BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

INITIAL BRIEF OF UTILITY SERVICE PARTNERS, INC.

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I. INTRODUCTION

Under the U.S. Department of Transportation pipeline safety regulations, local distribution companies have the responsibility to maintain distribution systems that are safe and reliable.[1] This includes approving all the materials used in, as well as, the inspection of repaired customer service lines.[2] Ownership of the customer service line,[3] be it by the property owner as is the case of all the major Ohio gas utilities and the surrounding states, or by the local distribution utility, has no impact on the responsibility of the local distribution utility to select the proper materials, inspect for leaks and supervise the repair and installation of service lines connected to its system. The Commission's authority in this area is based on two sources. The first source is the "Natural Gas Pipeline Safety Standards" contained in Section 4905.90, et. seq., Revised Code which specifically adopted the federal Pipeline Safety Code by reference[4] and gave the Commission authority to enforce the Pipeline Safety Code via the Commission's promulgated rules. Second, the Commission, under Sections 4905.05 and 4905.06, Revised Code has general supervisory power over utility property and operations. The Commission as a statutory agency, and not a constitutionally created entity, can only exercise that authority specifically delegated to it. Neither statutory mandate provides the Commission with authority to regulate non-utility property or persons other than public utilities. Thus, to the degree that the Stipulation and Recommendation or the Application seeks the Commission to order private citizens to only have their customer owned service lines repaired by Columbia, or require utility customers through utility rates to pay for repairs to non-utility property, the request is *ultra vires*.

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1 49 CFR §§ 192.1, 192.3, and 192.13.

2 49 CFR §§ 192.51-65 and 192.351-383.

3 Defined in 49 CFR §192.3 as the line between the utility service meter and the distribution system.

4 Section 4905.90(F), Revised Code.

The safety record of Ohio's natural gas utilities has been admirable until 2000. Since 2000 however there have been four "incidents"[5] all caused by the failure of a single piece of natural gas equipment - the Design-A riser. The Commission's response was appropriate given the gravity of the situation and its mission of protecting the public. The Commission issued a request for a proposal (RFP), hired a consultant to conduct laboratory tests on the Design-A risers, and instituted a Commission ordered investigation. As detailed below, the independent consultant found that the Design-A riser, a device that connects the buried portion of a plastic customer service line with the utility meter, is prone to disconnect.[6] When a Design-A riser disconnects, it can allow a rapid flow of gas to escape which is what caused the fatal house fire in the Columbia service area.[7]

Steel customer service lines which make up the majority of the customer service lines in Ohio do not have a problem of disconnection. Steel customer service lines do fail, but that failure is due to corrosion. Corrosion failures, unlike a disconnection, take place after many years in the ground and the development of slow leaks. Thus, the Staff Report in the Commission ordered investigation did not find steel lines or plastic lines with non Design-A risers prone to failure. Following the Staff Report, the Commission ordered all the major local distribution companies, including Columbia, to survey customer service lines and find where the Design-A risers were located, then formulate a plan to make the Design-A risers safe. Given the risk to human life it is not surprising that Chairman Schriber on January 23rd of this year wrote to all the jurisdictional gas companies:

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[5] Under Rule 4901:1-16-01(I) of the Ohio Administrative Code an incident is one in which a jurisdictional pipeline, which includes a customer service line from the utility distribution line to the meter, fails and the failure results in death, bodily injury or more than $50,000 of property damage.

[6] See the November 24, 2006 Staff Report in Case No. 05-463-GA-COI, p. 1.

[7] OCC Exs. 10-12.

> I want to follow up on my January 2, 2007 letter concerning gas risers to ensure that the utilities are doing everything possible to ensure the safety of the public.
>
> ... If your company finds a compromised gas riser in the condition of the failed risers detailed in the staff and laboratory report, I urge your company to deal with the situation immediately. I believe the public interest dictates that the utility itself deal with the dangerous situation. Public safety is imperative and proactive action is necessary".[8]

The Application and the Stipulation and Recommendation in the matter at bar is Columbia's response to the Commission Ordered Investigation and the Chairman's letters, but it is woefully inadequate. Columbia conditions its taking action to make the Design-A risers safe upon the Commission first absolving Columbia from any cost responsibility to find or repair the Design-A risers, and further granting to Columbia a franchised monopoly over the repair of all customer service lines after March 2008.

Given the fact that Columbia had the sole authority and responsibility to designate the materials that can be used in customer service lines and specifically authorized use of the Design-A riser, asking the Commission to shift all the cost for correcting that mistake to the customers is aggressive. Demanding that the Commission on top of that grant Columbia a monopoly over repair of all service lines it does not own - whether they have Design-A risers or not – in order for Columbia to correct its mistake is outrageous. Columbia is using the safety of its customers as a bargaining chip to better its financial position. This tactic should be rejected by the Commission; safety is not an item that should be bargained.

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[8] Administrative notice was taken of this letter, dated January 23, 2007 and docketed in Case No. 05-463-GA-COI (Tr. I, 219).

As of October 12, 2007, Columbia had almost completed its initial attempt to survey every customer to see if they have a Design-A riser.[9] Since the Staff Report and the independent consultant have determined that Design-A riser could fail without notice at any time and endanger the lives of those customers, Columbia should immediately notify every customer with a Design-A riser of the potential threat to them and their neighbors. That is not what is contained in the Application and the Stipulation. Nowhere in the Application or Stipulation is there a provision that Columbia will take the Design-A riser survey results which identified the location of every Design-A riser, and use that study to inform the individual property owner of the fact that they have a Design-A riser and are at risk. We can only speculate why Columbia, now that it has addresses for the Design-A risers, has not followed-up with a direct mailing to the customers with Design-A risers who are actually at risk. The result of sending a letter to the customers informing them of their risk would have a predictable result. Once homeowners were told that they have defective riser which could result in a potential life threatening gas explosion, many would demand an immediate repair, and would not be willing to wait until 2011. Further, the record in this proceeding indicates that they should not have to wait three years. There are almost 1,600 Department of Transportation ("DOT") certified plumbers on the Columbia website (USP Ex. 7, Exhibit USP-R2) who could make the repair and many more on the website in neighboring West Virginia and Pennsylvania. Further, there are hundreds of DOT certified plumbers listed in the Yellow Pages.[10] Columbia did not offer support for why it would take until 2011 to make the repairs, but fact that Columbia is demanding a monopoly on the repairs – that is all repairs must be done by their

[9] Columbia Ex. 1, p. 8.

[10] See USP Ex. 7, Exhibit USP-R4.

employees or selected DOT certificated plumbers Columbia has contracted with artificially reduces the labor pool and adds an extra bureaucratic step. A Columbia scheduler now must intercede between finding a time and place acceptable to property owner and DOT certificated plumber. Columbia has also taken away the property owner's ability to select the repairer of choice to do the work.

If Columbia was serious about ending the threat that its mistaken approval of the Design-A riser has caused, it would immediately inform all customers who have a Design-A riser of the threat and the availability of DOT certified plumbers who can correct it. Note, the Commission, in its September 12, 2007 Entry on Rehearing provided for customer repair of Design-A risers and reimbursement with a $500 limit. The Stipulation and Recommendation specifically repeals this feature.[11] Columbia should also consider expanding its inspection force so that it can fulfill its current policy of having an independent third party inspect all these service line repairs as well as the usual volume of steel line replacements. Having plumbers self-inspect is a diminution of current safety standards and will undoubtedly lead to future problems. Finally, Columbia should, with consultation of the Staff and the local repair industry, decide upon a safe, economically appropriate replacement for the Design-A riser. In the hearing there was testimony presented as to an above ground repair being used by Duke Energy of Ohio that could cut the cost and repair time.[12]

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[11] Paragraph 20 of the December 28, 2007 Stipulation and Recommendation states in part that: "Effective March 1, 2008, only Columbia may repair or replace a customer service line leak evaluated, classified and documented by Columbia as a hazardous customer service line leak.

[12] Tr. III, 6-24 at 48-75; OCC Ex. 13.

One feature of the Application and the Stipulation is that it socializes the cost of the Design-A riser replacement. USP does not object to doing so for the Design-A riser because for public safety the repair is going to have to be mandatory and since it is connected directly to the utility meter, the riser can be deemed utility property.[13] Currently, the policy is that customers who have their Design-A riser changed out can apply for reimbursement for the actual cost of the repair up to $500 dollars for the Design-A riser. There is no good reason for this policy to end on March 1, 2008 as called for in the Stipulation.[14] Columbia's bureaucracy may need three years to complete the Design-A riser replacement if it has to contract and schedule every repair, but if the people who are at risk are given the information and the tools to correct the problem, the Design-A riser replacement will go much faster.

The Stipulation and Recommendation in the matter at bar should be rejected and the Application modified to achieve the goal detailed in the Chairman's January 23, 2007 letter. USP suggests the following. First, Columbia, in the next 30 days in consultation with the Commission Staff and the customer service line repair industry, should settle upon an approved Design-A riser replacement technique(s).[15] Second, as soon as a repair technique for the Design-A riser is approved, a notice to all 320,000 Design-A riser owners informing them of the danger should be sent. The notice should inform property owners that that they can have the Design-A riser repaired by a DOT certified plumber \

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[13] Currently, the dividing line between customer property and utility property is the inlet of the meter; this could be changed for Design-A risers to the interconnection between the riser and the customer service line.

[14] Columbia Ex. 11, p. 16.

[15] A revised Stipulation and Recommendation was filed on December 31, 2007. It sets a date of February 1, 2008 for Columbia to select a repair protocol. This revised Stipulation and Recommendation was filed after the record was closed. It is not a part of this record.

contractor or Columbia will repair the Design-A riser. Columbia should then set up a process to send notices in advance to the property owners of when they are coming to effectuate the Design-A riser repair. Customers need to be informed as to when workmen are going to come on their property and the fact that they can ask to see proper identification of such workers and be able to advise the DOT certificated plumbers of special concerns about their property. Most importantly, property owners must be given the opportunity to repair the Design-A riser sooner and be reimbursed. If the Commission required the above three suggestions, it would maximize the work force of DOT certificated plumbers and substantially reduce the period of time needed to perform the Design-A riser replacements. It will also fulfill the obligation of this Commission to make sure that the members of the public who are at risk are informed and given an opportunity to rectify the hazard.

This brings us to the most outlandish aspect of the Application and the Stipulation. Columbia demands that as a condition precedent for fixing the hazardous Design-A risers for which it is partially responsible, the Commission must award it a monopoly starting March 1, 2008 to repair all customer service lines. There is no reason for Columbia to condition fixing the Design-A rise hazard on the sole right to fix steel customer service lines it does not own. Further, the Commission simply lacks the authority to order property owners over whom it has no jurisdiction to use only Columbia to make repairs to their privately owned property. The Commission also lacks the authority to make customers who are not benefited pay for repairs to non-utility private property.[16] Finally, USP alone has 100,000 repair contracts[17] that would be

[16] Rates have to be just and reasonable under Section 4905.22 and .34, Revised Code. It is unjust and unreasonable to charge customers for the repair of non-utility property when that non-utility property is

voided by such a Commission Order and other repair and warranty providers would be similarly affected. Article 1 Section 10 of the United States Constitution prohibits government impairment of contracts, and Article 1 Section 19 of the Ohio Constitution similarly limits alienation of property by government action without compensation.

The Design-A riser situation can be easily distinguished from the repair of steel and non Design-A risers. First, the Design-A riser connects directly into the utility meter so at least that part of the riser – which is the part that is prone to failure – is subject to Commission jurisdiction under Section 4905.05 and .06, Revised Code because it could considered part of the utility meter. Second, as detailed below if a public safety hazard exists there is authority for the Commission to act. In the case of the Design-A riser the Commission has investigated and independently documented the public safety hazard. The same evidence that finds the Design-A riser a latent hazard states the problem of steel pipe corrosion, the major cause of customer service line repair and replacement, not to be such a hazard. There is simply no predicate which has been laid in this proceeding or in the Commission Ordered Investigation into the recent incidents that would justify extraordinary governmental action such as taking property and abrogating contracts.

Even if the Commission had the authority to grant Columbia a monopoly on repairing pipelines it does not own, the hearing unearthed a disturbing fact about the Columbia planned repair program. Once Columbia has secured a monopoly over repair from the Commission, it plans to water down its quality control policies and let its employees or the plumbers it hires self inspect their work. To assure quality, Columbia plans on replacing independent third party inspection of all customer line repairs with a few random inspections. Self-inspection is a corner

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not dedicated to public service. A customer service line serves only the land owner's property and thus is not dedicated to or used by the public.

[17] Referred to as warranty service agreements in the hearing. See Tr II, 155-156.

cutting process which may enhance margins but will not enhance safety. The fact that this is part of the Columbia program shows the true colors of the Application and the Stipulation, they are designed more to enhance business than to promote safety.

If the Commission is confident in the Staff Report's conclusions that finds the Design-A riser is a hazard to public health and safety and contains a latent defect which gives no warning before it fails, then the Design-A risers should be changed over as soon as practical and people subject to the danger must be notified immediately and given a opportunity to eliminate the hazard they face. If during the next three years, a Design-A riser fails and kills or causes property damage again in the Columbia service territory, when it becomes known that Commission had access to the names of the people at risk and authorized a plan by Columbia which did not include giving meaningful notice to the victims of their risk and an opportunity to immediately correct the hazard, the Commission will be held responsible in the court of public opinion. If it is established that the primary reason for not individually telling people of the Design-A hazard and letting them fix it was to give Columbia an *ultra vires* monopoly over the repair of non-utility property, the Commission may be subject to adverse rulings in a court of law.

II. BACKGROUND

A. Prior Proceedings Which Established The Potential Public Safety Risk From The Design-A Riser.

The Application in the matter at bar has its genesis in the Commission ordered investigation of natural gas risers in Case No. 00-681-GA-GPS, *In the Matter of the Investigation of The Cincinnati Gas and Electric Company relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters.*[18] A riser is the vertical portion of the customer service line that connects directly into the utility meter. While the natural gas utilities own the meter, for all major natural gas utilities in Ohio the customer service line is owned by the property owner. In the above cited investigation, the Staff recommended opening a statewide investigation because of a series of natural gas incidents reported to the Staff by the local distribution companies (LDC).[19] An "incident" under Rule 4901:1-16-01(I) of the Ohio Administrative Code (OAC), is an event that must be reported to the Commission.[20] It involves the release of gas from an intrastate gas pipeline facility and results in death, personal injury, requiring inpatient hospitalization, or estimated property damage of $50,000 or more.[21] Since 2000, four reportable incidents have occurred in Ohio (Willowville in 4/2000, Medina in 12/2000, Princeton in 10/2002, and in Avon in 5/2003).[22] The Staff also received a number of "non-incident" riser failure reports.[23]

On April 13, 2005, the Commission initiated Case No. 05-463, *In the Matter of the Investigation of the Installation, Use and Performance of Natural Gas Service Risers,*

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[18] Staff Report, p. 1.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

Throughout the State of Ohio and Related Matters.[24] The Commission opened Case No. 05-463 to examine riser types, insulation and overall performance because of the potential risk posed by risers as a link between the gas distribution service line and the meter located near or within a customer's premises.[25]

To assist in its investigation, the Commission employed consultants through the University of Akron, Departments of Polymer and Mechanical Engineering and hired a testing laboratory.[26] The consultants were hired to develop investigative procedures, testing methods as well as to provide ongoing consultation including conclusions and recommendations.[27] In addition to the consultants, the Commission hired the Akron Rubber and Development Laboratory, Inc. (ARDL) for its expertise in rubber and gaskets.[28]

The focus of the consultants' and laboratory's work had been on plastic risers.[29] Risers can be made of both plastic and metal. Metallic risers are used largely in non-residential establishments, while for the past 20 years plastic risers have been used primarily in residential applications.[30] As an initial step, the Commission ordered the four largest LDCs (CG&E, Columbia, DEO, and VEDO) to conduct a statistically valid "sampling study of inventory risers to determine the manufacturer of each gas service riser and collect associated data."[31]

Laboratory testing focused exclusively on the performance of plastic risers because not only were they were the cause of all the incidents reported to the Staff, but, according to the Staff

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Staff Report, pp. 1-2.
[31] Staff Report, p. 2.

Report, the "primary cause of metallic riser leaks is corrosion which can be controlled and is less hazardous."[32] By contrast, a failed plastic riser can blow full gas pressure against a structure and cause significant damage.[33]

In order to investigate the conditions of riser installation and the overall performance and cause of riser failures, the Commission's consultants designed an investigative procedure which divided risers into three categories: removed in service no-fail riser (no-leak), new risers, and removed from service leaking risers.[34] Within each category, risers were classified either as Design-A (riser assembled in the field) or Design-B (riser assembled in the factory).[35]

After reviewing the consultants' analysis, the Staff advised the Commission to consider the following recommendations at pages 14-15 of the Staff Report:[36]

> (1) Put distribution operators on notice that proper installation of Design-A risers (assembled in the field), is critical and that Design-A risers with a low gasket force retention that are subjected to certain tensile loading and low temperature cycling are more prone to failure.
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> (2) Require the distribution operators to continue to track and monitor riser leak failures in their pipeline systems and report semi-annually all riser failures to the Commission Staff. Additionally, require those operators who have experienced riser failures to keep records on failure investigation and report in their semi-annual report to the Commission Staff what steps have been taken to prevent recurrence as required under 49 CFR § 192.617.

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[32] Staff Report, p. 3.

[33] *Id.*

[34] Staff Report, p. 4.

[35] *Id.*

[36] None of the recommendations have anything to do with transferring ownership of customer service lines. (Tr. IV, 252-255).

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

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

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

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

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

Comments were filed by numerous parties in response to the Staff Report in February, 2007. The Commission has not yet issued any decision addressing these comments as of today's date, but the consultants study and the Staff Report provide credible, independently varied evidence that a safety hazard exists with Design-A risers. A disconnection of a Design-A riser from the meter is a risk unknown to the property owner. This is in stark contrast to the corrosion of steel pipes which is both foreseeable by property owners, and presents only a low level of risk. Further, the corrosion risks are picked up on the periodic leak monitoring tests required to be performed by utility.[37] In sum, the reported incidents, Commission's investigation and independent consultant reports have established an immediate public safety risk as to Design-A riser. No incidents, consultant reports or other information has been presented in this proceeding indicating an immediate public safety risk as to steel customer service lines with steel risers, or plastic service lines with non Design-A risers.

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[37] 49 CFR §192.723.___

B. Procedural History

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

On July 11, 2007, the Commission issued an Entry granting the application in part and deferring in part the rest of the application and ordering Columbia to file modified tariffs for approval. On August 10, 2007, Utility Service Partners and Interstate Gas Supply, Inc., each filed applications for rehearing from the July 11, 2007 Entry. On September 12, 2007, the Commission issued an Entry on Rehearing granting in part the applications for rehearing filed by Utility Services Partners and Interstate Gas Supply, Inc. The next day, the Attorney Examiner set the matter for hearing. Direct testimony was filed by Columbia witnesses Martin, Ramsey, and Brown on October 15, 2007. On October 23, 2007, OCC filed testimony of its witness

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

On October 26, 2007, the Friday before the hearing, a Stipulation and Recommendation was filed by Columbia Gas of Ohio signed by representatives of Columbia and the Staff.

Hearings were held October 29-31, 2007. At the conclusion of the October 31 hearing, a schedule was established for the filing of rebuttal/surrebuttal and the Stipulation and Recommendation phases of the hearing. Rebuttal testimony and testimony in support of the Stipulation and Recommendation was filed on November 19, 2007 by Columbia and by the Staff. Surrebuttal testimony and testimony in opposition to the Stipulation was filed by Utility Service Partners, Inc. on November 28, 2007. The prepared direct testimony of Jill A. Henry was filed on behalf of the Staff on December 3, 2007. The hearing concluded on December 3, 2007 with the rebuttal/surrebuttal testimony and testimony in support of the Stipulation and testimony in opposition to the Stipulation phases of the hearing. Briefs were scheduled to be filed on December 31, 2007 and on January 13, 2008.

III. ARGUMENT

A. Standard of Review.

Columbia filed this case pursuant to Section 4929.11, Revised Code. That statute is entitled "Automatic Rate Adjustments" and allows the Commission to approve certain automatic

adjustment mechanisms or devices in a natural gas company's rate schedules. As the applicant Columbia has the burden of proof to demonstrate that its proposed IRP is just and reasonable.[38]

During the hearing on the Application, Columbia and the Staff entered into a Stipulation which slightly modified the Application. A partial stipulation is not binding on the Commission, though the terms of some stipulations can be accorded substantial weight. *See Consumers' Counsel v. Pub. Util. Comm'n.* (1992), 64 Ohio St. 3d 123, at 125, citing *Akron v. Pub. Util. Comm'n.* (1978), 55 Ohio St. 2d 155. As recently as December 19, 2007, the Commission stated that "this concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered."[39] (Emphasis added.)

Further, the Commission may use the three pronged test in evaluating stipulations as recently set forth in *In re Ohio Department of Development for an Order Approving Adjustment to the Universal Service Fund Risers*, Case No. 07-661-EL-UNC, Opinion and Order, December 19, 2007, at p. 18.

B. The Commission's Criteria With Respect to The Stipulation Was Not Met.

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into stipulations. Columbia and the Staff filed a Stipulation and Recommendation (Columbia Ex. 11) on October 26, 2007. However, it must be recognized that the Stipulation was not supported by a vast majority of the parties in the proceeding. Likewise, one cannot state that the Stipulation is unopposed by the vast majority of parties in the proceeding. Three of the eight parties (USP, ABC, and Interstate Gas Supply) oppose the Stipulation and a fourth party, IEU-Ohio, has neither expressed support nor opposition with respect to the Stipulation and Recommendation.

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[38] Because Columbia seeks to change the terms and conditions in Columbia's tariff as to customer service lines, as if it were an "ATA" case, the burden of proof should be on Columbia pursuant to Section 4909.18, Revised Code.

[39] *See In re Ohio Department of Development for an Order Approving Adjustments to the Universal Service Fund Riders*, Case No. 07-661-EL-UNC, Opinion and Order, December 19, 2007 at p. 18.

Thus, USP submits that the Commission should not accord substantial weight to this Stipulation and Recommendation.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Ohio-American Water Co.*, Case No. 99-1038-WW-AIR (June 29, 2000); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for the Commission's consideration is whether the agreement is just and reasonable and should be adopted. In considering the reasonableness of a Stipulation, the Commission has used the following criteria:

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

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

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

Unlike most cases, the Commission is confronted here with a Stipulation which is not supported by a majority of the parties in the proceeding, is not a product of serious bargaining, does not benefit rate payers/the public interest, and violates several important regulatory principles or practices. If the Commission weighs the evidence on each of these three criteria, it must come to the conclusion that the Stipulation and Recommendation is not just and reasonable and should be rejected.

1. *The settlement is not a product of serious bargaining among capable, knowledgeable parties as those parties with the most at risk oppose the Stipulation.*

This Stipulation and Recommendation (Columbia Ex. 11) was not introduced until the last day of the hearing (Tr. IV, 203-204).[40] It was not filed until October 26, 2007, the Friday before the hearing. Only two parties, Columbia and the Staff, signed the stipulation at the time of hearing. On December 20, 2007, 17 days after the hearing ended, counsel for the Ohio Partners for Affordable Energy filed a letter notifying the Docketing Division that it had "agreed to the Stipulation as a signatory party". The Ohio Partners for Affordable Energy ("OPAE") made a brief opening statement,[41] but presented no direct testimony nor cross-examined any witnesses.

Whatever the case, it clearly can be stated that half of the parties in this case did not sign or agree to the stipulation as a signatory in this case. Neither ABC Gas Repair, IEU-Ohio, Interstate Gas Supply, Inc., nor USP signed the stipulation.

Of the five parties who sponsored direct testimony and cross-examined witnesses at the hearing, three (OCC, ABC Gas Repair, and USP) actively opposed the Stipulation and Recommendation during the hearing.

The Commission must analyze the concept of "serious bargaining". According to Columbia witness Brown, the Stipulation started out with a partial agreement in principle but there were some issues to be resolved.[42] But to evaluate whether or not serious bargaining occurs, one must first ask who are the parties negotiating and do they possess something with which to bargain? The Stipulation, if approved, would remove the right of a property owner to

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[40] The general practice at Commission proceedings is to mark a Stipulation and Recommendation as a joint exhibit; this practice was not followed in this case.

[41] Tr. I, 19.

[42] Tr. IV, 205.

determine who, among DOT certified and Columbia-approved plumbers, would repair or replace his or her customer service line.[43] In other words, property owner choice will be lost under the Stipulation. Property owners will not be able to purchase a warranty service to cover their customer service lines. They will not be able to elect who comes on to their land and repairs or replaces their customer service lines. They will no longer be allowed to change the location of a customer service line on their property. Under this Stipulation, if a property owner wants to fix or repair a non-hazardous leaking customer service line that has not yet been graded to a grade 1, 2 or 2 + status, the property owner will have the option of repairing or replacing it at his expense.[44] Columbia will be responsible for monitoring that non-hazardous grade 3 leak.[45] Thus, under the Stipulation and Recommendation, there is a financial incentive for property owners not to fix non-hazardous leaks but to allow them to become hazardous or upgraded to a 2A level so that Columbia will fix the hazardous customer service line. This is not good public policy.

The fact of the matter is that the parties with the most at risk in this case are the property owners[46] and the warranty service providers and plumbers who work directly with property owners in repairing and replacing customer service lines. Property owners, warranty service providers, and plumbers have the most at risk in this case.[47] Their absence from the signature page of the Stipulation and Recommendation suggests that there is no serious bargaining in this case. In other words, Columbia and the Staff are bargaining over their respective interests in conveniences; serious bargaining over property owner choice, property rights, contractual rights,

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[43] Columbia Ex. 11, p. 16.
[44] Tr. IV, 141 and 145-146.
[45] Tr. IV, 145.
[46] OCC represents residential consumers, not property owners.
[47] USP Ex. 8, p. 5.

and the right to participate in a competitive business as opposed to a newly created monopoly did not take place in this case.

The reason for the serious bargaining standard is to prevent a cabal of interests from getting together and seeking their goals at the sole expense of another unwilling party. That is precisely what we have with the current Stipulation. Columbia gets a monopoly of the repair of property it does not own, to be paid for by all customers with no right to opt out and this is paid for by current warranty and repair providers and all property owners. Unlike a seriously bargained settlement where each party sacrifices, here Columbia has no sacrifice as it escapes any payment of the $160,000,000 it will take to change out the Design-A risers and earns a whole new profit business monopoly. Since a majority of those parties with the most at risk did not engage in any serious bargaining for the Stipulation and Recommendation, the first criterion has not been met.

2. *The settlement, as a package, does not benefit rate payers and the public interest.*

The Commission must determine whether or not this second criterion should be applied in its present form. As Mr. Riley pointed out in his testimony in opposition to the Stipulation and Recommendation, the Stipulation affects more than just rate payers; it affects land owners and the warranty providers/OQ plumbers who provide the repair/replacement service on customer service lines.[48] In addition, the Commission must recognize that landlords who are not customers and not rate payers are also affected by this Stipulation.[49] Such landlords, who have no privity of contract with Columbia and are not subject to the tariff, will lose certain rights if this Stipulation and Recommendation is approved. Thus, the Commission should take this fact

[48] USP Ex. 8, p. 5.

[49] Tr. IV, 188 and 269.

into account in evaluating not only whether or not rate payers benefit under the Stipulation, but whether property owners, warranty service providers, OQ plumbers, and all who are in the business of providing safe natural gas service and are part of the public interest.

The testimony in support of the Stipulation on the second criterion is sparse, at best. Columbia witness Brown testified that "the provision of the Stipulation with respect to Columbia's prospective responsibility for the repair or replacement of service lines that have hazardous leaks will conform the pipeline safety treatment of those lines, the practice followed nearly everywhere else in the United States."[50] Yet, on cross-examination, Columbia witness Brown conceded that the Stipulation and Recommendation regarding ownership of customer service lines, if approved, would differ from the treatment in portions of West Virginia, southwestern Pennsylvania, and most of Ohio.[51] His regulatory experience was limited to New York, Pennsylvania, West Virginia, Maryland, and Ohio.[52]

Staff witness Henry talked in generalities as well. She testified that the Stipulation allows Columbia to assume responsibility for future maintenance, repair, and replacement of hazardous customer-owned service lines.[53] She also felt that this would allow Columbia to "uniformly correct all safety issues" as required by the pipeline safety regulations.[54] She stated that she supported the stipulation because it provides better LDC oversight and clear lines of responsibility for pipeline safety compliance.[55] She also stated that repair and replacement work

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[50] Columbia Ex. 10, p. 3.
[51] Tr. IV, 190.
[52] Tr. IV, 198-199.
[53] Staff Ex. 4, p. 4.
[54] *Id.*
[55] Staff Ex. 4, p. 5.

on service lines would be enhanced as a result of a uniform approach to repair and replacement, with clear lines of responsibility for the work performed.[56]

USP witness Philip E. Riley countered each and every one of these "alleged benefits" in his testimony. Rate payers who are landowners are denied choice under the Stipulation and Recommendation.[57] Rate payers who are landowners and own relatively new customer service lines are forced to subsidized other rate payers who are landowners owning older customer service lines.[58]

USP witness Riley testified that there will be no uniform approach to repair and replacement under the Stipulation because Columbia can use either its employees or independent contractors to either perform the repair and replacement work or to inspect such work. Today, there is a uniform approach where an independent plumber retained by the customer repairs or replaces the customer service line and Columbia performs an independent inspection of such work. That will be lost under the Stipulation. There will be no uniform approach to repair and replacement of customer service lines in Ohio because most of the other Ohio natural gas companies will be using the current approach where the landowner owns the customer service line that runs from the property line to the meter.[59]

USP witness Riley explained that adoption of the Stipulation and Recommendation would not provide better LDC oversight and clear lines of responsibility. Under current conditions today, local distribution companies such as Columbia have oversight and clear lines of responsibility for pipeline safety compliance. The customer has responsibility for what is on

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[56] *Id.*
[57] USP Ex. 8, p. 5.
[58] *Id.*
[59] USP Ex. 8, p. 7.

his property with the exception of the meter. Changing ownership of customer service lines does not increase LDC oversight, nor make clearer the lines of responsibility for pipeline safety compliance.[60]

Most importantly, there are two aspects of the Stipulation and Recommendation that will diminish safety. The first is that under the Stipulation and Recommendation, there will no longer be an independent review by a third-party of the repair or replacement work done by a plumber.[61] USP witness Phipps, the only OQ plumber to testify, stated that checks and balances are a good idea for even the best of plumbers.[62] Columbia witness Ramsey conceded that there is value generally when someone else other than one's self reviews one's work.[63] The second aspect that will diminish safety is that Columbia will only monitor a Grade 3 leak until it becomes hazardous or upgraded under the Stipulation and Recommendation. If a Grade 3 leak occurs, the customer must fix the customer service line at his expense.[64] The customer has a financial incentive to allow the non-hazardous leak to become a hazardous one and let Columbia repair it. Thus, safety will be diminished under the Stipulation and Recommendation.[65]

In addition, there are several other reasons why the Stipulation and Recommendation does not benefit rate payers and the public interest. Property owners will lose the right to choose which qualified plumber they want to have come on their property and fix their customer service line.[66] Tenants will be forced to pay for the repair or replacement of customer service lines that

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[60] USP Ex. 8, p. 7.
[61] Tr. IV, 141-142; USP Ex. 8, pp. 5-6.
[62] Tr. IV, 116.
[63] Tr. I, 24 and 50.
[64] Tr. IV, 141 and 145-146.
[65] USP Ex. 8, p. 6.
[66] Tr. I, 59-62.

they do not own.[67] Tenants will have to pay the same amount as property owners.[68] Customers who own new facilities with plastic customer service lines will be required to pay the same amount as those customers with older bare steel customer service lines. In summary, the diminished safety coupled with the lack of choice mandates a finding that the Stipulation, as a package, does not ultimately benefit the public interest.

3. *The settlement package violates several important regulatory principles or practices.*

The third criterion in evaluating settlements requires the Commission to determine if the settlement package violates any important regulatory principles or practices. While neither Columbia witness Brown nor Staff witness Henry believed that any important regulatory practices or principles were violated, cross-examination of both indicates that neither looked very far. In contrast, USP witness Riley brought out the fact that several important and significant regulatory principles and practices are violated if this Stipulation and Recommendation were to be adopted.

It is beyond argument that the State policy as to natural gas services and goods is one of promoting competition, competition, diversity, and flexibility in the provision of natural gas supplies, suppliers, services, and goods so that consumers will have a choice. Section 4929.02(A)(2), Revised Code, indicates that the policy of the State is to promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions and quality options they elect to meet their respective needs. Subsection (A)(3) of that same statute indicates that it is the policy of the State to promote diversity of natural gas supplies and suppliers, by giving consumers

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[67] Tr. I, 35.

[68] *Id.*

effective choices over the selection of those supplies and suppliers. Section 4929.02(A)(4), Revised Code, indicates that it is the policy of the State to encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods. Subsection (A)(5) of that same statute indicates that the policy of the State is to encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods. Section 4929.02(A)(6), Revised Code, indicates that the policy of the State is to recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment. Subsection (A)(7) of that same statute indicates that the policy of the State is to promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapter 4905 and 4909 of the Revised Code. Section 4929.02(A)(8), Revised Code, indicates that the policy of the State is to promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods. Finally, it is the natural gas policy of this State under Section 4929.02(A)(9), Revised Code, to ensure that the risks and rewards of a natural gas company's offering of non-jurisdictional and exempt services and goods do not affect the rates, prices, terms or conditions of non-exempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this State.

Columbia witness Brown conceded that Section 4929.02, Revised Code, represented important regulatory principles.[69] If the Stipulation and Recommendation were to be approved, these important regulatory principles will be violated. Under the Stipulation and Recommendation, effective March 1, 2008 every property owner who currently owns a customer service line will no longer have the choice of retaining an independent plumber to fix or repair his or her customer service line.[70] Under the Stipulation and Recommendation, as of March 1, 2008, warranty service providers will no longer be permitted to fix or repair customer service lines in the Columbia Gas service territory.[71] Under the Stipulation and Recommendation, customers who do not own property will have no choice but to pay the Columbia imposed fee to fix or replace customer service lines they do not own and are not responsible for. Under the Stipulation and Recommendation, property owners who want to purchase a warranty service for their customer-owned service line will no longer be permitted to do so. With respect to the regulatory principle of avoidance of subsidies, under either the IRP or the Stipulation and Recommendation, those property owners who are also Columbia customers and who installed high-quality customer-owned services lines with a relatively long life will be subsidizing those property owners/Columbia customers who did not.[72] Under the Stipulation and Recommendation, property owners will no longer be permitted to select the independent plumbers with the price, terms, conditions, and quality options they want to meet their needs -- it will be Columbia that selects such a supplier to meet its needs. As a result, there will be less diversity of such natural gas services and consumers will no longer have effective choices.

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[69] Tr. IV, 185.
[70] Columbia Ex. 11, p. 16.
[71] Tr. IV, 138.
[72] Tr. I, 32-35.

Instead of relying on the market to provide repair and replacement services for customer services lines, customers will have to look to a monopoly, namely, Columbia. It should be obvious that the proposal in the Stipulation and Recommendation to transfer ownership of customer service lines over to Columbia will violate several important regulatory principles set forth in Section 4929.02(A), Revised Code.

The next important regulatory principle that is violated is the principle that the cost causer or the person who imposes costs upon a system should pay for such costs. This will be violated when the Stipulation and Recommendation is approved because all rate payers will pay the same amount of money for repair and replacement of customer-owned service lines. In other words, the property owner who used great care in having installed the highest quality customer service line with the longest life will be required to pay for the choices of lesser quality in materials and installation made by others.[73] Likewise, those persons who rent apartments and do not own property will be required under the Stipulation and Recommendation to pay for the repair and replacement of the landlord's customer service lines.[74] Those who build homes using plastic customer service lines will now be required to help pay for the replacement or repair of older bare steel lines of other customers.[75] Columbia witness Brown acknowledged that the principle that the cost causer should pay for the costs imposed upon a system is an important regulatory principle.[76] It is clear that the Stipulation and Recommendation violates this principle.

Another significant regulatory principle which is violated by the Stipulation and Recommendation is that the Commission can only regulate that over which it has statutory

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[73] Tr. I, 32-35.
[74] Tr. I, 35.
[75] Tr. I, 34-35.
[76] Tr. IV, 191.

authority. While the Commission has jurisdiction over natural gas utilities such as Columbia Gas, the Commission has no authority to require property owners to only use Columbia for repair of the customer service lines they own. For example, if a Florida landlord owned a residential dwelling in Columbia Gas' service territory and rented it out to a residential family who became a Columbia Gas customer, the landlord rights would be affected under this Stipulation and Recommendation. If the Stipulation and Recommendation is approved, a property owner will no longer be able to use a warranty service provider after March 1, 2008, will no longer have the right to choose the plumber of his choice to repair or replace a hazardous customer service line, and will no longer have the right to repair or replace a non-hazardous but leaking customer service line.[77] Columbia witness Brown agreed that the Stipulation and Recommendation would affect such a landlord.[78] Yet the Commission has no authority over such a landlord. Thus, the Stipulation and Recommendation violates another important regulatory principle.

The Commission will also be violating another regulatory principle because if it approves the Stipulation and Recommendation, it will be effectively creating a new monopoly in Columbia's service territory over what has previously been non-jurisdictional property (e.g., customer owned service lines). The Commission has no authority to do this. Further, under the Stipulation and Recommendation, Columbia will eventually place those portions of the customer service lines that it repairs or replaces in its rate base and will earn a return on and a return of such property. This violates Section 4929.02(A)(9), Revised Code, which provides that "the risks and rewards of a natural gas company's offering of non-jurisdictional and exempt services and goods do not affect the rates, prices, terms or condition of nonexempt, regulated services and

[77] Columbia Ex. 11, p. 16.
[78] Tr. IV, 187-189.

goods of a natural gas company.[79] Columbia will in effect be taking over a new heretofore unregulated business -- a monopolistic warranty service provider -- and will be adjusting jurisdictional rates to recover its costs for this new venture.

Finally, by approving the Stipulation and Recommendation in this case, the Commission will be regulating the property rights of private citizens. Columbia witness Brown conceded that private property rights were important regulatory principles.[80] But he personally did not look at the Ohio Constitution in analyzing this criterion.[81] USP invites the Commission to review the February 2, 2007 Initial Comments of Columbia Gas of Ohio, Inc. in *In re Investigation of the Installation, Use, and Performance of Natural Gas Service Risers*, Case No. 05-463-GA-COI at page 5, which provides as follows:

> It is well established, moreover, that the Commission is a creature of the General Assembly, and has only the powers and jurisdiction expressly conferred by statute. *Time Warner AxS v. Public Utilities Commission*, 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996); *Radio Relay Corp. v. Public Utilities Commission*, 45 Ohio St.2d 121, 127, 341 N.E.2d 826, 830 (1976); *Village of New Bremen v. Public Utilities Commission*, 103 Ohio St. 23, 132 N.E. 162 (1921) (Paragraph 1 of the Syllabus). The right to private property is guaranteed by Article I, § 19 of the Ohio Constitution, and no statute even arguably empowers the Commission to appropriate the private property of a utility's customers and transfer that property to the utility. Nor does the Commission have statutory authority to require utilities to repair or replace defective customer-owned risers, any more than the Commission could require utilities to repair or replace defective furnaces, water heaters, gas grills, or other gas-burning appliances which the customers have purchased from appliance dealers or other third parties. From a legal standpoint, the responsibility for maintaining, repairing, or replacing such facilities or equipment belongs to, and remains with, the customer (or the customer's supplier or contractor), and not with the gas distribution company.[82]

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[79] The purpose of this statute is to prevent cross-subsidies. As has been pointed out in this brief, the Application and Stipulation and Recommendation is fraught with cross-subsidies on several levels.

[80] Tr. IV, 200.

[81] Tr. IV, 201.

[82] Columbia's Initial Comments in Case No. 05-463-GA-COI were incorporated by reference in the application in this case.

The Commission must find that the Stipulation and Recommendation, as a package, violates several important regulatory principles and practices that cannot be ignored. The Commission must reject the Stipulation and Recommendation.

C. The Focus of this Case Should be on Resolving the Design-A Riser Issue, an Issue Separate and Apart from Customer Owned Service Lines.

1. *The Design-A riser safety problem is separate and apart from the issue of limiting ownership rights of customer owned service lines.*

The Application and the Stipulation and Recommendation both "lump together" the safety problem with Design-A risers and the issue of transferring ownership rights over customer service lines. There is simply no basis for treating the riser problem and the transfer of ownership of customer service lines in the same manner.

The Staff Report in Case No. 05-463-GA-COI clearly was focused on the problems associated with the Design-A risers. None of the Staff's recommendations in the Staff Report had anything to do with changing the ownership rights of customer service lines which are currently owned by customers in Ohio.[83] Indeed, Staff witness Henry agreed with the statement that potential problems associated with riser design does not warrant changing the current system of customer ownership rights over the service lines.[84]

USP does not object to Columbia repairing Design-A risers which the owners do not repair and does not object to socializing the cost as a means of addressing an immediate public safety problem. USP witness Riley explained that Columbia has a great deal of responsibility for the Design-A riser problem.[85] A Design-A riser could only be installed if Columbia approved

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[83] Tr. IV, 252-255.

[84] Tr. IV, 282.

[85] USP Ex. 7, p. 6.

it.[86] Because it appears that Columbia's approval was a mistake, it makes sense that Columbia takes some responsibility for this mistake.[87] Second, unlike the steel customer service lines which corrode slowly and pose a low level threat, the Design-A riser can fail instantaneously and pose a larger risk of harm.[88] Thus, there is an element of an imminent danger with respect to the Design-A risers that does not exist with customer-owned service lines.[89]

Implementing a solution to the Design-A riser issue is much simpler than attempting to change ownership of customer service lines.[90] The Design-A riser is typically connected above ground, with the customer service line running up to the connection making the demarcation as to the ownership of a riser very clear.[91] A newly installed riser by Columbia could be considered as a component of the meter in regards to ownership.[92]

By contrast, there is no immediate safety problem with respect to the transfer of ownership rights of customer service lines. The Commission did not issue an RFP or hire an outside consultant to study the issue of the impact of transferring ownership of customer service lines from customers to LDC's.[93]

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[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] Dominion East Ohio, in its comments in Case No. 05-463, offered to do a study and analysis on the impacts of transferring ownership of customer service lines from customers to LDC's. Staff witness Henry did not believe that the Staff had responded to that offer (Tr. IV, 273-274).

This case should be about solving the Design-A riser issue, not granting a monopoly to Columbia over the service and maintenance of customer service lines which are not owned by the utility.[94]

2. *The Commission must resolve many issues to ensure the prompt and safe replacement of prone to failure Design-A risers.*

a) Notice To The Customers At Risk

From a public policy standpoint, the greatest flaw with either the Application or the Stipulation is the failure to promptly inform the individual members of the public at risk directly of the Design-A riser. Columbia now knows the exact location of most if not all of the Design-A risers in its system. If the Staff Report is correct these people are at risk and should be immediately notified that the riser coming into their meter may without notice detach which could result in a deadly fire. The reason that neither the Application nor the Stipulation provide for public notice is that once the individual property owners were advised of the risk many simply would not wait until 2011 for the Columbia to get around to fixing it. They would want to be made safe now and would not stand to hear that the Commission will not let them fix the potential hazard on a pipeline they own because it has given Columbia a monopoly to do so. Further, if taken to court, the Commission is likely to lose on this issue. The Commission, in defending its grant of monopoly to Columbia, would have to explain why not notifying the customer of the risk of the Design-A riser or allowing the property owner to immediately repair its defective riser immediately was part of a reasonable plan to eliminate a public safety hazard. The Commission may also have a problem convincing a court that having Columbia contract with the DOT plumber rather than the property owner to repair the property owner's riser is needed for safety. The fact of the matter is that the monopoly requirement for Columbia to do

[94] USP Ex. 7, p. 7

the repair contracting for the Design-A riser is a business enhancement not a safety enhancement.

b) Finalizing the Approved Design-A Replacement Technique

Another issue facing the Commission is what is the best method for replacing the Design-A risers. Columbia has not fully investigated the replacements.[95] As OCC witness, Bruce M. Hayes, testified, "Columbia's application does not contain . . . [a]ny consideration of the partial replacement alternative[,] . . . [and] [w]hat riser has been selected to replace prone-to-leak Design-A risers[.]".[96] While Columbia's application is lacking in detail, the Ohio Consumers' Counsel has advocated the use of the Perfection Servi-Sert riser, a riser that Duke Energy developed with the assistance of both Battelle and Perfection, the manufacturer of the Servi-Sert riser.[97]

This riser was best described by Gary J. Hebbeler, the General Manager of Gas Engineering for Duke Energy. Mr. Hebbeler testified that, "[t]he Servi-Sert was a replacement part for a service head type of [a] flexible riser. It replaces the connection between the plastic part and the meter assembly."[98] Mr. Hebbeler also noted that Duke is currently using both a full replacement (a 5-foot perfection full riser) and a partial replacement using the Servi-Sert riser.[99]

Mr. Hebbeler described the replacement of a Design-A riser with a Servi-Sert riser as follows:

> On the partial replacement [Servi-Sert riser] you would naturally have to shut the gas off. Again you would have to have qualified people do this. You would go

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[95] OCC Ex. No. 13, pp. 7-8.
[96] *Id.*
[97] Tr. II, 10-11.
[98] Tr. II, 8.
[99] Tr. II, 8-9.

> up and if the meter bracket would be out of the ground far enough, in our case we use eight inches above the surface, you could cut that connection out between the plastic and meter assembly and just replace it with the Servi-Sert.[100]

Mr. Hebbeler also testified that by using the Servi-Sert riser, Duke Energy avoids the cost of restoration of hard pavement, the cost of digging a hole around a house and also the savings of redoing the landscaping.[101] He also noted that Duke Energy has utilized the Servi-Sert riser in 75% of riser replacements.[102] This testimony raises the issue of what is the best (and most efficient) method for addressing the Design-A riser issue and brings into doubt both Columbia's time and cost estimates to replace the prone-to-failure Design-A risers.

In sum, the state of the record shows that Columbia has yet to settle on a repair. Not having a well examined approved method for repairing the Design-A riser is an impediment to both decreasing the time to effectuate the repairs and control the costs. Spending time on ways to change the steel service line industry in lieu on focusing on fixing the Design-A problem is a misallocation of Columbia's pipeline safety resources. The Commission should in its order in the matter at bar give Columbia 30 days to consult with the Staff, Duke and the other local pipeline repair providers and settle on a Design-A repair protocol it is willing to take responsibility for. Neither Columbia nor the property owner can efficiently proceed towards eliminating the Design-A riser safety issue until a repair protocol is agreed upon.

c) Time Limit on the Design-A Riser Repairs

Lastly, and most importantly, the Commission must determine whether Columbia's three-year timeframe for replacing the prone-to-failure risers in its service territory is acceptable. There is no dispute in this matter that the Design-A riser is a significant safety issue that must be

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[100] Tr. II, 9-10.
[101] Tr. II, 11.
[102] Tr. II, 11-12.

addressed. Yet Columbia has proposed a three year period in its application (and Stipulation) for replacing the prone-to-failure Design-A risers[103] claiming that is the "minimum amount of time that the program can be accomplished[.]"[104] Columbia has provided not studies or a time line to substantiate the need for three years. The record reflects that Columbia plans to "outsource [the] majority (80% to 90%) of the replacement of prone-to-failure risers to OQ plumbers and contractor."[105] As reflected by the listing of certificated DOT plumbers on Columbia's website, there are 1,598 plumbing companies in Ohio with DOT qualified employees.[106] Moreover, the use of the Servi-Sert riser may shorten the repair time required for the riser replacements (being an above-ground installation) and is being used by Duke Energy in its service territory. As well, Columbia witness Ramsey agreed that the supply of qualified plumbers might increase due to migration from other areas of the State or adjacent states if the demand for qualified plumbers greatly increased in Columbia's service territory.[107]

If each of the DOT contractors on Columbia's approved web site were to replace two of the prone to failure Design-A risers each working day, the task could be completed within six (6) months.[108] If the property owners directly affected were not barred from directly contracting with the DOT certified plumbers, most would seek out the repair immediately. This is particularly true if they knew the alternative was to wait possibly until 2011 for Columbia to do it.

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[103] Columbia Ex. 1, p. 13; Application, p. 5; Stipulation, p. 5.

[104] TR. I, 106.

[105] Columbia Ex. 1, p. 13.

[106] USP Ex. 7, p. 3, Exhibit USP-R2.

[107] Tr. I, 37.

[108] Columbia estimates there are 320,000 prone to failure risers. (Columbia Ex. 1, p. 9). There are over 1,500 companies on Columbia's website with DOT qualified employees. (USP Ex. 7, Exhibit USP-R2). There are approximately 250 working week days in a calendar year.

If the Commission is concerned about the repair costs, those costs could be socialized, or assistance could be provided to low income property owners in a version of the PIPP program.[109] Given the availability of a number of DOT certified plumbers and a reimbursement program, it is reasonable to assume that three years will not be necessary to make the Design-A risers safe, so long as the property owners are not excluded and Columbia is not given authority to restrict the work to only plumbers or contractors that they have contractual relations with.

3. *Columbia's Responsibility For The Cost Of Repairing Design-A Risers.*

Given the record in this case a more pertinent issue for the Commission is not whether Columbia should be given a monopoly on repair of the Design-A riser, but whether Columbia should be absolved from financial responsibility for its approving the Design-A risers that are prone-to-failure in the first place. After all, Columbia approved the various Design-A risers for inclusion on its approved materials list.[110] The reason a company has an approved materials list is to provide some assurance to homeowners who lack the company's expertise that the materials being used are of a sufficient quality in order to provide some level of security to the homeowner, a statement agreed to by Columbia witness Brown.[111] In fact, Columbia witness Brown agreed that Columbia's obligation towards the approved materials list is part of its overall responsibilities toward maintaining a safe system and providing adequate service.[112] Yet, as concluded in the Staff Report, certain Design-A risers are prone-to-failure (or have already failed) and require immediate replacement per Chairman Schriber in his January 23, 2007 letter

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[109] Partial Income Payment Plan.

[110] Staff witness Henry testified that Staff only reviews Columbia's approved materials list for conformance with the gas pipeline safety standards. "As long as the material they are installing or allowing to be installed, into their system meets the requirements to the pipeline safety code, we have no problem with it" (Tr. IV, 267).

[111] Tr. I, 214.

[112] *Id.*

to local distribution companies.[113] Thus, the Commission has the responsibility of determining to what extent it believes Columbia should be absolved of its liability for the Design-A riser issue and the fact that an estimated 320,000 risers may require replacement in Columbia's service area.[114]

In doing so, the Commission should consider the cost of the replacements. Columbia has proposed replacing the prone-to-failure Design-A risers over three years and will do so "if and only if, the costs of doing so are funded through the proposed IRP Rider."[115] Columbia's stipulation with Staff makes no change to this provision, and would impose the entire $160,000,000 estimated cost of replacing the prone-to-failure Design-A risers on all rate paying customers in Columbia's service territory.[116] The Commission must decide if Columbia should bear all, some or none of the cost of its decision to approve the Design-A risers and whether all rate payers should share in paying the cost or the property owners, who own the risers

D. The Transfer of Ownership and Responsibility for Customer Owned Service Lines Under the IRP is a Solution Seeking a Problem.

There are many crucial tasks for Columbia to complete to make its customers safe from the Design-A riser hazard to which it contributed. These tasks include completing the survey as to where the 320,000 Design-A risers are located and selecting the optimal Design-A riser repair protocol. It would seem prudent for Columbia to have solved the Design-A riser problem first before taking on repair responsibilities for the approximate one million service lines which do

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[113] Administrative notice was taken of this letter, dated January 23, 2007 and docketed in Case No. 05-463-GA-COI (Tr. I, 219).

[114] Columbia Ex. 1, p. 9.

[115] Application, p. 5).

[116] Columbia Ex. 11, pp. 5-6.

not have Design-A risers. Further, for the following legal and policy reasons it is not in the public interest to grant Columbia a repair monopoly of customer service lines it does not own.

1. *The record reflects no evidence of safety issues associated with customer-owned service lines.*

The record in this matter reflects no evidence of safety issues associated with customer owned service lines. First, the Staff Report in Case No. 05-463-GA-COI makes no reference whatsoever to any safety issues associated with customer owned service lines.[117] None of the Staff Report's recommendations addressed safety issues related to customer owned service lines.[118] In fact, at page 3 of the Staff Report, the Staff noted that "[l]aboratory testing focused exclusively on the performance of plastic risers because not only were they the cause of all of the incidents reported to staff, but because the primary cause of metallic riser leaks is corrosion which can be controlled and is less hazardous." The Staff Report also states, at page 3, that "the risk presented with metallic riser leaks is lower since they tend to have very slow leaks underground that do not result in an incident. In contrast, a failed plastic riser can blow full gas pressure against a structure and cause significant damage." The focus of the Staff Report was on the plastic Design-A riser issue, not on metallic lines and not on customer owned service lines.

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

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

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[117] Administrative notice was taken of the Staff Report. (Tr. I, 121).

[118] Tr. IV, 252-255.

A. That's correct.[119]

Ms. Henry also agreed that it was "true that the purpose of the Commission's investigation was to test the types of gas service risers being installed, the conditions of their installation, and the overall performance of those risers throughout Ohio."[120]

The lack of any reference to safety issues with customer owned service lines in the Staff Report as well as the testimony of Staff witnesses Steele and Henry is consistent with the expert testimony proffered by Carter T. Funk. Mr. Funk holds a Bachelor of Science degree in mechanical engineering and has held many positions in the natural gas industry, including positions in engineering, corporate planning, operations and planning.[121] In addition, Mr. Funk was a licensed professional engineer in Ohio for many years.[122] Mr. Funk testified at the hearing that:

> Customer service line leaks generally occur in the metal pipelines that have been underground for several decades. In my experience, leaks are generally caused by corrosion and metal fatigue. Plastic lines also leak, but leaks generally occur immediately after installation due to improper installation or due to damage from digging....[i]n my experience, the bulk of customer service lines leaks are caused by corrosion.[123]

Likewise, Timothy W. Phipps who is a DOT operator qualified plumber with over 20 years of experience in the natural gas industry[124] testified that:

> [c]ustomer service line leaks generally occur in metal pipelines that have been underground for several decades. In my experience, leaks are generally caused by corrosion and metal fatigue due to lack of cathodic protection on bare steel lines. Plastic lines also leak, but leaks generally occur due to damage from shifting in

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[119] Tr. II, 73-74.
[120] Tr. IV, 244.
[121] USP Ex. No. 4, p.1.
[122] *Id.*
[123] USP Ex. No. 5, pp. 3-4.
[124] Tr. IV, 100.

the ground causing a sharp object to be pushed into the line. This can be prevented by the use of clean fill to backfill these lines.[125]

The testimony of Columbia witness Ramsey, who is Columbia's Operations Compliance Manager for Ohio, Kentucky and Indiana, supports Messrs. Funk's and Phipp's testimony. Specifically, Mr. Ramsey doesn't see the type of catastrophic failures in steel customer service lines that are seen with the Design-A risers.[126] He could not recall ever seeing an incident of a catastrophic failure in a customer service line.[127]

In fact, neither Columbia nor the Staff presented any evidence regarding clamor from the public over the safety of customer-owned service lines. The lack of any evidence in the record as to safety issues with customer owned service lines can be attributed to the existing system. Under this system, Columbia's obligation "...upon discovery of leakage or other dangerous conditions involving customer-owned equipment, is to make the situation safe – including the disconnection of gas service whether necessary – and to advise the customer to make the necessary repairs only through the use of a certificated DOT plumber."[128] This statement was confirmed by Columbia witness Ramsey who testified that "the gas company employee on site advises the customer what they need to do to effectuate the repairs."[129] In addition to Columbia's direct communications to customers, both Columbia and the Commission maintain websites with information for customers on repairing customer service lines.[130]

Lastly, if there is any doubt that the sole safety issue in this proceeding is related to the Design-A risers, a review of the Chairman's January 2, 2007 and January 23, 2007 letters to all

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[125] USP. Ex. 6, p. 2.
[126] Tr. I, 57.
[127] Tr. I, 57.
[128] Application, p. 3.
[129] Tr. IV, 147.
[130] Tr. I, 38, USP. Ex. 7, p. 3.

local distribution companies is final. In his January 2, 2007 correspondence, Chairman Schriber stated that:

> I trust you are aware of the recent investigation completed by my staff **concerning gas risers** in Ohio. In short, the staff presented a report that outlines the potential circumstances under which an operating gas riser may fail. Staff based its discussion in its report on a comprehensive laboratory study, ordered by the Commission. The Commission sought comments on that report and the underlying scientific study in Docket No. 05-463-GA-COI.
>
> There will be an opportunity to comment on the staff recommendations in the Docket before the Commission, but it is my sincere hope that you will begin to take measures in reaction to the investigation findings as soon as possible. At a minimum, I would hope that your company would begin a riser inventory to identify the types and locations of risers on your system. The work to identify the risers on the system could take some time and starting now would provide the groundwork for an expedited process later.
>
> I also hope to see a discussion of the utilities taking over responsibility for the customer owned service lines and your comments before the Commission. The current system leaves responsibility with the homeowner. I am interested in your thoughts about the prudence of that regulatory framework.

(emphasis added)

Likewise, in his January 23, 2007 letter, Chairman Schriber stated that:

> I want to follow up on my January 2, 2007 letter **concerning gas risers** to ensure that the utilities are doing everything possible to ensure the safety of the public. ... If your company finds a compromised gas riser in the condition of the failed risers detailed in the staff and laboratory report, I urge your company to deal with the situation immediately. I believe the public interest dictates that the utility itself deal with the dangerous situation. Public safety is imperative and proactive action is necessary.

(emphasis added)

The only reference to customer service lines in Chairman Schriber's letters was in his January 2, 2007 letter in which he requested that he hoped to see a discussion on the prudence of a regulatory framework under which utilities took over responsibility for customer owned service lines. Rather than engaging in a discussion on this issue, Columbia, unlike other natural gas utilities, has used Chairman Schriber's request as an opportunity to take over responsibility for

customer service lines on private property, assume ownership of customer service lines upon repair and reclaim the service line warranty business that it sold to Utility Service Partners only four years ago.

Simply put, there is no existing safety issue related to customer-owned service lines.

2. *There is no factual support to justify the IRP's transfer of ownership and responsibility of customer owned service lines.*

a) Safety and oversight.

The current process for repairing customer owned service lines in Ohio ensures safety at the customer's residence by incorporating an independent third-party inspection of the service line repair. Specifically, Columbia performs a thorough inspection of the repair work done by DOT qualified plumbers prior to restoring service.[131] If any part of the inspection fails, Columbia will not restore service. This independent third-party inspection adds significant value to service line safety in Ohio and would be eliminated under both the IRP and the Stipulation and Recommendation.[132]

The testimony of Timothy W. Phipps and Carter T. Funk, both veterans of the gas industry, reflects the importance of this independent inspection. Mr. Phipps testified in his direct testimony that there was value to the independent inspection of service line repairs and replacement performed by Columbia employees under the current system.

> Today, as a DOT OQ plumber, I cannot turn on gas to a repaired or replaced service line. Only Columbia can reestablish service after repairs and proper testing are completed. Columbia inspects my work. Columbia verifies that approved piping and fittings that were installed, ensures that trenching is adequate and inspects the fill to ensure that no sharp objects are in the fill that could abrade the service line and lead to leaks. Columbia also performs a pressure test of the service line and riser for plastic service lines is a five minute test held at 90 pounds per square inch. Without Columbia's independent inspection, there is a

[131] Tr. IV, 106-107.

[132] Tr. I, 24 and 50.

> potential that a contractor may take shortcuts such as not doing the pressure test or simply using natural gas from the curb to perform the pressure test rather than inert gas which requires a contractor to carry a compressor. As well, a contractor may fail to use sand to pack around a plastic line when replacing a steel line because fill on older steel lines may contain sharp objects or rocks. There is also a possibility that a contractor may use an unapproved fitting because that was the only fitting available in his truck rather than return to the shop and pick up the proper fitting. Columbia's independent oversight helps prevent these types of shortcuts.[133]

Mr. Funk also strongly agreed that there was value to the independent inspection of service line repairs and replacements performed by Columbia employees under the current system. In his direct testimony, Mr. Funk stated that:

> Under today's system, Columbia is required to inspect every contractor repair and replacement of a customer service line before the line is put back in service. This independent third-party inspection is a significant safety feature that ensures that the person performing the work has not made mistakes or taken shortcuts .... Under today's system, shortcuts and mistakes can be caught because Columbia, a party without a financial interest in the repair, inspects the entire repair or replacement prior to restoring service. As well, Columbia performs an actual pressure test, not the individual performing the repair or replacement .... There is no doubt in my mind that the existing system for repairs and replacements of customer service lines is much safer than what Columbia proposes under the IRP. This is especially true as any mistakes or shortcuts that occur because of the IRP will be hidden under ground.[134]

Mr. Phipps summed it up best when he stated ". . . I think that . . . checks and balances is [are] good for even the best plumber."[135]

Even Columbia witness Ramsey agreed that there was value to the independent inspections. Specifically,

> Q. Isn't it true that in your opinion there is a value to Columbia inspecting an independent plumber's work?
>
> A. Yes, it is.[136]

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[133] USP Ex. 6, pp. 1-2.

[134] USP Ex. 5, pp. 2-3.

[135] Tr. IV, 116.

Yet, in the face of this testimony, both Columbia and the Staff propose eliminating this independent review under the IRP and Stipulation.[137]

In place of the current 100% independent review of every service line and repair or replacement, Columbia proposes to replace that inspection with its random audit process. Columbia witness Ramsey gave a very brief answer to the measures Columbia will adopt to replace the independent inspection that exists today.

> Q. Can you explain what measures Columbia Gas of Ohio plans to undertake and if the IRP is approved in checking its own work?
>
> A. Columbia Gas has in place in the audit program that audits our field people on a regular basis. That schedule for audit is based on several factors. I don't set that schedule, but I do know it does rotate. We do audits, regular audits, of our field people in the work that they perform. If we take -- if we begin to repair and replace customer service lines, that work would be rolled into that audit.[138]

Upon further examination by the Attorney Examiner, Columbia witness Ramsey admitted that the audit program he was referring to "are conducted over a third of our operating territory on an annual basis, and they are only done over a two or three week period in each of those third of those operating areas, so we will only be on-site riding with the field people for a very small percentage of the time."[139]

Subsequent to this testimony, over a month later, Columbia witness Ramsey presented additional new measures by which Columbia would monitor service lines.

> For the in-house repairs, the company employees complete the work and they inspect that work and complete that work themselves. Where we contract work, we have contract coordinators that are out on-site with the contractors. They may not be at the specific site the entire time, but they are on-site on a regular basis inspecting the work and ensuring that it is done properly. As previously stated,

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[136] Tr. I, 50.
[137] Tr. I, 72; Tr. IV, 141-142.
[138] Tr. I, 108.
[139] Tr. I, 114.

those inspectors are instructed to be on-site at a frequency that will guarantee the work is done properly.[140]

Yet, having developed additional reasons to assure the Commission and the public of service line repair safety, Mr. Ramsey was unable to answer the question of whether "the loss [of the independent inspection] tends to make the safety evaluation of work performed after the IRP more safe or less safe? When asked that question, he simply stated, "I don't know."[141]

The Commission should also consider that under the Stipulation, an owner will not have incentive to make any repairs to a non-hazardous leak. As stated by Columbia witness Ramsey, "[u]nder the stipulation, the property owner would have the option of having a grade 3 leak repaired."[142] Moreover, the property owner would have to pay for the repair of a customer service line with a non-hazardous leak at his or her own expense.[143] However, under the Stipulation, Columbia will repair or replace all service lines with hazardous leaks.[144] The logical conclusion from this type of system is that property owners with customer service lines that have non-hazardous leaks will have a strong incentive to ignore the leak, wait until it becomes a hazardous leak at which point Columbia would pay for the repair. Such a system does not promote safety in Columbia's service territory.

b) Customer confusion.

There also is no evidence in the record to support Columbia's claim that the IRP (and the Stipulation) will eliminate confusion over customer-owned service lines. First, although Columbia witnesses and Staff witnesses proffered testimony that the IRP and stipulation would

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[140] Tr. IV, 56.

[141] Tr. I, 72.

[142] Tr. IV, 145-146.

[143] Tr. IV, 141.

[144] Tr. IV, 140.

reduce customer confusion, they provided no evidence that customer confusion exists. For example, Columbia witness Ramsey testified that he did not make any kind of survey of customers to determine the extent of their knowledge with respect to contacting qualified individuals to get repairs to customer service lines completed.[145] Likewise, Staff witness Steele agreed that "when customers have concerns about risers or service lines today, they can make one phone call to have Columbia come out and inspect that line or riser[,]"[146] and that his basis for his statement that customers have little or no knowledge of making decisions on placements of risers was simply based on phone calls he had received at his office. There is simply no factual support that customer confusion exists in Ohio as to who has responsibility for and ownership of customer service lines.

To the contrary, the record contains significant factual support that there is no customer confusion. The best evidence in the record is that after a leak is discovered (and made safe), Columbia advises the property owner to make the necessary repairs only through the use of a DOT Qualified plumber.[147] And as stated by Columbia witness Ramsey, "as of today -- as it works today, the gas company employee on site advises the customer what they need to do to effectuate the repairs[,]"[148] Mr. Ramsey also agreed that this process eliminated any customer confusion over the repairs, as illustrated by the following exchange:

> Q. Okay. But in either situation, the customer knows exactly what's going to happen upon being informed by the service tech? The customer is informed one way or the other today -- or under the stipulation what portion, if any, they are responsible for?
>
> A. I believe that's correct.

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[145] Tr. I, 37-78.
[146] Tr. II, 57.
[147] Application, 3.
[148] Tr. IV, 147.

Q. Okay. And so there will be no customer confusion under the stipulation as to what the customer is reasonable for, right?

A. I don't believe so.

Q. And there is no customer confusion today for those same reasons, right?

A. Not to what they are -- what actions they have -- not to the instructions that the company gives them on the actions they need to take.[149]

Columbia's claim that confusion exists is also contrary to the multitude of resources available to consumers. For example, Columbia maintains a brochure on its web site in a section titled "Natural gas lines - What is your responsibility?" This section states:

> Columbia Gas of Ohio owns and maintains the main supply lines to the curb box at the street. However, the property owner is responsible for repairing or replacing all service lines and house lines beyond the curb box, including any that extend beyond the meter to the appliances in your home or business.
>
> If buried piping isn't maintained, it might become subject to corrosion and leakage over time. For your safety, we inspect pipelines for leakage on a regular basis. If the line is metallic, we also inspect it for corrosion. Our routine inspection covers all gas piping between the company supply line and the meter.
>
> If our inspection detects a problem in any portion of the piping that you own, we may interrupt your service until you have had it repaired. Any inspection, installation, repair or replacement of natural gas lines or appliances should be done only by a licensed heating/cooling contractor or plumber who is certified by the U.S. Department of Transportation. If the contractor fails to follow appropriate procedures and does not sign and leave a yellow "Service Qualification Card" at the work site, Columbia Gas will not be able to restore service.[150]

And as noted above, Columbia provides a 74-page list of plumbing companies with DOT operator qualified employees on its website."[151] Columbia's website also refers customers to

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[149] Tr. IV, 148.

[150] USP Ex. No. 7, p.3, Exhibit USP-R1.

[151] USP Ex. No. 7, p. 3, Exhibit USP-R2.

local yellow pages, Chambers of Commerce, municipal building/ permitting office, internet web searches, etc. for plumbers/contractors qualified to perform the required work."[152]

Another good example of resources available to customers are the AT&T Yellow Pages, one of the resources for DOT Qualified plumbers listed on Columbia's website.[153] Under the listing Gas Lines, Installation and Repairing at page 589 of the AT&T Yellow Pages, there is an advertisement for Columbus Gas Line Repair, noting that service and house lines installed and repaired and the wording DOT Qualified. On the same page, there is an advertisement for Buckeye Plumbing Repair noting DOT certified, emergency gas leak repair, replace house line and service line. These are just some of the examples throughout the Yellow Pages of advertisements for DOT certified plumbers. As Mr. Riley testified, natural gas contractors and plumbers would not be listing and advertising in the local yellow pages if the owners of the service lines were so ill-informed that they didn't know they have repair responsibilities for customer service lines." [154]

Instead of eliminating confusion, the Stipulation will lead to confusion. First, the Stipulation creates different zones of responsibility and ownership for customer service line leaks on the property. The property owner will continue to have responsibility for all leaks after the meter (i.e., house lines and ancillary lines). The property owner will also have responsibility for service lines from the curb box to the meter for non-hazardous leaks (Grade 3) but Columbia will have responsibility for hazardous leaks (Grade 2, 2A and Grade 1). However, ownership of the customer service line will remain with the property owner until Columbia replaces the service line. And even then, only the section that Columbia replaces will be owned by Columbia. The

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[152] *Id.*, Exhibit USP-R1.

[153] USP. Ex. No. 7, p. 3-4, Exhibits USP-R2 and R4.

[154] USP Ex. No. 7, p. 4.

remaining portion of the line will continue to be owned by the property owner. Not only does this lead to different zones of ownership and responsibility on the property, but such a system will wreak havoc on local county auditors who must maintain property tax records.

Moreover, this ownership/responsibility scheme will only exist in Columbia's service area resulting in a patchwork system within Ohio.[155] As Mr. Riley testified, "[t]he vast majority of property owners of the State will continue to be responsible for the repair and/or replacement of leaking customer service lines. People moving into Columbia's service area from other service areas would not be aware of the difference, generating real confusion."[156]

The demarcation for customer service line ownership today is very clear – it is at the property line and the message today is "simple and straightforward – if a gas line is leaking anywhere to any degree on the property, the property owner is responsible."[157] The Stipulation will change this, leading to real confusion.

c) Cost efficiencies.

Central to Columbia's proposal to assume responsibility and ownership of customer owned service lines is its claim that "cost efficiencies . . . may be realized through the centralized management and operation of a replacement program, as well as the coordination of work between Columbia and outside plumbers and contractors at a cost lower than most existing service line warranties."[158] However, Columbia has presented no evidence that its program for service lines will cost less than today's existing system.

In his direct testimony in this matter, Philip Riley, President and CEO of Utility Service Partners noted that:

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[155] *Id.*.
[156] *Id.*.
[157] USP Ex. 7, p. 5.
[158] Application, p. 6.

> Columbia's plan eliminates customer choice, eliminates any competition and inserts additional utility bureaucracy between the land owner and the repair contractor. A centralized monopoly of the customer service line repair industry does not benefit consumers. Rather it eliminates customer choice in a non-commodity market and eliminates competition. This does not generate cost efficiencies and contradicts the principles of a competitive market.[159]

Columbia's response to Mr. Riley's testimony was to submit rebuttal testimony by Columbia witness Martin, who disagreed with Mr. Riley's statements and claimed that Columbia's ability to assess the cost of customer owned service line repairs to its entire customer base resulted in cost efficiency because the monthly charge per customer (5¢ per month during the first year to less than 25¢ per customer per month after the fifth year) was less than the cost of a standard service line warranty.[160]

Columbia's belief that cost efficiencies are generated by charging all customers instead of the cost-causer simply misses the mark. On cross-examination, Columbia witness Martin admitted that Columbia's studies, which were designed to quantify the impact of Columbia's assumption of financial responsibility for the repair or replacement of customer-owned service lines, did not address whether Columbia can repair a customer service line at incurred costs less than the cost incurred by a customer service line warranty provider, such as Utility Service Partners.[161] Moreover, it is undisputed that Columbia will still be required to inspect all service lines in its service territory every three years in accordance with DOT regulations, that the actual repair work will still be done by DOT operator qualified plumbers and contractors and that both under the IRP and Stipulation, the service lines installed or repaired will not differ in design, material, or method of installation from what is commonly used in the industry today.[162] And

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[159] USP Ex. 2, p. 10.
[160] Columbia Ex. 6, p. 2.
[161] Tr. IV, 66-67.
[162] Tr. IV, 15, 141.

significantly, Columbia did not dispute or challenge Mr. Riley's testimony that his company's estimated average cost to replace a leaking customer service line was $910.00 versus Columbia's estimated average cost of $1,000.00 to replace a leaking customer service line.[163] As Mr. Riley stated in his testimony, "[r]ather than saving Ohio customers money, the IRP transfers the cost of customer service line repairs from the property owners to all rate payers, regardless of whether the rate payer owns a service line or not. This is not a cost efficiency."[164]

3. *The Commission cannot approve the IRP and/or Stipulation as a Matter of Law.*

a) Impairment of Contract.

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

In this case, if the Commission grants Columbia the exclusive authority to perform service line repairs, it would nullify at least 100,000 of USP's warranty service contracts. This clearly constitutes a substantial impairment since it destroys USP's contractual relationship with

[163] USP Ex. 7, p. 2.
[164] *Id.*

its customers. Furthermore, such action by the Commission has no legitimate public purpose and does not meet the "public interest exception".

In United Gas Co. v. Mobile Gas Corp. 350 U.S. 332 (1956) a utility asked the Federal Power Commission to change its tariff for gas service so as to unilaterally change the terms and conditions of an existing contract. The Supreme Court found the Federal Power Commission rate making authority could not be extended to achieve abrogation of an existing contract. The *Mobile* case along with the High Court's decision in *Federal Power Commission v. Sierra Pacific Power*, 350 U.S. 348 (1956) form the *Mobile -Sierra* doctrine, which limits the police power of the state to override existing contracts only where adherence would violate the public interest. This "public interest" exception is only available under the circumstances of an "unequivocal public necessity." P*ermian Basin Area Rate Cases, 390 U.S. 747, 822 (1968).*

In the matter at bar the Commission has at least taken the steps necessary to comply with the *Mobile-Sierra* doctrine as to the Design-A riser to show an immediate safety hazard. Unlike aging steel customer service lines which property owners know will eventually need replacing, the product defect in the Design-A riser is unknown. The Design-A riser poses an "unequivocal public necessity" that justifies a rapid governmental response. The same is not true as to corroding steel customer service lines. For one hundred years in Ohio, independent service providers have repaired lines with an enviable track record.

Unlike the Design-A risers, the customer service lines are not an existing hazard and there is nothing to indicate that Columbia has superior personnel or equipment to repair such lines.[165] Nowhere in this record is it established that Columbia has any personnel or contractors under contract with DOT certification required to repair customer service lines. Granting

[165] Tr. IV, 284-285.

Columbia the right to repair the customer service lines is neither reasonable nor necessary. USP has established a working system to repair the service lines. Columbia, on the other hand, has no experience in repairing the lines and has not shown that it is capable of providing faster or better service. Columbia does not believe that the customer service lines it will install will differ in design, material, or installation from what is commonly used in the industry today.[166] Thus, transferring ownership of customer service lines to Columbia meets no legitimate public purpose and does not meet the "public interest exception". Allowing Columbia to assume responsibility for the repair and replacement of the customer service lines amounts to an unconstitutional impairment of USP's contracts.

b) Improper Takings of Private Property.

(1) Improper Taking of Contract Rights

Columbia's proposal to take responsibility for repair and replacement of the service lines also constitutes an unlawful taking of USP's contracts pursuant to Article 1, Section 19 of the Ohio Constitution and the 5th Amendment of the U.S. Constitution. First, Article 1, Section 19 of the Ohio Constitution provides that "[w]here private property shall be taken for public use, a compensation therefor shall first be made . . . ." OHIO CONST. art. I, § 19. Contract rights can constitute property protected against government taking without just compensation where such rights are directly appropriated for public use. *Ohio Valley Adver. Corp. v. Linzell*, 168 Ohio St. 259, 264 (1958). *See also, Bd. of Park Comm'r of Columbus v. DeBolt*, 15 Ohio St.3d 376 (1984).

In analyzing the public use requirement, the Supreme Court of Ohio has held that "although economic factors may be considered in determining whether private property may be

[166] Tr. IV, 141.

appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article 1 of the Ohio Constitution." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 356 (2006). The court went on to explain that "the exercise of sovereignty in eminent-domain cases is predicated on the notion that such a taking can be permitted only for the use and benefit of the people, which is distinct from government interest, profit or concern." *Id.* at 365.

Under the facts at issue here, Columbia's proposal results in a direct appropriation of USP's contracts. If Columbia is granted the exclusive authority to repair customer service lines, USP's contracts are of no value and its business obsolete. Furthermore, the appropriation is not for public use. The customer service lines present no immediate safety concerns; rather, granting Columbia the right to repair the lines allows the Commission to regulate and oversee such lines. Accordingly, the appropriation directly benefits the Commission, which under the *Norwood* case is not a permissible public purpose, and therefore constitutes an unlawful taking under the Ohio Constitution.

Columbia's proposal also represents a taking pursuant to the 5th Amendment of the U.S. Constitution (as applied to the states through the 14th Amendment). The 5th Amendment states that private property shall not be taken without just compensation. U.S. CONST. Amend. V. With respect to the taking of contract rights, the analysis is very similar to that under the Ohio Constitution. Since the U.S. "Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from independent sources such as state law." *Philips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998). As discussed above, Ohio law recognizes valid contracts as property which is protected against a taking by the government without just compensation.

An owner of property suffers a taking under the 5th Amendment when the owner "has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . . ." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Although the *Lucas* case involved real property rather than contract rights, the Court's reasoning is applicable here. That is, Columbia's proposal constitutes a taking of USP's contracts since USP is forced to sacrifice all economic benefit of its property. Moreover, as previously discussed, there is no public purpose in giving Columbia a monopoly over servicing the gas lines. Accordingly, Columbia's proposal must be denied as an unconstitutional taking of private property.

(2) Improper Taking of Service Lines

In addition to the foregoing takings claims, Columbia's proposal in its Application to transfer ownership of the service lines also amounts to a compensable taking of private property from each individual landowner pursuant to Article 1, Section 19 of the Ohio Constitution and the 5th Amendment of the U.S. Constitution. Columbia fully admits that "no statute even arguably empowers the Commission to appropriate the private property of a utility's customers and transfer that property to the utility."[167] Doing so would deprive a landowner of the right to maintain, repair and replace the service lines as he/she deems appropriate. Therefore, the Commission cannot, as a matter of law, allow Columbia to assume ownership of the service lines as such lines are replaced.

c) Commission Regulation of Non-Rate Payers.

A fatal flaw in the Application and the Stipulation is that both require the Commission to regulate non-rate payers. If the Commission were to do so, it would exceed its powers and

[167] See *Initial Comments of Columbia Gas of Ohio, Inc.*, Case No. 05-463-GA-COI, February 2, 2007, p. 5.

jurisdiction granted under Revised Code § 4905.04 which is limited to regulating public utilities and railroads. *See Penn Central Transp. Co. v. Public Utilities Commission*, 35 Ohio St.2d 97, 99 (1973) ("It is well settled in Ohio that the Public Utilities Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute."). "The General Assembly has defined the scope of the commission's jurisdiction in R.C. 4905.05 to '...extend to every public utility and railroad, the plant or property of which lies wholly within this state ... (or) to that part ... which lies within this state ...'." *Id.*

It is clear from the record in this matter that both the Application and Stipulation will result in Commission regulation of non-rate payers outside of Columbia's tariff. Columbia witness Brown agreed that a landlord of a residential house in Columbia's gas service territory would be subject to the IRP even though the landlord lived out of state and rented the property to a tenant who had gas service from Columbia.[168] Columbia witness Brown agreed that if the customer service line on the landlord's property developed a hazardous leak, that the landlord could not, under the Stipulation, choose an independent qualified contractor to repair that line.[169] Moreover, Columbia witness Brown stated that Columbia could essentially take whatever action was necessary on that landowner's property to repair the service line including the example of cutting down a 90 year old oak tree growing on or around the service line.[170] Under that same example, Staff witness Henry affirmed that the landlord would not be subject to Columbia's tariff.[171] Thus, under either the IRP or Stipulation, a landowner and non-rate payer would not be

[168] Tr. IV, 187.
[169] Tr. IV, 188.
[170] Tr. IV, 188-189.
[171] Tr. IV, 268-269.

able to repair or replace a hazardous customer service line on a rental property.[172] Although seemingly a minor detail, this example shows that Columbia's proposal to assume responsibility for and ownership of customer service lines would go beyond requiring a rate payer to conform to the tariff by subjecting non-rate payers to direct regulation by the Commission. For this reason alone, the Commission cannot accept without modification the Application or Stipulation.

The legal roadblocks raised by the structure of the Application and Stipulation cannot be ignored. The Commission cannot exceed its statutory authority and should not engage in conduct which results in the impairment of contracts and the taking of private property in Ohio. It should also be noted, as discussed above, that the Application and Stipulation violate the natural gas policy of this state and the important regulatory principle that the party creating the cost must bear the burden of the cost. The Commission cannot and should not approve either the Stipulation or the Application without modification.

IV. CONCLUSION

Wherefore, for the foregoing reasons, Utility Service Partners, Inc. respectfully requests that the Commission reject the Stipulation and Recommendation in its entirety and requiring the Application be re-filed and modified so that:

A. Columbia within 30 days, after consulting with the Staff and the Ohio customer service line industry, file with the Commission a set of protocols as to how the Design-A risers are to be repaired.

B. As soon as the repair protocol has been filed, notify directly all customers Columbia knows have Design-A risers that they are in danger and that they may either repair the Design-A riser themselves using an DOT certificated plumber or wait until Columbia fixes the riser. Columbia should give each property owner at least two weeks notice that they are coming to repair the Design-A riser.

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[172] Tr. IV, 188 and 270.

C. Keep in place the current program whereby a customer can effectuate the Design-A riser repair itself and apply for reimbursement for cost capped up to $500.

D. The Application should pledge to complete the Design-A riser repairs as soon as practical with a goal of 18 months.

E. Direct that the refilled Application not include any provision to direct or control repairs to customer service lines other than the Design-A riser and any hazardous condition found in a service line to which Columbia is conducting a Design-A riser repair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of Utility Service Partners was served upon the following persons by electronic mail and by first class U.S. mail, postage prepaid this 31st day of December, 2007:

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Summary: Brief Initial Brief of Utility Service Partners, Inc. electronically filed by Stephen M Howard on behalf of Utility Service Partners, Inc.