations of risers in their system.

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<sup>20</sup> Staff Report, p. 3. Supplement to Appellant’s Merit Brief, at S-007.

<sup>21</sup> *Id.*

<sup>22</sup> Staff Report, p. 4. Supplement to Appellant’s Merit Brief, at S-008.

<sup>23</sup> *Id.*

<sup>24</sup> None of the recommendations have anything to do with transferring ownership of customer service lines. (Tr. IV, 252-255). Supplement to Appellant’s Merit Brief, at S-079-082.

(4) Order distribution operators to incorporate new construction, including riser installation, as part of their operator qualification requirements.

(5) Put the distribution operators on notice that their failure investigation procedures should cover customer owned service line failures.

(6) Remind distribution operators that failure to comply with any provision of the order adopted in this case could result in civil forfeitures.

(7) Order other action as the Commission deems appropriate at this time.

Comments were filed by numerous parties in response to the Staff Report in February, 2007. The consultants study and the Staff Report provide credible, independently verified evidence that Design-A risers were prone to catastrophic failures. This is in stark contrast to the low level risk associated with the corrosion of metal pipes which is foreseeable by property owners. In fact, metallic risers were not even deemed significant enough of a safety risk as to be included in the Laboratory test. As previously stated and according to the Staff Report, the “primary cause of metallic riser leaks is corrosion which can be controlled and is less hazardous.”<sup>25</sup> Further, any risk associated with metallic customer service lines and metallic risers are significantly minimized as periodic leak monitoring tests are required to be performed by utility, resulting in a third of all customer service lines and risers being monitored for leaks every year.<sup>26</sup> In sum, the reported incidents, the Commission’s investigation and independent consultant reports have established an immediate public safety risk as to Design-A riser. No incidents, consultant reports or other information have been presented in this proceeding

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<sup>25</sup> Staff Report, p. 3. Supplement to Appellant’s Merit Brief, at S-007.

<sup>26</sup> 49 CFR §192.723. (Appendix to Appellant’s Merit Brief at A-067.)

indicating an immediate public safety risk as to metal customer service lines with metal risers, or plastic lines with non-Design-A risers.

On April 25, 2007, Columbia Gas of Ohio filed an application pursuant to Section 4929.11, Revised Code in Case No. 07-478-GA-UNC. Columbia sought approval of tariffs to recover through an automatic adjustment mechanism, costs associated with: Commission ordered riser inventory and identification process; the replacement of customer-owned risers prone to failure; and, the replacement of customer-owned service lines constructed or installed by Columbia as risers or service lines are replaced, hereinafter referred to as Columbia's Infrastructure Replacement Program ("IRP") and, pursuant to Section 4905.13, Revised Code such accounting authority as may be required to permit capitalization of Columbia's investment in customer-owned service lines and risers through the assumption of financial responsibility for these facilities and deferral of related costs for subsequent recovery through the automatic adjustment mechanism. Numerous parties moved to intervene in this proceeding including the Ohio Consumers' Counsel ("OCC"); ABC Gas Repair, Inc. ("ABC"); Interstate Gas Supply, Inc.; Ohio Partners for Affordable Energy ("OPAE"); Industrial Energy Users-Ohio, Inc.; and Utility Service Partners, Inc. ("USP").

On July 11, 2007, the Commission issued an Entry granting the application in part and deferring in part the rest of the application and ordering Columbia to file modified tariffs for approval. On August 10, 2007, Utility Service Partners and Interstate Gas Supply, Inc., each filed applications for rehearing from the July 11, 2007 Entry. On September 12, 2007, the Commission issued an Entry on Rehearing granting in part the applications for rehearing filed by Utility Services Partners and Interstate Gas Supply, Inc. The next day, the Attorney Examiner set the matter for hearing. Direct testimony was filed by Columbia witnesses Martin, Ramsey,

and Brown on October 15, 2007. On October 23, 2007, OCC filed testimony of its witness Bruce M. Hayes. ABC Gas Repair, Inc. filed the direct testimony and exhibits of Timothy Morbitzer. Utility Service Partners filed the testimony of Philip E. Riley, Jr., Carter T. Funk, and Timothy W. Phipps. On October 24, 2007, the Staff filed the testimony of David R. Hodgden and Edward M. Steele.

On October 26, 2007, the Friday before the start of the hearing, a Stipulation and Recommendation was filed by Columbia Gas of Ohio signed by representatives of Columbia and the Staff. None of the other parties (The Office of Consumers' Counsel, The Ohio Partners for Affordable Energy, Utility Service Partners, Inc., ABC Gas Repair, Inc., and IEU-Ohio) signed the Stipulation and Recommendation at that time.

Hearings were held October 29-31, 2007. At the conclusion of the October 31 hearing, a schedule was established for the filing of rebuttal/surrebuttal and the Stipulation and Recommendation phases of the hearing. Rebuttal testimony and testimony in support of the Stipulation and Recommendation was filed on November 19, 2007 by Columbia and by the Staff. Surrebuttal testimony and testimony in opposition to the Stipulation was filed by Utility Service Partners, Inc. on November 28, 2007. The prepared direct testimony of Jill A. Henry was filed on behalf of the Staff on December 3, 2007. The hearing was held and concluded on December 3, 2007 with the rebuttal/surrebuttal testimony and testimony in support of the Stipulation and testimony in opposition to the Stipulation phases of the hearing.

On December 20, 2007, a letter was filed by the Ohio Partners for Affordable Energy indicating that it had agreed to the Stipulation as a signatory party.

On December 28, 2007, and after the record was closed, an Amended Stipulation and Recommendation was filed on behalf of Columbia, the Staff, the Ohio Consumers' Counsel, and

the Ohio Partners for Affordable Energy. This Amended Stipulation and Recommendation was not served on the other parties until December 31, 2007, the date the Initial Briefs were due. Subsequently, an agreement between all active parties was filed which recited certain agreed upon facts and allowed the Amended Stipulation to be accepted into evidence without testimony and/or the opportunity for cross-examination. Subsequently, Reply Briefs were filed by Columbia, the Staff, the Office of Consumers' Counsel, ABC Gas Repair, Inc., Interstate Gas Supply, Inc., the Ohio Partners for Affordable Energy, and Utility Service Partners, Inc.

On April 9, 2008, the Commission issued an Opinion and Order adopting the Amended Stipulation and directing that Columbia file tariffs for Commission approval. The Commission's April 9, 2008 Order changed the responsibility for repairing or replacing customer service lines in Columbia Gas of Ohio's service territory. Prior to April 9, 2008, the property owner had the responsibility and could contract with warranty service providers such as Utility Service Partners, Inc. to provide a warranty service on customer service lines. As of March 1, 2008, no property owner or warranty service provider could fix or repair hazardous customer service lines -- only Columbia could do so. The effect of the April 9, 2008 Order was to create a monopoly in which Columbia could only fix or repair hazardous customer service lines, thus displacing the gas warranty service business of warranty service providers such as the Appellant. The April 9, 2008 Order impaired the existing gas warranty service contracts Utility Service Partners had with its customers in Ohio. It also took away the right of property owners to choose who, among qualified U.S. Department of Transportation certified plumbers, could fix or replace hazardous customer service lines. The Commission directed Columbia to file revised tariffs.

On April 23, 2008 Utility Service Partners filed a Motion for Stay of Implementation of the April 9, 2008 Opinion and Order. Columbia filed a Memorandum Contra. Applications for

Rehearing were filed by Utility Service Partners, Inc. and Columbia Gas of Ohio, Inc. on May 9 and May 12, 2008 respectively.

On June 4, 2008 the Commission issued an Entry in which it denied Columbia's Application for Rehearing, denied Utility Service Partners' Motion for a Stay and denied all but one ground of Utility Service Partners' Application for Rehearing. Columbia filed revised tariffs on June 6, 2008 consistent with the April 9, 2008 Order which were approved on June 25, 2008 by Commission Entry.<sup>27</sup> Utility Service Partners, Inc. filed its Notice of Appeal on August 1, 2008.

## II. ARGUMENT

### Proposition of Law No. 1:

**The Commission is a creature of the General Assembly, and has only the powers and jurisdiction expressly conferred by statute. Time Warner Axs v. Public Utilities Commission, 75 Ohio St. 3d 229, 661 N.E. 2d 1097 (1996); Radio Relay Corp. v. Public Utilities Commission, 45 Ohio St. 2d 121, 341 N.E. 2d 826 (1976); Village of New Bremen v. Public Utilities Commission, 103 Ohio St. 23, 132 N.E. 162 (1921). The General Assembly has not conferred upon the Commission the authority to grant a monopoly over the repair and replacement of non-utility owned service lines.**

The Commission can only regulate that over which it has statutory authority. While the Commission has jurisdiction over natural gas companies such as Columbia Gas<sup>28</sup>, the Commission has no authority to require property owners to only use Columbia for repair of the customer service lines they own. The Commission cannot regulate non-utility property, such as customer service lines, or non-utility businesses, such as landlords, plumbers, contractors or warranty service providers. The Commission may be heard to argue that everything that can possibly affect public utility service is within its reach. This Court has ruled many times though

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<sup>27</sup> When the Commission acts to approve a tariff, it carries the force of law. Schmukler v. Ohio Bell Tel. Co., 116 N.E. 2d 819, 825; 66 Ohio L. Abs. 213 (C.P. Cuyahoga. Cty., 1953).

<sup>28</sup> Section 4905.04 -.06, Revised Code grants the Commission supervisory authority over public utilities.

that the Commission has only those powers and authorities specifically delegated to it by the General Assembly. Time Warner Axs v. Public Utilities Commission, 75 Ohio St. 3d 229, 661 N.E. 2d 1097 (1996); Radio Relay Corp. v. Public Utilities Commission, 45 Ohio St. 2d 121, 341 N.E. 2d 826 (1976); Village of New Bremen v. Public Utilities Commission, 103 Ohio St. 23, 132 N.E. 162 (1921). Simply put, the Commission's powers are finite, not infinite and the Commission cannot claim undelegated authority because it would be useful in carrying out the duties which the General Assembly has given the Commission.

By its April 9, 2008 Order, the Commission is overreaching and exceeding its statutory authority by affecting the contract rights and property of third parties over whom it has no jurisdiction. For example, if a Florida landlord owned a residential dwelling in Columbia Gas' service territory and rented it out to a residential family who became a Columbia Gas customer, that landlord's property rights are affected under the Commission's April 9, 2008 Order. The property owner would no longer be able to use a warranty service provider after March 1, 2008, no longer have the right to choose the qualified plumber of his or her choice to repair or replace a hazardous customer service line, and would no longer have the right to repair or replace a non-hazardous but leaking customer service line.<sup>29</sup> Columbia witness Brown conceded that the Stipulation and Recommendation, which was adopted by the Commission, would affect such a landlord.<sup>30</sup> Yet the Commission has no authority over such a landlord. If there is a need to bring in non-utility property under the domain of the Public Utilities Commission of Ohio, the General Assembly must act. It has not. Thus, the April 9, 2008 Order exceeds its statutory authority and is *ultra vires*.

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<sup>29</sup> December 28, 2007 Amended Stipulation and Recommendation at paragraph 20. Supplement to Appellant's Merit Brief, at S-014.

<sup>30</sup> Tr. IV, 187-189. Supplement to Appellant's Merit Brief, at S-074-076.

Up until the April 9, 2008 Order, property owners were free to choose among hundreds of qualified and certified plumbers to repair or replace their customer service lines. No statute established a monopoly or limited choices. But despite the absence of statutory authority, the Commission, by its April 9, 2008 Order, created a new monopoly in Columbia's service territory over what has previously been non-jurisdictional property (e.g., customer owned service lines) by giving Columbia the sole right to decide who will repair or replace hazardous customer service lines. The Commission has no authority to do this; only the General Assembly can.

It is also worth noting that under the Commission's April 9, 2008 Order, Columbia will eventually place those portions of the customer service lines that it repairs or replaces in its rate base and will earn a return on and a return of such property. This also violates Section 4929.02(A)(9), Revised Code, which provides that "the risks and rewards of a natural gas company's offering of non-jurisdictional and exempt services and goods do not affect the rates, prices, terms or condition of nonexempt, regulated services and goods of a natural gas company."<sup>31</sup>

Because of the Commission's April 9, 2008 Order, Columbia will be taking over a heretofore unregulated business and will become a monopolistic warranty service provider and will be adjusting jurisdictional rates to recover its costs for this new venture. The Commission has no authority to create a new monopoly or allowing Columbia to adjust its regulated rates for the purpose of taking over previously non-jurisdictional property violates Ohio law. The Court must find that the Commission has acted *ultra vires*.

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<sup>31</sup> The purpose of this statute is to prevent cross-subsidies.

**Proposition of Law No. 2:**

**The Commission's April 9, 2008 Opinion and Order failed to establish that a safety issue exists as to anything other than the Design-A risers and the extension of the program to address customer service lines without Design-A risers is not based upon the record before it. Ideal Transp. Co. v. Public Utilities Commission of Ohio (1974), 42 Ohio St. 2d 195, 71 Ohio Op. 2d 183, 326 N.E. 2d 861.**

The Commission, in its April 9, 2008 Order, "lumped together" the safety problem with plastic Design-A risers, and the majority of the service lines that are metal or plastic but do not have Design-A risers. The record in this matter reflects no evidence of safety issues associated with non-Design-A customer service lines which makes up the majority of all service lines. There is simply no basis for pointing to the Design-A riser problem as justification for granting a monopoly over the repair and replacement of non-Design-A customer service lines.

The Staff Report in Case No. 05-463-GA-COI makes no reference whatsoever to any safety issues associated with metal customer owned service lines.<sup>32</sup> None of the Staff Report's recommendations addressed safety issues related to metal customer owned service lines.<sup>33</sup> In fact, at page 3 of the Staff Report, the Staff noted that "[l]aboratory testing focused exclusively on the performance of plastic risers because not only were they the cause of all of the incidents reported to staff, but because the primary cause of metallic riser leaks is corrosion which can be controlled and is less hazardous." The Staff Report also stated, at page 3, that "the risk presented with metallic riser leaks is lower since they tend to have very slow leaks underground that do not result in an incident. In contrast, a failed plastic riser can blow full gas pressure against a structure and cause significant damage." The focus of the Staff Report was on the plastic Design-A riser issue, not on metallic lines or non-Design-A customer owned service lines.

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<sup>32</sup> Administrative notice was taken of the Staff Report. Tr. I, 121. Supplement to Appellant's Merit Brief, at S-052.

<sup>33</sup> Tr. IV, 252-255. Supplement to Appellant's Merit Brief, at S-079-082.

In addition to the plain language of the Staff Report, the testimony of Staff witnesses Steele and Henry leaves little doubt that the safety issues in this matter are related only to the Design-A risers. For example, Mr. Steele stated that his concern was on the prone-to failure risers.

Q. Would you agree with me that your concern is over the safety hazard caused by prone-to-leak risers that are either actually leaking or are prone to leak?

A. That's correct.<sup>34</sup>

Ms. Henry also agreed that it was "true that the purpose of the Commission's investigation was to test the types of gas service risers being installed, the conditions of their installation, and the overall performance of those risers throughout Ohio."<sup>35</sup>

The lack of any reference to safety issues with non-Design-A customer owned service lines in the Staff Report in Case No. 05-463-GA-COI as well as the testimony of Staff witnesses Steele and Henry in Case No. 07-478-GA-UNC is consistent with the expert testimony proffered by USP witness Carter T. Funk. Mr. Funk holds a Bachelor of Science degree in mechanical engineering and has held many positions in the natural gas industry, including positions in engineering, corporate planning, operations and planning.<sup>36</sup> In addition, Mr. Funk was a licensed professional engineer in Ohio for many years.<sup>37</sup> Mr. Funk testified at the hearing that:

Customer service line leaks generally occur in the metal pipelines that have been underground for several decades. In my experience, leaks are generally caused by corrosion and metal fatigue. Plastic lines also leak, but leaks generally occur immediately after installation due to improper installation or due to damage from

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<sup>34</sup> Tr. II, 73-74. Supplement to Appellant's Merit Brief, at S-60-61.

<sup>35</sup> Tr. IV, 244. Supplement to Appellant's Merit Brief, at S-077.

<sup>36</sup> USP Ex. 4, p.1. Supplement to Appellant's Merit Brief, at S-020.

<sup>37</sup> *Id.*

digging....[i]n my experience, the bulk of customer service lines leaks are caused by corrosion.<sup>38</sup>

Likewise, Timothy W. Phipps who is a DOT operator qualified plumber with over 20 years of experience in the natural gas industry<sup>39</sup> testified that:

[c]ustomer service line leaks generally occur in metal pipelines that have been underground for several decades. In my experience, leaks are generally caused by corrosion and metal fatigue due to lack of cathodic protection on bare steel lines. Plastic lines also leak, but leaks generally occur due to damage from shifting in the ground causing a sharp object to be pushed into the line. This can be prevented by the use of clean fill to backfill these lines.<sup>40</sup>

The testimony of Columbia witness Ramsey, who is Columbia's Operations Compliance Manager for Ohio, Kentucky and Indiana, supports Messrs. Funk's and Phipp's testimony. Specifically, Mr. Ramsey did not see the type of catastrophic failures in steel customer service lines that are seen with the Design-A risers.<sup>41</sup> He could not recall ever seeing an incident of a catastrophic failure in a customer service line.<sup>42</sup>

In fact, neither Columbia nor the Staff presented any evidence regarding clamor from the public over the safety of customer-owned service lines. The lack of any evidence in the record as to safety issues with customer owned service lines can be attributed to the system in place for decades until April 9, 2008. Under this system, Columbia's obligation "...upon discovery of leakage or other dangerous conditions involving customer-owned equipment, is to make the situation safe – including the disconnection of gas service whether necessary – and to advise the customer to make the necessary repairs only through the use of a certificated DOT plumber."<sup>43</sup> This statement was confirmed by Columbia witness Ramsey who testified that "the gas company

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<sup>38</sup> USP Ex. 4, pp. 2-4. Supplement to Appellant's Merit Brief, at S-021-023.

<sup>39</sup> Tr. IV, 100. Supplement to Appellant's Merit Brief, at S-067.

<sup>40</sup> USP Ex. 3, p. 2. Supplement to Appellant's Merit Brief, at S-025-026.

<sup>41</sup> Tr. I, 57. Supplement to Appellant's Merit Brief, at S-044.

<sup>42</sup> *Id.*

<sup>43</sup> Application of Columbia Gas of Ohio, p. 3. Supplement to Appellant's Merit Brief, at S-012.

employee on site advises the customer what they need to do to effectuate the repairs.”<sup>44</sup> In addition to Columbia’s direct communications to customers, both Columbia and the Commission maintain websites with information for customers on repairing customer service lines.<sup>45</sup>

USP did not object to Columbia instituting a program to identify and repairing Design-A risers, especially since Columbia has a great deal of responsibility for the Design-A riser problem.<sup>46</sup> A Design-A riser could only be installed if Columbia approved it.<sup>47</sup> Because it appears that Columbia’s approval was a mistake, it made sense that Columbia take some responsibility for this mistake.<sup>48</sup> Unlike the metal customer service lines which corrode slowly and pose a low level threat, the Design-A riser can fail instantaneously and pose a larger risk of harm.<sup>49</sup> Thus, there is an element of an imminent danger with respect to the Design-A risers that does not exist with customer-owned service lines.<sup>50</sup>

Implementing a solution to the Design-A riser issue is much simpler than restructuring the service line repair and placement industry in Ohio and attempting to change ownership of customer service lines.<sup>51</sup> The Design-A riser is typically connected above ground, with the customer service line running up to the connection making the demarcation as to the ownership of a riser very clear.<sup>52</sup> A newly installed riser by Columbia could be considered as a component of the meter in regards to ownership.<sup>53</sup>

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<sup>44</sup> Tr. IV, 147. Supplement to Appellant’s Merit Brief, at S-073.

<sup>45</sup> Tr. I, 38, USP. Ex. 7, p. 3. Supplement to Appellant’s Merit Brief, at S-028 and S-039.

<sup>46</sup> USP Ex. 7, p. 6. Supplement to Appellant’s Merit Brief, at S-030.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

By contrast, there is no immediate safety problem necessitating the transfer of ownership rights and responsibilities of non-Design-A customer service lines. The Commission did not issue a request for proposal (“RFP”) or hire an outside consultant to study the issue of the impact of transferring ownership and responsibilities of customer service lines from customers to local distribution companies (“LDCs”) such as Columbia.<sup>54</sup>

The Commission’s April 9, 2008 Order should have stopped at solving the Design-A riser issue, not granting a monopoly to Columbia over the service and maintenance of customer service lines which are not owned by the utility.<sup>55</sup>

Record support abounds as to why the Commission should have stopped at solving the Design-A riser problem and should have left the ownership and responsibility for customer service lines alone. There is no uniform approach to repair and replacement of customer service lines under the Order because Columbia proposed to use either its employees or independent contractors to either perform the repair and replacement work or to inspect such work. Up until the Commission’s April 9, 2008 Order, there was a uniform approach where an independent plumber retained by the customer repairs or replaces the customer service line and Columbia performs an independent inspection of such work. That is now lost under the April 9, 2008 Order. There will be no uniform approach to repair and replacement of customer service lines in Ohio because most of the other Ohio natural gas companies will be using the current approach where the landowner owns the customer service line that runs from the property line to the meter.<sup>56</sup>

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<sup>54</sup> Dominion East Ohio, in its comments in Case No. 05-463, offered to do a study and analysis on the impacts of transferring ownership of customer service lines from customers to LDCs. Staff witness Henry did not believe that the Staff had responded to that offer (Tr. IV, 273-274). Supplement to Appellant’s Merit Brief, at S-083-084.

<sup>55</sup> USP Ex. 7, p. 7. Supplement to Appellant’s Merit Brief, at S-031.

<sup>56</sup> USP Ex. 8, p. 7. Supplement to Appellant’s Merit Brief, at S-36.

USP witness Riley explained that any adoption by the Commission of the Stipulation and Recommendation would not provide better utility (“LDC”) oversight and clear lines of responsibility. Prior to the April 9, 2008 Order, natural gas companies such as Columbia had oversight and clear lines of responsibility for pipeline safety compliance. The customer had responsibility for what is on his property with the exception of the meter. Changing ownership of customer service lines does not increase LDC oversight, nor make clearer the lines of responsibility for pipeline safety compliance.<sup>57</sup>

Most importantly, there are two aspects of the April 9, 2008 Order that will diminish safety. The first is that there will no longer be an independent review by a third-party of the repair or replacement work done by a plumber.<sup>58</sup> USP witness Phipps, the only U.S. DOT Operator Qualified plumber to testify, stated that checks and balances are a good idea for even the best of plumbers.<sup>59</sup> Columbia witness Ramsey conceded that there is value generally when someone else other than one’s self reviews one’s work.<sup>60</sup> The second aspect that will diminish safety is that Columbia will only monitor a Grade 3 leak until it becomes hazardous or upgraded under the Stipulation and Recommendation. If a Grade 3 leak occurs, the customer must fix the customer service line at his expense.<sup>61</sup> The customer now has a financial incentive to allow the non-hazardous leak to become a hazardous one and let Columbia repair it. Thus, safety is diminished under the Commission’s April 9, 2008 Order.<sup>62</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Tr. IV, 141-142; USP Ex. 8, pp. 5-6. Supplement to Appellant’s Merit Brief, at S-034-035 and S-069-070.

<sup>59</sup> Tr. IV, 116. Supplement to Appellant’s Merit Brief, at S-068)

<sup>60</sup> Tr. I, 24 and 50. Supplement to Appellant’s Merit Brief, at S-038 and S-043.

<sup>61</sup> Tr. IV, 141 and 145-146. Supplement to Appellant’s Merit Brief, at S-069 and S-071-072.

<sup>62</sup> USP Ex. 8, p. 6. Supplement to Appellant’s Merit Brief, at S-035.

In conclusion, the Commission did not base its decision on the record before it, but rather “bootstrapped” the safety concerns relating to the Design-A riser to the issue of customer service lines.

**Proposition of Law No. 3:**

**The Commission cannot substantially impair the contracts of others because it did not meet the tests of Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983).**

Article 1, Section 10 of the U.S. Constitution provides that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts.” U.S. CONST. art. I, § 10 In general, “[c]ontracts between individuals or corporations are impaired within the meaning of the Constitution . . . whenever the right to enforce them by legal process is taken away or materially lessened.” *Lynch v. United States*, 292 U.S. 571, 580 (1934). Article II, Section 28 of the Constitution of Ohio prohibits the passage of laws impairing the obligation of contracts. Courts have posed three questions in determining whether the contract clause has been violated: (1) Has the state law operated as a substantial impairment of a contractual relationship? (2) Does the law have a significant and legitimate public purpose, such as remedying a general social or economic problem? and (3) Are the means chosen to accomplish the purpose reasonable and necessary? See *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 (1983).

In this case, when the Commission granted Columbia the exclusive authority to perform customer service line repairs, it nullified at least 100,000 of USP’s warranty service contracts. This clearly constitutes a substantial impairment since it destroys USP’s contractual relationship with its customers. Yet, the Commission unreasonably and unlawfully misapplied the test in Energy Reserves Group, 459 U.S. 400, 411-412 (1983) on several levels and failed to find that there was a substantial impairment of contracts.

First, the Energy Reserves Group case involved state legislation. In this case, we have no legislation, only the *ultra vires* action of the Commission. Second, the Energy Reserves Group tests indicate that “in determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.” The customer service line warranty business has never been regulated in Ohio so all of the warranty suppliers such as the Appellant were participating in a non-Commission regulated industry when they contracted with their customers.

It is also important to note that the factual record on this issue is clear and uncontested. Phillip E. Riley, Jr., president and chief executive officer of USP, testified that USP had 100,000 active contracts to warrant and repair customer owned service lines in the Columbia service area. If Columbia took sole responsibility for the maintenance, repair and replacement of customer service lines, those contracts would be worthless and USP’s Ohio operation would be put out of business.<sup>63</sup> Mr. Riley was subject to cross examination on his direct testimony and again on rebuttal testimony. There are no facts in the record to counter his testimony. Further, as a matter of logic, if Columbia was granted a monopoly to exclusively repair and replace all customer owned service lines in its service area (which is what the Commission did) then it follows that all other providers will be excluded from that business. Significantly, the Commission admitted this on page 17 of the Order where it noted that the proposal before it “would impair existing contracts to some extent”. This admission alone renders the Commission’s actions unlawful and unreasonable.

Although the Commission made this admission, it then attempted to transfer the burden of proof to USP. One of the criteria to be applied before accepting a Stipulation is the finding

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<sup>63</sup> USP Ex. 2, pp. 6-8. Supplement to Appellant’s Merit Brief, at S-017-020.

that no important regulatory principle or practice has been violated.<sup>64</sup> Once the facts had been presented that existing warranty service contracts will be impaired, there was a burden of production on Columbia and the signatories to the Amended Stipulation and Recommendation to demonstrate that this impairment does not violate Article I, Section 10 of the United States Constitution or Article II, Section 28 of the Ohio Constitution which prohibits the passage of laws impairing the obligations of contracts. Yet, the Commission unreasonably and unlawfully transferred the burden of proof to USP as evidenced by its statements on pages 17 and 18 of the Order.

The Commission also improperly applied the test to determine if a substantial impairment occurred. First, at page 18 of the Order, the Commission erred in finding that “the companies will not be deprived entirely of potential business with their current customers”. The test is not whether the Commission’s action will totally destroy contractual expectations (United States Trust Co. v. New Jersey, 431 U.S. 1, at 17 (1977)) nor whether it will entirely deprive USP of its potential business with current customers; the test is whether the Commission’s action in approving the Amended Stipulation will “operate as a substantial impairment of a contractual relationship.” Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, at 244 (1978). The Commission erred in considering the “deprivation entirely of potential business” as one of the factors.

The Commission also stated at page 18 of its Order that USP has no assurance in one month that any given contract will be in place for the next month. Again, the Commission applied the wrong test. Neither the term of the contract nor the existence of the right to terminate a contract under certain circumstances is material in applying this test. The Commission failed

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<sup>64</sup> Office of Consumers’ Counsel v. Pub. Util. Comm., (1992) 64 Ohio St. 3d 123, at 126.

to take into account that its action substantially impaired the contractual relationships existing between USP and its end use customer (who owns customer service lines and signs a warranty contract).

The Commission at page 18 of its Order also states that “the state’s regulatory power with regard to pipeline safety must be implied in any contract relating to pipeline warranties.” No statutory authority exists to support the Commission’s claim that it has regulatory authority over contracts for customer service line warranties. The problem is that the Commission, instead of the General Assembly, has unlawfully and without authority expanded its regulatory power with regard to pipeline safety beyond utilities.

The Commission also failed to properly apply the “significant and legitimate public purpose” test as the second prong of the Energy Reserves Group test. The second prong of the Energy Reserves Group test is:

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem...(emphasis added).

The Commission misapplied this test. In order to properly apply the test, the Commission must find that there currently exists a broad and general social or economic problem. The Commission did not find this. The Commission only investigated the problem with risers; it conducted no review or analysis of customer-owned services lines either in Columbia Gas’ service territory or in Ohio.

In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Court invalidated a Minnesota pension law which impaired established contractual relations between employers and employees. Allied Structural Steel (“Allied”) was an Illinois corporation which maintained an office in Minnesota. Under its pension plan, employees were entitled to retire and receive a

pension at age 65 regardless of the length of service, and an employee's pension right became vested if he satisfied certain conditions as to the length of service and age. Allied was the sole contributor to the pension trust fund and each year made contributions to the fund based on actuarial predictions of eventual payout needs. But Allied's plan neither required it to make specific contributions nor imposed any sanction on it for failing to make adequate contributions, and Allied retained the right not only to amend the plan but also to terminate it at any time and for any reason.

In 1974, Minnesota enacted a law that subjected certain private employers who provided pension benefits to a "pension funding charge" if the employer terminated the plan or closed a Minnesota office. The charge was assessed if the pension funds were insufficient to cover full pensions for all employees who had worked at least ten years, and periods of employment prior to the effective date of the act were to be included in the ten year employment criterion.

Shortly thereafter, in a move planned before the passage of the act, Allied closed its Minnesota office, and several of its employees, who were then discharged, had no vested pension rights under Allied's plan but had worked for Allied for ten years or more, thus qualifying as pension obligees under the Act. Minnesota notified Allied that it owed a pension funding charge of \$185,000. Allied filed suit claiming that the Minnesota law unconstitutionally impaired its contractual obligations to its employees under its pension plan.

The Court stated at 438 U.S. 234 at 250:

This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. (Citation omitted.) It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. (Citation

omitted.) It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships -- irrevocably and retroactively. (Citation omitted.) And its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

The Court in Allied stated that “[I]f the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.” 438 U.S. at 242.

Utility Service Partners submits that those limits have been exceeded in this case. The Commission’s actions with respect to transferring responsibility and ownership of customer service lines from customers to Columbia were not purportedly taken to deal with a broad, generalized economic or social problem. Warranty service operators, such as USP, operated in a competitive environment that was not subject to state regulation at the time its contractual obligations were originally undertaken. By its April 9, 2008 Order, the Commission has now invaded this area by creating a monopoly over repair and replacement of hazardous non-utility customer service lines. The Commission’s action did not effect simply a temporary alteration of contractual relationships, but rather worked a severe, permanent and immediate change in those relationships – irrevocably and retroactively if the Commission’s Order stands. And the Commission’s action was aimed not at all warranty service providers in Ohio but only those operating within the Columbia Gas of Ohio service territory. There are 25 other natural gas companies operating in Ohio. USP submits that the factors the Supreme Court found persuasive in the Allied Structural Steel Co. case to invalidate a Minnesota pension law are also applicable

here. The Court must find that the Commission unlawfully abridged existing contractual relationships.

In addition, the Commission's conclusion at page 19 of its Order that a "significant and legitimate public purpose" justified any substantial impairment is completely contrary to the facts in the record. First, the Commission placed great weight on the fact that leaks in metal service lines "can" present significant safety hazards. The test is not whether there might or can be a problem; the test is whether there exists a broad and general social and economic problem. Unlike the situation with respect to Design-A risers, there is nothing in the record that demonstrates that the current condition of metal customer service lines is a broad and general problem in Ohio<sup>65</sup>. The test is not whether the Commission's approval of the Amended Stipulation will improve public safety; the test is whether a broad and general social or economic problem exists. The Commission has identified the existence of no broad and general social or economic problem -- only stating that "leaks in customer service lines . . . can be a safety hazard." Order, at p. 19. The Commission misunderstood and misapplied the test. Likewise, the Commission made other erroneous, unreasonable and unlawful statements at page 19 of its Order. For example, the Commission stated that "proper maintenance of such lines and full compliance with federal and state safety regulations is made more difficult by ownership and responsibility being held by different entities..." No citation is given by the Commission for this statement. There is no evidence anywhere in the record where any witness pointed to a specific situation where repairs, replacements and inspections could not be safely and efficiently completed because a customer owned his own customer service line.

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<sup>65</sup> Columbia witness Ramsey could not specifically recall any instances whatsoever of a catastrophic failure of a customer service line. Tr. I, 49. Supplement to Appellant's Merit Brief, at S-042.

The Commission also erroneously stated at page 19 of its Order that “Columbia, under the existing approach, has no ability to retrain repair personnel, to supervise the actual repair process, or to ensure uniformity in the approach to repair and maintenance.” (emphasis added) If Columbia has no ability to do these things, it is doubtful that the mere approval of the Amended Stipulation will give Columbia additional ability. On the other hand, USP submits that Columbia, under the system in place prior to April 9, 2008, did in fact have the opportunity to train independent contractors through the DOT Operator Qualified training process (overseen by Columbia), to inspect the actual repair process, and to ensure uniformity in the approach to repair and maintenance.<sup>66</sup> The cross-examination of the Staff on the “Yellow Pages” issue should have revealed to the Commission that certain independent contractors are approved by Columbia Gas of Ohio.<sup>67</sup> Further, prior to April 9, 2008, Columbia inspected all repairs and replacements done by independent, qualified contractors.<sup>68</sup> Columbia also had an approved parts list that independent plumbers must use.<sup>69</sup> Thus, the Commission’s statement that Columbia “has no ability to retrain repair personnel, to supervise the actual repair process, or to ensure uniformity in the approach to repair and maintenance[.]” under the existing approach is unreasonable, unlawful, and wrong.

The Commission also speculated at page 19 of its Order that:

where responsibility for the cost of repair is left with customers, those customers may be reluctant to report a suspected leak. We believe that customers may report the odor of gas more readily if they are assured that Columbia will repair any problem without the anticipation of an out-of-pocket payment by the customer.”

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<sup>66</sup> Tr. I, 67-71; II, 192. Supplement to Appellant’s Merit Brief, at S-046-050; S-064.

<sup>67</sup> Tr. II, 58-62. Supplement to Appellant’s Merit Brief, at S-055-059.

<sup>68</sup> Tr. I, 48-49. Supplement to Appellant’s Merit Brief, at S-041-042.

<sup>69</sup> Tr. II, 44 and 106. Supplement to Appellant’s Merit Brief, at S-054 and S-062.

Again, no record support is offered to support this belief. However, if the Commission is going to engage in such speculation, it should have also recognized that more than 100,000 Ohio customers who had warranty contracts were not reluctant to report a suspected leak because they were assured that their warranty service provider would repair any problem without the anticipation of an out-of-pocket payment by the customer. The Commission also ignored the undisputed facts that Columbia inspects a third of all customer service lines every year for leaks and that Columbia witness Ramsey could never recall a catastrophic incident associated with a customer service line.<sup>70</sup> The Commission's speculation is unfounded.

The Commission also stated at page 19 that "adoption of the Amended Stipulation is likely to result in a safer system, overall."<sup>71</sup> Again, the Court's test is not whether the Commission regulation improves or increases public safety; the test must be whether a general and broad social and economic problem currently exists. The Commission not only failed to find that a current, general and broad problem exists with respect to customer service lines located in the Columbia service territory, it also failed to find the existence of a general and broad social and economic problem with respect to all customer service lines in Ohio.

The third prong of the Energy Reserves Group test is:

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."

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<sup>70</sup> 49 CFR § 192.723. (Appendix to Appellant's Merit Brief at A-067); Tr. I, 49. Supplement to Appellant's Merit Brief, at S-042.

<sup>71</sup> The use of the qualifier "overall" appears to be a concession on the part of the Commission that adoption of the Amended Stipulation may not result in a safer system with respect to certain aspects. For example, under the Amended Stipulation, there will be no third-party independent inspection of repairs and replacements of customer service lines. (Tr. I, 72; Tr. IV, 141-142.) Supplement to Appellant's Merit Brief, at S-051 and S-069-070. This lack of an independent third-party inspection unreasonably and unlawfully diminishes public safety.

The Commission did not properly apply this test either. The Commission failed to discuss “the rights and responsibilities of contracting parties.” Under the Amended Stipulation, property owners will no longer be permitted to select the independent plumbers with the price, terms, conditions and quality options they want to meet their needs -- it will be Columbia that selects such contractor to meet Columbia’s needs.<sup>72</sup> A warranty service provider such as USP will no longer have the right to serve its contract customers and, will have to terminate the contracts that it has with its qualified independent plumbers to repair or replace customer service lines. None of these factors were discussed by the Commission on pages 19-20 of its Order. Further, the “suitability to purpose” test has to measure “whether the adjustment of the rights and responsibilities of contracting parties is based upon a reasonable condition and is of a character appropriate to the public purpose justifying the legislation’s adoption.” In this case, we have no legislative adoption -- only the ultra vires action of the Commission.

The Commission’s attempt to support its holding by claiming at page 20 that “the IRP does appropriately address the need to improve public safety in the gas line distribution system” is also unlawful, unreasonable and wrong. For example, the Commission stated at page 20 of its Order that it finds that “it is appropriate to allow that party to supervise a selection of workers, the materials to be used, and the work actually performed.” The Commission has ignored the record on this point. Prior to April 9, 2008, Columbia maintained an approved list of independent contractors.<sup>73</sup> It had an approved list of materials to be used in the repair or replacement of customer service lines.<sup>74</sup> It inspected the work actually performed by

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<sup>72</sup> Tr. I, 64. Supplement to Appellant’s Merit Brief, at S-045.

<sup>73</sup> Tr. II, 58-62. Supplement to Appellant’s Merit Brief, at S-055-059.

<sup>74</sup> Tr. I, 68. Supplement to Appellant’s Merit Brief, at S-047.

independent contractors.<sup>75</sup> These facts are undisputed in the record and completely contrary to the Commission's implication that the existing system did not have these features.

The Commission also went beyond the record when, at page 20 of its Order, the Commission found it "entirely reasonable that public safety will be improved by assigning maintenance responsibility to the party who carries a legal responsibility for complying with safety regulations." No citation to the record is offered in support of this finding because there is none. The signatory parties did not provide evidence that safety improved in other state jurisdictions where ownership of and responsibility for customer service lines was transferred from customers to operators. Thus, the Commission has no basis for making this type of finding.

Finally, the Commission, in applying the "suitability to purpose test", merely states at page 20 that the IRP does "appropriately address the need to improve public safety in the gas distribution system," deferring to Staff witness Steele and his rationale. First, the record undisputedly establishes that there was no public safety issue with customer service lines. And again, the mere fact that the Commission action purportedly "improves" safety is not what the test requires. The test is that the Commission must identify the existence of a general and broad need in Ohio. The Commission failed to do this and the Court must reverse this failure.

**Proposition of Law No. 4:**

**The Commission cannot take action which will result in the taking of private property without just compensation.**

The Commission also erred when, at page 21 of its Order, it held that there would be "no taking [of private property] at all." In reaching that erroneous conclusion, the Commission stated that there would be no wholesale transfer of customer service line ownership to Columbia.

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<sup>75</sup> This independent inspection will not be available under the Amended Stipulation and will unreasonably and unlawfully diminish safety. Tr. I, 47-48. Supplement to Appellant's Merit Brief, at S-040-041.

Instead, the Commission noted that “only lines repaired or replaced by Columbia would belong to Columbia.” Regardless whether the Commission issues an order instantaneously transferring all ownership of customer service lines or issues an order transferring ownership after a repair or replacement, the fact remains that the Commission’s order will result in a taking of private property. Moreover, Columbia admitted that the portion of a line that is repaired or patched will become Columbia’s property.<sup>76</sup> It is difficult to reconcile the argument that the Amended Stipulation provides a “uniform” system with the fact that only those portions of repairs and not the entire line will be Columbia’s property.

The Commission also tried to justify its actions by taking the position that a customer agrees to Columbia taking ownership of a customer service line by taking service through Columbia. Specifically, the Commission stated, at page 21 of its Order, that “...no homeowner is obligated to allow Columbia to enter the homeowner’s private property or to install repair parts on that property. The property owner is welcome to choose not to have those repairs made and to eliminate gas service entirely.” This statement made by the Public Utilities Commission of Ohio flies in the face of its mission statement and is an ultimatum that any property owner must give up his or her private property rights as a condition of receiving natural gas to heat and fuel a home..<sup>77</sup> Such an ultimatum is clearly unreasonable and unlawful.

The Commission also stated, at page 21, of its Order that “the IRP would not take from the property owner the right to make decisions concerning the property. That right remains with the property owner.” This is not true. Under the Amended Stipulation, the property owner will no longer have the right to make decisions about who he or she wants to repair or replace

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<sup>76</sup> Tr. I, 49-50. Supplement to Appellant’s Merit Brief, at S-042-043.

<sup>77</sup> “Our mission is to assure all residential and business customers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choice.”

hazardous customer service lines.<sup>78</sup> That is a right taken away from the property owner and it is worth noting that prior to the Commission's action, the customer had the right to choose the qualified plumber of his choice.<sup>79</sup> Also, if the Commission truly believed that no property rights were being taken from the property owner, why did it, on page 22 of its Order, specifically direct Columbia to work with the customer regarding location, relocation, and, manner of installation of the customer service line, "to the extent feasible"? This directive alone proves that the Commission has taken from the property owner the right to make decisions about the owner's property.

The Commission also unreasonably and unlawfully stated that as far as the customer is concerned, the customer is being adequately compensated because in place of a leaking service line, the customer will have the use of a functional service line. Again, the Commission misunderstood the concept of property rights. "The value of property consists of the owner's absolute right of dominion, use, and disposition for every lawful purpose. This necessarily excludes the power of others from exercising any dominion, use, or disposition over it. Hence, any physical interference by another with the owner's use and enjoyment of his property is a taking, to that extent." *City of Mansfield v. Balliett*, 65 Ohio St. 451, at 471; 63 N.E. 86 (1902) When the Commission created a monopoly over the repair and replacement of non-utility customer service lines and gave that monopoly to Columbia, it clearly interfered with and took property rights from the homeowner. The use of a functional customer service line is not adequate compensation for taking those property rights.

Indeed, Columbia told the Commission unequivocally in its February 2, 2007 Initial Comments in Case No. 05-463-GA-COI at page 2: "(n)o statute even arguably empowers the

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<sup>78</sup> Tr. I, 48. Supplement to Appellant's Merit Brief, at S-041.

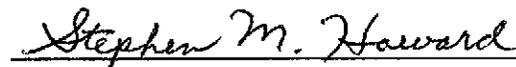
<sup>79</sup> *Id.*

Commission to appropriate the private property of a utility's customer and transfer that property to the utility." Yet, the Commission's actions have taken away a utility customers right to direct the repair and replacement of a privately owned service line and given discretion to Columbia as to the method and manner of any repairs. These actions constitute a taking of private property under Ohio law and in doing so, the Commission has acted unreasonably and unlawfully. The Court should reverse the Commission and find that the Commission's action resulted in a taking of private property.

### III. CONCLUSION

This is an appeal that demands the objective review of the actions of the Public Utilities Commission of Ohio. Unfortunately, the Commission discarded legal notions of acting within its statutory authority in this case, all under the guise of “improving public safety”. The record does not support a factual finding that customer service lines present a public safety issue and the Commission is without authority to give Columbia a monopoly over the repair and replacement of service lines. Just as troubling, the Commission’s actions have impaired the contracts of others and resulted in the taking of private property. The Court must reverse the Commission’s decision with respect to the Commission’s attempt to expand its regulatory authority, exercising jurisdiction and control over the private property of Ohio residents.

Respectfully submitted,



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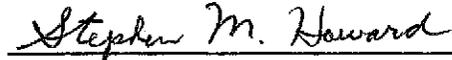
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Utility Service Partners was served upon the following persons by hand delivery or first class U.S. mail, postage prepaid this 10<sup>th</sup> day of October, 2008:

  
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