

**In The
Supreme Court of Ohio**

Utility Service Partners, Inc.,

Appellant,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

: Case No. 08-1507
:
: On appeal from the Public Utilities
: Commission of Ohio, Case No. 07-478-
: GA-UNC, *In the Matter of the Applica-*
: *tion 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.*

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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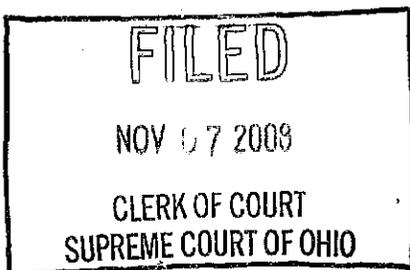
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	:	<i>Treatment.</i>

**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

The orders of the Public Utilities Commission of Ohio (Commission) that are here on appeal improve the safety of the natural gas distribution system operated by Columbia Gas of Ohio, Inc. (Columbia or the Company). The orders adopt an amended stipulation and recommendation (amended stipulation), which was signed by the Commission's Staff, Columbia, the Office of the Ohio Consumers' Counsel (OCC), and Ohio Partners for Affordable Energy (OPAE). The amended stipulation accomplishes a number of objectives. Most importantly, the amended stipulation requires Columbia to assume responsibility for the future repair, replacement, and maintenance of hazardous, leaking customer service lines.

Not surprisingly, the record evidence in this case confirms that leaking customer service lines can cause personal injury and property damage, not only to the property on which they are located, but to surrounding residences as well. In assuming responsibility for these hazardous, leaking service lines, Columbia will supervise the selection and training of all repair personnel, oversee the repair process, and ensure a uniform approach to repair and maintenance. The amended stipulation also relieves Columbia's customers of the burden of paying, out-of-pocket, the costs of repairs and maintenance on hazardous, leaking service lines.

The Commission expressly found that its adoption of the amended stipulation can be expected to improve the safety of Columbia's gas distribution system, and that increasing the safety of the system is a critical public interest. In adopting the amended stipulation, the Commission acted well within its statutory gas pipeline safety jurisdiction, and its orders are supported by sufficient record evidence such that they are not manifestly against the weight of the evidence, nor do they show misapprehension, mistake, or willful disregard of duty. Rather, the Commission's orders, which appropriately address the need to improve the public safety of Columbia's gas distribution system, are entirely reasonable and should be affirmed.

STATEMENT OF THE FACTS AND CASE

The questions before the Commission, now raised to this Court, involve public safety and the ability of Columbia to provide safe and reliable service to its customers. On April 1, 2000, a natural gas explosion occurred at 1278 McGuffey Lane, Willowville,

Ohio (McGuffey Lane incident).¹ As a result of the McGuffey Lane incident, and a number of other gas service riser failures in Ohio, the Commission, on its Staff's recommendation, decided to open an investigation into gas service risers, a segment of the customer service line that connects the utility's distribution system to the utility's gas meter. The service line is the pipeline that runs from the owner's property line to the gas meter. Through this investigation, the Commission sought to evaluate the type of gas service risers being utilized, the conditions of riser installation, and the overall performance and failures of gas service risers in order to determine whether issues related to gas service risers required the Commission's direction. *In re Investigation of Gas Service Risers*, Case No. 05-463-GA-COI (Entry at 1-2) (April 13, 2005), App. at 16-17.

As part of that investigation, the Commission ordered the four largest natural gas distribution companies in Ohio, including Columbia, to perform two general tasks. The Commission ordered Columbia and the others to identify a sample number of installed risers and to remove a portion of those risers for submission to a testing laboratory.

¹ "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, 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. Ohio Admin. Code § 4901:1-16-01(I) (Anderson 2008), Appellant's App. at A-068 (references to appellant's appendix are denoted "Appellant's App. at ____;" references to appellant's supplement are "Appellant's Supp. at ____;" references to appellee's appendix attached to this brief are "App. at ____;" and references to appellee's second supplement are "Sec. Supp. at ____."

Ultimately, the results of this testing led the Commission's Staff to find that certain risers are more prone to failure than others. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry at 1) (July 11, 2007), Sec. Supp. at 1. Staff submitted this finding to the Commission with several recommendations. The Commission's Chairman sent a letter to Columbia, and the other three large distribution companies, asking them to among other things address the question of whether they should assume responsibility for the entirety of customer-owned service lines.

The Commission directed Columbia, and all other local distribution companies (LDCs), to bear the costs associated with the investigation (a total of twenty-six companies shared the cost). *In re Investigation of Gas Service Risers*, Case No. 05-463-GA-COI (Entry at 2-3) (August 3, 2005), App. at 22-23. The Commission indicated that it would consider applications for accounting deferrals for the cost of this investigation. *Id.*

On April 25, 2007, Columbia filed an application² with the Commission for (a) 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 and (b) 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

² This application contained Columbia's Infrastructure Replacement Plan (IRP), its plan to replace prone-to-fail risers and customer-owned service lines.

permit deferral of related costs for subsequent recovery through the automatic adjustment mechanism. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry at 1-3) (July 11, 2007), Sec. Supp. at 1-3. That application initiated the proceeding from which this appeal originates.

A hearing was held on Columbia's application. The hearing was continued to December 3, 2007 to address the filing of a stipulation and recommendation by the Company and Staff, which was later joined by Ohio Partners for Affordable Energy (OPAE). Subsequently, an amended stipulation was filed by the Company, the Staff, the Office of the Ohio Consumers' Counsel (OCC), and OPAE on December 28, 2007. The amended stipulation contains almost the same terms as the earlier stipulation, except for some minor changes, the addition of the provisions regarding the Riser Material Plan, and the ending date for the accounting provisions within the amended stipulation. The testimony and other evidence in the record supports the terms of the amended stipulation just as it supported the earlier stipulation. The amended stipulation has the support of the local distribution company with the expertise to install and oversee pipeline installation, the regulatory experts on the Commission's Staff, and the representatives of the residential ratepayers.

On February 4, 2008, the active parties in this proceeding stipulated certain facts, as well as the amended stipulation, into the record without additional supporting testimony. These same parties joined in a motion to cancel the hearing scheduled for testimony on the amended stipulation on the same date. The Attorney Examiner granted the motion to cancel the hearing, and accepted the stipulated facts and the amended stipula-

tion into the record on February 5, 2008. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry at 3) (February 5, 2008), Sec. Supp. at 14.

The Commission issued its opinion and order on April 9, 2008, finding “that the stipulation meets the three criteria for adoption of stipulations and should, therefore, be adopted to the extent set forth herein.” *Id.* (Opinion and Order at 36) (April 9, 2008), Appellant’s App. at A-042. In its opinion and order, the Commission addressed Utility Service Partners, Inc.’s (USP) impairment of contract claim by finding that there is no substantial impairment due to the terms of the gas line warranty contracts and their coverage. *Id.* at 17, Appellant’s App. at A-023. Further, as noted in the order, the Commission’s gas pipeline safety jurisdiction should be no surprise to USP and USP must have been aware, when entering into these agreements, that the natural gas industry is heavily regulated and dangerous. *Id.* at 18, Appellant’s App. at A-024. Finally, the Commission found that the state’s pipeline safety regulatory power must be implied in any pipeline warranty contract. *Id.*

Given the testimony of Staff, Columbia, and USP witnesses, the Commission found “even if there were a substantial impairment of the warranty contracts . . . , we would have a significant and legitimate public purpose in causing such an impairment.” *Id.* at 19, Appellant’s App. at A-025. The Commission determined “that leaks in customer service lines, including gas risers, can be a safety hazard . . . [and] 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.

* * *” *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at

19) (April 19, 2008), Appellant's App. at A-025. Staff witness Steele testified that Columbia is responsible, under federal and state law, for the safety of the service lines even though the customer owns the line. Based on his considerable experience, Mr. Steele 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 (Testimony of Edward M. Steele) at 9-12, Sec. Supp. at 59-62. Columbia witness Ramsey testified that leaks in steel service lines can present significant safety hazards. Columbia Ex. 5 (Rebuttal Testimony of Michael Ramsey) at 2, Sec. Supp. at 66. Even USP witness Funk agreed that corrosion on bare steel service lines can present a safety hazard. Tr. IV at 93, Sec. Supp. at 94. Additionally, USP witness Phipps 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, Sec. Supp. at 102-103.

Even though the Commission determined there was no substantial impairment of USP's contracts, the Commission went on to find based on record evidence that adoption of the amended stipulation would appropriately address the need to improve the public safety of the gas distribution system. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 20) (April 9, 2008), Appellant's App. at A-026. Staff witness Steele enumerated many ways in which approval of the infrastructure replacement program (IRP) would improve public safety. He testified that Columbia would have better control of the quality of work performed, materials used could be verified, a uniform line of demarcation would be established, and Columbia would have complete responsi-

bility for all pipelines regulated by pipeline safety regulations. Staff Ex. 2 (Testimony of Edward M. Steele) at 8-12, Sec. Supp. at 58-62. The Commission then reasonably determined that because there was no unconstitutional impairment of USP's contracts, the Commission was not prohibited from considering Columbia's IRP as recommended by the amended stipulation. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 20) (April 9, 2008), Appellant's App. at A-026.

USP claims now, as it did before the Commission, that adoption of the amended stipulation results in the taking of property without just compensation. In terms of USP's taking claim for property rights of customers, the Commission found no taking at all. *Id.* at 21, Appellant's App. at A-027. Only hazardous, leaking lines repaired or replaced by the Company would belong to Columbia. *Id.* Further, property owners do have a choice in the matter. They do not have to permit Columbia onto their property to install or repair service lines. The choice is theirs. It is a condition of service. *Id.*

In considering the reasonableness of the amended stipulation, the Commission examined whether the settlement was the product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principle or practice. The Commission found that all criteria were met and adopted the amended stipulation subject to certain modifications.

On April 23, 2008, USP filed a motion for stay of implementation of the April 9, 2008 opinion and order. Columbia responded with a memorandum contra filed on April 28, 2008. On May 9, 2008, USP and Columbia filed applications for rehearing. The

Commission denied all but one ground of USP's rehearing application, finding on June 4, 2008 that "[u]nder 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." *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry on Rehearing at 2) (June 4, 2008), Appellant's App. at A-045.

Columbia filed tariffs on June 6, 2008 pursuant to the Commission's opinion and order. Those tariffs were approved by the Commission's June 25, 2008 Entry. USP filed its Notice of Appeal on August 1, 2008 and its Merit Brief on October 10, 2008.

ARGUMENT

Proposition of Law No. I:

By approving the amended stipulation, the Commission acted within its pipeline safety regulatory powers and jurisdiction. Ohio Rev. Code Ann. § 4905.91, et seq. (Anderson 2008).

The Commission has the authority to approve the amended stipulation. The Commission has broad authority over Columbia, and all other public utilities under the Commission's jurisdiction. Ohio Rev. Code Ann. § 4905.05 (Anderson 2008), App. at 1. The General Assembly gave the Commission "general supervision over all public utilities within its jurisdiction." Ohio Rev. Code Ann. § 4905.06 (Anderson 2008), App. at 1-2. More specifically, the General Assembly gave the Commission power to adopt and enforce a gas pipeline safety code by promulgating rules and issuing orders. Ohio Rev. Code Ann. § 4905.91(A) (Anderson 2008), App. at 4. The General Assembly determined

that “[t]he commission shall administer and enforce that code.” *Id.* In addition, the General Assembly provided that the Ohio gas pipeline safety code should conform to federal regulation. Ohio Rev. Code Ann. § 4905.91(B) (Anderson 2008), App. at 4-5; Ohio Admin. Code § 4901:1-16-03 (Anderson 2008), App. at 11. The General Assembly also authorized the Commission to accept funds from the federal government to implement the federal Natural Gas Pipeline Safety Act. *Id.*; 49 U.S.C. § 60101, *et seq.* (2008), App. at 24-27.

Consequently, the Commission promulgated Ohio Administrative Code Chapter 4901:1-16, Gas Pipeline Safety. Through these rules, the Commission adopted the gas pipeline safety regulations contained in 49 C.F.R. 40, 191, 192, and 199. Ohio Admin. Code § 4901:1-16-02 (Anderson 2008), App. at 10. Under federal and state law, Columbia is responsible for the safety of the service line, even though the customer owns that line.³

In fact, the Commission is empowered by R.C. 4905.95(B):

If, pursuant to a proceeding it specially initiates or to any other proceeding and after the hearing provided for under division (A) of this section, the commission finds that:

* * *

³ Columbia is an “operator” (Ohio Admin. Code § 4901:1-16-01(L)(2) (Anderson 2008), App. at 7) and, as an “operator,” is required to comply with the rules in Ohio Administrative Code Chapter 4901:1-16 (Ohio Admin. Code § 4901:1-16-02(C) (Anderson 2008), App. at 10). *See also In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18-19) (April 9, 2008), Appellant’s App. at A-024 – A-025; Staff Ex. 2 (Testimony of Edward M. Steele) at 9-12, Sec. Supp. at 51-54.

(2) An intrastate pipe-line transportation facility is hazardous to life or property, the commission by order:

(a) Shall require the operator of the facility to take corrective action to remove the hazard. Such corrective action may include suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other action.

Ohio Rev. Code Ann. § 4905.95(B)(2) (Anderson 2008), App. at 6. As the Commission found in its opinion and order:

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 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.

In re Columbia Gas of Ohio, Case No. 07-478-GA-UNC (Opinion and Order at 19) (April 9, 2008), Appellant's App. at A-025. The Commission ordered Columbia to do only what the General Assembly authorized the Commission to do. A hearing was noticed and held, the amended stipulation was supported by the record, and the Commission reasonably found in favor of the amended stipulation.

By approving and adopting the amended stipulation and the included tariffs, the Commission approved a plan by which Columbia maintains service lines, a responsibility it has under law. USP does not dispute that Columbia has a legal duty to maintain the entire gas distribution system, including customer-owned service lines. The change in

Columbia's responsibility authorized by the Commission's order that USP debates is a dispute about policy, a dispute about which actions Columbia *ought* to undertake to meet its responsibilities. The responsibility for repairing or replacing customer service lines provided in the order is consistent with that existent in the majority of states. Staff Ex. 2 (Testimony of Edward M. Steele) at 9, Sec. Supp. at 59. Having the distribution system operator responsible for testing, maintaining, repairing, and operating the pipeline to the meter results in the many benefits discussed in testimony and recognized by the Commission in its order. Those benefits include improved safety by allowing Columbia to assume all operation, maintenance, and replacement responsibilities for its system, including service lines and risers, resulting in better oversight by Columbia and a uniform approach to repair and replacement, with clear lines of responsibility for the work performed. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18-19) (April 9, 2008), Appellant's App. at A-024 – A-025. The Commission had ample reason and authority to adopt the amended stipulation.

USP seeks to advance its business interests behind the veil of advocating "customer ownership of service lines." But there is no evidence the customers need or want USP's advocacy. Individual residential customers did not intervene in the case to complain about the amended stipulation. USP presented no residential customers as witnesses, much less for the purpose of complaining about Columbia assuming responsibility for performing the maintenance of service lines. All the representatives of residential property owners that were a party to the case are signatories to the amended stipulation

and recommended it to the Commission. USP has no standing to raise any arguments on behalf of Columbia's customers or property owners.⁴

The lack of property owners' complaints is understandable. The amended stipulation removes the burden of arranging for repairs from the property owners and requires experts to do it. It also increases the speed with which repairs may be completed and gas service returned. It has only benefits for residential property owners. Standing issues aside, residential property owners are not negatively impacted.

Not only does USP lack standing, but also USP ignores the pipeline safety statutes and the numerous Court decisions deferring to the Commission's expertise and enforcement responsibility. USP is correct that the Commission has only the powers and jurisdiction conferred by the General Assembly. *Time Warner AxS v. Pub. Util. Comm'n*, 75 Ohio St. 3d 229, 661 N.E.2d 1097 (1996). As demonstrated above, the Commission's opinion and order was within its pipeline safety powers and jurisdiction to protect the public safety. This Court has recognized many times that "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Constellation NewEnergy v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775, 778 (2000). This Court should find that the Commission has the authority to approve and adopt the amended stipulation as a matter of law and fact.

⁴ USP has not established its standing to argue the merits of any of the legal claims it raises on behalf of the owners/customers. *See infra* at 36-37.

Proposition of Law No. II:

Pursuant to R.C. 4903.13, this Court will not reverse or modify a Commission decision as to questions of fact, where, as it is here, the decision is supported by sufficient probative evidence to show that the Commission's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record that it shows misapprehension, mistake, or willful disregard of duty. *Constellation NewEnergy v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 540, 820 N.E.2d 885, 894 (2004).

The Commission found, based on substantial record evidence, that the public benefit of the amended stipulation is that it gives Columbia complete responsibility for all pipelines covered by the federal pipeline safety regulations (49 C.F.R. § 192.1, *et seq.* (2008), App. at 12-13) and allows Columbia to uniformly correct all safety issues as required by those regulations. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18-19, 29-30) (April 9, 2008), Appellant's App. at A-024 – A-025, A-035 – A-036; Staff Ex. 4A (Testimony of Jill A. Henry) at 4, Sec. Supp. at 37.⁵ The amended stipulation permits Columbia to systematically replace, as quickly as practical, all prone-to-fail risers, and to take responsibility for the future maintenance, repair, and replacement of hazardous customer service lines. Staff Ex. 4A (Testimony of Jill A. Henry) at 4, Sec. Supp. at 37. The terms of the amended stipulation address the public safety considerations raised by Columbia's application before the Commission.

On brief, USP also purports to speak for its customers in terms of the lack of benefits in the amended stipulation for them. *See, e.g.*, Appellant's Brief at 19, 20-25. Yet again, USP's CEO and President Philip Riley testified that he "can speak on behalf of

⁵ Staff witness Henry adopted the testimony of Edward M. Steele, filed November 19, 2007, in support of the stipulation. Tr. IV at 239-242, Sec. Supp. at 106-109.

Utility Service Partners, what our thoughts, ideas, and concerns are. *I don't believe that the customers [USP's customers] have given me any authority to speak on their behalf.*" Tr. IV at 122-123, Sec. Supp. at 104-105. In fact, OCC, the only party empowered to speak on behalf of Columbia's residential customers, of whom less than ten percent (*Id.* at 123, Sec. Supp. at 105) are also USP's customers, joined in the amended stipulation filed with the Commission on December 28, 2007.⁶

All the provisions of the amended stipulation adopted by the Commission are in the public interest and, contrary to USP's arguments, are supported by substantial record evidence. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order) (April 9, 2008), Appellant's App. at A-007 – A-043. The amended stipulation contains all the provisions found in the original stipulation plus additional provisions to protect the public interest. Amended Stipulation at 16-17, Sec. Supp. at 17-18; Staff Ex. 3 (Testimony of David Hodgden) at 2-7, Sec. Supp. at 43-48; Staff Ex. 4A (Testimony of Jill A. Henry) at 3-6, Sec. Supp. at 36-39; *see also In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order) (April 9, 2008), Appellant's App. at A-007 – A-043. The two most significant additions are the Riser Material Plan (RMP) found in paragraph 21 and the sunset provision found in paragraph 22. As can be seen from the description of the RMP, Columbia maintains its primary focus on safety by summarizing "the riser materials Columbia will use in its riser replacement program under the IRP and its rationale for that decision. Columbia's decision regarding riser materials will primarily focus

⁶ See standing argument *infra* at 36-37.

on safety. Full cost estimates, including but not limited to, material reliability, cost of remediation and operational flexibility will also be considered.” Amended Stipulation at 16, Appellant’s Supp. at S-014. Safety is the paramount issue in this case. The RMP provides greater input into the process regarding riser replacement, but leaves the ultimate decision on what material to use and how and when to use it with Columbia, subject to review by the Commission. The provision, as adopted, also permits the riser replacement program to go forward beginning March 1, 2008 and stay on a timely and reasonable track. *Id.* at 17, Sec. Supp. at 18.

The other public safety aspect of the amended stipulation is the recommendation that Columbia assume the responsibility for repairing or replacing all hazardous customer service lines. *Id.* at 9, Sec. Supp. at 16. In the gas riser investigation and in testimony in this proceeding, Staff recognized and recommended that local distribution company oversight of more of the distribution system, including the customer service line, enhanced the safety of the system to the benefit of all. Staff Report at 14-15, Sec. Supp. at 85-86; Staff Ex. 2 (Testimony of Edward M. Steele) at 8-9, Sec. Supp. at 58-59. Columbia witness Brown and Staff witness Steele both testified that to their knowledge, based on their individual and collective many years of experience, ownership and maintenance responsibility of customer service lines in most other states lies with the local distribution company. Staff Ex. 2 (Testimony of Edward M. Steele) at 9, Sec. Supp. at 58; Columbia Ex. 10 (Rebuttal Testimony of Thomas J. Brown) at 3, Sec. Supp. at 22.

USP argues that property owners lose ownership of, and choice regarding replacement of, a piece of corroded pipe. Appellant’s Brief at 11-12. Based on record evidence,

the Commission found the local distribution company better positioned to safely maintain customer service lines. The Commission determined that public safety considerations outweigh a property owner's right to choose. The local distribution company that is responsible under federal and state law for maintaining the gas distribution system (including customer service lines) is better positioned to make decisions about who to hire as service personnel, and how to repair or replace this piece of the pipeline system. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18-19, 25-30) (April 9, 2008), Appellant's App. at A-024 – A-025, A-031 – A-036. Columbia, like all distribution operators, is responsible for qualifying individuals, such as plumbers, to perform repair or replacement of all facets of its distribution system. 49 C.F.R. § 192.801 (2008), App. at 13. The qualification regulations were instituted to ensure a qualified workforce to perform operations and maintenance tasks on pipeline facilities and to reduce the probability of, and consequences of, incidents caused by unqualified operators. Staff Report at 13, Sec. Supp. at 84. Because Columbia will have managerial oversight of both riser and hazardous customer service line repair and replacement, it will have the authority to fire a plumber who decides to take shortcuts. Tr. IV at 104-105, Sec. Supp. at 98-99. USP witness Phipps stated that as many as one-third of contractors hired to perform work on service lines or risers may take shortcuts that could lead to leaks. *See* USP Ex. 6 (Surrebuttal Testimony of Timothy W. Phipps) at 1-2, Sec. Supp. at 25-26; Tr. IV at 103-106, Sec. Supp. at 97-100. USP witness Phipps agreed that the authority to hire and fire is important in a process such as this. Tr. IV at 99, Sec. Supp. at 95. This authority will act as a deterrent to shoddy work by employees and contractors

alike. Columbia will know ahead of time that an employee or contractor is certified to perform the necessary work. Tr. IV at 317, Sec. Supp. at 106. Additionally, the record shows instances of Columbia arriving on the scene to inspect a replaced customer service line that is in a covered trench with the allegedly certified plumber's card left on site but the plumber is nowhere to be found. Tr. II at 208, Sec. Supp. at 91. The record reflects that Columbia will audit its contractors' and employees' work. Columbia Ex. 5 (Rebuttal Testimony of Michael Ramsey) at 2-3, Sec. Supp. at 66-67.

USP contends that the record contains no evidence regarding safety issues with customer-owned service lines. Appellant's Brief at 15-16. Yet, the record demonstrates just that; customer-owned service lines can and do present a safety hazard. In fact, USP witness Funk testified under cross-examination that corrosion in bare steel service lines can present a safety hazard. Tr. IV at 93, Sec. Supp. at 94. *USP witness Phipps also acknowledged that he has seen the results of gas line fires at residences and that these fires pose a risk to other residences in the immediate vicinity.* Tr. IV at 108-109, Sec. Supp. at 102-103.

Columbia witness Ramsey reasonably analogized Columbia's hazardous leak experience with company-owned bare steel service lines to the problems experienced with customer-owned bare steel service lines. Columbia Ex. 5 (Rebuttal Testimony of Michael Ramsey) at 2, Sec. Supp. at 66. He testified that in 2006 Columbia experienced

numerous grade one leaks⁷ on bare steel service lines and nine percent of those were hazardous. *Id.* This evidence of hazardous leaks with company-owned bare steel service lines further supports the need for Columbia to take over repair and replacement of customer-owned bare steel service lines. Columbia has considerable experience repairing and replacing its own bare steel lines. USP witness Phipps testified that he has a fairly high regard for Columbia's ability to make the safety system work in Ohio. Tr. IV at 102, Sec. Supp. at 96. USP witness Phipps also testified that he believes that Columbia is very thorough in the way it implements its responsibilities under the current system. *Id.* at 106, Sec. Supp. at 100. Mr. Phipps further testified he has no reason to believe that Columbia would be anything but thorough in performing these duties. *Id.* at 107, Sec. Supp. at 101.

The Commission found in favor of the uniform approach to repair and replacement of risers and hazardous, leaking service lines provided by the amended stipulation. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 29) (April 9, 2008), Appellant's App. at A-035; Staff Ex. 4A (Testimony of Jill A. Henry) at 5, Sec. Supp. at 38. The Commission's order reasonably guards against the risks posed by the current piecemeal method of dealing with service line repair and replacements. Staff witness Henry testified that, "through this stipulated agreement, repair and replacement

⁷ Ohio Admin. Code § 4901:1-16-04(H)(1) defines a grade one leak to "represent[] an existing or probable hazard to persons or property, and requires immediate repair or continuous action until the conditions are no longer hazardous."

work on risers and service lines will be enhanced as a result [of] [sic] a uniform approach to repair and replacement, with clear lines of responsibility for the work performed.” *Id.*

USP argues that adoption of the amended stipulation will not provide a uniform approach to repair and replacement of customer service lines. Appellant’s Brief at 17-18. USP speculates that Columbia’s independent inspection of the plumber’s work will be lost. Mr. Phipps, USP’s witness, testified as many as one-third of these third-party plumbers take shortcuts or do shoddy work. *See* USP Ex. 6 (Surrebuttal Testimony of Timothy W. Phipps) at 1-2, Sec. Supp. at 25-26; Tr. IV at 103-106, Sec. Supp. at 97-100. That is the reason that Columbia has to inspect third-party plumbers’ work. If Columbia is in the position of managing the work and the employees and contractors doing the work, there will be uniform oversight. Columbia will audit the work of both contractors and employees, and field supervisors currently make weekly visits to observe and inspect employees’ work. Columbia Ex. 5 (Rebuttal Testimony of Michael Ramsey) at 2-3, Sec. Supp. at 66-67. If service line work is outsourced, Columbia will have construction coordinators regularly monitor contractors’ work. Columbia witness Ramsey testified that “[t]he standard for the gas industry is to have a quality assurance program for work performed by gas company employees.” *Id.* at 2, Sec. Supp. at 66. In adopting the amended stipulation, the Commission relied on the evidence discussed above, finding that Columbia’s proposal for repairing and replacing risers and hazardous service lines under the amended stipulation offers a greater degree of uniformity and clearer oversight than does reliance on the current system.

Citing contrary evidence in the record, USP contends not just that the Commission should have come to a different conclusion, but that the Commission's order is allegedly not based on the record. Appellant's Brief at 13-19. From the discussion above, and as the Commission's order demonstrates, the decision is based on substantial evidence. Thus, USP's only true argument is with the decision reached, the Commission's weighing of the facts. This Court has stated time and again "that the appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. [Citation omitted]. This burden is difficult to sustain, since the court has consistently deferred to the commission's judgment in matters that require the commission to apply its special expertise and discretion with regard to factual matters." *Constellation NewEnergy*, 104 Ohio St. 3d at 541, 820 N.E.2d at 894-895, citing *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001), *et al.* The Commission's order shows that it carefully weighed the evidence and reached a decision within the bounds of its statutory authority. USP fails to meet its burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or clearly unsupported by the record.

USP asserts that the Commission's opinion and order is not based upon the record before it, citing *Ideal Trans. Co. v. Pub. Util. Comm'n*, 42 Ohio St. 2d 195, 326 N.E.2d 861 (1975). In *Ideal Transport*, the Court was faced with a situation where facts in the record contradicted the Commission's findings. *Id.* at 196-198, 326 N.E.2d at 862-864. While there are conflicting facts in the record in this case, as the previous discussion of the Commission's opinion and order and the record evidence shows, the Commission

considered *all* the facts in making its decision. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 25-30) (April 9, 2008), Appellant's App. at A-031 – A-036. Unlike in *Ideal* where the facts conflicted with the Commission's findings, there are sufficient facts in this case that support the Commission's findings. For example, the record demonstrates customer-owned service lines can and do present a safety hazard. USP's own witness, Mr. Funk, testified that corrosion in bare steel service lines can present a safety hazard. Tr. IV at 93, Sec. Supp. at 94. In addition, USP witness Phipps stated that he has seen the results of gas service line fires at residences and that these fires pose a risk to other residences in the immediate vicinity. Tr. IV at 108-109, Sec. Supp. at 102-103.

Finally, Columbia witness Ramsey logically compared Columbia's hazardous leak experience with company-owned bare steel service lines (specifically, numerous hazardous, grade one leaks in 2006) to the problems associated with customer-owned bare steel service lines. Columbia Ex. 5 (Rebuttal Testimony of Michael Ramsey) at 2, Sec. Supp. at 66. This evidence of hazardous leaks with company-owned bare steel service lines further supports the Commission's finding that "it is appropriate and reasonable, in an effort to improve the level of public safety, to shift the responsibility for maintenance and repair of service lines to Columbia, in addition to requiring Columbia to replace prone-to-fail risers." *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 29) (April 9, 2008), Appellant's App. at A-035.

The Commission based its decision on the record before it, carefully considering and weighing the evidence in favor of protecting the public safety. The Court should find

that USP's arguments fail to show that "this court should substitute its judgment for that of the commission." *Constellation NewEnergy*, 104 Ohio St. 3d at 541, 820 N.E.2d at 895. As a result, the Court should find that the Commission's decision was reasonable and lawful, and affirm the Commission's opinion and order.

Proposition of Law No. III:

The Commission correctly applied the three-part test of *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* in concluding that its adoption of the amended stipulation does not result in a substantial impairment of contracts. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410-413 (1983); *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 77-80, 495 N.E.2d 380, 386-388 (1986).

USP argues that the Commission "unreasonably and unlawfully misapplied" the three-part test from *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983) (*Energy Reserves* test). Appellant's Brief at 19. The Commission used this test to determine whether its adoption of the amended stipulation would substantially impair USP's warranty contracts. The Commission reasonably applied the *Energy Reserves* test to the facts of this case and should therefore be affirmed.

A. There is no substantial impairment of contracts. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410-413 (1983); *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 77-80, 495 N.E.2d 380, 386-388 (1986).

USP contends that the Commission's adoption of the amended stipulation – more specifically, its approval of Columbia's assumption of financial responsibility for the repair, replacement, and maintenance of hazardous customer service lines – results in a substantial impairment of USP's warranty contracts. USP's complaint is based on the

Commission's application of the three-part *Energy Reserves* test – not with the fact that the Commission used this particular test to frame its analysis but with how the Commission applied the test and the outcome that it reached. Based on the record in this case, the Commission carefully and correctly applied the *Energy Reserves* test in reaching its conclusion that its adoption of the amended stipulation does not result in the substantial impairment of USP's warranty contracts.⁸

As the Court is well aware, the U.S. Constitution prohibits the states from passing any "Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1, App. at 14. Similarly, the Ohio Constitution provides that "[t]he general assembly shall have no power to pass . . . laws impairing the obligation of contracts." OH CONST. art. II, § 28, App. at 15; *see also Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 219, 797 N.E.2d 1256, 1261 (2003) (stating that "[t]he Ohio constitutional protection of contracts is coextensive with that of the federal Constitution"). "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

The U.S. Supreme Court has used the three-part *Energy Reserves* test to determine whether the state has impaired a contractual relationship in violation of the Contract

⁸ In its order, the Commission noted that constitutional questions, such as USP's contract impairment and takings claims, are beyond the Commission's authority to decide. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 14) (April 9, 2008), Appellant's App. at A-020. The Commission considered USP's arguments only for the purpose of deciding whether to adopt the amended stipulation. *Id.*

Clause. *Energy Reserves*, 459 U.S. at 410-413; see also *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 77-80, 495 N.E.2d 380, 386-388 (1986) (citing favorably the *Energy Reserves* decision and applying a similar analytical approach). Finding that the *Energy Reserves* test is a “clear statement of the law,” the Commission chose to follow the *Energy Reserves* test as the basis for its analysis of USP’s contract impairment claim. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 16) (April 9, 2008), Appellant’s App. at A-022.

The first part of the *Energy Reserves* test is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” *Energy Reserves*, 459 U.S. at 411 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). Under this prong of the test, the severity of the impairment and whether the relevant industry has been subject to regulation are relevant factors to be considered in the analysis. *Id.* (citing *Allied Structural Steel*, 438 U.S. at 242 n.13; *Veix v. Sixth Ward Bldg. & Loan Ass’n*, 310 U.S. 32, 38 (1940); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)).

Citing the *Energy Reserves* test, USP argued before the Commission that approval of the amended stipulation, which would require Columbia to assume financial responsibility for the repair, replacement, and maintenance of hazardous customer service lines, would result in a substantial impairment of USP’s warranty contracts with its customers. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 15, 16-17) (April 9, 2008), Appellant’s App. at A-021, A-022 - A-023. Applying the first part of the *Energy Reserves* test to this claim, the Commission reasonably concluded that USP’s

existing warranty contracts would not be substantially impaired by adoption of the amended stipulation. *Id.* at 17, Appellant's App. at A-023.

With respect to the severity of the impairment, the Commission considered both the terms of USP's warranty contracts and the extent of their coverage. *Id.* The record confirms that USP "provides home utility-line warranty products to residential customers in a variety of states, including Ohio." USP Ex. 2 (Testimony of Philip E. Riley, Jr.) at 2, Sec. Supp. at 76. In addition to external gas pipeline warranties, USP offers other services to its customers, including "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." *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 17) (April 9, 2008) (citing Tr. II at 119-121, Sec. Supp. at 88-90), Appellant's App. at A-023. USP has already offered to transfer its customers' warranty coverage from external gas lines to these other types of services. *Id.* at 17-18, Appellant's App. at A-023 – A-024; Tr. II at 120-121, Sec. Supp. at 89-90. The amended stipulation affects only USP's external gas pipeline warranty business in Ohio and does not deprive USP of its other business dealings with its customers, including gas pipeline warranty contracts for lines within customers' homes. Further, USP's customers may cancel their warranty contracts at any point. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18) (April 9, 2008) (citing USP Ex. 2 (Testimony of Phillip E. Riley, Jr.) at 7, Sec. Supp. at 81), Appellant's App. at A-024. USP has no assurance that any given contract will remain in effect from one day to the next; it has no protection from termination of the contract by the customer.

Regarding the second relevant factor under the first prong of the *Energy Reserves* test, which is whether the industry is subject to regulation, the Commission noted that its gas pipeline safety jurisdiction should not come as a surprise to USP. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18) (April 9, 2008), Appellant's App. at A-024. USP should have known, when entering into its warranty contracts, that the natural gas industry is highly dangerous and thus highly regulated, and that the Commission's regulatory authority over gas pipeline safety is implied in any gas pipeline warranty contract. *Id.*; see *City of Akron v. Pub. Util. Comm'n*, 149 Ohio St. 347, 355, 78 N.E.2d 890, 895 (1948) ("The authority of the state . . . must be treated as an implied condition of any contract and as such it is as much a part of the contract as though written into it."); *Board of Comm'rs of Franklin County v. Pub. Util. Comm'n*, 107 Ohio St. 442, 450-451, 140 N.E. 87, 90 (1923) ("[A]ll contracts whose subject-matter involves the public welfare will have read into them with the same force and effect as if expressed in clear and definite terms all public regulations then existing or thereafter to be enacted which tend to the promotion of the health, order, convenience, and comfort of the people and the prevention and punishment of injuries and offenses to the public."). Thus, because the severity of the impairment is slight, and the gas pipeline industry has been subject to extensive regulation by the Commission, the Commission reasonably concluded that its adoption of the amended stipulation does not result in a substantial impairment of USP's gas pipeline warranty contracts.

USP argues that the *Energy Reserves* case involved state legislation, and that the Commission's adoption of the amended stipulation is not legislation, but rather an *ultra*

vires action. Appellant's Brief at 20. As discussed above, the Commission has acted well within its statutory authority. *See, e.g.*, Ohio Rev. Code Ann. § 4905.06 (Anderson 2008) (granting authority "to prescribe any rule or order that [it] finds necessary for protection of the public safety"), App. at 1-2; Ohio Rev. Code Ann. § 4905.90 (Anderson 2008), App. at 2-4. USP further argues that the customer service line warranty business has not been regulated in the past. Appellant's Brief at 20. The natural gas industry, which is the proper industry in question, has, of course, been the subject of extensive regulation. *See Energy Reserves*, 459 U.S. at 413-414 ("At the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive."). Further, USP admits that it has been required to use qualified plumbers certified by the U.S. Department of Transportation, as well as materials from a Columbia-approved materials list. USP Application for Rehearing at 11, Sec. Supp. at 74.

The Commission's adoption of the amended stipulation is a valid exercise of the state's police power, despite USP's suggestion to the contrary. Appellant's Brief at 24. This Court's precedent supports the Commission's exercise of that power, as well as its conclusion that there is no substantial impairment in this case. For example, the Court has affirmed that "[i]t is one of the prime essentials of the principles of public policy that freedom of contract and private dealing may be restricted by law for the good of the community" and "[t]he police power would lose very much of its potentiality if its operation could be defeated by contracts whose continued operation would be detrimental to the public welfare." *Board of Comm'rs of Franklin County v. Pub. Util. Comm'n*, 107

Ohio St. 442, 450, 453, 140 N.E. 87, 90, 91 (1923) (affirming the Commission's order authorizing the abandonment of an interurban railroad line and rejecting a claim that the discontinuance of service constituted an impairment of franchise contracts).

Further, the Court has stated that the prohibition against impairment of contracts "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'n*, 56 Ohio St. 2d 212, 217-218, 383 N.E.2d 588, 592 (1978) (quoting *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854, 860 (1957)). Additionally, the Court noted that the legislation or administrative order in question is not invalidated "unless the legislating body's initial determination that the law bears a real and substantial relationship to public health, safety and welfare appears to be clearly erroneous." *Ohio Edison Co.*, 56 Ohio St. 2d at 218, 383 N.E.2d at 592 (rejecting a contract impairment claim and finding that the Power Siting Commission's denial of an application for a certificate of environmental compatibility and public need, based on evidence that the utility's proposed expansion plans would have a greater than minimum adverse recreational impact, was a "valid exercise of police power"); *see also City of Akron*, 149 Ohio St. at 347, 78 N.E.2d at 890 (rejecting a contract impairment claim and affirming the Commission's emergency order regarding the sale of natural gas during a projected shortage).

The Commission's adoption of the stipulation is a valid exercise of the state's police power. Its determination that adoption of the stipulation does not substantially

impair USP's warranty contracts is consistent with this Court's own precedent, as well as with the *Energy Reserves* test.

B. Even if there were a substantial impairment of contracts, the Commission has a significant and legitimate public purpose in adopting the amended stipulation. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410-413 (1983); *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 77-80, 495 N.E.2d 380, 386-388 (1986).

The Commission's adoption of the amended stipulation does not result in a substantial impairment of USP's external gas pipeline warranty contracts. That is the end of the analysis under the *Energy Reserves* test. Assuming for the sake of argument that USP's warranty contracts have been substantially impaired by the Commission's adoption of the amended stipulation,⁹ the substantial impairment would be justified by the Commission's significant and legitimate purpose in protecting the public safety.

If a substantial impairment exists, the second step of the *Energy Reserves* test is whether the state has "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 (1983) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, 249 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)); see also *Board of Comm'rs of Franklin*

⁹ Even though the Commission determined that there was no substantial impairment of USP's warranty contracts, it nevertheless considered USP's contract impairment claim under the second and third prongs of the *Energy Reserves* test. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 18) (April 9, 2008), Appellant's App. at A-024. This brief likewise addresses the second and third parts of the test, but only in response to USP's arguments, and not as a concession that a substantial impairment exists.

County v. Pub. Util. Comm'n, 107 Ohio St. 442, 450, 140 N.E. 87, 90 (1923) (stating that “all contracts when made are subject to the paramount rights of the public”).

The Commission found that, even if there were a substantial impairment of USP’s warranty contracts, it would have a significant and legitimate public purpose in causing such an impairment. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 19) (April 9, 2008), Appellant’s App. at A-025. The Commission determined that adoption of the amended stipulation would likely result, on the whole, in a safer gas distribution system. *Id.* Improving the safety of the system is a significant and legitimate public purpose.

The Commission cited a number of concerns. Leaks in customer service lines can be a safety hazard. *Id.*; Tr. IV at 92 (USP witness Funk agreeing that leaking service lines can be a safety hazard), Sec. Supp. at 93; Tr. IV at 108-109 (USP witness Phipps agreeing that leaking lines are repaired for safety reasons and confirming that line leaks cause house fires, not only damaging the property in question, but also creating a danger to neighboring residences), Sec. Supp. at 102-103; Columbia Ex. 5 (Rebuttal Testimony of Michael Ramsey) at 2 (Columbia witness Ramsey testifying that leaks in service lines can present significant safety hazards), Sec. Supp. at 66. Proper maintenance of the lines, as required to be in full compliance with federal and state safety regulations, was made more difficult by responsibility being held by various parties – customers, Columbia, and warranty providers such as USP. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 19) (April 9, 2008), Appellant’s App. at A-025; Staff Ex. 2 (Testimony of Edward M. Steele) at 9-12, Sec. Supp. at 59-62. Under the prior system,

Columbia had no means to train repair personnel, supervise the repair process, or ensure a uniform approach to repair and maintenance. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 19) (April 9, 2008), Appellant's App. at A-025. Additionally, because Columbia's customers were burdened with the cost of repairs, some of those customers may have been reluctant to report suspected leaks. *Id.* Now that Columbia has assumed financial responsibility for repairs and maintenance,¹⁰ those customers no longer have a reason to refrain from reporting the suspected leak as soon as possible. *Id.*

USP misinterprets the second part of the *Energy Reserves* test, and argues that the Commission must identify the existence of a broad and general social or economic problem. Appellant's Brief at 22, 24, 25, 27, 29. The test, however, requires only that the Commission have a significant and legitimate public purpose. Remedying a broad and general social or economic problem is one type of significant and legitimate public purpose; it is not the only such purpose. Even so, the Commission's adoption of the amended stipulation, by improving the safety of the gas distribution system, can be considered a remedy to a broad and general social or economic problem. The Commission concluded that "[i]ncreasing public safety, as it relates to the gas distribution system, is

¹⁰

Columbia will recover the cost of repairing or replacing risers and customer-owned service lines through the automatic adjustment mechanism. All customers will benefit from Columbia's maintenance of hazardous customer service lines and thus from shared cost responsibility for that maintenance, as they benefit from the rest of the gas distribution system that they support through rates paid to Columbia. Further, hazardous customer service lines pose a threat not just to the owner of the property on which they are located, but also to the surrounding property owners. Columbia's oversight of hazardous customer service lines enhances the safety of the system to the benefit of all.

critical.” *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 19) (April 9, 2008), Appellant’s App. at A-025. This all-important purpose of improving the safety of the gas distribution system is a significant and legitimate public purpose, and would therefore justify a substantial impairment of USP’s gas pipeline warranty contracts, if such an impairment were to exist.

- C. **Even if there were a substantial impairment of contracts, adjustment of the contract rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the amended stipulation’s adoption. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 410-413 (1983); *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 77-80, 495 N.E.2d 380, 386-388 (1986).**

Improvement of the safety of the gas distribution system is a significant and legitimate public purpose. Where a significant and legitimate public purpose exists, the final question of the *Energy Reserves* test 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, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412 (1983) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)). As long as the state is not a party to the contract, the Court defers to “legislative judgment as to the necessity and reasonableness of a particular measure.” *Id.* at 412-413 (quoting *United States Trust Co.*, 431 U.S. at 22-23).

Relying upon the expertise of Staff witness Steele, the Commission concluded that the amended stipulation appropriately addresses the need to improve the integrity of the

gas distribution system and the attendant risk of harm to the public that is caused by hazardous customer service lines. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 20) (April 9, 2008) (citing Staff Ex. 2 (Testimony of Edward M. Steele) at 8-12, Sec. Supp. at 58-62), Appellant's App. at A-026. Having now assumed financial responsibility for the repair, replacement, and maintenance of hazardous customer service lines, Columbia has better control over the quality of work being performed, and hazardous lines and risers can be repaired more effectively and efficiently. *Id.* at 19-20, Appellant's App. at A-025 – A-026. The types of materials that are used to repair and maintain lines can be verified. *Id.* Further, the amended stipulation established a uniform demarcation of responsibility for the repair, replacement, and maintenance of hazardous customer service lines. *Id.* Columbia now has complete responsibility for all pipelines subject to federal pipeline safety regulations. *Id.*

For these reasons, the Commission reasonably concluded that "public safety will be improved by assigning maintenance responsibility to the party who carries the legal responsibility for complying with safety regulations" (*i.e.*, Columbia). *Id.* at 20, Appellant's App. at A-026. It was therefore appropriate to allow Columbia, as the party with both legal and financial responsibility for the repair and maintenance of hazardous customer service lines, to supervise the selection of workers, the materials used, and the work performed to repair and maintain those lines. *Id.* Even if a substantial impairment of USP's contracts were to result from the Commission's adoption of the amended stipulation, the adjustment of the rights and responsibilities of USP and its warranty customers was based upon reasonable conditions and was of a character appropriate to the public

purpose justifying the stipulation's adoption. The Commission acted reasonably with respect to its significant and legitimate public purpose of improving the safety of the gas distribution system, and its orders should be affirmed.

Proposition of Law No. IV:

The Commission reasonably concluded that its adoption of the amended stipulation does not result in the taking of private property without just compensation.

USP argues that the Commission erred in concluding that adoption of the amended stipulation would not result in a compensable taking of private property. Appellant's Brief at 29. USP does not clearly set out its position on this issue, but its primary concern appears to be that the Commission's orders mandate a transfer of ownership. *Id.* at 30. As the Commission explained, the amended stipulation requires only that Columbia must assume financial responsibility for the repair, replacement, and maintenance of hazardous service lines and relieve Columbia's customers of this financial burden. The Commission's orders should be affirmed.

- A. **USP has no standing to argue that the Commission's approval of the amended stipulation results in a taking of private property without just compensation. OH CONST. art. I, § 19; *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 77, 701 N.E.2d 1002, 1008 (1998); *Shealy v. Campbell*, 20 Ohio St. 3d 23, 24, 485 N.E.2d 701, 702 (1985).**

USP does not contend that it has suffered a taking as the result of the Commission's adoption of the amended stipulation. Instead, USP argues that the amended stipulation renders a taking of the property of its warranty customers without just compensa-

tion. USP does not have standing to assert a takings claim on behalf of its warranty customers and its claim should therefore be dismissed.

“Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue.” *Ohio Pyro, Inc. v. Ohio Dep’t of Commerce*, 115 Ohio St. 3d 375, 381, 875 N.E.2d 550, 557 (2007) (citing *Ohio Contractors Ass’n v. Bicking*, 71 Ohio St. 3d 318, 320, 643 N.E.2d 1088, 1089 (1994)); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“[A] plaintiff must demonstrate standing for each claim he seeks to press.”). “[I]f a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action.” *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 77, 701 N.E.2d 1002, 1008 (1998). “[A]ctions must be brought in the name of the party who possesses the substantive right being asserted under applicable law.” *Shealy v. Campbell*, 20 Ohio St. 3d 23, 24, 485 N.E.2d 701, 702 (1985).

“To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief.” *Id.* at 25, 485 N.E.2d at 702-703. With respect to takings, the Ohio Constitution specifically provides that if private property is appropriated by the government, “compensation shall be made to the *owner*.” OH CONST. art. I, § 19 (emphasis added), App. at 15. USP does not own the gas service lines in question (*i.e.*, the line from the curb to the meter, including the riser). The lines belong to the owners of the property on which they are located. Because USP is not the owner of the lines, it has no standing

to raise a takings claim. Having no ownership interest in the service lines, USP has also failed to demonstrate how it has been prejudiced by the Commission's orders. *See, e.g., Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 302, 595 N.E.2d 873, 876 (1992) (applying "the established principle that this court will not reverse an order of the commission absent a showing of prejudice by the party seeking reversal").

As discussed below, the Commission found that its adoption of the amended stipulation would not result in a taking. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 21) (April 9, 2008), Appellant's App. at A-027. The Commission appropriately recognized, however, that even if there is an argument to be made with regard to the Takings Clause, USP is not the proper party to raise it. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry on Rehearing at 12) (June 4, 2008), Appellant's App. at A-055. Columbia's customers, as the owners of the gas service lines, are the real parties in interest. Because USP does not have standing, it is not entitled to have the Court review the merits of its takings claim and the Court should dismiss it accordingly.

B. Adoption of the amended stipulation does not result in the taking of private property without just compensation. *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 115 Ohio St. 3d 337, 875 N.E.2d 59 (2007); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Quite simply, the Commission's adoption of the amended stipulation does not effect a compensable taking of private property rights. The amended stipulation merely

provides that Columbia is required to repair, replace, and maintain hazardous customer service lines and that it will assume financial responsibility for doing so.

As the Commission recognized, the state is prohibited from taking private property for public use without just compensation. U.S. CONST. amend. V, XIV, App. at 14, 14; OH CONST. art. I, § 19, App. at 15. State regulations that result in a permanent physical invasion of property or a complete deprivation of all economically beneficial use of property are considered *per se* takings. *State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 115 Ohio St. 3d 337, 341, 875 N.E.2d 59, 64 (2007). Otherwise, state regulations are evaluated under the standard established in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id.*, 875 N.E.2d at 64. Under *Penn Cent.*, certain factors have particular significance. These factors are the economic impact of the regulation on the party seeking compensation;¹¹ the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the government action. *Penn Cent.*, 438 U.S. at 124.

In this case, the Commission concluded that its approval of the amended stipulation would not result in a compensable taking of the private property of Columbia's customers. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 21) (April 9, 2008), Appellant's App. at A-027. The amended stipulation does not effect

¹¹ To be clear, no party is seeking compensation in this case. There are no pending mandamus actions. *See State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Comm'rs*, 115 Ohio St. 3d 337, 340, 875 N.E.2d 59, 64 (2007) ("Mandamus is the appropriate action to compel public authorities to commence appropriation cases when an involuntary taking of private property is alleged."). None of Columbia's customers (*i.e.*, the owners of the service lines) opposed the amended stipulation. In fact, the Office of the Ohio Consumers' Counsel is a signatory party to the amended stipulation.

a blanket transfer of ownership of customer service lines to Columbia, as USP suggests. Appellant's Brief at 29-30. Rather, its provisions require Columbia to assume financial responsibility for the repair, replacement, and maintenance of hazardous, leaking customer service lines, including risers. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 12-13) (April 9, 2008), Appellant's App. at A-018 – A-019. When such a leak is identified, Columbia is now required to repair or replace the line at the Company's expense. *Id.* Columbia's customers, therefore, are not individually required to pay, out-of-pocket, for the repair or replacement of the hazardous line or for the maintenance of the new one. Columbia's customers remain responsible only for initial curb-to-meter service. *Id.* The amended stipulation requires only that Columbia assume full responsibility for remedying hazardous customer service lines, and USP does not explain how this transfer of responsibility for hazardous lines constitutes a taking. Its legal authority consists of a single citation to an inapposite case. Appellant's Brief at 31 (citing *City of Mansfield v. Balliett*, 65 Ohio St. 451, 63 N.E. 86 (1902) (determining that “[a]ny actual and material interference [with riparian] rights, which causes special and substantial injury to the owner, is a taking of his property”) (paragraph 2 of the syllabus)).

Contrary to USP's assertion, the amended stipulation does not take from Columbia's customers the right to decide how to handle a hazardous service line. No property owner is obligated to allow Columbia to enter the owner's private property for the purpose of repairing, replacing, or maintaining a hazardous service line on that property. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 21)

(April 9, 2008), Appellant's App. at A-027. As long as the property owner desires to continue gas service, the owner must allow Columbia to make repairs, as a condition of receiving that service. Property owners, however, may always decide to forgo the repairs and discontinue their gas service. USP accuses the Commission of issuing an unreasonable "ultimatum," arguing that property owners must give up their property rights as a condition of receiving gas service. Appellant's Brief at 30. Specifically, USP notes that customers no longer have the right to select a company other than Columbia to repair a hazardous line. *Id.* at 30-31. But USP fails to mention that customers no longer have to pay, out-of-pocket, for those repairs. The amended stipulation may limit the customers' repair options, but it also relieves them of a significant financial burden. Further, as noted by the Commission, the customers' right to decide on a repair company, and the materials and methods to be employed, was already limited by existing safety regulations. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry on Rehearing at 12) (June 4, 2008) ("Because of the inherently volatile nature of natural gas, numerous conditions are reasonably placed on the right to receive gas service."), Appellant's App. at A-055.

The Commission's adoption of the amended stipulation does not rise to the level of a permanent physical invasion of hazardous service lines or a complete deprivation of all economically beneficial use of those lines. In fact, USP alleges only that the Commission "interfered" with customers' property rights. Appellant's Brief at 31. Because the Commission's action does not constitute a *per se* taking, the *Penn Cent.* factors should be

considered, all of which support the Commission's determination that there is no taking of private property in this case.

With respect to the economic impact of the Commission's action, there is no economic harm to Columbia's customers. Under the terms of the amended stipulation, they are no longer required to pay out-of-pocket for the repair or replacement of a hazardous service line. Columbia has assumed financial responsibility for such work. Additionally, there should be little, if any, detrimental effect to property values. In place of a hazardous, leaking service line on the property, the customer will benefit from the use of a fully functional and safe service line. Second, the amended stipulation does not interfere with the distinct investment-backed expectations of Columbia's customers. A hazardous, leaking service line is of no value to the property owner. Columbia's assumption of responsibility for the repair of hazardous service lines does not negatively impact property owners' distinct investment-backed expectations. It is the leaking line that creates a safety hazard and consequently impairs the value of the property – not Columbia's efforts to eliminate the hazard. The fact that the repaired or replaced line belongs to Columbia is not likely to have interfered much, if at all, with the distinct investment-backed expectations of Columbia's customers.

Finally, the character of the government action – the Commission's adoption of the amended stipulation – cannot “be characterized as a physical invasion by government.” *Penn. Cent.*, 438 U.S. at 124. Rather, it stems “from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Id.* The Commission's adoption of the amended stipulation does not cause a physical invasion or

occupation of private property, nor does it deny property owners an economically viable use of their property. At most, the amended stipulation impacts only one strand (*i.e.*, the right to have a company other than Columbia repair a hazardous service line) of each owner's bundle of property rights, which is not a taking. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). More importantly, the Commission's adoption of the amended stipulation advances the state's legitimate interest in the safety of its citizens. Accordingly, the Court should reject USP's takings claim.

C. The Commission's adoption of the amended stipulation was a reasonable and lawful exercise of the state's police power. *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 131, 702 N.E.2d 81, 93 (1998).

In adopting the amended stipulation, the Commission reasonably and lawfully exercised the state's police power. This Court has determined that "[p]rivate property rights may be limited through the state's exercise of its police power when restrictions are necessary for the public welfare." *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 131, 702 N.E.2d 81, 93 (1998); *see also* OH CONST. art. I, § 19 ("Private property shall ever be held inviolate, but subservient to the public welfare."), App. at 15. "[I]t must appear that the interests of the general public require its exercise and the means of restriction must not be unduly oppressive upon individuals." *State ex rel. Pizza*, 84 Ohio St. 3d at 131, 702 N.E.2d at 93 (citing *Froelich v. Cleveland*, 99 Ohio St. 376, 391, 124

N.E. 212, 216 (1919)). Additionally, the government action must have a substantial relationship to the public health, morals, and safety. *Id.*, 702 N.E.2d at 93.

The Commission determined that approval of the amended stipulation would likely result in a safer gas distribution system and that improving public safety, as related to the gas distribution system, is of critical importance. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 19) (April 9, 2008), Appellant's App. at A-025. The record fully supports the Commission's conclusion. Columbia's assumption of financial responsibility for the repair, replacement, and maintenance of hazardous customer service lines is necessary to protect the public's interest in receiving gas service via a distribution system that is safe and properly maintained. Further, the amended stipulation does not unduly burden customers. In fact, under its terms, they are relieved of the financial burden for repair and maintenance work. Thus, even if the Commission's adoption of the amended stipulation has restricted private property rights, the safety of the public is an interest that justifies the Commission's action.

- D. Even if adoption of the amended stipulation were to result in a taking of private property, "just compensation" has been adequately addressed under the terms of the amended stipulation. *Columbia Gas Transm. Corp. v. An Exclusive Natural Gas Storage Easement*, 67 Ohio St. 3d 463, 465, 620 N.E.2d 48, 50 (1993).**

Assuming for the sake of argument that the Commission's approval of the amended stipulation would result in a taking of private property, "just compensation" has been adequately addressed under the terms of the amended stipulation. Just compensation is generally measured from the property owner's point of view. *Columbia Gas*

Transm. Corp. v. An Exclusive Natural Gas Storage Easement, 67 Ohio St. 3d 463, 465, 620 N.E.2d 48, 50 (1993). The amended stipulation only requires Columbia to repair and maintain *hazardous* customer service lines. In the event that a hazardous customer service line is identified, Columbia will repair or replace that line. The cost of parts and labor will be assumed by Columbia, without any out-of-pocket payment by the property owner. As compensation for the “taking” of the hazardous, leaking service line, the property owner will receive a functional, non-leaking line – one that safely conveys gas to the property. The Commission determined that a fully functioning gas service line sufficiently compensates the owner for any “taking” of the hazardous line that may occur at the time of repair or replacement. *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Opinion and Order at 21-22) (April 9, 2008), Appellant’s App. at A-027 – A-028. The value to the property owner of having a functional service line, safely distributing gas to the property, far outweighs the value of a hazardous, leaking line. Thus, even if the Commission’s adoption of the amended stipulation has caused a taking of private property, the affected property owners will be adequately compensated. The Commission should be affirmed.

CONCLUSION

The Commission reasonably adopted an amended stipulation under which Columbia is required to assume responsibility for the future repair, replacement, and maintenance of hazardous, leaking customer service lines. In adopting the amended stipulation, the Commission acted within the bounds of its gas pipeline safety jurisdiction

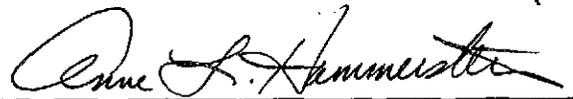
and regulatory powers. The Commission's orders are fully supported by sufficient record evidence, which establishes that leaking customer service lines pose a safety hazard to persons and property. Additionally, the Commission reasonably concluded that its adoption of the amended stipulation does not result in a substantial impairment of contracts or a taking of private property without just compensation.

The Commission's adoption of the amended stipulation is a major stride toward improving the safety of gas pipeline maintenance in the State of Ohio, and its orders should be affirmed.

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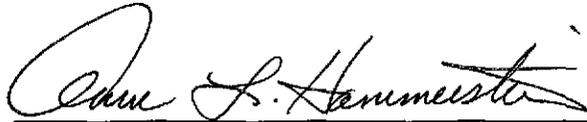
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 7th day of November, 2008.



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4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4905.05 Scope of jurisdiction.

The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities and railroads; to the records and accounts of the business thereof done within this state; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system.

Nothing in this section, or section 4905.06 or 4905.46 of the Revised Code pertaining to regulation of holding companies, grants the public utilities commission authority to regulate a holding company or its subsidiaries which are organized under the laws of another state, render no public utility service in the state of Ohio, and are regulated as a public utility by the public utilities commission of another state or primarily by a federal regulatory commission, nor do these grants of authority apply to public utilities that are excepted from the definition of "public utility" under divisions (A) to (C) of section 4905.02 of the Revised Code.

4905.06 General supervision.

The public utilities commission has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in

that section, and may examine such companies and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies. The commission, through the public utilities commissioners or inspectors or employees of the commission authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device, and lines of any public utility. The power to inspect includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety. In order to assist the commission in the performance of its duties under this chapter, authorized employees of the motor carrier enforcement unit, created under section 5503.34 of the Revised Code in the division of state highway patrol, of the department of public safety may enter in or upon, for inspection purposes, any motor vehicle of any motor transportation company or private motor carrier as defined in section 4923.02 of the Revised Code.

In order to inspect motor vehicles owned or operated by a motor transportation company engaged in the transportation of persons, authorized employees of the motor carrier enforcement unit, division of state highway patrol, of the department of public safety may enter in or upon any property of any motor transportation company, as defined in section 4921.02 of the Revised Code, engaged in the intrastate transportation of persons.

4905.90 Natural gas pipeline safety standards definitions.

As used in sections 4905.90 to 4905.96 of the Revised Code:

(A) "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.

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

(C) "Gathering lines" and the "gathering of gas" have the same meaning as in the Natural Gas Pipeline Safety Act and the rules adopted by the United States department of transportation pursuant to the Natural Gas Pipeline Safety Act, including 49 C.F.R. part 192, as amended.

(D) "Intrastate pipe-line transportation" has the same meaning as in 82 Stat. 720 (1968), 49 U.S.C.A. App. 1671, as amended, but excludes the gathering of gas exempted by the Natural Gas Pipeline Safety Act.

(E) "Master-meter system" means a pipe-line system that distributes gas within a contiguous property for which the system operator purchases gas for resale to consumers, including tenants. Such pipe-line system supplies consumers who purchase the gas directly through a meter, or by paying rent, or by other means. The term includes a master-meter system

as defined in 49 C.F.R. 191.3, as amended. The term excludes a pipeline within a manufactured home, mobile home, or a building.

(F) "Natural Gas Pipeline Safety Act" means the "Natural Gas Pipeline Safety Act of 1968," 82 Stat. 720, 49 U.S.C.A. App. 1671 et seq., as amended.

(G) "Operator" means any of the following:

(1) A gas company or natural gas company as defined in section 4905.03 of the Revised Code, except that division (A)(6) of that section does not authorize the public utilities commission to relieve any producer of gas, as a gas company or natural gas company, of compliance with sections 4905.90 to 4905.96 of the Revised Code or the pipe-line safety code created under section 4905.91 of the Revised Code;

(2) A pipe-line company, as defined in section 4905.03 of the Revised Code, when engaged in the business of transporting gas by pipeline;

(3) 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;

(4) Any person that owns, operates, manages, controls, or leases any of the following:

(a) Intrastate pipe-line transportation facilities within this state;

(b) Gas gathering lines within this state which are not exempted by the Natural Gas Pipeline Safety Act;

(c) A master-meter system within this state.

"Operator" does not include an ultimate consumer who owns a service line, as defined in 49 C.F.R. 192.3, as amended, on the real property of that ultimate consumer.

(H) "Operator of a master-meter system" means a person described under division (F)(4)(c) of this section. An operator of a master-meter system is not a public utility under section 4905.02 or a gas or natural gas company under section 4905.03 of the Revised Code.

(I) "Person" means:

(1) In addition to those defined in division (C) of section 1.59 of the Revised Code, a joint venture or a municipal corporation;

(2) Any trustee, receiver, assignee, or personal representative of persons defined in division (H)(1) of this section.

(J) "Safety audit" means the public utilities commission's audit of the premises, pipe-line facilities, and the records, maps, and other relevant documents of a master-meter system to determine the operator's compliance with sections 4905.90 to 4905.96 of the Revised Code and the pipe-line safety code.

(K) "Safety inspection" means any inspection, survey, or testing of a master-meter system which is authorized or required by sections 4905.90 to 4905.96 of the Revised Code and the pipe-line safety code. The term includes, but is not limited to, leak surveys, inspection of regulators and critical valves, and monitoring of cathodic protection systems, where applicable.

(L) "Safety-related condition" means any safety-related condition defined in 49 C.F.R. 191.23, as amended.

(M) "Total Mcfs of gas it supplied or delivered" means the sum of the following volumes of gas that an operator supplied or delivered, measured in units per one thousand cubic feet:

- (1) Residential sales;
- (2) Commercial and industrial sales;
- (3) Other sales to public authorities;
- (4) Interdepartmental sales;
- (5) Sales for resale;
- (6) Transportation of gas.

4905.91 Intrastate gas pipelines.

For the purpose of protecting the public safety with respect to intrastate pipe-line transportation by any operator:

(A) The public utilities commission shall:

(1) Adopt, and may amend or rescind, rules to carry out sections 4905.90 to 4905.96 of the Revised Code, including rules concerning pipe-line safety, drug testing, and enforcement procedures. The commission shall adopt these rules only after notice and opportunity for public comment. The rules adopted under this division and any orders issued under sections 4905.90 to 4905.96 of the Revised Code constitute the pipe-line safety code. The commission shall administer and enforce that code.

(2) Make certifications and reports to the United States department of transportation as required under the Natural Gas Pipeline Safety Act.

(B) The commission may:

(1) Investigate any service, act, practice, policy, or omission by any operator to determine its compliance with sections 4905.90 to 4905.96 of the Revised Code and the pipe-line safety code;

(2) Investigate any intrastate pipe-line transportation facility to determine if it is hazardous to life or property, as provided in 82 Stat. 720 (1968), 49 U.S.C.A. App. 1679b(b)(2) and (3);

(3) Investigate the existence or report of any safety-related condition that involves any intrastate pipe-line transportation facility;

(4) Enter into and perform contracts or agreements with the United States department of transportation to inspect interstate transmission facilities pursuant to the Natural Gas Pipeline Safety Act;

(5) Accept grants-in-aid, cash, and reimbursements provided for or made available to this state by the federal government to carry out the Natural Gas Pipeline Safety Act or to enforce sections 4905.90 to 4905.96 of the Revised Code and the pipe-line safety code. All such grants-in-aid, cash, and reimbursements shall be deposited to the credit of the gas pipe-line safety fund, which is hereby created in the state treasury, to be used by the commission for the purpose of carrying out this section.

(C) The commission's regulation of gathering lines shall conform to the regulation of gathering lines in 49 C.F.R. 192 and 199, as amended, and the commission's annual certification agreements with the United States department of transportation, except that rule 4901:1-16-03, paragraph (D) of rule 4901:1-16-05, and rule 4901:1-16-06 of the Ohio Administrative Code shall also apply to gathering lines. The procedural rules under chapter 4901:1-16 of the Ohio Administrative Code shall also apply to operators of gathering lines.

4905.95 Notices, hearings and orders of commission.

(A) Except as otherwise provided in division (C) of this section:

(1) The public utilities commission, regarding any proceeding under this section, shall provide reasonable notice and the opportunity for a hearing in accordance with rules adopted under section 4901.13 of the Revised Code.

(2) Sections 4903.02 to 4903.082, 4903.09 to 4903.16, and 4903.20 to 4903.23 of the Revised Code apply to all proceedings and orders of the commission under this section and to all operators subject to those proceedings and orders.

(B) If, pursuant to a proceeding it specially initiates or to any other proceeding and after the hearing provided for under division (A) of this section, the commission finds that:

(1) An operator has violated or failed to comply with, or is violating or failing to comply with, sections 4905.90 to 4905.96 of the Revised Code or the pipe-line safety code, the commission by order:

(a) Shall require the operator to comply and to undertake corrective action necessary to protect the public safety;

(b) May assess upon the operator forfeitures of not more than one hundred thousand dollars for each day of each violation or noncompliance, except that the aggregate of such forfeitures shall not exceed five hundred thousand dollars for any related series of violations or noncompliances. In determining the amount of any such forfeiture, the commission shall consider all of the following:

- (i) The gravity of the violation or noncompliance;
- (ii) The operator's history of prior violations or noncompliances;
- (iii) The operator's good faith efforts to comply and undertake corrective action;
- (iv) The operator's ability to pay the forfeiture;
- (v) The effect of the forfeiture on the operator's ability to continue as an operator;
- (vi) Such other matters as justice may require.

All forfeitures collected under this division or section 4905.96 of the Revised Code shall be deposited in the state treasury to the credit of the general revenue fund.

(c) May direct the attorney general to seek the remedies provided in section 4905.96 of the Revised Code.

(2) An intrastate pipe-line transportation facility is hazardous to life or property, the commission by order:

(a) Shall require the operator of the facility to take corrective action to remove the hazard. Such corrective action may include suspended or restricted use of the facility, physical inspection, testing, repair, replacement, or other action.

(b) May direct the attorney general to seek the remedies provided in section 4905.96 of the Revised Code.

(C) If, pursuant to a proceeding it specially initiates or to any other proceeding, the commission finds that an emergency exists due to a condition on an intrastate pipe-line transportation facility posing a clear and immediate danger to life or health or threatening a significant loss of property and requiring immediate corrective action to protect the public safety, the commission may issue, without notice or prior hearing, an order reciting its finding and may

direct the attorney general to seek the remedies provided in section 4905.96 of the Revised Code. The order shall remain in effect for not more than forty days after the date of its issuance. The order shall provide for a hearing as soon as possible, but not later than thirty days after the date of its issuance. After the hearing the commission shall continue, revoke, or modify the order and may make findings under and seek appropriate remedies as provided in division (B) of this section.

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 naphtha.

(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.

4901:1-16-02 Purpose and scope.

(A) The rules contained in this chapter prescribe:

(1) GPS and drug and alcohol testing requirements to protect the public safety.

(2) Procedures for the staff to administer and enforce the pipeline safety code.

(B) This chapter also governs GPS proceedings to:

(1) Investigate and determine an operator's compliance with the pipeline safety code.

(2) Investigate and determine whether an operator's intrastate gas pipeline facility is hazardous to human life or property, as provided in 49 U.S.C. 60112, as effective on the date referenced in paragraph (D) of this rule.

(3) Review settlement agreements and stipulations by the staff and the operator.

(4) Issue and enforce compliance orders.

(5) Issue emergency orders without notice or prior hearing when immediate action is needed to protect the public safety.

(6) Assess forfeitures.

(7) Direct the attorney general to seek enforcement of commission orders, including orders assessing forfeitures, and to seek appropriate remedies in court to protect the public safety.

(C) All operators shall comply with the rules of this chapter.

(D) Each citation contained with this chapter that is made to a section of the United States code or a regulation in the code of federal regulations is intended, and shall serve, to incorporate by reference the particular version of the cited matter that was effective on February 13, 2008.

4901:1-16-03 Adoption of U.S. department of transportation gas pipeline safety regulations.

(A) The commission hereby adopts the GPS regulations of the U.S. department of transportation contained in 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.

(B) Telephone notice and report requirements applicable to gathering lines (per division (C) of section 4905.91 of the Revised Code) are set forth in rule 4901:1-16-05 of the Administrative Code.

4901:1-16-04 Records, maps, inspections and leak classifications.

Each operator shall:

(A) Establish and maintain all plans, records, reports, information and maps necessary to ensure compliance with the pipeline safety code, and keep such plans, records, reports, information and maps in Ohio at the operator's headquarters or appropriate company office(s) readily available for inspection, examination and copying by the commission, its staff or its authorized representative(s).

(B) Provide and make available its plans, records, reports, information and maps, as the commission, its staff or its authorized representative(s) may require to administer and enforce the pipeline safety code.

(C) Permit the commission, its staff and authorized representative(s) to: enter and inspect its premises, operations and intrastate gas pipeline facilities; and inspect, examine and copy its plans, records, reports, information and maps, which the commission, its staff or its authorized representative(s) may require to administer and enforce the pipeline safety code.

(D) Make its premises, operations and intrastate gas pipeline facilities readily accessible to the commission, its staff and its authorized representative(s).

(E) Except for an operator of a master meter system, establish and maintain maps of the operator's service area which identify the operator's intrastate gas pipeline facilities, excluding service lines as defined in 49 C.F.R. 192.3 as effective on the date referenced in paragraph (D) of rule 4901:1-16-02 of the Administrative Code.

(F) Unless otherwise provided by this chapter, establish and retain records for three years to show compliance with the requirements of 49 C.F.R. 192 as effective on the date referenced in paragraph (D) of rule 4901:1-16-02 of the Administrative Code.

(G) Retain records of each leak survey, as required by 49 C.F.R. 192.723 as effective on the date referenced in paragraph (D) of rule 4901:1-16-02 of the Administrative Code, for five years.

(H) Classify all hazardous leaks immediately and classify all other leaks within two business days of discovery, utilizing the following standards for leak classification, monitoring, and repair:

(1) A grade one leak represents an existing or probable hazard to persons or property, and requires immediate repair or continuous action until the conditions are no longer hazardous.

(2) A grade two leak is that recognized as being nonhazardous at the time of detection, but requires scheduled repair based upon the severity and/or location of the leak.

(3) A grade three leak is that recognized as nonhazardous at the time of detection and can be reasonably expected to remain nonhazardous.

(I) Upon discovery of any leak, take the following actions:

(1) Take immediate action on grade one leaks to protect life and property and continuous action until the condition is no longer hazardous. This may require but is not limited to implementation of the operator's emergency plan.

(2) Repair or clear grade two leaks no later than fifteen months from the date the leak is discovered, unless the pipeline containing the leak is replaced within twenty-four months from the date the leak is discovered. Grade two leaks shall be reevaluated at least once every six months until cleared.

(3) Reevaluate grade three leaks during the next scheduled survey or within fifteen months from the date of the last inspection (whichever is sooner) and continue to reevaluate such leaks on that same frequency until the leak is repaired or there is no longer any indication of leakage.

§ 192.1 What is the scope of this part?

(a) This part prescribes minimum safety requirements for pipeline facilities and the transportation of gas, including pipeline facilities and the transportation of gas within the limits of the outer continental shelf as that term is defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331).

(b) This part does not apply to—

(1) Offshore gathering of gas in State waters upstream from the outlet flange of each facility where hydrocarbons are produced or where produced hydrocarbons are first separated, dehydrated, or otherwise processed, whichever facility is farther downstream;

(2) Pipelines on the Outer Continental Shelf (OCS) that are producer-operated and cross into State waters without first connecting to a transporting operator's facility on the OCS, upstream (generally seaward) of the last valve on the last production facility on the OCS. Safety equipment protecting PHMSA-regulated pipeline segments is not excluded. Producing operators for those

pipeline segments upstream of the last valve of the last production facility on the OCS may petition the Administrator, or designee, for approval to operate under PHMSA regulations governing pipeline design, construction, operation, and maintenance under 49 CFR 190.9.

(3) Pipelines on the Outer Continental Shelf upstream of the point at which operating responsibility transfers from a producing operator to a transporting operator;

(4) Onshore gathering of gas—

(i) Through a pipeline that operates at less than 0 psig (0 kPa);

(ii) Through a pipeline that is not a regulated onshore gathering line (as determined in §192.8); and

(iii) Within inlets of the Gulf of Mexico, except for the requirements in §192.612.

(5) Any pipeline system that transports only petroleum gas or petroleum gas/air mixtures to—

(i) Fewer than 10 customers, if no portion of the system is located in a public place; or

(ii) A single customer, if the system is located entirely on the customer's premises (no matter if a portion of the system is located in a public place).

49 C.F.R. § 192.801 Scope.

(a) This subpart prescribes the minimum requirements for operator qualification of individuals performing covered tasks on a pipeline facility.

(b) For the purpose of this subpart, a covered task is an activity, identified by the operator, that:

(1) Is performed on a pipeline facility;

(2) Is an operations or maintenance task;

(3) Is performed as a requirement of this part; and

(4) Affects the operation or integrity of the pipeline.

U.S. Const. art. I, § 10

Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything 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 its 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 control 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. Const. amend. V

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.

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OH CONST. art I, § 19

EMINENT DOMAIN.

§19 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. (1851)

DAMAGES FOR WRONGFUL DEATH.

RETROACTIVE LAWS.

OH CONST. art II, § 28

§28 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. (1851)

cause of riser failures. The Commission initiates this investigation pursuant to the authority granted under Sections 4905.04, 4905.05, and 4905.06, Revised Code. To accomplish such an evaluation, we determine that it is best to initiate, at this time, a generic investigation (not a compliance or violation investigation) in order to look broadly at the current practices concerning gas service risers by Ohio's local distribution companies and the rate of failures, and consider whether any additional actions can or should be taken. The Commission has therefore opened the above-captioned proceeding. Within the ambit of this proceeding, the Commission intends to evaluate the type of gas service risers being utilized, the conditions of riser installation, and the overall performance and failures of gas service risers, in order to determine whether there are any issues related to gas service risers that need Commission direction.

- (4) This proceeding will involve an investigation that will develop an inventory of gas risers in use in Ohio, the maintenance of records relating to riser failures, and the testing of various risers. As part of the investigation, the collected service risers will be tested by an independent qualified laboratory. The conclusion of the testing will be reviewed by the staff, in consultation with consultant(s). This investigative process, which will be more fully described below, will be followed by a staff report and a determination by the Commission of whether any additional steps should be taken.
- (5) The Commission has determined, in order to assist staff, that it should obtain consultant(s) that have expertise in the field of materials science engineering and compression/mechanical testing. The Commission will issue a request for proposals from qualified laboratories that are capable of performing the appropriate testing of gas service risers. The consultant(s) shall assist in evaluating bid proposals from laboratories, developing testing protocols to be used by the selected laboratory, overseeing the work of the selected laboratory, and working with staff of the Commission throughout the process.
- (6) All local distribution companies in the state of Ohio will submit, directly to staff, monthly reports of all gas service risers that have failed in their territory within the preceding 30 days. The first of these reports will cover the month of April 2005 and will be submitted by no later than May 6, 2005. Subsequent reports will cover one calendar month and will, similarly, be submitted by no later than one week after the end of each month. The reports of riser failures should be prepared on a monthly basis until otherwise directed by this Commission. Attached to this entry is the form to be used by all local distribution companies, so that a consistent format for this information is used. The form should be submitted electronically, unless other arrangements are made with staff.

- (7) The four largest local distribution companies in Ohio (The Cincinnati Gas & Electric Company; Columbia Gas of Ohio, Inc.; The East Ohio Gas Company d/b/a Dominion East Ohio; and Vectren Energy Delivery of Ohio, Inc.; collectively, the four LDCs) shall take the following actions:
- (a) Each of the four LDCs shall conduct a statistically valid sampling study of inventory risers to determine the manufacturer of each gas service riser and to collect associated data.
 - (b) In order to facilitate the collection of that data and risers in a consistent, usable, and statistically valid manner, each of the four LDCs shall meet with staff to discuss sampling methodology and, in addition, attend a workshop to be held at the offices of the Commission at 10:00 a.m., on April 28, 2005, in the Hearing Room 11-E, 11th floor, at 180 East Broad Street, Columbus, Ohio 43215. The four LDCs are directed to have, at a minimum, the actual personnel who will conduct this inventory, in attendance at the workshop.
 - (c) The inventory of risers shall be performed by personnel who are trained in appropriate identification procedures. The inventory shall be completed by no later than June 20, 2005. The inventory is to be submitted to staff and its consultant(s). The form should be submitted electronically, unless other arrangements are made with staff.
- (8) The consultant(s) will assist staff in developing testing criteria and protocols for assessing risers, including riser removal criteria and protocols. Once the removal protocols and criteria are provided, all local distribution companies in the state of Ohio will, in the event of a riser failure (as defined by these criteria and protocols), remove the failed risers. In accordance with these protocols and pursuant to staff direction, the local distribution companies will submit selected risers to the testing laboratory within seven days after the removal of a failed riser. If the laboratory has not yet been selected, the risers will be appropriately stored according to the protocols and delivered to the laboratory within seven days after the laboratory's selection. In accordance with the protocols, the submission of failed risers to the testing laboratory shall continue until November 11, 2005.
- (9) All local distribution companies will contribute to cover the costs of the consultant(s) and selected laboratory. Each company's contribution will be based upon the number of service lines in its territory (as reported in its most recently filed annual report). The exact dollar amounts and payment methodology will be determined at a later date.

- (10) All local distribution companies will be informed by subsequent entry of the identity of the laboratory that will be testing risers for this Commission investigation.

It is, therefore,

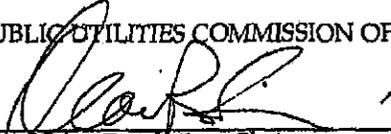
ORDERED, That all local gas distribution companies in the state of Ohio shall comply with directives in this entry concerning gas service riser failures, as set forth in findings (6), (8), and (9). It is, further,

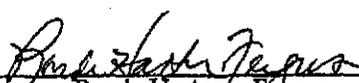
ORDERED, That The Cincinnati Gas & Electric Company; Columbia Gas of Ohio, Inc.; The East Ohio Gas Company d/b/a Dominion East Ohio; and Vectren Energy Delivery of Ohio, Inc., each comply with directives in this entry concerning inventorying gas service risers, as set forth in finding (7). It is, further,

ORDERED, That The Cincinnati Gas & Electric Company; Columbia Gas of Ohio, Inc.; The East Ohio Gas Company d/b/a Dominion East Ohio; and Vectren Energy Delivery of Ohio, Inc., each attend a workshop to be held at the offices of the Commission at 10:00 a.m. on April 28, 2005, in Hearing Room 11-E, 11th Floor, 180 East Broad Street, Columbus, Ohio 43215. It is, further,

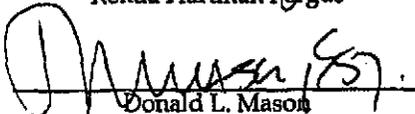
ORDERED, That a copy of this entry be served upon all local gas distribution companies in the state of Ohio and the Ohio Gas Association.

THE PUBLIC UTILITIES COMMISSION OF OHIO


 Alan R. Schriber, Chairman


 Ronda Hartman Fergus

 Judith A. Jones


 Donald L. Mason

 Clarence D. Rogers, Jr.

JWK:geb

Entered in the Journal

APR 13 2005


 Renee J. Jenkins

Renee J. Jenkins
Secretary

Monthly Riser Failure Report

Company Contact

Date

Phone Number

Number	Install Date	Failure Date	Address	City	County	Sent for Testing	Service Line Material (Steel, Plastic, or Copper)	Task Type (pulsant, corrosion, abridge, material failure, unknown)	Repair Method (replaced riser, tightened, other)	Manufacturer (Central, Conditonal, Notman, Perfection, Rob Key, D'Amico, Other)	Riser Type (Service Head Adapter, Preformed or Rigid, Bare Steel, Steel Cased, Copper)
1											
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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Investigation of the) Case No. 05-463-GA-COI
Installation, Use, and Performance of)
Natural Gas Service Risers Throughout the)
State of Ohio and Related Matters.)

ENTRY

The Commission finds:

- (1) On April 13, 2005, the Commission issued an entry initiating a Commission-ordered investigation into the type of gas service risers being installed in the state of Ohio, the conditions of installation, and their overall performance.
- (2) In that entry, we cite multiple riser failures throughout Ohio in the past several years and the recommendation of the Commission staff in *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, to open a statewide investigation.
- (3) In the April 13, 2005, entry we also stated we would hire consultant(s) to assist the Commission's staff in, among other tasks, developing testing protocols and working with staff throughout the process. (*Id. at 2*) Those duties include assisting staff in developing riser removal protocols.
- (4) In conjunction with the consultant and the US Department of Transportation, staff has developed riser removal protocols. The field protocol for riser removal includes a definition of "riser leak" which shall be used by local distribution companies to determine riser leaks appropriate for reporting to the Commission staff on the "Monthly Riser Failure Report", as well as sending removed risers to the testing lab. All local distribution companies will, in the event of a riser leak, as defined, remove risers according to the protocols. The protocols will be docketed and shared with all local distribution companies prior to a training workshop to be hosted by the Commission staff.

- (5) In order to ensure that local distribution companies have adequate training in the removal of risers, the Commission will sponsor a workshop to be attended by all local distribution companies at 10:00 a.m. on August 26, 2005, to be held at the offices of the Ohio Gas Association, 200 Civic Center Drive Columbus, Ohio 43215.
- (6) On June 29, 2005, the Commission issued an entry putting forth a Request for Proposals (RFP) seeking bids from qualified laboratories capable of performing appropriate testing of gas service risers. The RFP developed by the Commission's consultant identified two types and three categories of risers for testing. The three categories are new risers, no-leak risers removed from service, and leaking risers removed from service.
- (7) The local distribution companies, in instances of defined riser leaks, will remove risers according to the protocols and submit them to the testing laboratory within seven days after the removal.
- (8) In the case of no-leak risers, each of the four largest local distribution companies in Ohio; (The Cincinnati Gas and Electric Company; Columbia Gas of Ohio, Inc; The East Ohio Gas Company d/b/a Dominion East Ohio; and Vectren Energy Delivery of Ohio) shall work with staff to identify qualified no-leak risers as outlined by the Commission's consultant in the RFP "General Description of Investigative Procedures", for the purpose of studying the effects of aging on riser performance.
- (9) The local distribution companies will remove and replace qualified no-leak risers and, at no cost to the property owners, provide them with a new riser from the company's approved list of manufacturers.
- (10) The four large local distribution companies will also work with the staff in developing customer notices which will be distributed to eligible no-leak riser property owners no later than September 1, 2005.
- (11) The four large local distribution companies shall provide all no-leak risers to the testing laboratory by October 1, 2005.
- (12) The Commission finds the above-delineated investigatory measures are necessary for the protection of the public safety.

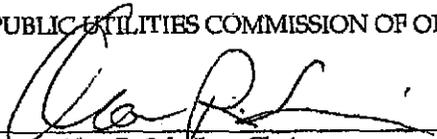
(13) The Commission recognizes the costs of investigation born by the local distribution companies. In recognition of these costs, we will entertain applications for accounting deferrals for the cost of this investigation and review them on a case-by-case basis. Issues related to the recovery of any deferred riser investigation costs, including the appropriate level of recovery costs will be addressed in each company's subsequent base rate proceeding.

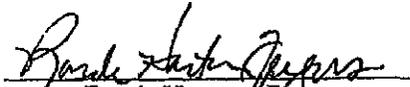
It is, therefore,

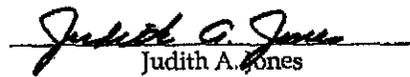
ORDERED, That a workshop for training local distribution companies on riser removal protocols will be held at 10:00 a.m., on August 26, 2005, at the offices of the Ohio Gas Association, 200 Civic Center Drive Columbus, Ohio 43215

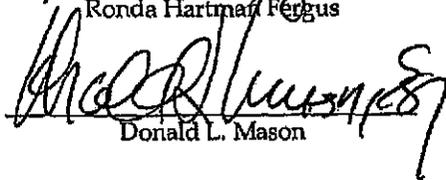
ORDERED, That local distribution companies shall comply with the requirements set forth in findings (4) through (11).

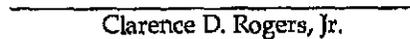
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus


Judith A. Jones

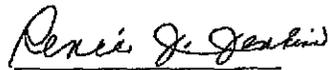

Donald L. Mason


Clarence D. Rogers, Jr.

DG:jc

Entered in the Journal

AUG 03 2005



Renee J. Jenkins
Secretary

49 U.S.C. § 60101. Definitions

(a) General.--In this chapter--

(1) "existing liquefied natural gas facility"--

(A) means a liquefied natural gas facility for which an application to approve the site, construction, or operation of the facility was filed before March 1, 1978, with--

(i) the Federal Energy Regulatory Commission (or any predecessor); or

(ii) the appropriate State or local authority, if the facility is not subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.); but

(B) does not include a facility on which construction is begun after November 29, 1979, without the approval;

(2) "gas" means natural gas, flammable gas, or toxic or corrosive gas;

(3) "gas pipeline facility" includes a pipeline, a right of way, a facility, a building, or equipment used in transporting gas or treating gas during its transportation;

(4) "hazardous liquid" means--

(A) petroleum or a petroleum product; and

(B) a substance the Secretary of Transportation decides may pose an unreasonable risk to life or property when transported by a hazardous liquid pipeline facility in a liquid state (except for liquefied natural gas);

(5) "hazardous liquid pipeline facility" includes a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid;

(6) "interstate gas pipeline facility" means a gas pipeline facility--

(A) used to transport gas; and

(B) subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.);

(7) "interstate hazardous liquid pipeline facility" means a hazardous liquid pipeline facility used to transport hazardous liquid in interstate or foreign commerce;

(8) "interstate or foreign commerce"--

(A) related to gas, means commerce--

(i) between a place in a State and a place outside that State; or

(ii) that affects any commerce described in subclause (A)(i) of this clause; and

(B) related to hazardous liquid, means commerce between--

(i) a place in a State and a place outside that State; or

(ii) places in the same State through a place outside the State;

(9) "intrastate gas pipeline facility" means a gas pipeline facility and transportation of gas within a State not subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.);

(10) "intrastate hazardous liquid pipeline facility" means a hazardous liquid pipeline facility that is not an interstate hazardous liquid pipeline facility;

(11) "liquefied natural gas" means natural gas in a liquid or semisolid state;

(12) "liquefied natural gas accident" means a release, burning, or explosion of liquefied natural gas from any cause, except a release, burning, or explosion that, under regulations prescribed by the Secretary, does not pose a threat to public health or safety, property, or the environment;

(13) "liquefied natural gas conversion" means conversion of natural gas into liquefied natural gas or conversion of liquefied natural gas into natural gas;

(14) "liquefied natural gas pipeline facility"--

(A) means a gas pipeline facility used for transporting or storing liquefied natural gas, or for liquefied natural gas conversion, in interstate or foreign commerce; but

(B) does not include any part of a structure or equipment located in navigable waters (as defined in section 3 of the Federal Power Act (16 U.S.C. 796));

(15) "municipality" means a political subdivision of a State;

(16) "new liquefied natural gas pipeline facility" means a liquefied natural gas pipeline facility except an existing liquefied natural gas pipeline facility;

(17) "person", in addition to its meaning under section 1 of title 1 (except as to societies), includes a State, a municipality, and a trustee, receiver, assignee, or personal representative of a person;

(18) "pipeline facility" means a gas pipeline facility and a hazardous liquid pipeline facility;

(19) "pipeline transportation" means transporting gas and transporting hazardous liquid;

(20) "State" means a State of the United States, the District of Columbia, and Puerto Rico;

(21) "transporting gas"--

(A) means the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in interstate or foreign commerce; but

(B) does not include the gathering of gas, other than gathering through regulated gathering lines, 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 that the Secretary of Transportation determines to be a nonrural area, except that the term "transporting gas" includes the movement of gas through regulated gathering lines;

(22) "transporting hazardous liquid"--

(A) means the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid by pipeline, in or affecting interstate or foreign commerce; but

(B) does not include moving hazardous liquid through--

(i) gathering lines in a rural area;

(ii) onshore production, refining, or manufacturing facilities; or

(iii) storage or in-plant piping systems associated with onshore production, refining, or manufacturing facilities;

(23) "risk management" means the systematic application, by the owner or operator of a pipeline facility, of management policies, procedures, finite resources, and practices to the tasks of identifying, analyzing, assessing, reducing, and controlling risk in order to protect employees, the general public, the environment, and pipeline facilities;

(24) "risk management plan" means a management plan utilized by a gas or hazardous liquid pipeline facility owner or operator that encompasses risk management; and

(25) "Secretary" means the Secretary of Transportation.

(b) Gathering lines.--(1)(A) Not later than October 24, 1994, the Secretary shall prescribe standards defining the term "gathering line".

(B) In defining "gathering line" for gas, the Secretary--

(i) shall consider functional and operational characteristics of the lines to be included in the definition; and

(ii) is not bound by a classification the Commission establishes under the Natural Gas Act (15 U.S.C. 717 et seq.).

(2)(A) Not later than October 24, 1995, the Secretary, if appropriate, shall prescribe standards defining the term "regulated gathering line". In defining the term, the Secretary shall consider factors such as location, length of line from the well site, operating pressure, throughput, and the composition of the transported gas or hazardous liquid, as appropriate, in deciding on the types of lines that functionally are gathering but should be regulated under this chapter because of specific physical characteristics.

(B)(i) The Secretary also shall consider diameter when defining "regulated gathering line" for hazardous liquid.

(ii) The definition of "regulated gathering line" for hazardous liquid may not include a crude oil gathering line that has a nominal diameter of not more than 6 inches, is operated at low pressure, and is located in a rural area that is not unusually sensitive to environmental damage.

