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 of Ohio
The Public Utilities Commission of Ohio,	:	Case No. 07-478-GA-UNC
	:	
Appellee.	:	

APPENDIX TO THE MERIT BRIEF OF APPELLANT UTILITY SERVICE PARTNERS, INC.

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CERTIFICATE OF SERVICE

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

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IN THE SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF APPELLANT UTILITY SERVICE PARTNERS, INC.

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Notice of Appeal of Appellant Utility Service Partners, Inc.

Appellant, Utility Service Partners, Inc. ("USP" or "an appellant"), hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13 to the Supreme Court of Ohio, from an Opinion and Order of the Public Utilities Commission of Ohio ("the Commission" or "the appellee"), entered on April 9, 2008 (attached), and an Entry on Rehearing of the Commission entered on June 4, 2008 (also attached), both in PUCO Case No. 07-478-GA-UNC.

Appellant was and is a party of record in PUCO Case No. 07-478-GA-UNC, and timely filed an application for rehearing of the appellee's April 9, 2008 Opinion and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues on appeal herein, by entry entered on June 4, 2008.

The appellant complains and alleges that appellee's April 9, 2008 Opinion and Order and appellee's June 4, 2008 Entry on Rehearing in PUCO Case No. 07-478-GA-UNC are unlawful, unjust and unreasonable in the following respects, as set forth in the appellant's Application for Rehearing:

1. The Commission lacks statutory authority to create a monopoly over the repair and replacement of Design-A risers.

2. The Commission has failed to establish a safety issue exists as to non-utility customer service lines without Design-A risers, and lacks the authority to establish a monopoly as to the repair of such pipelines.

3. The Commission unreasonably and unlawfully found that the Amended Stipulation will not be an unconstitutional substantial impairment of contracts.

4. The Commission unreasonably and unlawfully found that adoption of the Amended Stipulation would not result in a taking of property.

5. The Commission unreasonably and unlawfully failed to specify a deadline for the replacement of risers.

6. The Commission unreasonably and unlawfully relied on the Riser Material Plan ("RMP") as it is not part of the record.

7. The Commission unreasonably and unlawfully found that Columbia's proposal as to the lack of regularity of inspections under the Amended Stipulation was reasonable.

8. The Commission unreasonably and unlawfully failed to address both the timing and the nature of the subject matter of the Amended Stipulation before considering whether serious bargaining occurred.

9. The Commission unreasonably and unlawfully found that the Amended Stipulation, considered as a whole, will benefit rate payers and the public.

10. The Commission unreasonably and unlawfully found that the approval of the Amended Stipulation will not violate state policy.

11. The Commission unreasonably and unlawfully failed to require that notice of this case and hearing be provided to plumbers, warranty service providers, and property owners because of the impact on contract rights and property rights that are affected by the Commission's change in policy.

12. There was no evidence showing that Columbia has the managerial ability or experience to manage the repair and replacement of hazardous customer service lines.

13. The Commission's decision is not supported by the manifest weight of the evidence.

WHEREFORE, the appellant respectfully submits that the appellee's April 9, 2008 Opinion and Order and appellee's June 4, 2008 Entry on Rehearing in PUCO Case No. 07-478-GA-UNC are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to the appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Section 4903.13, Revised Code, I certify that a copy of this Notice of Appeal was served upon Alan R. Schriber, Chair, Public Utilities Commission of Ohio, 12th Floor, 180 East Broad Street, Columbus, Ohio 43215-3793, or, in the event of his absence, upon any Public Utilities Commissioner, or by leaving a copy at the Office of the Commission at their office on the 12th Floor, 180 East Broad Street, Columbus, Ohio 43215-3793, and was filed with the Public Utilities Commission of Ohio Docketing Division, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793 in Case No. 07-478-GA-UNC this 1st day of August, 2008. Further, I certify that a copy of this Notice of Appeal was sent by ordinary, first class U.S. mail, unless indicated below by hand-delivery, and via electronic mail to all parties of record in Case No. 07-478-GA-UNC on the 1st day of August, 2008.

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Certificate of Filing

I certify that a Notice of Appeal has been filed with the Docketing Division of the Public Utilities Commission in Case No. 07-478-GA-UNC in accordance with Sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code on August 1, 2008.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment.	)	Case No. 07-478-GA-UNC
In the Matter of the Application of Columbia Gas of Ohio, Inc., for Authority to Modify its Accounting Procedures to Provide for the Deferral of Expenses Related to the Commission's Investigation of the Installation, Use, and Performance of Natural Gas Service Risers.	)	Case No. 07-237-GA-AAM

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OPINION AND ORDER

The Commission, coming now to consider the testimony and other evidence presented in these proceeding, hereby issues its opinion and order.

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OPINION

I. BACKGROUND AND HISTORY OF THE PROCEEDINGS

On April 13, 2005, the Commission initiated an investigation into the types of gas service risers being installed in Ohio, the conditions of installation, and their overall performance. *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,* Case No. 05-463-GA-COI (COI case). As a part of the COI case, the Commission ordered the four largest local distribution companies (LDCs), including Columbia Gas of Ohio, Inc. (Columbia), to identify a sample number of installed risers and to remove a portion of those risers for submission to a testing laboratory. Staff of the Commission has filed a report in the COI case, finding that certain risers are more prone to failure than others. Staff submitted several recommendations to the Commission, recently considered by the Commission in that docket.

On January 2, 2007, the chairman of the Commission issued a letter in the COI case, requesting that LDCs consider the prudence of the current regulatory framework that leaves responsibility for the customer-owned service lines with the homeowner and, in addition, discuss the possibility that utilities might take over that responsibility.

On March 2, 2007, Columbia filed an application in case number 07-237-GA-AAM, captioned above (deferral case). The application asks for the Commission's permission for Columbia to defer the expenses it has incurred in connection with the Commission investigation in the COI case.

Motions to intervene in the deferral case were filed by the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE), on March 21 and April 3, 2007, respectively. Columbia opposed both motions, filing memoranda contra on April 9 and 23, 2007. OCC replied on April 19, 2007.

On April 25, 2007, Columbia filed an application in Case Number 07-478-GA-UNC, captioned above (riser case). The application covers both the recovery of certain riser-related costs and the assumption of responsibility for service lines and risers. Columbia seeks recovery of all associated costs through an automatic adjustment mechanism, pursuant to Section 4929.11, Revised Code. That section allows the Commission to approve a mechanism that provides for charges to fluctuate automatically in accordance with changes in a specified cost.

Motions to intervene in the riser case were filed on April 30, June 6, June 8, June 26, July 2, and August 7, 2007, by OPAE; OCC; Utility Service Partners, Inc. (USP); Interstate Gas Supply, Inc. (IGS); Industrial Energy Users-Ohio (IEU); and ABC Gas Repair, Inc.

(ABC), respectively. Columbia opposed the intervention by OPAE, filing a memorandum contra on May 11, 2007. OPAE replied on May 16, 2007.

Correspondence relating to the riser case was received from several members of the public, between July 9 and March 20, 2008.

On July 11, 2007, the Commission bifurcated the riser case and considered Columbia's proposal to initiate the proposed infrastructure replacement program (IRP). Applications for rehearing of the July entry were filed by USP and IGS, along with a motion by USP for clarification. The Commission issued an entry on rehearing on September 12, 2007.

A hearing on the aspects of the application that were not previously determined was scheduled to begin on Monday, October 29, 2007. Testimony was filed by Columbia on October 15, 2007; by OCC, USP, and ABC on October 23, 2007; and by staff on October 24, 2007. On October 26, 2007, the last business day before the hearing was scheduled to begin, a stipulation (original stipulation) was filed in the docket, reflecting the agreement of Columbia and staff. The hearing proceeded, as scheduled, on October 29, 30, and 31, 2007, with testimony by Michael Ramsey, Larry Martin, and Thomas Brown, on behalf of Columbia; Gary Hebbler and Bruce Hayes, behalf of OCC; Philip Riley, Jr., Timothy Phipps, and Carter Funk, on behalf of USP; Timothy Morbitzer, on behalf of ABC; and David Hodgden and Edward Steele, on behalf of staff of the Commission.

The hearing was scheduled to continue on December 3, 2007. Rebuttal testimony and testimony in support of the stipulation were filed by Columbia and staff on November 19, 2007. Surrebuttal testimony and testimony in opposition to the stipulation were filed by USP, on November 28, 2007. The hearing proceeded, as scheduled, on December 3, 2007, with the testimony of Michael Ramsey, Larry Martin, and Thomas Brown, on behalf of Columbia; Carter Funk, Timothy Phipps, and Philip Riley, Jr., on behalf of USP; and David Hodgden and Jill Henry, on behalf of staff.

At the conclusion of the hearing, the attorney examiner scheduled initial briefs to be filed on Monday, December 31, 2007, and reply briefs to be filed on January 14, 2008. On December 28, 2007, one business day before the initial briefs were due, an amended stipulation (amended stipulation) was filed in the docket, reflecting the agreement of Columbia, staff, OCC, and OPAE. The briefs of Columbia and staff, filed on December 31, 2007, referenced the amended stipulation. Initial briefs were also filed on December 31, 2007, by USP, ABC, and IGS.

On January 4, 2008, USP and ABC jointly moved to strike the amended stipulation. On January 8, 2008, staff moved for a hearing on the amended stipulation. Staff's motion was supported, subsequently, by Columbia and OCC. On January 10, 2008, the examiner

reopened the record of the proceedings and scheduled a continuation of the hearing for February 5, 2008. The deadline for filing reply briefs was also continued.

Testimony was filed, on January 28, 2008, by Columbia, staff, and USP. On February 4, 2008, a joint motion was filed by Columbia, OCC, staff, OPAE, USP, IGS, and ABC. The motion requested that the final day of hearing be cancelled, as the parties had all executed an agreement setting forth certain facts that could be received into evidence, which facts primarily relate to the course of settlement negotiations that led up to the stipulation and amended stipulation. Together with that motion, the parties filed their agreement (agreement as to facts). The examiner cancelled the hearing and ordered that reply briefs be filed no later than February 19, 2008.

On February 15, 2008, OCC filed comments, stating that it had reviewed Columbia's riser material plan, as required under the amended stipulation, and had no objection to it.[1] On that same day, USP filed an objection to Columbia's failure to provide it with copies of its riser material plan, as required by the amended stipulation. On February 19, 2008, USP noted that it had received Columbia's plan and, having no objection to it, now withdrew its previously filed objection.

On February 19, 2008, reply briefs were filed by Columbia, OCC, staff, OPAE, USP, ABC, and IGS.

On February 28, 2008, Columbia filed an application to revise its rider rate based on costs accumulated through December 31, 2007, together with supporting testimony of Larry Martin. On March 3, 2008, USP commented that the record is closed and that Columbia had made no motion to reopen the record.

II. DISCUSSION

A. Applications and Prior Substantive Orders

1. Application in Deferral Case

Columbia, in its application for authority to defer costs for subsequent collection, lists several categories of costs that it has incurred:

(a) Payments to the Commission for statistical analysis performed by consultants used to estimate Columbia's riser population by type.

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1 The provision of a riser material plan is required by the terms of the amended stipulation under consideration in this opinion and order.

(b) Training development and training costs related to riser testing and performance of the survey.

(c) Labor and expenses incurred in the collection of riser samples for the Commission's investigation.

(d) Commission assessments for the testing of risers and preparation of the staff report.

(e) Contract and company labor costs incurred to conduct the survey.

(f) Project management costs, including labor and expenses for survey management; data management; report generation and invoice process for contracted services.

(g) Incremental expenses incurred at Columbia's contact center as a result of increased call volumes as customers inquired about the riser survey and related riser matters.

Columbia asks, in the deferral case application, for authority to revise its accounting procedures to allow retroactive deferral of the costs already incurred and deferral of the costs to be incurred in these same categories, all of which, it says, stem from its compliance with Commission directives in the COI case. Recovery of those deferred amounts would be addressed, Columbia proposes, either in a separate proceeding or in its next base rate case. However, the deferral case application does ask for approval of the recovery of carrying charges on the deferred balance.

2. Application in Riser Case

The application in the riser case asks, first, for approval, under Section 4929.11, Revised Code, of tariffs designed to recover, through an automatic adjustment mechanism, costs associated with the inventory of risers that was ordered in the COI case, the replacement of customer-owned risers that are identified as prone to failure, and the replacement of customer-owned service lines that are constructed or installed by Columbia as risers or service lines are replaced. The application also asks for accounting authority to permit capitalization of Columbia's investment in customer-owned service lines and risers through assumption of financial responsibility for these facilities and to permit deferral of related costs for subsequent recovery through the automatic adjustment mechanism.

3. Orders Issued Prior to Hearing

On July 11, 2007, the Commission determined that, "in light of the attendant public safety concerns, it is important not to delay unnecessarily actions designed to promote public safety." Therefore, the Commission bifurcated the riser case and, at that time, considered Columbia's proposal to initiate the proposed IRP. (Entry at finding 14.)[2] On the basis of our consideration at that time, we approved the following aspects of the proposal:

(a) Columbia's assumption of responsibility for future repair and replacement of service lines (up to the meter) and risers, where those service lines or risers are actually leaking and those leaks are determined by Columbia to be hazardous.

(b) Columbia's replacement, in an orderly and systematic method, over a period of approximately three years, of all risers that are prone to failure, as so identified in the staff report filed on November 24, 2006, in the COI case.

(c) Columbia's reimbursement, within a reasonable period after submission of appropriate documentation, of those customers who have replaced risers or service lines since November 24, 2006, for actual, reasonable costs incurred, with the maximum reimbursement for the replacement of a riser being $500 and with the maximum reimbursement for the replacement of a customer service line being $1,000.

(d) Columbia's assumption of appropriate rights and responsibilities related to any new risers and service lines as those risers or service lines are replaced or as reimbursement for replacements are paid.

(e) Accounting authority for the deferral of costs related to Columbia's inventory of risers and related to the approved changes in responsibility, as well as the replacement of risers prone to failure.

The Commission also specified, in that entry, certain aspects of Columbia's proposal that we were not then deciding. Those aspects included the justness or reasonableness of, or our possible approval of, tariffs to recover, through an automatic adjustment mechanism or otherwise, costs associated with the Commission-ordered riser inventory and identification process or with Columbia's replacement or repair of service lines or risers. Therefore, we made no ultimate decision to grant or deny Columbia's application under

2 All references to the record relate to the record in the riser case.

Section 4929.11, Revised Code. We also made no decision relating to the request for accounting authority to permit capitalization of Columbia's investment in service lines and risers, the responsibility for the need to repair risers, the process for the remainder of the proceeding, or any other issues having been raised by the parties. Finally, we stated that we made no determination with regard to Columbia's offer to assume responsibility for additional risers and service lines beyond those that Columbia was specifically authorized by that entry to repair or replace based on the need to address immediate safety issues. (Entry, July 11, 2007, at finding 23.)

Applications for rehearing of the July entry were filed by USP and IGS, along with a motion by USP for clarification. The Commission's resultant entry on rehearing granted rehearing to limit the approval such that Columbia was, at that time, authorized only to replace risers that are prone to failure and associated service lines where an associated service line is determined by Columbia to have a hazardous leak. In addition, the Commission granted rehearing to require Columbia to reimburse customers for repairs or replacement effected after the date of the July entry, thus deleting the termination date on reimbursement. (Entry on rehearing, September 12, 2007, at findings 13 and 20.)

B. Summary of the Stipulation and Amended Stipulation

According to staff's reply brief, the amended stipulation differs from the original stipulation in only a few, identifiable ways (staff reply at 5). As the amended stipulation is the most recent agreement, we will review it in full. However, as most of the testimony on the record pertains to the original stipulation, we will also identify all differences between the two documents.

The amended stipulation is signed by staff and Columbia, as was the original stipulation, as well as OCC and OPAE. OCC and OPAE were not parties to the original stipulation. The amended stipulation purports to resolve all issues in both the deferral case and the riser case. The following is a summary of the major aspects of the amended stipulation:

(1) Columbia should be permitted to capitalize its investment in the replacement of prone-to-failure risers and in the repair and replacement of hazardous customer service lines. Columbia should also be permitted to assume responsibility for the future maintenance, repair, and replacement of hazardous service lines and for the replacement, over a three-year period, of prone-to-failure risers.

(2) Columbia should be permitted to capitalize its investment in risers and service lines as they are replaced (including the reimbursement of customers for their replacement of such lines or risers, under the terms

of the prior entry in the riser case and either stipulation). Such capitalization should include the related depreciation, incremental property taxes, and the post in-service carrying charges (PISCC) and should be recovered through an IRP rider.

(3) Columbia should reimburse customers who have contracted with a department-of-transportation operator-qualified plumber (DOT OQ plumber) for replacement of a prone-to-failure riser or hazardous customer service lines, where the repairs are completed between November 24, 2006, and February 28, 2008, and where the request for reimbursement is made by September 1, 2008. Such reimbursement should be made within 60 days of the request. The original stipulation provides for payment by check or credit to a past due arrearage. The amended stipulation requires payment by check. Upon reimbursement, the line or riser will become the asset of Columbia. Columbia will not process any reimbursement requests received after September 1, 2008.

(4) The original stipulation provides that, by November 30, 2007, Columbia would file a pre-filing notice containing estimated IRP rider schedules to become effective in May 2008, based on actual and projected data through December 31, 2007. Both the original stipulation and the amended stipulation provide that, by February 28, 2008, Columbia will file an application (updated, in the case of the original stipulation), supporting the establishment of the level of the IRP rider based on actual costs through December 31, 2007. The IRP rider will allow the recovery of testing and survey costs deferred in the deferral case, IRP customer notification and education costs, deferred PISCC costs, deferred depreciation, deferred property taxes, and related gross receipts taxes.

(5) By November 30, 2008, and on the same schedule in succeeding years, Columbia should file a pre-filing notice containing estimated IRP schedules for the IRP rider to become effective the following May. An updated application should be filed by each following February 28, reflecting actual costs incurred through the end of the preceding year and adjusted to reflect the associated gross receipts tax obligation.

(6) Columbia will provide to staff sufficient records to enable staff to analyze and audit the filed schedules. Each IRP rider rate should become effective by May 1 following the February filing unless delayed by the Commission, found to be unreasonable or unjust by

staff, or objected to (and not resolved to the satisfaction of the Commission) by a party to the riser case. Each rate following the initial level will also true up the revenues collected with estimated revenues.

(7) Riser testing and survey costs to be collected shall be adjusted to exclude work performed in the field that, while not directly recommended by the staff report in the COI case, were economical and practicable to perform while crews were deployed. These costs consist of activities that would have been conducted during 2007 in the absence of the riser survey and that are required under gas pipeline safety (GPS) regulations.

(8) PISCC shall be computed, in the annual IRP rider filings, based on the life of the asset upon which it was accrued and shall be deferred on all investment between the dates the asset was placed into service (or reimbursement of a customer was made) and the date recovery of the investment commences. The PISCC rate shall be determined annually based on Columbia's weighted cost of debt, exclusive of the equity component, and with no compounding. PISCC is to be verified by staff.

(9) Deferred property taxes are to be calculated on all eligible assets at Columbia's estimated composite property tax rate.

(10) Deferred depreciation expense shall be calculated on all eligible assets at the applicable, Commission-approved rates.

(11) Columbia will defer customer notification and education expenses and will provide staff (in the original stipulation, this was to be provided to the Commission) with sufficient records for analysis. Staff retains the right to propose that IRP costs to be recovered be amortized for recovery over a period longer than one year.

(12) All deferred expenses for which Columbia seeks recovery will be identified in a separate subaccount and will not be subject to any carrying charges. Annual filings will provide detailed explanations of expenses.

(13) Columbia's IRP revenue requirement will be recovered from customers through a monthly fixed charge to all customers under rate schedules SGS, SGTS, FRSGTS, MGS, MGTS, GS, GTS, and FRGTS.

The amount of the charge will be the quotient of total program costs to be recovered divided by the total actual bills rendered to customers during the test year. The initial rate is to be set at zero. Costs recovered through the IRP rider shall not be recovered through distribution base rates.

(14) Annual IRP filings shall include a true-up of revenues collected with revenue estimated at the completion of each twelve-month recovery period, with any variances to be recognized in a subsequent IRP filing.

(15) IRP filings that request recovery of costs should include audited accounting and billing records in sufficient detail to enable staff and OCC (OCC was not included in the original stipulation) to analyze Columbia's filing.

(16) Columbia will work with staff and OCC (OCC was not included in the original stipulation) regarding customer notification and education, including changes in responsibility, complaint handling, and reimbursement, and will provide drafts of materials prior to printing and distribution.

(17) When Columbia files a distribution rate case, the rate base will include its cumulative investment in net plant-in-service, including prone-to-failure risers and hazardous service lines repaired or replaced by Columbia, and related deferrals, through the date certain in the applicable distribution rate case. Upon authorization by the Commission, distribution base rates will provide for recovery of the amortization of deferred PISCC, deferred property taxes, and deferred depreciation expense, as well as related gross receipts taxes, through the date certain. The IRP rider will then be adjusted to remove from the rider the impact of those items through the date certain.

(18) At the time it files its next base rate case, Columbia may seek approval of a revised IRP formula that provides for a return on and of its investment in service lines and risers, and related expenses. The amended stipulation goes on to say that Columbia also may seek approval of any amendment to the IRP, including a riser material plan, and that other signatory parties reserve the right to litigate such a proposal.

(19) Individual customers will remain responsible for the initial installation of curb-to-meter service. Columbia shall assume the financial

responsibility for repair, replacement, and maintenance of service lines that have been determined by Columbia to have hazardous leaks.

(20) After March 1, 2008, only Columbia or its representatives may repair or replace a customer service line that Columbia has found to have a hazardous leak.

(21) Based on a paragraph only found in the amended stipulation, Columbia will submit a riser material plan (RMP) no later than February 1, 2008. The RMP will summarize the riser materials to be used in the IRP, along with Columbia's rationale. Columbia's decisions as to materials will focus on safety but will also consider cost, reliability and operational flexibility. If more than one type of riser material is selected, Columbia will also submit to staff, OCC, and OPAE the general criteria to be used in determining the circumstances in which each material may be used. Any current party in the riser case may object to the costs or materials selected, on or before February 15, 2008.

(22) Under a paragraph only found in the amended stipulation, the accounting provisions of the amended stipulation will not apply to capital investment incurred after June 30, 2011, unless otherwise agreed to by the parties and approved by the Commission. Capital investment incurred after that date will not accrue PISCC and no costs (e.g. depreciation, property taxes, and gross receipts taxes) related to capital investment incurred after that date will be deferred.

(23) The amended stipulation is conditioned on adoption by the Commission in its entirety and without material modification.

(24) The signatory parties agree that the original and amended stipulations are in the best interests of all parties and urge their adoption by the Commission.

C. Commission Authority

According to USP and ABC, the Commission may not, as a matter of law, adopt the stipulation. USP and ABC point, variously, to the Commission's lack of authority over non-ratepayers and the constitutional grounds of impairment of contracts and unlawful taking of private property.

With regard to authority over non-ratepayers, USP submits that the IRP would result in the Commission's regulation of non-ratepayers outside of Columbia's tariff, since a landowner who is not a ratepayer (e.g., a landlord) would be prohibited from repairing his own hazardous leak and could not influence Columbia's actions taken in the course of effectuating such a repair. (USP brief at 56-57.) The Commission disagrees with this analysis. By supplying his rental property with gas lines, the landlord is inviting his tenant to enter into a contract for the delivery of gas services, under such terms as the provider offers. Those terms include restrictions on the ability of the tenant or landlord to make repairs. This is not tantamount to the Commission attempting to regulate landlords.

With regard to the constitutional claims, USP, while pointing out "that the Commission does not have authority to decide constitutional questions," does request that we "recognize" that the approach taken by Columbia's application and the stipulation is "fraught with 'legal mine fields.'" (USP reply at 25.) Columbia suggests that the Commission does not have the "power to determine the legal rights and liabilities with respect to contract rights . . .." (Columbia reply at 11.)

We agree that traditional constitutional law questions are beyond our authority to determine. We do not disagree that our jurisdiction is limited to that granted to us by statute. However, the claim is made that we have no authority to approve the proposed measures in light of their violation of constitutional strictures. In order to decide whether or not to approve the IRP, as set forth in the application or the amended stipulation, we must, of necessity, review and analyze the existing body of law on this subject. Thus, although the questions are constitutional ones, we have no choice but to consider them and reach conclusions, prior to addressing the substance of the proceedings.

1. Impairment of Contracts

Both the United States Constitution and the Ohio Constitution prohibit the impairment of private contracts by government action. The former operates to prohibit states from "enter[ing] into any . . . Law impairing the Obligation of Contracts . . .." U.S. Const., Article I, Section 10. Similarly, the Ohio Constitution provides that the "General Assembly shall have no power to pass . . . laws impairing the obligation of contracts . . .." Ohio Const., Article II, Section 28.

USP and ABC assert that adoption of the IRP would result in unconstitutional impairment of its contracts with customers. "[I]f the Commission grants Columbia the exclusive authority to perform service line repairs, it would nullify at least 100,000 of USP's warranty service contracts." (USP brief at 51.)

Parties to this proceeding discuss both the appropriate methodology for analyzing contract impairment claims and, also, the appropriate application of such methodologies.

We will first discuss and resolve the methodology question and will then discuss and resolve its application to the facts at hand.

(a) Analytical Methodology

According to USP, the appropriate analysis requires answers to three questions: "(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? (3) Are the means chosen to accomplish the purpose reasonable and necessary?" (USP brief at 51, citing *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 [1983].) USP continues its discussion by reference to the *Mobile-Sierra* line of cases, in which the United States Supreme Court found that the Federal Power Commission could change the terms of an existing contract for gas service only where there was an unequivocal public necessity. *See United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power*, 350 U.S. 348 (1956); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

ABC points out that laws in place at the time and place when a contract is made are an inherent part of that contract. ABC then follows a similar approach to that used by USP, also asserting that a three-pronged approach must be followed. However, the three questions posed by ABC are "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." (ABC brief at 22, citing *General Motors Corp. v. Romein*, 503 U.S. 181 [1992].)

Staff also addresses this issue, starting from ABC's point regarding the inherent position of existing laws in contracts. It suggests that the corollary is also true. That is, contracts include, as implied provisions, not only existing laws but, also, the "reservation of essential attributes of sovereign power." The government, thus, "retains adequate authority to secure the peace and good order of society." (Staff reply at 30-1, citing *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 [1934].) Staff also points to an Ohio decision, relating to franchises granted by the state, in which the court similarly noted that such contracts remain "subject to public regulatory authority . . .." *Board of Commissioners of Franklin County v. Pub. Util. Comm.*, 107 Ohio St. 442 (1923). Another Ohio decision cited by staff specifically holds that

> [t]he protection provided by . . . provisions against impairment of contracts and taking of property without due process of law must bow to valid police power legislation designed to protect public health, safety and welfare, as long as the exercise of that police power "bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary."

Ohio Edison Co. v. Power Siting Comm., 56 Ohio St.2d 212, 217-8 (1978)(citations omitted).

Staff suggests following the three-part test in *Energy Reserves Group*, which was also discussed by USP. However, staff also points out that the first prong of this test also requires the consideration of the severity of the impairment and whether the industry has been subject to prior regulation. (Staff reply at 30-33.)

Both staff and USP pointed to the test in *Energy Reserves Group* as a useful analytical tool. We too find that it is a clear statement of the law in the area and note that it has been positively referenced by the Supreme Court of Ohio in a decision that followed a similar analytical approach. *City of Middletown v. Ferguson*, 25 Ohio St.3d 71 (1986). We do not find that limiting the public purpose prong of the test to circumstances of "unequivocal public necessity," as was discussed in the *Mobile-Sierra* line of decisions, is appropriate here. As noted by staff, that line of cases related to the authority of the Federal Energy Regulatory Commission to modify the terms of filed agreements, not to the constitutional argument currently before us. Therefore, the *Energy Reserves Group* test will form the basis for our analysis:

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." . . . 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. . . .
>
> 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. . . .
>
> 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."

Energy Reserves Group, 459 U.S. at 411-412 (citations omitted).

(b) Application of Test

(1) Part 1: Substantial Impairment

USP argues that the proposed IRP would "clearly constitute[] a substantial impairment since it destroys USP's contractual relationship with its customers." (USP brief at 51-2.) USP's witness, Philip Riley, testified that adoption of the IRP "would be

devastating to USP." He explained that USP has more than 100,000 active contracts with natural gas consumers in Columbia's service territory. According to Mr. Riley, each of these contracts can be cancelled at any time by the customer. Adoption of the IRP would, he said, force USP out of business in Ohio. (USP Ex. 2, at 6-7.) USP also argues that, with regard to the service lines (as opposed to the risers), there is no evidence to show that Columbia's personnel or equipment are superior to those of plumbers used by USP. USP, it says, has an established, functioning system. Columbia, it contrasts, has no experience repairing lines and has not shown that it will be faster or better. Thus, USP concludes that transferring ownership of service lines to Columbia does not meet the public interest exception. (USP brief at 52-53.)

ABC notes that it has existing, valid contracts with approximately 15,000 customers in Ohio. (ABC Ex. 3, at 3.) ABC opines that adoption of the stipulation would impair those contracts, by allowing Columbia the exclusive right to repair the customer service lines. It submits that the impairment would be substantial "because it would completely wipe out ABC Gas's contractual relationships." ABC concludes that the Commission should find that the plan would violate the prohibition against impairment of contracts. (ABC brief at 22-23.)

Columbia disagrees with the positions taken by ABC and USP, arguing that there is no unconstitutional impairment of contracts in this situation. First, it suggests, there is no substantial impairment because the warrantors cover "a plethora of utility lines . . .." It also points out that the contracts in question only last for a year at a time. Columbia even proposes that the warrantors will be benefitted, as they will still receive contract payments but will not have to effectuate the repairs. Columbia also notes that the subject matter of these contracts is one that is within the Commission's jurisdiction. Columbia opines that approval of the amended stipulation is a reasonable and necessary method for addressing a tremendous public safety issue. (Columbia reply at 11-13.)

Staff points out that the warrantors would have other possible business relationships with its customers, including the coverage of water lines, sewer lines and inside gas lines. Staff also notes that, if the warrantors do lose some business, it would only be for part of a year, as the contracts in question are for one-year terms. (Staff reply at 34.)

We find that, although the proposal before us would impair existing contracts to some extent, that impairment would not be substantial. This is the case both because of the terms of the contracts and their coverage. Testimony at the hearing revealed that USP offers other services to their customers, such as in-home water line warranties, in-home sewer warranties, in-home gas line warranties, in-home electric line warranties, external sewer warranties, external water line warranties, and landscape services; and that ABC offers coverage of outside water lines and in-home, as well as external gas lines. Further, that testimony showed that at least USP has offered to switch its customers' coverage from

external gas lines to other lines. (Tr. II at 119-121; Tr. III at 14-16.) Thus, the warranty companies will not be deprived entirely of potential business with their current customers. Further, we note that, at least with regard to ABC, the contracts in question are for one-year terms. (ABC Ex. 3, at 5.) Because of that fact, no impairment for greater than a year can result and, in fact, most of the contracts that will be affected have remaining terms of less than one year. As to the USP contracts, testimony revealed that the contracts may be cancelled by the customers at any time (USP Ex. 2, at 7). As USP has no assurance, in one month, that any given contract will be in place for the next month, the loss of that contract as a result of a changed regulatory environment should not be a substantial impairment. In addition, we cannot find impairment of contracts where the contracts themselves were not made available for our review. Such contracts might, for example, allow repairs to be made by other parties, resulting in no impairment of the contracts but, rather, an impairment of the business model used by the warrantors. The business model itself is not constitutionally protected. We note, finally, that the Commission's gas pipeline safety jurisdiction should be no surprise to these companies. They must have been aware, when entering into these contracts, that the natural gas industry is highly regulated and dangerous. The state's regulatory power with regard to pipeline safety must be implied in any contract relating to pipeline warranties.

Under the *Energy Reserves Group* three-part test, if there is no substantial impairment of contracts, the remaining two parts need not be addressed. However, although we have found that there is no substantial impairment of the warranty contracts, we will discuss the next aspects of the test.

(2) Part 2: Public Purpose

USP discusses the presence of a public purpose, although it addresses the question of whether there is an "unequivocal public necessity," a standard that we have declined to apply. USP agrees that the safety issues surrounding the field-assembled risers do pose such a public necessity, justifying a rapid governmental response. However, USP does not agree that there is such a public purpose with regard to customer service lines. It points out that independent service providers have repaired lines for one hundred years, with an enviable track record. USP opines that there is no evidence to show that customer service lines are an existing hazard. (USP brief at 52, citing Tr. IV at 284-285.)

Staff discusses safety at some length, pointing to its own witness as well as those of Columbia and USP. Staff witness Edward Steele testified that Columbia is responsible, under federal and state law, for the safety of the service line, even though the customer owns that line. Federal and state requirements give Columbia the responsibility for performance of leak surveys, odorization, line location, and cathodic protection (if applicable). He opined that safety would be improved by allowing Columbia to assume all operation, maintenance, and replacement responsibilities for its system, including service

lines and risers. (Staff Ex. 2, at 9-12.) Testifying in support of the stipulation, Mr. Steele opined that this approach would result in better oversight by Columbia and a uniform approach to repair and replacement, with clear lines of responsibility for the work performed. (Staff Ex. 4A, at 5.) Columbia's witness, Michael Ramsey, testified that leaks in steel service lines can present significant safety hazards. (Col. Ex. 5, at 2.) USP witness Carter Funk agreed that corrosion and bare steel service lines can present a safety hazard. (Tr. IV at 93.) Timothy Phipps, witness for USP, confirmed that gas line leaks do cause house fires, not only damaging the property in question but also risking neighboring residences. (Tr. IV at 108-109.) Thus, staff concludes, "the Commission has a significant and legitimate public purpose in regulating the safety of customer service lines as a part of the gas pipeline distribution system." (Staff reply at 36.) Columbia similarly claims that it has demonstrated that safety would be increased by allowing it to take over responsibility for maintenance, as set forth in the IRP. (Columbia reply at 12-13.)

We do find that, even if there were a substantial impairment of the warranty contracts in question, we would have a significant and legitimate public purpose in causing such an impairment. It is clear to us that leaks in customer service lines, including gas risers, can be a safety hazard. It is also clear to us 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, as, among other things, Columbia, under the existing approach, has no ability to train the repair personnel, to supervise the actual repair process, or to ensure uniformity in the approach to repair and maintenance. We are also concerned 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. We believe that adoption of the amended stipulation is likely to result in a safer system, overall. Increasing public safety, as it relates to the gas distribution system, is critical.

(3) Part 3: Suitability to Purpose

USP argues that no evidence shows that Columbia has superior personnel or equipment, has any experience repairing lines, that it will provide faster or better service, or that its work will differ in any way from the work of the technicians servicing lines today. (USP brief at 52-53, citing Tr. IV at 141.) Thus, USP does not believe that the IRP will reasonably address any public interest.

Staff witness Steele spelled out many ways in which approval of the IRP would improve public safety. He asserted that Columbia would have better control over the quality of work being performed, that hazardous lines and risers could be repaired more efficiently, that materials used could be verified, that a uniform line of demarcation would

be established, and that Columbia would have complete responsibility for all pipelines regulated by federal pipeline safety regulations. (Staff Ex. 2, at 8-12.)

We find that the IRP does appropriately address the need to improve public safety in the gas distribution system. We recognize the expertise of staff witness Steele and agree with his rationale. We find it entirely reasonable that public safety will be improved by assigning maintenance responsibility to the party who carries the legal responsibility for complying with safety regulations. We also find that it is appropriate to allow that party to supervise the selection of workers, the materials to be used, and the work actually performed.

As adoption of the amended stipulation and, therefore, the IRP will not be an unconstitutional impairment of contracts, we are not prohibited, on that basis, from considering it.

2. Taking of Property

The United States Constitution and the Ohio Constitution also prohibit the taking of private property without just compensation. U.S. Const., Amendment V; Ohio Const., Article I, Section 19.

USP asserts that adoption of the IRP would result in an unconstitutional taking of its contract rights and of its service lines. With regard to the contract rights, USP explains that "[c]ontract rights can constitute property protected against government taking without just compensation where such rights are directly appropriated for public use." (USP brief at 53, citing *Ohio Valley Adver. Corp. v. Linzell*, 168 Ohio St. 259 [1958].) USP contends that adoption of the IRP would cause its contracts to be of no value and would allow the Commission to regulate and oversee such lines, thereby directly benefitting the Commission. With regard to the alleged improper taking of service lines, USP contends that the IRP would transfer ownership of service lines to Columbia. (USP brief at 53-55.)

ABC discusses this issue only with regard to the occupation of individual landowners' property. ABC notes that ownership does not have to be transferred in order for a regulatory taking to occur. Rather, compensation, ABC explains, must be paid if a regulation "frustrates property rights." (ABC brief at 18, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982].) Considering the question of how to find such frustration of property rights, ABC looks to a decision of the Supreme Court of Ohio that found *per se* takings where either the owner suffered a permanent physical invasion of his property or the regulation completely deprived the owner of all economically beneficial use of the property. (ABC brief at 18, citing *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs.*, 115 Ohio St.3d 337 [2007].)

Columbia, in response, asserts that the unconstitutional taking claim is one that can only be made by the property owner at the time of the taking. (Columbia reply at 9.) Columbia goes on to disagree with the substance of the argument, pointing out that "the location of facilities for service to a customer on a customer's property is a condition of service." It also contends that the legitimate exercise of police power, such as for preservation of public safety, is an exception to the requirement that compensation must be paid in the event of a taking of private property, pointing a state appellate court decision. (Columbia reply at 10-11, citing *Andres v. City of Perrysburg*, 47 Ohio App.3d 51 [1988].)

Staff also disagrees with this claim of unconstitutionality. First, staff notes that there is no permanent physical occupation in this situation, as there was in the *Loretto* case relied upon by ABC. (Staff reply at 39, 41-44.) Staff goes on to emphasize that governmental intrusion on a person's property does not necessarily result in a compensable taking. If it did, then, as the Supreme Court stated, the government would be compelled to regulate by purchase. *Andrus v. Allard*, 444 U.S. 51 (1979). Staff suggests that various factors have been used to determine whether a regulation constitutes a compensable taking, such as the economic impact of the regulation on the party seeking compensation, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. Applying those factors, staff believes that there is little or no economic impact on customers, that there is no interference with investment-backed expectations, that the regulation would improve public safety, and that the regulation does not deny customers any use of their property. (Staff reply at 40-41.)

We find that the proposed IRP would not result in a compensable taking of private property. First, with regard to USP's claim that the regulation would result in a taking of its contract rights, we note that no contract rights are being directly appropriated for public use. In addition, we do not believe that USP's contracts will be of no value after adoption of the IRP, as discussed above with regard to impairment of contracts. Finally, we stress that adoption of the IRP is not a "benefit" to the Commission, as argued by USP, as this Commission already has regulatory supervision authority over pipeline safety matters.

With regard to the claims by both USP and ABC that this would be a compensable taking of property rights of customers, we find no taking at all. First of all, the IRP would not, as asserted by USP, "transfer" ownership to Columbia. Only lines repaired or replaced by Columbia would belong to Columbia. Second, and most important, no homeowner is obligated to allow Columbia to enter the homeowner's private property or to install its 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 is, as correctly described by staff, a condition of service. If the property owner wishes to continue to receive gas service, then the owner will need to allow Columbia to make repairs. Thus, the IRP would not take from the property owner the right to make decisions concerning the property. That right remains with the property owner. Further, even for the sake of argument, if adoption of the IRP

would result in a taking of private property, we note that the customer is being adequately compensated. In place of a leaking service line the customer will have use of a functional service line.

We do believe, however, that Columbia should, upon request by the customer, work with the customer regarding location, relocation, and, manner of installation of the service line, to the extent feasible under GPS regulations, Columbia's tariff, and Columbia's procedures.

D. Disputed Issues in the Amended Stipulation

USP, ABC, and IGS raise a number of specific issues regarding the content of the IRP. We will group these issues, in the following discussion, for effective consideration.

1. Issues Relating to Riser Replacement

(a) Reimbursement for Customers' Repairs

IGS and USP express concern over various aspects of the proposal that Columbia would reimburse customers, under certain circumstances, for their replacement of prone-to-failure risers. IGS argues that, contrary to the stated intent of the stipulation, imposing an arbitrary cutoff date for customers to arrange for their own riser replacements will not ease concerns regarding the scarcity of DOT OQ plumbers to make those replacements or the prices that such plumbers might charge during times of scarce resources. Rather, IGS believes that the imposition of a cutoff date would worsen any such problems. In addition, IGS points out that price pressures are resolved by the inclusion of a cap on the dollar amount of allowable reimbursement. (IGS brief at 3-4.)

Pointing out that the Commission's entry on rehearing in the riser case eliminated a prior deadline on reimbursable customer repairs, IGS also complains that the IRP would grant Columbia preferential treatment by allowing it a three-year time period in which to make repairs, while property owners choosing not to use Columbia's personnel would have only until February 28, 2008.[3] IGS believes that there is no justification for imposing an arbitrary cutoff date for customer repairs. "[A] customer with a riser that is prone to failure, or whose safety is otherwise potentially compromised by a hazardous service line, should be afforded the greatest possible latitude and choice in addressing these concerns in their time frame, not Columbia's three year schedule." Similarly, IGS does not believe that reimbursement requests made after September 1, 2008, should be rejected. (IGS brief at 4-5; IGS reply at 1-3 and 5-6.)

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3 This brief was, of course, filed on December 31, 2007, prior to the additional procedural steps necessitated by the filing of the amended stipulation.

IGS also asks that the Commission ensure that repairs or replacements effectuated through a consumer's warranty company would also be reimbursable. (IGS brief at 5.)

USP indicates that customers with prone-to-failure risers will not be able to ensure that their risers are immediately replaced but will, instead, have to wait for Columbia to reach them. USP suggests that the only reason for a cutoff date for customer replacement of such risers "is to ensure that Columbia gets a monopoly on repair." (USP reply at 2.)

Columbia responds to these concerns, stating that the cutoff dates are neither arbitrary nor unreasonable. It asserts that the date was chosen to correlate with the start of the IRP. Quoting language from the Commission's July 11, 2007, entry, Columbia asserts that the existence of a deadline is a reasonable, 15-month period in which customers could act on their own if they feel that immediate action is necessary.

Although Columbia correctly quotes our discussion in the July 11, 2007, entry, Columbia did not mention the reversal of that conclusion by our entry on rehearing of September 12, 2007. In that later entry, we recognized that "some customers may . . . be unwilling to wait for repairs until Columbia is in a position to address their property. Thus," we continued, "some customers may wish to make their own repairs. They should not be penalized for that effort." We also noted our awareness that "the entire repair process may be accelerated by allowing individuals to [arrange for] repairs on their own property." We concluded that our prior approval of Columbia's proposed cutoff date should be "modified such that any customer with a riser prone to failure, who replaces that riser or repairs or replaces both that riser and an associated service line that has a hazardous leak, will be reimbursable by Columbia . . . even if the repairs or replacement are effected after the date of the July entry." Entry on rehearing, at finding 20. We find no evidence in the record that would cause us to modify our conclusion on this point, nor was that conclusion subjected to an application for rehearing. Therefore, the provisions in the stipulation that would have the effect of negating our prior conclusion, although not phrased as such, will be of no effect. Any customer who does not wish to wait for Columbia to replace a prone-to-failure riser, or a prone-to-failure riser and associated service line that has a hazardous leak, may arrange for the replacement or repair through a DOT OQ plumber and be assured of reimbursement, as previously set forth in our entry on rehearing. However, we also note that, in a filing made on February 15, 2008, Columbia stated that it currently expects that the cost of a full riser replacement will be $385 and that the cost of a riser repair using a ServiSert fitting will be $330. Customer reimbursement should be limited to those levels, for all riser repairs or replacements made after the date of this opinion and order. As we noted in our entry on rehearing, in order to assist Columbia in its effort to track riser installation and usage, the Commission would advise customers who wish to replace or repair a prone-to-failure riser through a DOT OQ plumber to contact Columbia prior to arranging for such repair.

We also note that IGS has again raised the question of whether Columbia would reimburse for repairs effectuated through a line warrantor. As we stated in the September 12, 2007, entry on rehearing, Columbia shall, in that situation, reimburse the customer up to the amount of any payment made by the customer. These proceedings are not the appropriate forum for resolution of any dispute between Columbia and a warrantor as to coverage of the remainder of the cost.

(b) Customer Notification

USP declares that "the greatest flaw with either the Application or the Stipulation is the failure to promptly inform the individual members of the public at risk directly of the Design-A riser." It proposes that individuals who are at risk should be notified of the situation. (USP brief at 32-33.)

Responding to this concern, Columbia reassures USP that it has "been prudent and maintained a constant level of communication between it and customers informing them of safety concerns presented by prone to failure risers." It goes on to catalog the various notices that were forwarded to customers, including an explanatory letter to all customers in March and April of 2007; a second mailing of the same letter, in May of 2007, to customers having prone-to-failure risers, which mailing was halted after the July 2007 entry was issued and was resumed in September of 2007. Columbia also recounts having issued press releases, having posted information on its website and on its phone system, and having left door hangers on affected properties. (Columbia reply at 15-16.)

In our September 12, 2007, entry on rehearing, at finding 20, we ordered Columbia to inform all of its customers with prone-to-failure risers that they were affected by this issue. Columbia's efforts at notification of its customers, as set forth in its reply brief, reflect prudent and appropriate notification of customers as to the nature of the problem and the possible rectifying actions that could be taken. Thus, we do not find a problem with the proposal in this area. Columbia should continue to apprise its affected customers of ongoing developments related to their risers.

(c) Three-Year Time Frame

USP advises that "the Commission must determine whether Columbia's three-year timeframe for replacing the prone-to-failure risers in its service territory is acceptable." It points out that, while Columbia has claimed that three years is the minimum time in which the repairs can be accomplished, Columbia has not substantiated that claim. Columbia has not, says USP, provided any studies or time lines to prove its estimate. In addition, USP notes that the possible use of a partial replacement technique may shorten the required time for completion. By USP calculations, if each DOT OQ plumber listed on Columbia's

approved list would replace two of the affected risers each day, the task would be completed in six months. (USP brief at 34-35.)

USP is correct that proof of the appropriate time period is not in the record. Thus, the Commission is not in a position to evaluate Columbia's position. We are, therefore, ordering Columbia to work with Commission staff regarding its scheduling of riser replacement work, attempting to identify and take advantage of all possible efficiencies that do not result in loss of quality. As we have previously stated, this is a matter of the greatest public safety and must be completed as quickly as is possible.

(d) Materials to be Used

USP is also concerned that Columbia had not, at the time its brief was filed, reached conclusions regarding the best method for replacing the prone-to-failure risers. (USP brief at 33-34.) We note, in this regard, that the amended stipulation resolves this problem by adding the RMP.

2. Transfer of Responsibility for Service Lines

The application, as well as the amended stipulation, proposes the transfer of maintenance responsibility for the service line from the customer, whose property is served by that line, to Columbia. Certain of the intervenors disagree with that transfer. We will review, first, the arguments in favor of a transfer of responsibility and the responses to those arguments. We will then consider the arguments opposing the transfer, followed by responses to those arguments.

(a) Arguments Advocating Responsibility Transfer

Columbia asserts that it is prudent and necessary to approve the IRP, thereby granting Columbia responsibility for the maintenance, repair, and replacement of service lines. It cites, first, its belief that approval of the IRP will improve its ability to implement the GPS regulations. Columbia points out that its principal obligation under the GPS regulations is to advise customers of their obligations for maintenance and repair, because it does not own the lines. As a pipeline operator, it is responsible for conducting inspections and testing service lines. However, in the event that a leak is discovered through those efforts, all Columbia can do is terminate service, leaving the customer without service, inconvenienced by the need to repair the line, and forced to pay for unanticipated, costly work. Columbia also points to its inability to test failed equipment that is owned by customers (Tr. II at 99) and its lack of detailed records relating to customer-owned service lines. All of these problems would be resolved through approval of the IRP, according to Columbia, thus enhancing customer safety and enabling fulfillment of Columbia's responsibilities under state and federal laws. (Columbia brief at 9, 12-14.)

Columbia maintains that bare steel service lines are, at times, serious safety hazards. It asserts that witnesses for both USP and Columbia testified that leaking bare steel service lines can cause catastrophic evens, endangering the customer and neighbors (Tr. IV at 93; Tr. I at 107). It points to testimony relating to hazards caused by excavation or dig-ins (Tr. Tr. III at 26). Columbia also attempts to analogize service line leaks with its own experience relating to corrosion leaks on company service lines where, in 2006, nine percent of the leaks were hazardous. Columbia believes that uniform management by Columbia is the best method for addressing such problems. (Columbia brief at 14-15.)

Staff recommends allowing Columbia to assume responsibility for maintenance and repair of hazardous customer service lines, on the basis of testimony by its witness, Edward Steele, the chief of the Commission's Gas Pipeline Safety Section. Mr. Steele testified to the following benefits of the IRP: results in improved quality control relating to service line and riser installation, ensures proper riser installation, provides improved documentation for record-keeping and failure testing, provides more efficient repair, facilitates single-trip repair work, provides verification of materials, eliminates decision-making by customers, allows for uniform line of demarcation between areas under responsibility of company or customer, and gives Columbia complete responsibility for all pipelines regulated by GPS regulations. (Staff brief at 11-12, citing Staff Ex. 2, at 8-9.)

ABC submits that Columbia has failed, with these arguments, to establish that the current system is unsafe in the aggregate. It also suggests that Columbia has failed to explain how its repair process under the IRP would differ from the current system and, thereby, lead to increased safety. (ABC reply at 3-4.) ABC specifically disagrees with the contention that the IRP would give Columbia greater control over materials, processes, and documentation of repairs in customer service lines. It points out that Columbia already controls the materials used in such repairs and already can reject repair work done on those lines. (ABC brief at 12, citing Tr. I at 68-69.) It also notes that Columbia already has the ability to document work done on service lines. (ABC brief at 12, citing Tr. I at 50, 70-71.) ABC also does not believe that customers are confused by private ownership. It also suggests that Columbia could, if customers are confused, undertake an education or notice program, thereby alleviating the problem. ABC is concerned that the IRP would actually result in increased confusion, since Columbia would not have responsibility for interior lines or other downstream lines (such as service to a gas grill). (ABC brief at 10-12.)

USP also disagrees that launching the IRP would increase customer safety, raising several arguments. First, USP notes that Columbia's own estimate would have it replacing approximately 0.33 percent of all service lines annually. USP asks how such a small number could amount to a "pressing safety issue." (USP reply at 3.) USP points out that Columbia's own witness could not recall any instance in which a service line had a catastrophic failure. (Tr. I at 49.) USP pointed out that there was no evidence of increasing

rates of deterioration or of superior practices by Columbia's employees. USP also contends that the IRP would not result in improved implementation of GPS regulations, improved ability to maintain records, or improved supervision of plumbers. (USP reply at 3-8.)

USP also states that the IRP would not eliminate confusion, noting that no evidence proved the existence of customer confusion. On the other hand, according to USP, there is evidence that customers are not currently confused, since Columbia itself advises customers to repair leaks through DOT OQ plumbers and Columbia's website also provides such information (Tr. IV at 147-148). In addition, USP notes, the yellow pages provide information on available plumbers. USP contends that the IRP will lead to confusion by creating different zones of responsibility and ownership and by differing from the treatment of similar lines that are located in other areas of Ohio. (USP brief at 45-49.)

In addition, USP specifically disagrees with the benefits listed by Mr. Steele. With regard to quality control, USP points out that the IRP would not give Columbia any control over installation of new lines, that it already has control over the approved materials list and the approved plumbers list, and that it currently inspects all work. Regarding improved documentation, USP notes that Columbia could, under the present system, keep any records it deems necessary. USP also contends that the IRP would not create any repair efficiencies. Rather, USP reasons, the IRP would eliminate customer choice, eliminate competition, and insert an additional level of bureaucracy. USP also disputes Columbia's rationale that its proposal must be efficient because it would cost less than a standard service line warranty, pointing out that Columbia would charge all customers instead of just cost-causers. With regard to Mr. Steele's next point, USP argues that Columbia's convenience in having to make only one trip should not be a consideration. As to material verification, USP posits that Columbia's likely use of independent contractors and reduction in inspections will result in lessened material verification. Customer choice, as to who to hire for repairs or whether to purchase a warranty, is vital, in USP's opinion. USP also disagrees that the IRP would result in a clearer line of demarcation than the current system and believes that Columbia already has complete responsibility for pipelines. (USP Ex. 2, at 10; USP brief at 49-51; USP reply at 8-14.)

IGS disputes the safety claim, as well. It points out that, under the current system, all repairs would be made by DOT OQ plumbers and would be inspected by Columbia. (IGS reply at 4-5.)

(b) Arguments Opposing Responsibility Transfer

(1) Dissimilarity with Risers

ABC opines that Columbia has failed to prove that the public interest would be served by Columbia's taking responsibility for maintenance of customer service lines. ABC

stresses that, unlike prone-to-failure risers, such lines "have no propensity for sudden catastrophic failure." Therefore, ABC believes that customer service lines do not represent a hazard to the public. It points out that, instead, the slow decay that service lines do experience has led to the development of the line warranty industry and that private ownership of service lines has worked well for eighty years. (ABC brief at 6-8.)

In its reply brief, ABC continues this argument, asserting that Columbia has failed to show that the development of hazardous leaks in service lines "in the aggregate pose[s] a widespread threat warranting wholesale response." ABC argues that the repair process will not differ in any way that will lead to increased safety. (ABC reply at 3-4.)

USP similarly disputes the need for Columbia to take control of service line repairs, suggesting that there is no reason to treat the riser problem and the service lines in the same manner. (USP brief at 30.) It points out that the record reflects no evidence of safety issues associated with customer service lines. USP refers to testimony by its witnesses, Carter Funk and Timothy Phipps, both of who explained that customer service line leaks generally occur, in metal lines, due to metal corrosion and, in plastic lines, due to shifting, improper installation, or damage from digging. USP noted that neither staff nor Columbia presented evidence of a public "clamor" over service line safety. (USP brief at 38-42; USP reply at 4.)

Columbia notes that federal and state GPS regulations apply to all facilities, including service lines and risers. The IRP, as it argues, would give it responsibility for those lines covered by the GPS rules. (Columbia reply at 19-20.)

(2) Inspection

ABC also points out that the IRP would result in fewer safety checks than the current system. Presently, all service line repairs, after being made by a DOT OQ plumber, are inspected by Columbia. ABC points to Columbia testimony stating that there would be no third-party inspection under the IRP. ABC contends that this loss would result in diminished safety. (ABC brief at 8-9; ABC reply at 4-5.)

USP also asserts that third-party inspections, which would be eliminated under the IRP, add a significant level of safety. It points to testimony by witnesses Funk and Phipps, both of whom testified that Columbia's inspection of repairs is a valuable "check and balance," even for the best plumbers. USP notes that Columbia's proposal would include only occasional, random audits of repair work. (USP brief at 42-45.)

Columbia points out that it currently performs inspections in compliance with all applicable regulations. Under IRP, it states, field supervisors will make daily field visits, service technicians will perform periodic quality assurance checks, a construction coordinator will monitor all contractors' work, and the company will conduct a formal

audit program to inspect one-third of operating locations on an annual basis. (Columbia brief at 15, citing Col. Ex. 5, at 2-3.) In addition, Columbia explains that the reason for its present inspection of every repair made by third-party plumbers is that many of those plumbers take short-cuts and Columbia remains responsible for ensuring safety. Columbia submits that, with better managerial oversight and contractual control, inspection of every job will not be necessary. Finally, Columbia notes that the current system of inspections suffers from various problems, such as the plumber not being present, use of plumbers who are not on the DOT OQ list, and the inability of Columbia to access completed repairs for inspection. (Columbia brief at 15-20.)

Similarly, staff indicates that the current inspection system is necessitated by the quality of the third-party plumbers. With Columbia in the position of managing the work, there should be greater uniformity and clearer oversight, according to staff. (Staff reply at 16-17.)

(3) Class 3 Leaks

ABC and USP contend that the IRP would lessen public safety by creating a category of leaks (class 3 leaks) that would not be repaired by anyone. It notes that, under the application, Columbia would not be required to repair such leaks, as long as they remain at that level, and that the customer would not be allowed to do so. Under the stipulation, on the other hand, the responsibility for class 3 leaks would remain with the customer, according to ABC and USP, confusing the situation and creating a disincentive for the customer to repair the leak since Columbia will repair it for free if the customer allows it to remain uncorrected. (ABC brief at 9-10; ABC reply at 5; USP brief at 45.)

Columbia explains that it will grade all leaks, as required by applicable regulations. Under the amended stipulation, it would, it continues, repair only hazardous leaks, leaving grade 3 leaks to be monitored. Columbia assures that customers could choose to repair such leaks on their own. (Columbia reply at 16-17.)

(c) Commission Resolution

Evidence in the record reflects that, while service line leaks are generally not catastrophic, they are often categorized as hazardous and can present significant safety hazards and do have the potential to cause catastrophic damage to the customer's property or neighboring properties (Col. Ex. 5, at 2; Tr. I at 107-108). Therefore, we find that it is appropriate and reasonable, in an effort to improve the level of public safety, to shift responsibility for maintenance and repair of service lines to Columbia, in addition to requiring Columbia to replace prone-to-failure risers.

With regard to the regularity of inspections under the IRP, we find that Columbia's proposal is reasonable. Columbia plans to require regular training and education of the employees and contractors doing the repair work and will be supervising those workers in the field. We find, therefore, that the lack of inspection of every repair is not problematic.

Finally, we are not troubled by the treatment of grade 3 leaks. Such leaks are, as the name signifies, not hazardous. Columbia is required to continue to monitor their status. If such a leak becomes hazardous it will no longer be a grade 3 leak and will be repaired. This is a reasonable approach and appropriately minimizes Columbia's intrusion on the property of its customers.

We do note, however, that the proposed tariffs that are included as a part of the amended stipulation do not require Columbia to make repairs on any particular schedule. We find that, if customers are required to allow Columbia to make all repairs of hazardous leaks on the customer service line, Columbia should be required to complete those repairs in an expeditious manner. Therefore, the amended tariffs should set forth reasonable restrictions on the time to be taken by Columbia for repairing such lines. Columbia is directed to work with Commission staff to develop appropriate tariff language.

E. Evaluation of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994) *(citing Consumers' Counsel, supra,* at 126). The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

As each of these criteria is debated by the parties, we will proceed to a discussion of the argument and our resolution.

1. Serious Bargaining

Columbia asserts that the amended stipulation is the product of serious bargaining among capable, knowledgeable parties. It recounts settlement efforts among all parties of record, initiated by Columbia. Columbia admitted that, after USP and ABC stated that they would not support any settlement in which Columbia would assume responsibility for maintenance of service lines, no further efforts were made with those parties. Ongoing settlement discussions did not include USP or ABC. Columbia argues that their participation was not necessary, as it would have been a "vain act." Columbia notes that it did continue negotiations with IGS, as well as with OCC and OPAE, and points out that OCC and OPAE ultimately signed the amended stipulation, thereby garnering the support of representatives of a wide range of interests, broadly representative of the interests of ratepayers. (Columbia reply at 3-6.)

Staff, agreeing with Columbia's conclusion on this criterion, points out that all parties in the case are capable and knowledgeable and that the amended stipulation was executed by the natural gas utility, residential consumers, and staff of the state regulatory agency. Staff notes that the only opposition was from the warrantors. (Staff brief at 7-9.) Staff also contends that all parties had an opportunity to participate meaningfully in the process. (Staff reply at 6-9.)

USP, on the other hand, believes that the amended stipulation is not the product of serious bargaining since it fails to have the support of the warranty service providers and plumbers and the property owners, as the "parties" with the most at risk. It contends that "Columbia and the staff are bargaining over their respective interests in conveniences; serious bargaining over property owner choice, property rights, contractual rights, and the

right to participate in a competitive business as opposed to a newly created monopoly did not take place in this case." USP suggests that the "reason for the serious bargaining standard is to prevent a cabal of interests from getting together and seeking their goals at the sole expense of another unwilling party." (USP brief at 18-20; USP reply at 14-16.)

There is no dispute among the parties that initial settlement discussions involved all of the parties, including those opposing the ultimate stipulation. There also is no dispute among the parties that USP and ABC did not seek or initiate any settlement discussions after October 17, 2008, because they thought it was futile to continue negotiations based on their understanding that neither Columbia nor the Commission staff would accept a stipulation without Columbia assuming exclusive responsibility for the future maintenance, repair, and replacement of hazardous customer service lines. Indeed, these facts are included in the agreement as to facts, filed on February 4, 2008. While it is true, as the parties stipulated, that some settlement discussions did not include ABC or USP and that discussions with IGS were very limited, the parties also stipulated, in effect, that they appeared to have irreconcilable positions. USP and ABC would not accept a stipulation in which Columbia was assuming exclusive responsibility for the future maintenance, repair and replacement of hazardous customer service lines and that was unacceptable to Columbia and the staff of the Commission. (Agreement as to facts at 2, 3, and 5.) With that in mind, we find that it was not necessary to continue to invite all parties to participate in discussions.

No one possesses a veto over stipulations, as this Commission has noted many times. Additionally, those involved in the continuing discussions, and who ultimately became signatories to the amended stipulation, represent diverse interests including the buyers, sellers, and regulators of natural gas service. We would also note that, regardless of whether parties signed a stipulation or not, we have considered their arguments and positions on issues. Under these facts, we find the amended stipulation was the result of serious bargaining among capable, knowledgeable parties and that the first criterion has been met.

2. Benefit to Customers and the Public Interest

As discussed previously, staff testified as to numerous ways in which the IRP would provide benefits to customers and to the public at large. Staff believes that the IRP, as set forth in the amended stipulation, would enhance public safety and would be of assistance to customers in avoiding the needs to finance expensive repairs and to choose and oversee repair personnel. Staff stresses that Columbia is in a better position than customers to make appropriate safety determination and decisions regarding repairs. It also contends that the cost recovery mechanism set forth in the amended stipulation is practicable and reasonable, containing appropriate regulatory accounting and economic safeguards to protect the public interest, while allowing Columbia to recover its incremental IRP costs. Such

safeguards, while a part of the amended stipulation, were not included in Columbia's application. Importantly, the amended stipulation, according to staff, includes a sunset provision such that the accounting provisions would cease at the completion of the IRP program. Further, the amended stipulation also ensures the exclusion of costs associated with work required by GPS regulations that Columbia would have performed absent the riser survey and, also, the prevention of double recovery. Staff has the right, under the amended stipulation, to propose amortization over longer than one year, thereby moderating the impact of IRP costs on rates. The amended stipulation enhances accounting and reporting requirements in order to ensure that staff can appropriately evaluate and verify included costs and, in addition, requires an independent audit. The accrual of carrying charges on certain deferred costs is prohibited by the amended stipulation and, in addition, accrual of PISCC on capital investment is required to be at a simple interest rate based on Columbia's average cost of debt. All these provisions, in staff's opinion, benefit the public interest. (Staff brief at 9-15; staff reply at 9-18.)

Columbia also enumerates the benefits to customers of adoption of the IRP. Among those listed benefits are freedom from the risk of major repair bills, freedom from the need to choose and hire repairmen, affordability, system-wide safety, a socialized cost structure, coverage of all hazardous leaks, and a single point of contact in the event a leak occurs. Columbia also points out that the amended stipulation includes agreement on Columbia's assumption of responsibility for repair of hazardous customer service line leaks, the establishment of accounting to be used for investment related to replacement of risers and service lines, the establishment of a process for recovery of IRP costs, the development of an RMP that allows for objection by intervenors, the limitation on the time period during which the IRP will allow for the accrual of PISCC or capital-related expenses, the reimbursement of customers by direct payment rather than credit, the provision of detailed records to staff and OCC, and the development of customer communication and education materials relating to the IRP. (Columbia brief at 23, 24-25; Columbia reply at 7.) Columbia notes that the assumption of responsibility only for customer service line leaks that are hazardous is in keeping with USP's opening statement, in which counsel stated that Columbia has the obligation to inspect for hazardous conditions and repair them (Columbia brief at 24, citing Tr. I at 11). Columbia also asserts that approval of the amended stipulation will increase its ability to implement GPS regulations (Columbia reply at 7-8).

USP, on the other hand, points out that the IRP would affect landowners who are not customers. It disputes the uniformity argument on the bases that Columbia will use both employees and independent contractors to perform its work and that independent inspections will be lost. USP argues that the loss of repairs to grade 3 leaks will, in its estimation, diminish public safety. The loss of a customer's right to choose regarding the repair of hazardous leaks is a problem, in USP's opinion, as is the socialization of all costs regardless of causation. (USP brief at 20-24.)

With regard to factors that are identified by staff as benefits, USP has several counterarguments. For example, USP contends that the IRP will not result in better control of quality, as it already has an approved materials list and a list of approved plumbers and because it already inspects all repairs. Regarding proper installation of risers, USP points out that the IRP does not apply to new construction and that there is no evidence that Columbia's practices are superior to those of current plumbers. USP claims that there is no reason why Columbia could not keep better records, even without the IRP. USP disagrees with the contention that repairs will be more efficient and does not believe that a one-trip repair process is a valuable consideration. It also disagrees with the assertion that verification will be improved, since inspections will be reduced. It points out that, currently, customers who do not wish to make hiring decisions on repair crews can choose to purchase a warranty policy, a choice that will be denied them if the IRP is adopted. USP also disagrees that the line of demarcation between the responsibility of the customer and the company will be made clearer. Finally, USP does not believe that compliance with GPS regulations will be improved. (USP reply at 8-14.)

ABC opines that Columbia has failed to establish that the current system is unsafe or that the IRP would improve public safety. It also submits that, rather than diminishing customer confusion, the IRP would increase confusion by creating a system that would produce different outcomes in different situations. (ABC reply at 3-7.)

We have considered all of the parties' arguments and find that the amended stipulation will, as a package, benefit ratepayers and the public interest. Our primary concern is with ensuring public safety. Under the amended stipulation, Columbia has agreed to replace all prone-to-failure risers. In light of their potential for catastrophic failure, this is vital. We are concerned, however, with the length of time that the amended stipulation allows for completion of this effort and would encourage Columbia to make every effort to replace all such risers in as short a period as possible. We are aware that the amended stipulation provides that Columbia will resume to traditional regulatory accounting for capital investment incurred by Columbia after June 30, 2011. The Commission agrees with this approach. We note that, pursuant to the RMP, Columbia has "committed to using the Perfection ServiSert riser fitting within its riser replacement program where possible . . . [allowing] for the replacement . . . without the need for excavation . . .." (Columbia reply at 6-7.) We are hopeful that the use of this alternative will also result in faster completion of the entire replacement process. We are also hopeful that, by allowing customers to continue to be reimbursed for their replacement costs, Columbia will be relieved in the total number of risers affected by the IRP, thus allowing it to reach completion earlier.

Beyond risers, we find that public safety will be enhanced by allowing Columbia to take responsibility for repair of the hazardous customer service lines. The aspect of this proposal that we find most compelling is that it will allow Columbia, as the employer or

hirer of independent contractors, to control, more effectively, the work product of the plumbers making repairs to the system. We do not believe that the resultant patchwork of ownership will cause confusion, as the critical issue is not ownership but responsibility. With regard to responsibility, this change should relieve any confusion, as the customer will only be responsible for any repairs on the downstream side of the gas meter. Considering all of the arguments of the parties, we find that the amended stipulation, considered as a whole, will benefit ratepayers and the public.

3. Violation of Policies and Practices

USP contends that the Commission must consider state policy, as set forth in Section 4929.02, Revised Code, with regard to the amended stipulation. It argues that such policy would be violated on a number of fronts if we approve this plan. (USP brief at 24-27.) USP also believes that the cost causer (in this situation, a customer with a hazardous leak) should pay the incurred costs. Third, USP asserts that the IRP would result in the Commission asserting jurisdiction over non-customer landowners. On a related issue, USP believes that approval of the amended stipulation would be the regulation of property rights of private citizens. USP's final issue relating to this criterion is that, it asserts, the Commission would be creating a new monopoly over what has previously been non-jurisdictional property. (USP brief at 24-30.)

Staff confirms that, in its opinion, the amended stipulation does not violate any important regulatory principle or practice. Staff specifically addresses issues raised by USP. First, staff points out that the legislature, in adopting Section 4929.02, Revised Code, was not attempting to protect the warranty market. The statute, it notes, contains no policies relating to warranties. Staff does not believe the regulatory practice requires the cost causer, in this situation, to pay for costs imposed, since the landowner with a leaking line is not the only person benefitting from its repair. Staff emphasizes that the Commission does have the authority to adopt the amended stipulation. (Staff brief at 15-18; staff reply at 18-30.)

With regard to the state policy, as set forth in section 4929.02, Revised Code, it is unclear whether responsibility for maintenance of customer service lines was considered by the legislature at the time of its adoption. However, we believe that customer safety, especially in this tremendously dangerous area, is of the utmost importance. Therefore, we do not find that approval of the amended stipulation will violate state policy. We also find no other violation of important regulatory principles or practices.

F. Implementation

Columbia should work with staff to develop tariffs to carry out this opinion and order. Such tariffs should be filed in this docket for Commission approval.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) On March 2, 2007, Columbia filed an application in case number 07-237-GA-AAM.

(2) On April 25, 2007, Columbia filed an application in case number 07-478-GA-UNC.

(3) Motions to intervene by OCC, OPAE, USP, IGS, ABC, and IEU were granted.

(4) The Commission approved certain aspects of Columbia's proposal, by an entry issued on July 11, 2007, and an entry on rehearing issued on September 12, 2007.

(5) The hearing in these proceedings was held on October 29, 30, and 31, and continued on December 3, 2007.

(6) A stipulation was filed on October 26, 2007. An amended stipulation was filed on December 28, 2007. An agreement as to facts was filed on February 4, 2008.

(7) Briefs were filed on December 31, 2007, by Columbia, staff, USP, ABC, and IGS. Reply briefs were filed by Columbia, staff, USP, ABC, IGS, and OCC, on February 19, 2008.

(8) The issue for the Commission's determination is whether the amended stipulation is reasonable and should be adopted.

(9) The Commission finds that the stipulation meets the three criteria for adoption of stipulations and should, therefore, be adopted to the extent set forth herein.

It is, therefore,

ORDERED, That the stipulation filed in these proceedings be adopted to the extent set forth herein. It is, further,

ORDERED, That Columbia file, for Commission approval, proposed tariffs consistent with this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

JWK;geb

Entered in the Journal
APR 0 9 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment.	)	Case No. 07-478-GA-UNC

ENTRY ON REHEARING

The Commission finds:

(1) The applicant, Columbia Gas of Ohio, Inc., (Columbia) filed an application in this proceeding to recover certain riser-related costs and to assume responsibility for service lines and riders, seeking recovery of all associated costs through an automatic adjustment mechanism.

(2) On April 9, 2008, the Commission issued its Opinion and Order (opinion and order) in this proceeding. In the opinion and order, the Commission approved, with certain modifications, an amended stipulation (stipulation) filed by some of the parties in the cases (signatory parties), including Columbia, staff of the Commission (staff), the office of the Ohio Consumers' Counsel (OCC), and Ohio Partners for Affordable Energy (OPAE). The stipulation was opposed by Utility Service Partners, Inc. (USP); Interstate Gas Supply, Inc. (IGS); and ABC Gas Repair, Inc. (ABC).

(3) On April 23, 2008, USP filed a motion for stay of implementation of the opinion and order and for stay of an entry approving new tariffs until after the second monthly billing cycle following the Commission's issuance of any entry or order on rehearing. In response, Columbia filed a memorandum contra the motion for stay, on April 28, 2008.

(4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(5) On May 9, 2008, USP and Columbia filed applications for rehearing, asserting fourteen and one grounds for rehearing, respectively. We

will first discuss the applications for rehearing and will then address the motion for stay.

(6) In its first ground for rehearing, USP asserts that the Commission lacks statutory authority to create a monopoly over the repair and replacement of prone-to-failure risers. Pointing out that the Commission may only exercise power specifically conferred upon it by statute, USP argues that the Commission has no authority to regulate plumbers, contractors, or pipefitters and that the Ohio General Assembly did not empower the Commission to create a monopoly over repair and replacement of customer-owned service lines. By forbidding pipeline repairs by anyone other than Columbia, argues USP, the stipulation approved by the Commission does just that. USP also contends that the stipulation actually decreases public safety by prohibiting property owners from replacing their own prone-to-failure risers. (USP application for rehearing at 4-8.)

Columbia counters that the Commission clearly has the authority to order Columbia to repair and replace prone-to-failure risers. This authority is derived, Columbia contends, from the Commission's power to examine activities relating to safety of the public and to prescribe any order necessary for the public's protection. Section 4905.06, Revised Code. Columbia also points out that USP's counsel specifically asserted that USP did not object to Columbia's repair of prone-to-fail risers. Columbia also notes that the Commission did not prohibit customers from repairing their own prone-to-failure risers. (Columbia memorandum contra at 2-3.)

We would first note that USP, on page 9 of its application for rehearing, itself notes that the Commission "properly moved to direct the replacement of . . . prone-to-failure risers." In addition, we do not, of course, disagree with USP's statement that the Commission, being a creature of statute, only has that power given to it. Under the provisions of Section 4905.06, Revised Code, the Commission is specifically empowered and charged with the responsibility to supervise public utilities under its jurisdiction, such as Columbia, in order to assure the safety and security of the public. The limitation that USP would have us place on our supervisory authority is nowhere to be found in the statute. Moreover, we would point out that our opinion and order gave no effect to the provisions in the stipulation to which USP objects. Thus, contrary to USP's allegation, our opinion and order does not

prevent homeowners from arranging for more expeditious repair or replacement of their own prone-to-failure risers. To the contrary, we stated, on page 23, that "[a]ny customer who does not wish to wait for Columbia to replace a prone-to-failure riser, or a prone-to-failure riser and associated service line that has a hazardous leak, may arrange for the replacement or repair through a DOT OQ plumber and be assured of reimbursement . . ." USP's first assignment of error is denied.

(7) USP's second ground for rehearing states that the Commission failed to establish that a safety issue exists as to non-utility customer service lines without prone-to-failure risers and that it lacks the authority to establish a monopoly as to the repair of such pipelines. USP claims that there has been no showing that a current problem exists with regard to customer service lines that are not associated with prone-to-failure risers. USP states that the Commission, in reaching the conclusion that there are safety hazards stemming from such lines, failed to weigh the evidence and recognize the differences between the prone-to-failure riser situation and the customer service lines. It points out that the Commission conducted no investigation of customer service lines and that no evidence compared the safety records in states where operators own such lines with the safety records in states, like Ohio, where they do not. USP suggests that the Commission also failed to recognize evidence of slow decay in service lines and of the success of the warranty company system of repairs. USP also maintains that the Commission did not expressly find deficiencies and the need for improvement in the current system. Because the Commission does not distinguish the prone-to-failure riser situation from the service lines, USP calls for rehearing on this issue. Even if the Commission had conducted a proper investigation and had concluded that such service lines do constitute a safety hazard, USP still believes that the institution of a monopoly would be *ultra vires* for the same reasons as discussed under the first assignment of error. (USP application for rehearing at 8-10.)

Columbia believes that the record in this proceeding sets forth clear evidence that customer service lines with hazardous leaks present public safety issues and that public safety is enhanced by Columbia assuming responsibility for the maintenance and repair of customer service lines. Columbia points out that the record shows that it has responsibility, under federal pipeline safety laws, to conduct

inspections and tests of service lines but that, if it finds a hazardous leak, it can only shut off service and ask that a customer pay for unexpected repairs. The change ordered by our adoption of the stipulation would allow Columbia, it argues, to maintain complete records and would encourage customers to contact Columbia for repairs without concern for unanticipated repair bills. It also points to the testimony of four witnesses who offered support for the contention that leaking customer service lines can present safety hazards. Columbia underlines the testimony of the Commission's chief of gas pipeline safety to the effect that the stipulation will improve quality control and documentation, will streamline repairs, will eliminate decisions by customers unfamiliar with natural gas infrastructure, and will provide verification of materials and consistency in repairs. Columbia also stressed testimony that admitted some plumbers' lack of motivation to do a quality and thorough job. Columbia concludes that the Commission reasonably and lawfully found that public safety would be improved by assigning maintenance responsibility to Columbia. (Columbia memorandum contra at 3-5.)

We discussed the issue of the impact of customer service lines on public safety and the impact of the stipulation on those safety issues fully in our opinion and order. USP raises no new arguments. Our analysis of the safety issues related to customer service lines and, thus, the basis for our conclusions are well summarized by Columbia in its memorandum contra USP's application for rehearing. An enhanced and uniform system of supervision and control, by Columbia, over the repair of hazardous leaks that is different from the inspection system that is currently in place will improve public safety. We would also point out that Section 4905.06, Revised Code, does not require us to conduct a safety investigation of all service lines prior to issuing an order that finds certain changes to be necessary for the protection of the public safety. Neither does the fact that we did conduct an investigation relating to risers require us to do so in connection with customer service lines. USP's second ground for rehearing is denied.

(8) USP asserts, in its third assignment of error, that the Commission unreasonably and unlawfully found that the stipulation will not be an unconstitutional, substantial impairment of contracts. In support of this assignment, USP explains that the Commission, in analyzing the issue, misapplied the test in *Energy Reserves Group,*

Inc. v. Kansas Power and Light Co., 459 U.S. 400, 411-412 (1983) on several levels. We will discuss each of those allegations independently.

(a) First, USP simply asserts that *Energy Reserves* involved state legislation. It continues by stating that this is not legislation, but an *ultra vires* Commission action. (USP application for rehearing at 11.) In response, Columbia restates its prior argument that this Commission action was not *ultra vires* but, rather, was wholly within the powers of the Commission. (Columbia memorandum contra at 5.) For the reasons discussed above with regard to the first two assignments of error, we agree with Columbia. This ground for rehearing is denied.

(b) USP then moves to the Commission's discussion of the portion of the *Energy Reserves* test that required us to consider whether the industry that the complaining party has entered has been regulated in the past. USP asserts that the industry entered by the pipeline warrantors is not regulated but, rather, that the Commission and staff are attempting to extend their jurisdiction to an unregulated industry. It insists that, "[w]hile USP, ABC and IGS are required to use qualified USDOT certified plumbers and materials from a Columbia approved materials list, none of the three have [*sic*] been subject to direct state regulation in this area." (USP application for rehearing at 11.) We disagree with USP's contention that the line warrantors were not operating in a regulated industry. That is true, of course, only if the industry in question is the warranty industry. On the other hand, the substantive area in which the warrantors operate is the gas distribution industry. This area is, as the warrantors were fully aware, highly dangerous and deeply regulated. Therefore, we do not accept the arguments made by USP with regard to our application of the substantial impairment test in *Energy Reserves*.

USP also suggests that the Commission refused to find impairment of contracts on the basis of its statement that we had not been provided with contracts to review. Going on with this logic, USP also declares that the

Commission unlawfully transferred the burden of proof as to the stipulation not violating any important regulatory principle or practice to USP by noting that the contracts had not been provided. (USP application for rehearing at 11-12.) Columbia, in response to this argument, points out that the unavailability of contracts for review was only one basis for the Commission's determination that there was not substantial impairment. Other bases pointed out by Columbia were terms of the contracts, their coverage, the fact that the industry's level of regulation was no surprise to USP, the ability of customers to cancel USP contracts at any time, the availability of other warranty contracts from USP, and the implication of state regulatory power into the contracts. (Columbia memorandum contra at 5-6.) We do not agree with USP's assertion that, by pointing out the unavailability of the contracts, we transferred the burden of proof to USP. Immediately prior to that comment, we had reviewed evidence in the record as to the terms of those contracts, which evidence demonstrated the terms of the contracts that we found relevant to our determination. We also do not agree with USP's assertion that, by "admitting" that our decision would impair contracts to some extent, we were inconsistent with our ultimate conclusion on the issue. When we noted that there was an impairment "to some extent," we were merely noting that, factually, our decision had some impact on the contracts. We were not stating that there was any level of unconstitutional impairment. We specifically found, on pages 17 to 18, that there was no substantial impairment of contracts.

Further, USP contends that the Commission inappropriately found that the warrantors would not be deprived entirely of potential business with their current customers, rather than looking for substantial impairment of contractual relationship. It also suggests that neither the term of the contracts nor their termination provisions are relevant to the question of impairment. (USP application for rehearing at 12-13.) Columbia points out that "deprivation entirely of potential business" is not the test that the Commission applied but was only one factor that the Commission

considered within the test for a substantial impairment. The same is true, according to Columbia, of our consideration of the term of existing contracts. (Columbia memorandum contra at 6.) Columbia is correct that, in our analysis of whether the stipulation caused a substantial impairment of contracts, we looked at a number of issues, including whether the stipulation would result in a total deprivation of potential business, the term of the contracts, and their termination provisions. We determined, as a result of the numerous factors discussed in the opinion and order, that a substantial impairment would not result. We find no reason to alter that conclusion today.

Finally, USP disagrees with the Commission's statement that the state's regulatory power relating to pipeline safety must be implied in any pipeline warranty contract. USP believes, rather, that the Commission's action has unlawfully expanded that regulatory power beyond utilities. (USP application for rehearing at 13.) USP makes a serious error in alleging that we have attempted to expand our regulatory power beyond utilities. The jurisdiction that we asserted in the opinion and order is over Columbia. We are not regulating the warrantors. That our order has an impact on warrantors is inescapable but only consequential. The warrantors' business was based on an assumption that the regulatory environment in the area in which they operated would remain unchanged. No constitutional provision protects the warrantors' business model. Private parties such as USP do not have the ability to prevent a governmental regulator from fulfilling its duty to the public. We are, in this proceeding, regulating the actions of Columbia.

(c) USP's third category of arguments in its third assignment of error is the Commission also improperly applied the *Energy Reserves* test for a significant and legitimate public purpose. USP asserts that, in order to apply this test properly, the Commission must find that there currently exists a broad and general social or economic problem. To support its accusation that the Commission did not find such a problem, USP says that the "Commission only looked at Columbia Gas customer service lines in

this case and conducted no review or analysis of customer-owned services [*sic*] lines in Ohio." (USP application for rehearing at 14.) On the basis of another Supreme Court decision, USP submits that the Commission was not addressing a broad, generalized economic or social problem, that the warranty business operates in an environment not previously subject to state regulation, that the Commission's action worked a permanent change in the contractual relationships in question, and that the Commission's action was not aimed at all warranty service providers in Ohio. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). (USP application for rehearing at 15-16.)

USP also argues that the Commission erred in its statements regarding the actual existence of safety hazards that amount to broad and general social economic problems, the impact of this change on maintenance of the lines and the ability of Columbia to train repair personnel, supervise repairs, and ensure uniformity. It also disagrees with our conclusion that customers may report gas odor more readily if Columbia is responsible for repairs, noting that warranty customers and renters would not be so affected. (USP application for rehearing at 16-18.)

With regard to USP's major argument on this issue, Columbia points out that the *Energy Reserves* test uses "the remedying of a broad and general social or economic problem" as an example of a significant and legitimate public purpose for the regulation, not as a requirement. Columbia also counters that, in the cited *Allied Structural* case, workers' pensions were not previously subject to state regulation, contrary to public utilities in the situation at bar. (Columbia memorandum contra at 6-7.)

We also note that, because we found no substantial impairment of contracts, we were not required to reach the question of whether there was a significant and legitimate public purpose behind the action. Nevertheless, we did continue in our analysis and will address USP's argument on this point. We agree with

Columbia that a governmental action that causes a substantial impairment (which category, we have explained, does not include our decision in this proceeding) is not required, under Supreme Court precedent, to be directed at remedying a general social or economic problem. The Court in *Energy Reserves* used that as an example of an appropriate public purpose for a regulation. As the *Energy Reserves* decision was issued five years after the decision in *Allied Structural*, we will follow the *Energy Reserves* dictates. The purpose of our decision was thoroughly discussed in our opinion and order.

We also agree with Columbia that this decision is made in an area that has been highly regulated for many years. Of course, the dispute on this issue results from a differing approach to defining the industry in question. Only if USP defines the industry in question as the operation of a warranty service business for underground pipelines could we deem it to be unregulated. We, on the other hand, find it most relevant to consider regulation of the safety of gas pipelines, since it is for safety reasons that we took this action. Gas pipeline safety was clearly regulated at multiple levels prior to the issuance of the opinion and order in this proceeding.

A few other points made by USP must be addressed. USP believes that our action was required to cover all natural gas companies operating in Ohio, rather than just Columbia (USP application for rehearing at 16). Of course, in the field of utility regulation, we often deal with one utility at a time. USP also complains that the safety problem we identified with regard to steel service lines is only potential, not actual (USP application for rehearing at 16). We disagree with this semantic argument. Any time a customer service line leaks, there is indeed a present safety problem. The law does not require lines to be actually leaking prior to our taking preventative action to improve safety. We note, however, that our decision only has effect when there is indeed a hazardous leak.

With regard to USP's suggestion that we erred in our discussion of Columbia's ability to train personnel, supervise repairs, or ensure uniformity, we acknowledge that Columbia has some ability to train plumbers and to inspect repairs under the current process. However, Columbia ultimately has no control over the plumbers or the actual repair process. As we explained in the opinion and order, testimony at the hearing addressed the fact that oversight by Columbia would be substantially improved and uniformity would be increased. (Opinion and order at 18-19.) In addition, testimony regarding the current system revealed that plumbers are not always present for Columbia's inspections and may leave their qualification documentation on the meter, that plumbers who are not DOT-qualified may perform repairs based on another plumber's qualification card, and that Columbia does not now have sufficient managerial control to ensure that all plumbers who perform work are qualified. (Tr. II at 45, 93, 101.) We also note that a USP witness testified that 20 to 30 percent of plumbers take shortcuts in their work, which problems are found during Columbia's inspections. (Tr. IV at 103-106.) It remains our belief that approval of the stipulation is critical to Columbia's ability to ensure the safety of the affected lines.

Finally, as to USP's note that warranty customers and renters would not be more likely to report gas odor under the new system, we would point out that there are numerous Columbia customers who are neither warranty holders nor renters. We continue to believe, as we stated in the opinion and order, that these customers, at least, would be more likely to report an odor of gas if they did not expect to be financially responsible for the consequent repairs.

(d) USP also contends that the Commission erred in its application of the third prong of the *Energy Reserves* test, asserting that the Commission failed to discuss the rights and responsibilities of contracting parties. It also argues that the change made by the stipulation's adoption cannot be suitable to the public purpose because the adoption of the stipulation was *ultra vires*. It suggests

that the Commission was wrong in its statement that the proposed change would allow Columbia to supervise the selection of workers, the materials to be used, and the work performed, as it already performs these operations. Finally, USP asserts that the Commission failed to support its conclusion that public safety will be improved by assigning maintenance responsibility to the party who is legally responsible for complying with safety regulations. (USP application for rehearing at 18-19.)

Columbia responds to USP's assertion that the Commission was required to analyze the rights and responsibilities of the contracting parties. Columbia emphasizes that, contrary to USP's assertion, the *Energy Reserves* test actually requires an analysis of whether the adjustment of those rights and responsibilities is based on reasonable conditions and is of a character appropriate to the public purpose in question. (Columbia memorandum contra at 7-8.)

Once again, we note that this prong of the test need not have been reached, both because we found no substantial impairment and because we found an appropriate public purpose. That being said, however, as we discussed in the opinion and order and above, we believe that the transfer of responsibility to Columbia that is effectuated by this proceeding will enhance Columbia's ability to train plumbers, to monitor and inspect their work, to ensure uniformity, and, thereby, to improve safety. We note that USP's *ultra vires* argument has already been rejected. Its argument that Columbia already had the ability to supervise, choose materials, and inspect work was discussed above and explained on the basis that its current limited abilities will be substantially enhanced by the transfer of responsibility. Finally, as to support for our conclusion that public safety will be improved, we would indicate that the discussion on pages 18 and 19 led to this determination. USP's third assignment of error is denied.

(9) USP's fourth assignment of error claims that the Commission erred in finding that adoption of the stipulation would not result in a

taking of property. USP first complains that the Commission incorrectly stated that "only lines repaired or replaced by Columbia would belong to Columbia" when, in reality, only repaired portions of lines would belong to Columbia (USP application for rehearing at 20). While USP correctly states that only repaired parts of lines would be the property of Columbia, we believe that this minor difference is of no consequence to the point being made in the opinion and order.

USP goes on to assert that the Commission made an unreasonable ultimatum in its statement that a homeowner who does not want Columbia to repair a hazardous line may choose not to have gas service. USP points out that the homeowner will no longer be able to choose who will repair or replace lines. (USP application for rehearing at 20-21). Columbia agrees with the Commission, noting that customers only need to allow it to make repairs as a condition of service. It contends that this is a *de minimis* intrusion on property rights. (Columbia memorandum contra at 8.) In rejecting this argument, we would note that a homeowner's right to choose who will repair a gas line, as well as the materials and methods to be used, are already restricted by existing safety regulations. Because of the inherently volatile nature of natural gas, numerous conditions are reasonably placed on the right to receive gas service.

USP also contends that a customer is not adequately compensated for any taking that does exist by being given the use of a functional service line (USP application for rehearing at 21-22). First, to the extent that there is an argument to be made with regard to a taking, that would be a claim that could only be made by a property owner, not by USP. USP has no legal standing to assert a claim that our decision in this case results in an unconstitutional taking of property of Columbia's customers. Nevertheless, as we discussed in our opinion and order, we find no taking. (Opinion and order at 21.) Even assuming, *arguendo*, that there were a taking, we also conclude that use of a non-leaking service line, in place of one that was hazardous, at no cost to the homeowner, would be adequate compensation for any taking that is alleged to result from the transfer of responsibility to Columbia.

Finally, USP asserts that the Commission failed to consider that USP purchased its warranty business from a Columbia affiliate and that this proceeding would "reclaim" a large portion of that business. It notes that Columbia itself commented, in another case,

that the Commission does not have the power to appropriate the private property of a customer and transfer it to a utility. (USP application for rehearing at 22.) As we have previously discussed, we do not believe that our decision results in the transfer of private property from customers to Columbia. We also do not believe that the source of USP's business is relevant to any issue over which we have jurisdiction. USP's fourth assignment of error is denied.

(10) For its fifth assignment of error, USP asserts that the Commission erred in relying on statements contained in a reply brief and not within the record to conclude that Columbia has notified individual members of the public at risk from the prone-to-failure risers. USP suggests that we should have required Columbia to file affidavits indicating what notices were sent to customers in compliance with our September 12, 2007, entry on rehearing in this proceeding. (USP application for rehearing at 22-23.) We find that this suggestion is reasonable and is, therefore, granted. Within five days after the issuance of this entry on rehearing, Columbia shall file an affidavit indicating, with specificity, each notice that was sent to customers, notifying them of the risk of prone-to-failure risers in compliance with our September 12, 2007, entry on rehearing. Within ten days following that filing, any party may present arguments as to why such affidavit should not be admitted into the record and considered by the Commission.

(11) USP's sixth assignment of error indicates that the Commission erred by not specifying a deadline for the replacement of risers. USP points out that the Commission stated that it could not evaluate Columbia's proposed three-year schedule and ordered Columbia to work with staff regarding scheduling and efficiencies. USP believes that the stipulation should have included a proposed deadline and that, at this point, the Commission should require the parties to file evidence indicating what the scheduling of riser replacement work should be and then determine the reasonableness of that schedule. (USP application for rehearing at 23-24.) The Commission disagrees. The most efficient methodologies may change over time, based on experience, customer requests, the available labor pool, or other factors. In order to obtain the best outcome, the Commission believes that the parties should be allowed the freedom to seek out efficiencies that may arise from time to time and to modify plans as appropriate. Therefore, the Commission finds that this issue should be left to the parties and Commission staff. Should problems arise in this area,

those problems may, of course, be brought to the attention of the Commission. In addition, in order to monitor Columbia's progress in replacing prone-to-failure risers, Columbia shall submit, to staff, quarterly reports on such replacements. Rehearing on this ground is denied.

(12) USP's seventh ground for rehearing states that the Commission should not have relied on the riser material plan, as it is not part of the record. USP points out that the original stipulation did not address the best method for replacing the prone-to-failure risers and that the Commission, in the opinion and order, stated that the amended stipulation had resolved that problem by adding the riser material plan. As that plan had not been admitted into the record, USP asserts that the Commission could not base its decision on that plan. (USP application for rehearing at 24.)

The parties unanimously agreed that the amended stipulation may be admitted into evidence, without testimony or the opportunity for cross-examination (Agreement, February 4, 2008, at para. 12). In reliance upon that agreement, the amended stipulation is hereby admitted into evidence. The amended stipulation includes, in paragraph 21, the requirement that Columbia submit a riser material plan. In the opinion and order, on page 25, we did reference the riser material plan, as indicated by USP. However, that reference merely stated that, by including the requirement for preparation and filing of the riser material plan, Columbia had resolved USP's concern that it had not reached a conclusion about the best method for replacing prone-to-failure riser. The plan itself did not need to be in evidence for us to consider the fact that it was being prepared and filed. It was not the content of the riser material plan that was critical to our conclusion; only its existence. The fact of its existence was in evidence. This assignment of error is denied.

(13) USP next asserts, in the eighth ground for rehearing, that the Commission should not have found that Columbia's proposal as to the lack of regularity of inspections under the stipulation was reasonable. USP believes that the stipulation sacrifices safety for convenience as it allows Columbia to avoid making a follow-up trip for leak testing by having its contractors already present for the repair process. USP points to testimony emphasizing the importance of an independent, third-party check of completed repairs. (USP application for rehearing at 24-25.)

As Columbia noted, we fully considered this argument in the opinion and order. USP argued this point following the hearing. We found, in the opinion and order, that Columbia's proposal was reasonable in light of its managerial control, oversight, training, education, and supervision of the workers in the field. In light, also, of the problems encountered by Columbia in its current efforts to inspect repair work (opinion and order at 29), we remain unconvinced that third-party inspection of every repair is necessary or appropriate.

(14) The ninth assignment of error relates to serious bargaining. USP claims that the Commission failed to address the timing and the nature of the subject matter of the stipulation before considering whether serious bargaining occurred. USP divides its argument on this ground into two sections. First it discusses the timing of negotiations that led to the stipulation. It notes that the stipulation was docketed 17 days after the completion of the hearing, on the last business day before briefs were due. USP reasons that the "timing alone should suggest to the Commission that the signatory parties did not engage in serious bargaining." (USP application for rehearing at 25-26.) USP is, in essence, complaining that negotiations continued, after the hearing, among some of the parties to the proceeding. USP was not included in those continuing discussions. However, we understand that both the intervening warrantors, including USP, and the other parties believed the settlement discussions were futile. The unanimous agreement signed by the parties on February 4, 2008, indicates that USP would not accept a settlement, on October 19, 2007, in which Columbia would assume exclusive responsibility for the future repair and maintenance of hazardous customer service lines. The parties also state that USP did not seek or initiate settlement discussions after October 19, 2007, because it thought continued negotiations were futile and that Columbia also believed that continued negotiations would be futile. (Agreement at paras. 2 and 6.) We do not believe that the test of stipulations requires that parties continue to negotiate with one party once that party has rejected a settlement that gave Columbia exclusive responsibility for the future repair and maintenance of hazardous customer service lines. We also do not believe that the parties' determination not to perform a vain act is indicative of the seriousness of bargaining among the remaining parties. We note, in addition, that the steps taken in this case after the filing of the stipulation provided all parties with due process.

USP's second area of discussion in this claimed error relates to the nature of the settlement. USP contends that, because the stipulation has an impact on the business prospects of warrantors and those warrantors were not a part of the continuing settlement discussions, it cannot have been the result of serious bargaining. USP insists that the parties who continued to be involved in discussions were giving up nothing in sacrificing the rights of warrantors, independent plumbers, and landlords. (USP application for rehearing at 26.) We disagree with this line of argument. The stipulation relates to gas pipeline safety, inspection, and maintenance, not to the "competitive warranty service industry." The parties bargained seriously regarding these issues. That the resultant agreement had an impact on warrantors' business models does not mean that the warrantors had to agree with the outcome. It would be difficult to identify any stipulation that comes before us where there is not some business interest that is impacted and not in agreement with the stipulation. This ground for rehearing is denied.

(15) The tenth assignment of error posits that the Commission erred in finding that the stipulation, considered as a whole, will benefit ratepayers and the public. USP contests the Commission's failure to set a specific deadline for completion of the riser replacement project. In addition, it insists that our conclusion that public safety will be enhanced by allowing Columbia to take responsibility for repair of hazardous customer service lines is insufficient and is unsupported by evidence of record. Finally, USP disputes the Commission's conclusions that Columbia is in a better position than its customers to make appropriate safety determinations and decisions regarding repairs. USP believes that this statement was unsupported by evidence and is contrary to statutory mandates for customer choices in a competitive market. (USP application for rehearing at 26-28.)

Columbia points to the testimony of staff witness Steele, who opined that, as a result of the stipulation, Columbia would have better control of work quality, more efficient repair outcomes, and better verification of materials and performance. Columbia also emphasizes that customers should not be left with exclusive decision-making responsibilities for safety issues. (Columbia memorandum contra at 10-11.)

First, we note that we have previously discussed USP's desire that the Commission set a deadline for riser repairs. With regard to support for our conclusion that public safety will be enhanced as a result of approval of the stipulation, as noted by Columbia, Mr. Steele's testimony provided support for that determination. Finally, as to USP's argument that Ohio law mandates that customers should have choices in a competitive market, we find that such requirements are irrelevant to the pipeline safety issues before us. Section 4929.02, Revised Code, the recitation of the state policy behind the adoption of that chapter, addresses competition in the market for the purchase of natural gas. It does not require that customers have any right to make choices concerning safety issues affecting the general public. This ground for rehearing is denied.

(16) The eleventh assignment of error contends that the Commission erred in finding that approval of the stipulation will not violate state policy. USP accuses the Commission of failing to "consult" Section 4905.91, Revised Code. USP offers that this section grants the Commission certain powers over intrastate gas pipelines but "none involve the transfer of responsibility over customer service lines from a nonregulated entity to a natural gas company." USP also asserts that the Commission failed to explain "how it could assert jurisdiction over out-of-state non-customer land owners and under what authority it could create a new monopoly over what has previously been non-jurisdictional property." (USP application for rehearing at 28.)

Columbia counters that a statute's silence on a particular issue does not mean that such issue would violate state policy. According to Columbia, that the statute allows the Commission to adopt rules relating to pipeline safety tends to support the appropriateness of the Commission's action. (Columbia memorandum contra at 11-12.)

We agree with Columbia's reasoning that the fact that the law does not specifically address the transfer of responsibility of customer service lines does not imply its prohibition. We also note that Section 4905.91, Revised Code, begins with a statement that the included powers are granted "[f]or the purpose of protecting the public safety with respect to intrastate pipe-line transportation . . .." Thus, public safety is clearly part of the policy of the state. Further, as to USP's contention that we are attempting to assert jurisdiction

over nonregulated customers and out-of-state land-owners, we will repeat that we are merely asserting jurisdiction over Columbia. We are regulating the means by which it is to provide gas service and assure pipeline safety. This is clearly within our statutory jurisdiction under Chapter 4905., Revised Code. This assignment of error is denied.

(17) USP's twelfth assignment of error states that we erred in failing to require that notice of this case and the hearing be provided to plumbers, warranty service providers, and property owners because of the impact on contract rights and property rights that are affected by the proceeding. Recognizing that the case was not brought under a statute that required such notice, USP nevertheless argues that it was unreasonable for the Commission to adversely affect the businesses of many Ohio companies without at least giving notice to those affected. (USP application for rehearing at 29.)

Innumerable similar examples exist in which Commission decisions impact persons or entities that were neither parties to a Commission proceeding nor individually notified of its existence. The law does not require such notice in this case and we do not believe that it was unreasonable to proceed without such notice. Rehearing on this ground is denied.

(18) The thirteenth ground for rehearing complains that there was no evidence showing that Columbia has the managerial ability or experience to manage the repair and replacement of hazardous customer service lines. USP notes that neither Columbia witnesses nor staff witness testified on this subject. USP believes that the Commission should have made such a determination prior to transferring responsibility to Columbia. (USP application for rehearing at 29-30.)

Columbia disagrees, pointing out that its witness Ramsey testified that, in 2006 alone, Columbia repaired 1, 652 leaks on its bare steel lines. It also points out that Columbia has significantly greater experience and managerial ability than USP, as it has been repairing and replacing company service lines for decades and it is responsible for inspecting plumbers' repairs. (Columbia memorandum contra at 12-13.)

In light of Columbia's position as a major provider of gas service in the state of Ohio and based on our longstanding regulatory oversight of Columbia, we are confident that Columbia has managerial ability or experience sufficient to repair hazardous customer service lines. In addition, we find that the fact that the record demonstrates its repair of 1,652 leaks on similar lines during 2006 alone is sufficient to evidence such abilities. This ground for rehearing is denied.

(19) USP's last assignment of error states that the decision was not supported by the manifest weight of the evidence. It contends that the direct testimony of several witnesses and the cross-examination of others were ignored. (USP application for rehearing at 30.) The Commission considered all evidence before it in reaching its determinations. This ground for rehearing is denied.

(20) Columbia's application for rehearing cites one assignment of error. It suggests that the Commission reconsider its directive that reimbursement between November 24, 2006, and April 9, 2008, be limited to customers with prone-to-failure risers who replace such risers and an associated service line with a hazardous leak. Columbia points out that the stipulation supplemented the Commission's prior order "by including reimbursement for service line repairs and replacements not associated with prone to failure risers *in addition* to reimbursement for service line repairs and replacements associated with prone to failure risers." (Columbia application for rehearing at 5 [emphasis in original].) Columbia attempts to convince the Commission that this approach is consistent with its prior orders.

USP, in its memorandum contra Columbia's application for rehearing, points out that Columbia's reimbursement of customers for repairs previously made to hazardous service lines that are not associated with prone-to-failure risers would increase the cost of this program and notes that it provides no estimates of the extent of such increase. Columbia also, according to USP, provides no policy reason for expanding the retroactive reimbursement program. USP asserts that the Commission's opinion and order is clear that the reimbursement for previous repairs only applied to prone-to-failure risers and associated service lines with hazardous leaks.

We agree with USP on this issue. Our July 11, 2007, entry allowed Columbia to repair not only prone-to-failure risers but also

hazardous service lines, regardless of whether those lines were associated with prone-to-failure risers. Together with that authority, we required reimbursement of customers who arranged for the repair of these items themselves. On rehearing of that entry, we limited Columbia's authority and its reimbursement obligation to prone-to-failure risers and associated hazardous customer service lines. Columbia now attempts to argue that, in such entry on rehearing, we only limited its authority but did not change the reimbursement obligation. It is nonsensical to suggest that we would have required Columbia to reimburse customers for repairs that it was not otherwise obligated to undertake itself. Clearly, the reimbursement obligation was limited to the same extent as the repair authority. We did not determine whether or not to grant Columbia the authority to repair hazardous customer service lines that are not associated with prone-to-failure risers until the issuance of the opinion and order in this case. Therefore, we see no logical reason to allow or require Columbia to reimburse customers for such repairs prior to our decision. Rehearing on this ground is denied.

(21) Arguments for rehearing not discussed in this second entry on rehearing have been adequately considered by the Commission in its opinion and order and are being denied.

(22) With regard to its April 23, 2008, motion for stay, USP contends that the Commission's grant of a stay would avoid significant economic harm to warranty providers such as USP and to independent plumbers in the event that the Commission reaches a different conclusion on rehearing. If, on the other hand, the opinion and order is affirmed on rehearing, the stay would, according to USP, provide an opportunity for notice and coordination of messages to customers, thereby avoiding confusion and uncertainty. USP also notes that a stay would permit notice to plumbers who are certificated the Department of Transportation that they may no longer repair or replace customer service lines in Columbia's territory. The motion for a stay specifically excludes repair or replacement of prone-to-failure risers.

USP contends that the most important factor that the Commission must consider in determining whether to grant a motion to stay is the harm that could be suffered by the moving party if relief is not granted. In addition, it notes that the Commission should also consider likelihood of success on the merits, substantial harm to

other parties if the stay is granted, and whether the stay would serve the public interest. USP believes that warrantors will suffer significant harm if the stipulation is implemented. It also is concerned that poor communication to the public about this change will harm plumbers, contractors, and customers. USP also asserts that Columbia will suffer little harm if the motion is granted, as it would just preserve the status quo for a period of time. USP argues that there is no imminent threat to public safety that would prevent the Commission from allowing resolution of issues prior to implementation.

(23) Columbia's memorandum contra the motion to stay first asserts that USP applied the incorrect test in its argument in favor of the motion. Columbia states that a more recent test describes the most important factor as the interest of the public. Columbia states that the other factors to be considered are whether there has been a strong showing that the moving party is likely to prevail on the merits, whether the moving party has shown that it would suffer irreparable harm absent the stay, and whether the stay would cause substantial harm to other parties.

(24) Regardless of the test to be adopted, we find no basis for granting the extended stay requested by USP, either of implementation of the opinion and order or of approval of new tariffs. Both were requested for a period lasting until after the second monthly billing cycle following our issuance of this entry on rehearing. We find little likelihood of success on the merits, especially in light of our ruling today with regard to the applications for rehearing. As we have found that the changes we have ordered are in the interest of public safety, we also find that public safety requires implementation in a reasonably expeditious fashion. We also note that it should take little time for DOT OQ plumbers to be notified of the changes that have been approved. Therefore, while no tariffs have yet been filed by Columbia and, therefore, no tariff approval is pending, we will agree that any tariffs that may be approved by the Commission to effectuate the matters covered by this proceeding will not become effective any earlier than June 18, 2008. This period of time will allow for necessary notifications to be made.

It is, therefore,

ORDERED, That the stipulation be admitted into evidence in this proceeding. It is, further,

ORDERED, That USP's application for rehearing be granted in part and denied in part. It is, further,

ORDERED, That the parties comply with the provisions of this entry on rehearing. It is, further,

ORDERED, That Columbia's application for rehearing be denied. It is, further,

ORDERED, That USP's motion for a stay be granted to the extent set forth in this entry on rehearing. It is, further,

ORDERED, That Columbia submit, to staff, quarterly reports of its progress in replacing prone-to-failure risers. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

JWK;geb

Entered in the Journal
JUN 0 4 2008

Reneé J. Jenkins
Secretary

§ 192.617 Investigation of failures.

Each operator shall establish procedures for analyzing accidents and failures, including the selection of samples of the failed facility or equipment for laboratory examination, where appropriate, for the purpose of determining the causes of the failure and minimizing the possibility of a recurrence.

§ 192.619 Maximum allowable operating pressure: Steel or plastic pipelines.

(a) Except as provided in paragraph (c) of this section, no person may operate a segment of steel or plastic pipeline at a pressure that exceeds the lowest of the following:

(1) The design pressure of the weakest element in the segment, determined in accordance with subparts C and D of this part. However, for steel pipe in pipelines being converted under § 192.14 or uprated under subpart K of this part, if any variable necessary to determine the design pressure under the design formula (§ 192.105) is unknown, one of the following pressures is to be used as design pressure:

(i) Eighty percent of the first test pressure that produces yield under section N5.0 of Appendix N of ASME B31.8, reduced by the appropriate factor in paragraph (a)(2)(ii) of this section; or

(ii) If the pipe is 12¾ inches (324 mm) or less in outside diameter and is not tested to yield under this paragraph, 200 p.s.i. (1379 kPa).

(2) The pressure obtained by dividing the pressure to which the segment was tested after construction as follows:

(i) For plastic pipe in all locations, the test pressure is divided by a factor of 1.5.

(ii) For steel pipe operated at 100 p.s.i. (689 kPa) gage or more, the test pressure is divided by a factor determined in accordance with the following table:

Class location	Factors [1], segment—		
	Installed before (Nov. 12, 1970)	Installed after (Nov. 11, 1970)	Converted under § 192.14
1	1.1	1.1	1.25
2	1.25	1.25	1.25
3	1.4	1.5	1.5
4	1.4	1.5	1.5

[1] For offshore segments installed, uprated or converted after July 31, 1977, that are not located on an offshore platform, the factor is 1.25. For segments installed, uprated or converted after July 31, 1977, that are located on an offshore platform or on a platform in inland navigable waters, including a pipe riser, the factor is 1.5.

(3) The highest actual operating pressure to which the segment was subjected during the 5 years preceding July 1, 1970 (or in the case of offshore gathering lines, July 1, 1976), unless the segment was tested in accordance with paragraph (a)(2) of this section after July 1, 1965 (or in the case of offshore gathering lines, July 1, 1971), or the segment was uprated in accordance with subpart K of this part.

(4) The pressure determined by the operator to be the maximum safe pressure after considering the history of the segment, particularly known corrosion and the actual operating pressure.

(b) No person may operate a segment to which paragraph (a)(4) of this section is applicable, unless over-pressure protective devices are installed on the segment in a manner that will prevent the maximum allowable operating pressure from being exceeded, in accordance with § 192.195.

(c) Notwithstanding the other requirements of this section, an operator may operate a segment of pipeline found to be in satisfactory condition, considering its operating and maintenance history, at the highest actual operating pressure to which the segment was subjected during the 5 years preceding July 1, 1970, or in the case of offshore gathering lines, July 1, 1976, subject to the requirements of § 192.611.

[35 FR 13257, Aug. 19, 1970]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 192.619, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

§ 192.621 Maximum allowable operating pressure: High-pressure distribution systems.

(a) No person may operate a segment of a high pressure distribution system

(1) In business districts, at intervals not exceeding 4½ months, but at least four times each calendar year; and

(2) Outside business districts, at intervals not exceeding 7½ months, but at least twice each calendar year.

[35 FR 13257, Aug. 19, 1970, as amended by Amdt. 192–43, 47 FR 46851, Oct. 21, 1982; Amdt. 192–78, 61 FR 28786, June 6, 1996]

§ 192.723 Distribution systems: Leakage surveys.

(a) Each operator of a distribution system shall conduct periodic leakage surveys in accordance with this section.

(b) The type and scope of the leakage control program must be determined by the nature of the operations and the local conditions, but it must meet the following minimum requirements:

(1) A leakage survey with leak detector equipment must be conducted in business districts, including tests of the atmosphere in gas, electric, telephone, sewer, and water system manholes, at cracks in pavement and sidewalks, and at other locations providing an opportunity for finding gas leaks, at intervals not exceeding 15 months, but at least once each calendar year.

(2) A leakage survey with leak detector equipment must be conducted outside business districts as frequently as necessary, but at least once every 5 calendar years at intervals not exceeding 63 months. However, for cathodically unprotected distribution lines subject to § 192.465(e) on which electrical surveys for corrosion are impractical, a leakage survey must be conducted at least once every 3 calendar years at intervals not exceeding 39 months.

[35 FR 13257, Aug. 19, 1970, as amended by Amdt. 192–43, 47 FR 46851, Oct. 21, 1982; Amdt. 192–70, 58 FR 54528, 54529, Oct. 22, 1993; Amdt. 192–71, 59 FR 6585, Feb. 11, 1994; Amdt. 192–94, 69 FR 32895, June 14, 2004; Amdt. 192–94, 69 FR 54592, Sept. 9, 2004]

§ 192.725 Test requirements for reinstating service lines.

(a) Except as provided in paragraph (b) of this section, each disconnected service line must be tested in the same manner as a new service line, before being reinstated.

(b) Each service line temporarily disconnected from the main must be tested from the point of disconnection to the service line valve in the same manner as a new service line, before reconnecting. However, if provisions are made to maintain continuous service, such as by installation of a bypass, any part of the original service line used to maintain continuous service need not be tested.

§ 192.727 Abandonment or deactivation of facilities.

(a) Each operator shall conduct abandonment or deactivation of pipelines in accordance with the requirements of this section.

(b) Each pipeline abandoned in place must be disconnected from all sources and supplies of gas; purged of gas; in the case of offshore pipelines, filled with water or inert materials; and sealed at the ends. However, the pipeline need not be purged when the volume of gas is so small that there is no potential hazard.

(c) Except for service lines, each inactive pipeline that is not being maintained under this part must be disconnected from all sources and supplies of gas; purged of gas; in the case of offshore pipelines, filled with water or inert materials; and sealed at the ends. However, the pipeline need not be purged when the volume of gas is so small that there is no potential hazard.

(d) Whenever service to a customer is discontinued, one of the following must be complied with:

(1) The valve that is closed to prevent the flow of gas to the customer must be provided with a locking device or other means designed to prevent the opening of the valve by persons other than those authorized by the operator.

(2) A mechanical device or fitting that will prevent the flow of gas must be installed in the service line or in the meter assembly.

(3) The customer's piping must be physically disconnected from the gas supply and the open pipe ends sealed.

(e) If air is used for purging, the operator shall insure that a combustible mixture is not present after purging.

(f) Each abandoned vault must be filled with a suitable compacted material.

4901:1-16-01 Definitions.

As used in this chapter:

(A) "C.F.R." means code of federal regulations.

(B) "Chief" means the chief of the gas pipeline safety section of the commission or his/her designee.

(C) "Commission" means the public utilities commission of Ohio.

(D) "Contiguous property" includes, but is not limited to, a manufactured home park as defined in section 3733.01 of the Revised Code; a public or publicly subsidized housing project; an apartment complex; a condominium complex; a college or university; an office complex; a shopping center; a hotel; an industrial park; and a race track.

(E) "Gas" means natural gas, flammable gas, or gas which is toxic or corrosive.

(F) "Gathering line" is determined in the same manner as in 49 C.F.R. 192.8 as effective on the date referenced in paragraph (D) of rule 4901:1-16-02 of the Administrative Code.

(G) "GPS" means gas pipeline safety.

(H) "GPS proceeding" means a commission-ordered investigation of any incident, violation, or possible noncompliance with the pipeline safety code.

(I) "Incident" means an event that involves a release of gas from an intrastate gas pipeline facility and results in any of the following:

(1) A death.

(2) Personal injury requiring inpatient hospitalization.

(3) Estimated property damage of fifty thousand dollars or more, which is the sum of:

(a) The estimated cost of repairing and/or replacing the physical damage to the pipeline facility.

(b) The cost of material, labor and equipment to repair the leak, including meter turn-off, meter turn-on and light up.

(c) The cost of gas lost by an operator or person or both. Cost of gas lost shall not include the cost of gas in a planned operational release of gas by an operator, which is performed in compliance with the pipeline safety code.

(d) The estimated cost of repairing and/or replacing other damaged property of the operator or others, or both.

(J) "Intrastate gas pipeline facility" includes any new and existing pipelines, rights-of-way, and any

equipment, facility, or building used in the transportation of gas either wholly or partly within this state or from an interstate gas pipeline in Ohio to a direct sales customer in Ohio buying gas for its own consumption.

(K) "Master meter system" means a pipeline system that distributes gas to two or more buildings or residences within a contiguous property where the operator purchases gas from an outside source for resale to consumers, including tenants. Such pipeline system supplies consumers who purchase the gas directly through a meter, or by paying rent, or by other means. Master meter systems shall exclude pipelines within a manufactured home or a building, except it shall include service lines.

(L) "Operator" means:

(1) A gas company as defined by division (A)(5) of section 4905.03 of the Revised Code.

(2) A natural gas company, including a producer of gas which does business as a natural gas company pursuant to division (A)(6) of section 4905.03 of the Revised Code.

(3) A pipeline company, when engaged in the business of transporting gas by pipeline as defined by division (A)(7) of section 4905.03 of the Revised Code.

(4) A public utility that is excepted from the definition of "public utility" under division (B) or (C) of section 4905.02 of the Revised Code, when engaged in supplying or transporting gas by pipeline within this state.

(5) Any person who owns, operates, manages, controls, leases, or maintains an intrastate gas pipeline facility or who engages in the transportation of gas. This includes but is not limited to a person who owns, operates, manages, controls, leases, or maintains a master meter system within this state.

"Operator" does not include an ultimate consumer who owns a service line on the real property of that ultimate consumer.

(M) "Person" means any individual, corporation, business trust, estate, trust, partnership, association, firm, joint venture or municipal corporation and includes any trustee, receiver, assignee, or personal representative thereof.

(N) "Pipeline" means all parts of those physical facilities through which gas moves in transportation, including pipe, valves, and other appurtenance attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies.

(O) "Pipeline safety code" means 49 C.F.R., 40, 191, 192, and 199 as effective on the date referenced in paragraph (D) of rule 4901:1-16-02 of the Administrative Code; sections 4905.90 to 4905.96 of the Revised Code; this chapter; and commission orders issued thereunder.

(P) "Safety audit" is defined as set forth in section 4905.90 of the Revised Code.

(Q) "Safety inspection" includes the following inspections, surveys and testing of a master meter system which are authorized by the pipeline safety code, and includes mapping (if accurate maps are

not available from the operator) and pipe locating (if the operator could not locate pipelines in its system).

(1) Testing of cathodic protection of metallic pipelines.

(2) Sampling of combustible gas to determine the proper concentration of odorant in distribution pipelines, unless records of the natural gas company performing the safety inspection show that the concentration of odorant in the gas transported to or near the master meter system conforms with the pipeline safety code.

(3) Gas leak surveys.

(4) Inspection and servicing of pressure regulating devices.

(5) Testing or calculation of required capacity of pressure relief devices.

(6) Inspection and servicing of critical valves.

(7) Inspection of underground vaults housing pressure regulating/limiting equipment and ventilating equipment.

(R) "Staff" means the commission employees to whom responsibility has been delegated for enforcing and administering the GPS requirements contained in this chapter and the Revised Code.

(S) "Synthetic Natural Gas" means gas formed from feedstocks other than natural gas, including coal, oil or naptha.

(T) "Transportation of gas" means:

(1) The gathering, transmission, or distribution of gas by pipeline, or the storage of gas within this state.

(2) The movement of gas through regulated gathering lines, but does not include the gathering of gas in those rural locations that are located outside the limits of any incorporated or unincorporated city, town, or village, or any other designated residential or commercial area (including a subdivision, business, shopping center, or community development) or any similar populated area.

(U) "U.S.C." means United States code.

Effective: 06/20/2008

R.C. 119.032 review dates: 09/30/2009

Promulgated Under: 111.15

Statutory Authority: 4905.91

Rule Amplifies: 4905.90

Prior Effective Dates: 2/1/91, 10/13/94, 1/6/05, 6/17/06, 8/24/07

U.S. Constitution - Article 1 Section 10

Article 1 - The Legislative Branch
Section 10 - Powers Prohibited of States

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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.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. Constitution - Amendment 5

Amendment 5 - Trial and Punishment, Compensation for Takings

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No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

being imposed on the governor by statute, it is not an executive function, but is a ministerial duty: State ex rel. Tranger v. Nash, 66 Ohio St. 612, 64 N.E. 558 (1902).

Manner in which officer may be elected

The general assembly, under this section, may direct by law the manner in which any officer, not otherwise provided for by the state or national constitution, shall be elected or appointed; whether such officer shall be elected or appointed is left to the discretion of the general assembly: State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 102 (1876).

Municipal court, creation of

The legislative act providing for a municipal court for the city of Cincinnati (103 v 279) with a presiding judge with functions, emoluments and term of office different from that of the other judges of that court is not creating a new office or exercising appointive power, and is therefore valid: State ex rel. Fox v. Yeatman, 89 Ohio St. 44, 105 N.E. 74 (1913).

Political party, grant of power to

The enlargement of the powers and imposition of new duties upon the members of the central committee of a political party are a constitutional grant of power and not an appointment of an individual to an office by the general assembly, which is prohibited by OConst art II, § 27: State ex rel. Hayes v. Jennings, 173 Ohio St. 370, 19 Ohio Op. 2d 314, 182 N.E.2d 546 (1962).

Power of appointment

The power to remove is ordinarily a concomitant of the power of appointment which by virtue of OConst art II, § 27, the general assembly ordinarily cannot exercise. However, inasmuch as OConst art III, § 21, expressly allows the conferring of special appointive power upon the senate to advise and consent to appointments to state office, the other portion of the appointive power, that is the power to remove, can also reasonably be conferred upon the senate: Stebbins v. Rhodes, 56 Ohio St. 2d 239, 10 Ohio Op. 3d 387, 383 N.E.2d 605 (1978).

Representative-at-large, vacancy

Where a vacancy in the office of representative-at-large is created by the death of the incumbent, and the special election to fill the vacancy is fixed by the governor on the date of the succeeding general election, mandamus will not be issued to control the exercise of discretion by the governor: State ex rel. Armstrong v. Davey, 130 Ohio St. 160, 4 Ohio Op. 38, 198 N.E. 180 (1935).

§ 28 Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Cross-References to Related Sections

Conservancy districts, curative provisions, RC § 6101.43.
Cure of errors and defects, RC § 2719.01 et seq.
Deeds and mortgages, curative provisions, RC §§ 5301.07, 5301.30, 5301.45.
Drainage proceedings, curative provisions, RC § 6103.23.
Sanitary districts, curative provisions, RC § 6115.44.
Statute presumed prospective, RC § 1.48.

Comparative Legislation

States prohibited from passing ex post facto laws or laws impairing the obligation of contracts, USConst art I, § 10

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Research Aids

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Am-Jur2d: Const L §§ 260-267
Retroactive laws prohibited:
O-Jur3d: Cancel & Ref Inst § 83; Char § 51; Const. L §§ 505, 557, 559, 562, 567, 571, 573, 583; Count, Twp & Mun §§ 4, 618; Deeds § 179; Energy § 35; Lim & L § 7; Stat § 344; Tax §§ 167, 169; Workers' Comp § 9
Am-Jur2d: Const L §§ 634-681

ALR

Giving superiority to special or local assessment lien over earlier private lien or mortgage as violating constitutional prohibition of retroactive laws. 75 ALR2d 1127.
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Validity of retroactive operation of statute imposing time limitation upon action to vacate adoption decree. 83 ALR2d 946.
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Law Review

Constitutionality of legislation remitting penalties on delinquent taxes. Comment. 4 OSLJ 191 (1938).
Driving under the influence of alcohol in Ohio after Senate Bill 432 — the prosecutor's viewpoint. Ronald J. O'Brien. 15 ToledoLRev 171 (1983).
Obligations of contracts: intent and distortion. Robert C. Palmer. 37 CaseWResLRev 631 (1987).
Ohio's attempt to circumvent the concept of intentional tort: enactment of Revised Code Section 4121.80. Comment. 16 CapitalULRev 279 (1986).
Ohio's comparative negligence statute: given prospective application in Viers v. Dunlap. Note. 12 CapitalULRev 639 (1983).
Public contracts, private contracts, and the transformation of the constitutional order. Thomas W. Merrill. 37 CaseWResLRev 597 (1987).
The retroactive application of Ohio's comparative negligence statute — a golden opportunity. Richard A. Wise. 9 Ohio N.U.L. Rev. 63 (1982).
The unconstitutionality of sovereign immunity in Ohio — [illegible] stand for the illegitimate king. Commentary. [illegible] ToledoLRev 77 (1986).
Viers v. Dunlap: prospective application of comparative negligence. Case note. 10 Ohio N.U.L. Rev. 213 (1983).

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intoxicating liquors shall or shall not be sold in such district, and providing for another determination at the expiration of such period, do not violate this section: Lloyd v. Dollison, 3 Ohio C.C. (n.s.) 328, 13 Ohio Cir. Dec. 571 (1902).

Permission for animals named to run at large

The authority conferred upon commissioners of counties and trustees of townships to grant general and special permission for animals named to run at large, as conferred by § 2, of the act of April 13, 1865 (62 v 185; see GC § 5811 [RC § 951.04] et seq), was within the scope of legislative power, and does not conflict with this section: Fox v. Fox, 24 Ohio St. 335 (1873).

Power of suspending laws

Only the general assembly may exercise the power of suspending laws. The operation of a section of the General Code may be suspended by the terms of a provision properly included in an appropriation act during the life of such act, which cannot exceed two years: 1927 OAG p. 718 (1927).

§ 19 Inviolability of private property.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Cross-References to Related Sections

Appropriation of property, RC § 163.01 et seq.
Eminent domain proceedings for registered land, RC § 5309.71 et seq.

Ohio Constitution

Appropriation of right of way by corporation, OConst art XIII, § 5.

Comparative Legislation

Due process, USConst amend V; USConst amend XIV

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Appropriation of property. **2 Ohio Civ. Prac.** Ch. 21
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Property rights. **1 Anderson Fam. L.** §§ 12.1-12.9
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Will, power to make as protected by the constitution. **1 Page on Wills** § 3.1 et seq
Will, power to revoke. **2 Page on Wills** § 21.1

Research Aids

Private property to be held inviolate:
O-Jur3d: Const L §§ 277, 426, 484, 485, 490, 491, 497-502, 504, 505; Em Dom §§ 2, 11, 13, 31, 36, 39, 40, 48, 101, 103, 105, 109, 113, 117, 121, 122, 135, 146, 186, 240, 255, 256, 260, 263, 275, 277, 278, 350, 359, 365, 378, 474; Highways §§ 77, 244, 250, 253, 262, 281, 282, 364, 502; Prop § 20; Sch §§ 32, 201; Spec A § 13; Tax § 1047; Water §§ 72, 332, 423, 536
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ALR

Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway. 42 ALR3d 13.
Compensation for condemning public utility plant. 68 ALR2d 392.
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Measure and elements of damage for limitation of access caused by conversion of conventional road into limited-access highway. 42 ALR3d 148.
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4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall, when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such section upon request of the public utilities commission by mandamus or other appropriate proceedings.

Effective Date: 07-01-1996

4929.02 Policy of state as to natural gas services and goods.

(A) It is the policy of this state to, throughout this state:

(1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

(2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;

(4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;

(5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;

(6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;

(7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;

(8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;

(9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;

(10) Facilitate the state's competitiveness in the global economy;

(11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

Effective Date: 06-26-2001; 2008 SB221 07-31-2008

4929.11 Automatic adjustment mechanism or device for rates.

Nothing in the Revised Code prohibits, and the public utilities commission may allow, any automatic adjustment mechanism or device in a natural gas company's rate schedules that allows a natural gas company's rates or charges for a regulated service or goods to fluctuate automatically in accordance with changes in a specified cost or costs.

Effective Date: 09-17-1996

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Tariffs to Recover Through An Automatic Adjustment Clause Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment	)	**Case No. 07-478-GA-UNC**

APPLICATION FOR REHEARING OF
UTILITY SERVICE PARTNERS, INC. FROM APRIL 9, 2008 OPINION AND ORDER

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BEFORE THE
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In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Tariffs to Recover Through An Automatic Adjustment Clause Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment	))))))))	**Case No. 07-478-GA-UNC**

APPLICATION FOR REHEARING OF
UTILITY SERVICE PARTNERS, INC. FROM APRIL 9, 2008 OPINION AND ORDER

Pursuant to Section 4903.10, Revised Code and Rule 4901-1-35 of the Ohio Administrative Code, Utility Service Partners, Inc. ("USP"), an intervenor in this case, files this Application for Rehearing from the Commission Opinion and Order approving the Amended Stipulation. USP submits that the Opinion and Order is unreasonable and unlawful for the following reasons:

A. **The Commission lacks statutory authority to create a monopoly over the repair and replacement of Design-A risers.**

B. **The Commission has failed to establish a safety issue exists as to non-utility customer service lines without Design-A risers, and lacks the authority to establish a monopoly as to the repair of such pipelines.**

C. **The Commission unreasonably and unlawfully found that the Amended Stipulation will not be an unconstitutional substantial impairment of contracts.**

D. **The Commission unreasonably and unlawfully found that adoption of the Amended Stipulation would not result in a taking of property.**

E. **The Commission unreasonably and unlawfully relied on statements contained in a reply brief and not within the record to conclude that Columbia has notified individual members of the public at risk of the Design-A riser.**

F. **The Commission unreasonably and unlawfully failed to specify a deadline for the replacement of risers.**

G. **The Commission unreasonably and unlawfully relied on the Riser Material Plan ("RMP") as it is not part of the record.**

H. **The Commission unreasonably and unlawfully found that Columbia's proposal as to the lack of regularity of inspections under the Amended Stipulation was reasonable.**

I. **The Commission unreasonably and unlawfully failed to address both the timing and the nature of the subject matter of the Amended Stipulation before considering whether serious bargaining occurred.**

J. **The Commission unreasonably and unlawfully found that the Amended Stipulation, considered as a whole, will benefit rate payers and the public.**

K. **The Commission unreasonably and unlawfully found that the approval of the Amended Stipulation will not violate state policy.**

L. **The Commission unreasonably and unlawfully failed to require that notice of this case and hearing be provided to plumbers, warranty service providers, and property owners because of the impact on contract rights and property rights that are affected by the Commission's change in policy.**

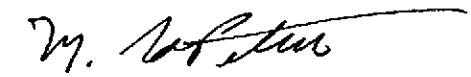
M. **There was no evidence showing that Columbia has the managerial ability or experience to manage the repair and replacement of hazardous customer service lines.**

N. **The Commission's decision is not supported by the manifest weight of the evidence.**

A Memorandum In Support setting forth the specific grounds for rehearing is attached.

WHEREFORE, Utility Service Partners, Inc. respectfully requests that the Commission grant its application for rehearing.

Respectfully submitted,



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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of Tariffs to Recover Through An Automatic Adjustment Clause Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment	))))))))	**Case No. 07-478-GA-UNC**

MEMORANDUM IN SUPPORT

On April 9, 2008, the Commission issued an Opinion and Order in this case. The Commission, among other things, adopted an Amended Stipulation Recommendation in this case. The adoption of the Amended Stipulation and Recommendation is unreasonable and unlawful for a variety of reasons.

I. ARGUMENT

A. The Commission lacks statutory authority to create a monopoly over the repair and replacement of Design-A risers.

The Commission is a creature of the General Assembly and may exercise only that authority affirmatively conferred upon it by statute. Penn Central Trans. Co. v. Public Util. Comm. (1973), 35 Ohio St. 2d 97, 64 Ohio Op. 2d 60, 298 N.E. 2d 587. The General Assembly gave specific powers to the Commission in the area of pipeline safety. This authority, however, is limited to the regulation and supervision of utilities. The General Assembly did not grant the Commission authority to regulate plumbers, contractors and pipe fitters as they build and repair non-utility owned pipelines. Specifically, the General Assembly did not empower the Commission to create a state franchised monopoly over the repair and replacement of non-utility, customer owned service lines. Paragraph 20 of the Amended Stipulation, filed after the close of

the record in the matter at bar, however, does exactly that. By authority of the Public Utilities Commission, it forbids USP or any contractor using properly certified plumbers from repairing or replacing non-utility owned customer service lines. Even more extreme, Paragraph 20 of the Stipulation forbids the property owner from repairing its own pipeline after February 29, 2008.

The powers of the Public Utilities Commission of Ohio as to intrastate gas pipelines are set forth in Section 4905.91, Revised Code. In its April 9, 2008 Opinion and Order, the Commission never analyzed this statute to determine whether it had the authority to adopt the grant of an exclusive monopoly to Columbia called for in paragraph 20 of the Amended Stipulation and Recommendation. Reviewing the six subsections of Section 4905.91, Revised Code now reveals none of the sections even remotely authorize the Commission to create a monopoly as to the repair and replacement of non-utility property. Section 4905.91(A)(1), Revised Code requires the Commission to adopt and, possibly amend or rescind, rules concerning pipe-line safety, drug testing and enforcement procedures. This case did not involve the adoption or amendment of rules. Subsection (A) (2) requires the Commission to make certifications and reports to the United States Department of Transportation. There was no issue in this case about the ability of the Commission to make certifications and reports to the United States Department of Transportation nor any indication that the monopoly granted by paragraph 20 of the Stipulation emanates from the United State Department of Transportation.

Subsection (B) (1) allows the Commission to investigate any service, act, practice, policy or omission by <u>any operator</u> to determine compliance. An operator of a pipeline system under Revised Code Section would be a utility under Section 4905.03 (A)(6) and (7), Revised Code; an operator is one who supplies natural gas service or delivers natural gas through tubes or piping. Subsection (B) (2) and (3) allows the Commission to investigate any intrastate pipe-line

transportation facility to determine if it is hazardous to life or property. The Commission did this in Case No. 05-463-GA-COI with respect to Design-A risers, but the Commission investigation did not involve plumbers, pipe fitters or contractors – only utilities that operated pipeline systems.

Subsections (B)(4) and (5) allow the Commission to enter into and perform contracts or agreements with the United States Department of Transportation and to accept grants-in aid funds and reimbursements provided for or made available to Ohio by the federal government to carry out the Natural Gas Pipeline Safety Act or to enforce Sections 4905.90 through 4905.96, Revised Code. There was nothing in this case which involved the Commission entering into and performing contracts or agreements with the United States Department of Transportation or having to accept grants-in aid funds and reimbursements provided for or made available by the federal government. Further, there is no statutory authorization for the Commission to ban USP and the hundreds of other contractors employing Department of Transportation certified plumbers or the plumbers working independently from repairing non-utility owned pipelines in this state. Subsection (C) of 4905.91, Revised Code deals with the regulation of gathering lines which were not at issue in this case.

The fact that the Commission lacks authority to regulate plumbers, contractors and the public as to the construction, repair and maintenance of customer owned service lines does not preclude the Commission from adequately protecting the public. The Commission, in its September 12, 2007 Entry on Rehearing[1] in this proceeding required Columbia to "inform customers who are found to have risers prone to failure that they have such a riser." This language is crystal clear – Columbia was to tell the property owners who actually have Design-A

[1] Finding 20.

risers that they are at risk. (see Section E which discusses whether this requirement has been fulfilled). The September 12 Entry on Rehearing then provided that property owners, at risk by virtue of having a Design-A riser, were free to use USP, or any other Department of Transportation plumber to make the repairs, and Columbia, in accordance with its current rules, would inspect and approve the repair. Finally, the property owner could apply to Columbia for reimbursement so the Commission could achieve its articulated goal of socializing the cost.

Paragraph 20 of the Stipulation reverses the Commission's September 12, 2007 Entry on Rehearing in one fundamental aspect; after February 29, 2008, it prohibits anyone except Columbia from making the repair – including the owner of the customer service line. While Subsection (B)(2) can be read to authorize safety investigations and general supervisory statutes authorize the ordering of repairs, there is no authority for the Commission to exclude otherwise qualified contractors or plumbers from making repairs to customer owned service lines.

Further, the Amended Stipulation actually decreases safety. Columbia and the signatory parties have agreed upon a three year time frame to fix or repair all the Design-A risers. Thus, under the terms of the Amended Stipulation, after February 29, 2008 a landowner must wait until Columbia gets around to repairing or replacing its Design-A riser. This could take as long as three years. If safety is truly important, the Commission should allow the property owner to replace Design-A risers now and into the future. If the Commission believes socialization of the cost is in the public interest, it should require Columbia to reimburse property owners for such repair or replacement work as was done in the September 12, 2007 Entry. Eliminating the February 29, 2008 deadline for reimbursement for those who had Design-A risers repaired will allow customers to avoid the bottleneck monopoly that the Commission has created and will

allow landowners to have the latitude to fix their Design-A risers sooner and restore safety quicker.

In summary, Section 4905.91, Revised Code does not provide the Commission with the authority to create a monopoly over the repair and replacement of Design-A risers. The public is better served if, in addition to Columbia repairing the Design-A risers, home and property owners not be barred from making the repairs to risers by using Columbia approved DOT certified independent plumbers. The Commission must grant rehearing on this issue.

B. The Commission has failed to establish a safety issue exists as to non-utility customer service lines without Design-A risers, and lacks the authority to establish a monopoly as to the repair of such pipelines.

With respect to the creation of a monopoly over the repair and replacement of hazardous non-utility customer service lines, Columbia and the signatory parties have proposed a solution in search of a problem. Unlike the situation with the Design-A risers, there has been no showing that a current problem exists with respect to non-Design-A customer service lines.

At page 29 of its Opinion and Order, the Commission states that "while service line leaks are generally not catastrophic, they are often categorized as hazardous and can present significant safety hazards and do have the potential to cause catastrophic damage to the customer's property or neighboring properties..." Based on that finding, the Commission found that it was appropriate and reasonable, in an effort to improve the level of public safety, to shift responsibility for maintenance and repair of service lines to Columbia, in addition to requiring Columbia to replace prone-to-failure risers. The Commission's findings as to customer service lines are unreasonable and unlawful because the Commission failed to weigh the evidence and recognize two entirely different situations.

With respect to the risers, the Commission conducted an investigation in Case No. 05-463-GA-COI and issued a Staff Report because there were several incidents including a fatality, a serious injury and substantial damage to property. The Commission retained a consultant and investigated the problem with risers, finding that Design-A risers presented a real risk to the public. Based on this investigation and analysis, the Commission ordered natural gas companies to take certain steps with respect to Design-A risers which are prone to fail. The failure of a Design-A riser has in fact resulted in a catastrophic situation involving combustion of large quantities of gas. This is a danger to the public and the Commission, relying upon the facts uncovered through its investigation, has properly moved to direct the replacement of such prone-to-failure risers.

In contrast, the Commission conducted no investigation of customer service lines. No consultant was retained to analyze the current state of customer service lines in Ohio that are owned by customers. (TR. IV, 245.) No one presented any evidence comparing the safety record in states where operators owned customer service lines with the safety record in Ohio and those states where customers owned the customer owned service lines. The Commission did not find that the current system is unsafe.

The Commission also failed to recognize the evidence in the record that shows that customer service lines decay over the years and that the development of the service line warranty industry and private ownership of customer service lines has worked well for over 80 years. (TR. I, 55-57.) The Commission failed to expressly find that the current system of customer ownership of customer service lines is deficient and is in need of improvement in the level of public safety.

Yet, the Commission states at page 29 that because service lines leaks "are often categorized as hazardous and can present significant safety hazards and do have the potential to cause catastrophic damage to the customer's property or neighboring properties, it is necessary to shift the responsibility for maintenance and repair of service lines to Columbia." The fact of the matter is that for over a century, society has recognized that service line leaks are rarely catastrophic, although service line leaks can be categorized as hazardous under Commission rules. This should not come as a revelation to the Commission or its Staff. But unlike the situation with the Design-A risers, the Commission has failed to identify a deficiency in the current system in Ohio of customer owned customer service lines that justifies creating a new monopoly for Columbia.

If the Commission is to order the same type of treatment for customer service lines that it has ordered for Design-A risers, it must do so based upon the record before it. The record does not justify the same type of treatment for customer service lines that the Commission has ordered for risers. The Commission's failure to distinguish between risers and customer service lines is unreasonable and unlawful. Rehearing must be granted.

Finally, if after a proper investigation conducted under Section 4905.91, Revised Code, the Commission does in fact find that non-Design-A customer service lines do create a safety hazard, it may order Columbia to repair them or for Columbia to socialize the cost, but it cannot grant Columbia a franchised monopoly to exclusively make all the repairs. Such would be *ultra vires* for as detailed in the above section the General Assembly has simply not granted such authority to the Commission.

C. The Commission unreasonably and unlawfully found that the Amended Stipulation will not be an unconstitutional substantial impairment of contracts.

The Commission has unreasonably and unlawfully misapplied the test in Energy Reserves Group, 459 U.S. 400, 411-412 (1983) on several levels.

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." Neither USP nor ABC nor IGS are entering a regulated industry. It is the Commission and its Staff that is attempting to extend their jurisdiction over an industry whose individual members have not previously been regulated. While USP, ABC and IGS are required to use qualified USDOT certified plumbers and materials from a Columbia approved materials list, none of the three have been subject to direct state regulation in this area. The Commission failed to consider this in its analysis.

At page 18 of its Opinion and Order, the Commission stated that "we cannot find impairment of contracts where the contracts themselves were not made available for our review." The Commission provides no rule or reason why the actual contracts themselves would have to be filed with the Commission. What would the Commission do with the 100,000 contracts if they were filed? Due process would not allow an off the record investigation and determination by the Commission. Proof as to the meaning and impact of the proposal to grant Columbia a monopoly over the repair of customer owned service lines is best determined by sworn testimony of credible witnesses who are familiar with the contracts and the industry. The record in the matter at bar 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. That if Columbia took sole responsibility for the maintenance, repair and replacement of customer service lines those 100,000 contracts would be worthless and that USP's Ohio operation would be put out of business (USP Exhibit 2, pp. 6 -8). 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 which allowed it exclusively to repair and replace all customer owned service lines in its service area we can say that all providers other than Columbia are excluded from that business. This the Commission admits on page 17 of the Opinion and Order where it noted that the proposal before it "would impair existing contracts to some extent". This inconsistency of position is unreasonable. To deny that USP has had its contracts impaired because it failed to file all 100,000 contracts when there is no requirement to do so is unlawful.

One of the criteria to be applied before accepting a Stipulation is the finding that no important regulatory principle or practice has been violated[2]. Once the facts have been presented that existing warranty service contracts will be impaired, there is 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 which prohibits states from passing laws impairing the obligations of contracts. The Commission unreasonably and unlawfully has transferred the burden of proof to USP.

At page 18 the Commission also erred in applying a standard 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

[2] Office of Consumers' Counsel v. Pub. Util. Comm., (1992) 64 Ohio St. 3d 123, at 126.

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 applying the "deprivation entirely of potential business" test.

The Commission also stated at page 18 of its Opinion and Order that USP has no assurance in one month that any given contract will be in place for the next month. Again, the Commission applies 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 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 also states that "the state's regulatory power with regard to pipeline safety must be implied in any contract relating to pipeline 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 looked at Columbia Gas customer service lines in this case and conducted no review or analysis of customer-owned services lines 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." 238 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 was 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. 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 Opinion and 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. As the Commission well knows, there are twenty-five 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 Commission should grant rehearing.

In addition, the Commission failed to properly apply this test by placing great weight on the fact that leaks in steel 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 customer service lines is a broad and general problem in Ohio[3]. 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 problem -- only stating that "leaks in customer service lines . . . can be a safety hazard." Opinion and Order, at p. 19. The Commission misunderstands and misapplies the test and rehearing should be granted.

There are other erroneous, unreasonable and unlawful statements made by the Commission on page 19 of its Opinion and Order. For example, the Commission states 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 for this statement. There is no evidence anywhere in the record where any

[3] Columbia witnessed Ramsey could not specifically recall any instances whatsoever of a catastrophic failure of a steel customer service line. TR. I, 49.

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.

The Commission also erroneously stated at page 19 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 existing approach, does in fact already have the opportunity to train independent contractors through the DOT Operator Qualified training process (overseen by Columbia), inspect the actual repair process, and ensure uniformity in the approach to repair and maintenance. (TR. I, 67-71; II, 192.) 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. (TR. II, 58-62.) Further, Columbia, under the existing approach, inspects all repairs and replacements done by independent, qualified contractors. (TR. I, 48-49.) Columbia also has an approved parts list that independent plumbers must use. (TR. II, 44 and 106.) Thus, the Commission's statement that Columbia cannot do these things under the existing approach is unreasonable, unlawful, and wrong.

The Commission also states at page 19 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." 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 the over 115,000 Ohio customers (USP

and ABC Gas combined) who have warranty contracts will not be reluctant to report a suspected leak because they are assured that their warranty service provider will repair any problem without the anticipation of an out-of-pocket payment by the customer. Further, the Commission failed to recognize that under the existing system, tenants who rent premises and are customers of Columbia, will not be reluctant to report a suspected leak.

The Commission states at page 19 that "adoption of the Amended Stipulation is likely to result in a safer system, overall."[4] 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 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."

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. (TR. I, 64.) A warranty service provider such

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[4] 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.) This lack of an independent third-party inspection unreasonably and unlawfully diminishes public safety.

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 Opinion and 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 states at page 20 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. Under the current system, Columbia has an approved list of independent contractors. (TR. II, 58-62.) It has an approved list of materials to be used in the repair or replacement of customer service lines. (TR. I, 68.) It currently inspects the work actually performed by independent contractors.[5] (TR. I, 47-48.)

At page 2 of its Opinion and Order, the Commission also finds 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." Again, 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.

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[5] This independent inspection will not be available under the Amended Stipulation and will unreasonably and unlawfully diminish safety. (TR. I, 47-48.)

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. 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 rehearing must be granted.

D. The Commission unreasonably and unlawfully found that adoption of the Amended Stipulation would not result in a taking of property.

At page 21 of its Opinion and Order, the Commission finds there would be "no taking at all." First, the Commission states that there would be no transfer of ownership to Columbia, only lines repaired or replaced by Columbia would belong to Columbia. This is not accurate. Only that portion of a line that is repaired or patched will become Columbia's property. (TR. I, 49-50.) 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 goes on to state at page 21 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 flies in the face of the PUCO mission statement.[6] This ultimatum is clearly unreasonable and unlawful. Under the current system, warranty service providers in a competitive market do not provide such an ultimatum to their customers. Instead of Columbia's ultimatum when it comes to repairing or replacing customer service lines, a warranty service provider will work with the property owner to get whichever qualified

[6] "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."

independent plumber the homeowner chooses to work on his property. (USP Ex. 2, (Riley Direct), pp 5-7.)

The Commission goes on to state at page 21 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 hazardous customer service lines. (TR. I, 48.) That is a right taken away from the property owner. Under the current system, the customer has the right to choose the qualified plumber of his choice. (TR. I, 48.) The Commission's statement that the property owner would not lose the right to make decisions about his property is belied by the first full paragraph at the top of page 22 of the Opinion and Order. If the Commission truly believed that no property rights were being taken from the property owner, why did it on page 22 specifically direct Columbia to work with the customer regarding location, relocation, and, manner of installation of the service line, to the extent feasible? Under the current system, warranty service providers, operating in a competitive market, already provide such service without having to be directed by the Commission or other regulatory agency. (USP Ex. 2 (Riley Direct), pp 5-7.) The Commission has transformed an industry of competitive warranty service providers into a monopoly, transferred that monopoly to Columbia, and has taken the property rights of warranty service providers and their customers.

The Commission also unreasonably and unlawfully states 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 misunderstands 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 creates a monopoly over the repair and replacement of non-utility customer service lines and gives that monopoly to Columbia, it has clearly interfered with and taken those property rights from the homeowner. The use of a functional service line is not adequate compensation for taking those property rights.

Finally, the Commission failed to recognize that USP purchased its gas line warranty business from a Columbia affiliate in 2003 never realizing that Columbia, would attempt to reclaim a large portion of the business through a regulatory filing in 2007. (USP Ex. 2, p. 7). 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 Commission to appropriate the private property of a utility's customer and transfer that property to the utility." The Commission unreasonably and unlawfully failed to consider these facts. Rehearing must be granted.

E. The Commission unreasonably and unlawfully relied on statements contained in a reply brief and not within the record to conclude that Columbia has notified individual members of the public at risk of the Design-A riser.

Have the home and property owners at risk of life and limb due to the installation of a Design-A riser been informed that they have a Design-A riser? There is nothing in the record that establishes the fact that Columbia, upon completing the Commission ordered survey to locate each and every Design-A riser, actually informed those customers that based on the Commission investigation in Case No. 05-463-GA-COI they were in grave risk of a riser failure and possible fire. The wisdom of the Commission's September 12, 2007 Entry is that it ordered

Columbia to "inform customers who are found to have risers prone to failure that they have such a riser." The Entry then permitted the home or property owners to use their warranty contract or call a DOT certified plumber to make the repair if they did not want to wait for Columbia to eliminate the safety risk.

On pages 15 and 16 of its Reply Brief, Columbia listed distribution dates of what appear to be general notices about the riser problem, which it also stated were posted on its website. There is no record citation substantiating these notice references in the Reply Brief. Further, a close reading of the Reply Brief seems to indicate that these notices were general notices, not the call to action that the Commission intended. In terms of notice, there is a difference between a general warning, such as "high blood pressure may be life threatening" and a notice that says "you have high blood pressure which may be life threatening". It is unreasonable and unlawful for the Commission to merely accept words in a Reply Brief for purposes of finding compliance with its September 12, 2007 Entry of Rehearing. The Commission should have required and Columbia should have filed affidavits in this case indicating that specific notices were sent which complied with the Commission's September 12, 2007 Entry on Rehearing. The Commission cannot rely on statements outside the record for proof that Columbia complied with its directives. Rehearing should be granted on this issue.

F. The Commission unreasonably and unlawfully failed to specify a deadline for the replacement of risers.

At page 25 of its Opinion and Order, the Commission stated that it was not in a position to evaluate Columbia's position on whether Columbia's proposed three-year time frame for replacing the proned-to-failure risers in its service territory is acceptable. The Commission ordered Columbia to work with the Staff regarding its scheduling of riser replacement work,

attempting to identify and take advantage of all possible efficiencies that do not result in loss of quality.

If, as the Commission states, this is a matter of the greatest public safety and must be completed as quickly as is possible, then Columbia and the Staff should have included such a proposed deadline in the Amended Stipulation. The Commission should grant rehearing, order the parties to file evidence indicating what the scheduling of riser replacement work should be, and then make a determination. The Commission's failure to require a specific appropriate time period is unreasonable and unlawful. The Commission should grant rehearing on this matter.

G. The Commission unreasonably and unlawfully relied on the Riser Material Plan ("RMP") as it is not part of the record.

USP noted in its Brief that Columbia had not reached conclusions regarding the best method for replacing the prone-to-failure risers. The Commission states at page 25 of its Opinion and Order that the Amended Stipulation resolves this problem by adding the RMP. The problem is that the RMP is not a part of this record. It was only filed on February 15, 2008 because USP objected to not receiving it. The Commission must base its decision on the record before it. Ideal Transportation Co. v. Pub. Util. Com (1975) 42 Ohio St. 2d 195; 71 Ohio Op. 2d 183; 326 N.E. 2d 861. The Commission must grant rehearing in order to provide an opportunity for the RMP to become part of the record if the Commission is to base its decision on it.

H. The Commission unreasonably and unlawfully found that Columbia's proposal as to the lack of regularity of inspections under the Amended Stipulation was reasonable.

Under the Amended Stipulation, Columbia will not have to make an additional trip to the site for follow-up leak testing since it or its contractors would already be there making the repairs. This is sacrificing safety for convenience and is unreasonable and unlawful. USP witnesses Funk and Phipps testified as to the importance of having an independent party review

the work done by independent plumbers. (USP Ex. 4, pp. 4-5; USP Ex. 6, pp. 1-2; TR. IV, 106 and 114-116.) Columbia witness Ramsey agreed that there is value in having an independent third party review one's work. (TR. I, 24.) The IRP and the Amended Stipulation, adopted by the Commission, places a higher priority on the convenience of Columbia not having to make an additional trip over the safety resulting from having an independent third party review.

Under the current system, Columbia personnel have the opportunity to verify the materials used in the replacement of risers and customer service lines (TR. I, pp. 47-48). That is the very feature that USP witness Phipps testified was so important as a check and balance. (TR. IV, pp. 106 and 114-116). Under the Amended Stipulation, Columbia will use independent contractors for the replacement of the risers and will likely do the same for customer service lines. (Columbia Ex. 1, p. 13; TR. I, p. 48; USP Ex. 8, p. 7) It is also likely that under the Amended Stipulation, the person who does the work repairing the customer service line will be the same person who does the inspection. (TR. I, 48.) Columbia witness Ramsey agreed that there is value in having an independent third party review one's work. (TR. I, 24.) Under the Amended Stipulation, the Commission has unreasonably and unlawfully diminished the prospect of verification of work to the detriment of the public.

I. The Commission unreasonably and unlawfully failed to address both the timing and the nature of the subject matter of the Amended Stipulation before considering whether serious bargaining occurred.

On December 20, 2007, 17 days after the matter was submitted on the record, counsel for the Ohio Partners for Affordable Energy filed a letter notifying the Docket Division that it had "agreed to the Stipulation as a signatory party". On December 20, 2007, there was only one Stipulation – the one filed on October 28, 2007. Then, on Friday afternoon, December 28 at 5:14 P.M., an Amended Stipulation and Recommendation was filed. Service of the Amended Stipulation was not made until the morning of December 31, 2007, the day the Initial Briefs were

due with the invitation that any party who wished to discuss joining this Amended Stipulation could contact the person serving the Amended Stipulation and Recommendation. The timing alone should suggest to the Commission that the signatory parties did not engage in serious bargaining.

More importantly, the Commission failed to look at the nature of the settlement before it evaluated compliance with the serious bargaining criterion. At page 32 of its Opinion and Order, the Commission states that "Additionally, those involved in the continuing discussions, and who ultimately became as signatories to the Amended Stipulation, represent diverse interests including the buyers, sellers and regulators of natural gas service." Had the nature of the Amended Stipulation been confined to regulated natural gas service, there would be no problem. But instead of being confined to regulated natural gas service and regulated property, the nature of the settlement was to intrude upon private non-utility property, private contracts, and a competitive warranty service industry. Columbia and the Staff gave up nothing in negotiating the Amended Stipulation; the rights of warranty service providers, independent plumbers, and landlords who are not utility customers were sacrificed under the guise of "improvements to safety". Anyone can attempt to bargain away property that does not belong to them; but that does not constitute "serious bargaining." The Commission should grant rehearing.

J. The Commission unreasonably and unlawfully found that the Amended Stipulation, considered as a whole, will benefit rate payers and the public.

At page 34 of its Opinion and Order, the Commission found that the Amended Stipulation will, as a package, benefit rate payers and the public interest. It stated that Columbia has agreed to replace all prone-to-failure risers and in light of the potential for catastrophic failure, this is vital. USP points out that it is not the potential for catastrophic failure but the actual occurrence of catastrophic failure that should make this replacement of all prone-to-

failure risers vital. Instead of merely "encouraging" Columbia to make every effort to replace all such risers in as short a period as possible, the Commission should have directed Columbia to complete the riser replacement project within a specified period of time. The failure to set a shorter deadline for Columbia is unreasonable and unlawful.

In addition, the Commission found at page 34 that "public safety will be enhanced by allowing Columbia to take responsibility for repair of the hazardous customer service lines." Unlike the situations with the risers, the Commission did not find here that there was a potential for catastrophic failure; only that public safety will be enhanced. The Commission then goes on at pages 34-35 to state that "the aspect of this proposal that we find most compelling is that it will allow Columbia, as the employer or hirer of independent contractors, to control, more effectively, the work product of the plumbers making repairs to the system." No evidence was put forth in this record supporting the notion that transferring responsibility for repair of hazardous customer service lines to Columbia will allow Columbia to control more effectively the work product. Under the current system, Columbia already has effective control over the work product of independent plumbers through the certification process (TR. II, 192), having an approved list of contractors (TR. II, 58-62) through the approved materials list (TR. I, 68), and the inspection process (TR. I, 67-70). Again, no evidence from other states was ever introduced showing that a system where the operator owns the customer service line will allow more effective control of the work product of the plumbers making repairs to the system. In addition, the Commission's reliance on the Staff position is misplaced because the Staff position is contrary to state law.

At page 32 of its Opinion and Order, the Commission states "Staff stresses that Columbia is in a better position than customers to make appropriate safety determination and decisions

regarding repairs." The Staff offered no objective evidence in support of that statement. More importantly, the Staff's view that it and Columbia are in a better position to make decisions for customers than customers is contrary to Section 4929.02, Revised Code. Section 4929.02(A)(2)(3)(4)(5)(6)(7)(8) and (10), Revised Code all mandate that customers should have choices in a competitive market. The Commission unreasonably and unlawfully has taken away those choices and in fact has diminished public safety by approving the Amended Stipulation. The Commission should grant rehearing.

K. The Commission unreasonably and unlawfully found that the approval of the Amended Stipulation will not violate state policy.

At page 35 of its Opinion and Order, the Commission believed that it was unclear whether responsibility for maintenance of customer service lines was considered by the legislature at the time of the adoption of Section 4929.02, Revised Code. However, the Commission believed that customer safety was of the utmost importance and that the approval of the Amended Stipulation did not violate state policy.

In making that finding, the Commission did not appear to consult Section 4905.91, Revised Code which deals with the powers of the Commission as to intrastate gas pipelines. The Commission has certain specific powers under that section, but none involve the transfer of responsibility over customer service lines from a nonregulated entity to a natural gas company. The Commission also failed to explain how it could assert jurisdiction over out-of-state non-customer land owners and under what authority it could create a new monopoly over what has previously been non-jurisdictional property. The Commission must squarely face these issues and grant rehearing.

L. The Commission unreasonably and unlawfully failed to require that notice of this case and the hearing be provided to plumbers, warranty service providers, and property owners because of the impact on contract rights and property rights that are affected by the Commission's change in policy.

The Commission never directed that notice of this case be published or given to independent plumbers, warranty service providers, or landlords who were not customers of Columbia. Although this case was not brought under a statute which requires notice, the Commission's decision in this case has in effect changed public policy and will have impacted the contract rights and property rights of those that are affected by the Commission's decision. It is unreasonable and unlawful for the Commission to jeopardize and adversely affect the businesses of many Ohio companies without at least giving notice to those affected. Rehearing should be granted.

M. There was no evidence showing that Columbia has the managerial ability or experience to manage the repair and replacement of hazardous customer service lines.

While the Commission has adopted the Amended Stipulation which calls for the transfer of responsibility and ownership of hazardous customer services lines to Columbia, nowhere in the record is there any evidence that Columbia has the managerial ability or experience to manage the repair and replacement of hazardous customer services lines. Neither Mr. Ramsey (Columbia Ex. 1) nor Mr. Steele (Staff Ex. 2) offered any testimony on this issue. In fact, Staff witness Henry indicated that the Staff has not stated that Columbia employees or Columbia practices are more superior than the plumbers currently doing the work. (TR. I, 284-285.) Before transferring responsibility and ownership, the Commission should have made a determination as to whether Columbia had the managerial ability or experience to manage the repair and replacement of hazardous customer service lines. The Commission could not make

such a determination because there is no evidence in the record to support such a determination. Rehearing should be granted.

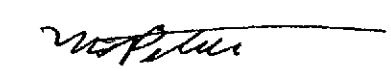
N. The Commission's decision is not supported by the manifest weight of the evidence.

USP submits that any objective reading and analysis of the evidence in this case would compel one to conclude that the Amended Stipulation and Recommendation should not be adopted. The Commission ignored the direct testimony of witnesses Riley, Funk, Phipps, and Morbitzer and the cross-examination of the Columbia and Staff witnesses and simply adopted a conclusion that appears to be pre-ordained. Rehearing should be granted.

II. CONCLUSION

The Commission grant rehearing from the April 9, 2008 Opinion and Order in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Rehearing of Utility Service Partners, Inc. was served upon the following persons by electronic mail and by first class U.S. mail, postage prepaid this 9th day of May, 2008:

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