FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

All parties to this case agree that under both federal and state law Columbia Gas of Ohio, Inc., the local distribution company (LDC) in this case, is required to safely maintain and operate customer service lines, a part of which is the natural gas riser. Disagreement arises over just how much of the service line Columbia should be responsible for repairing. The warranty service providers believe that they should be permitted to continue to serve the needs of homeowners and landlords. Yet, the record shows that

Columbia is in a better position in terms of knowledge and means of repairing this crucial piece of the gas pipeline delivery system than the average homeowner or landlord.

Only one point of contact is necessary if the Commission adopts the Amended Stipulation recommended by the Staff and the majority of the active parties to this proceeding. That contact is from the customer or landlord to Columbia. Columbia is in the business of operating a gas pipeline distribution system and falls under the regulation of the Commission and the United States Department of Transportation (USDOT). If the current system of maintenance of customer service lines remains, customers must make a call to Columbia and then at least one additional call to their warranty service provider. Warranty service providers and plumbers are not regulated by the Commission or the USDOT. In fact the record demonstrates that as many as one-third of plumbers who repair service lines purposefully take shortcuts or do shoddy work. One warranty service provider's witness recognized that Columbia is the lynchpin in terms of inspecting and keeping the distribution system safe. He testified that if the infrastructure replacement plan (that varies mainly in terms of scope from the Amended Stipulation) is adopted that Columbia will continue to make the pipeline system work safely in Ohio. Staff recommends adoption of the Amended Stipulation as a step toward achieving a better system of pipeline safety maintenance in this state.

HISTORY OF THE CASE

On April 1, 2000, a natural gas explosion occurred at 1278 McGuffey Lane, Willowville, Ohio (McGuffey Lane incident).[1] As a result of the McGuffey Lane incident, the Commission began investigating natural gas service riser failures in the Cincinnati area, in *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS. Other gas service riser failures also have occurred in Ohio, with varying impacts, but with a frequency that led the Commission, on Staff's recommendation, to open an investigation into gas service risers. Through this investigation, the Commission sought to evaluate the type of gas service risers being utilized, the conditions of riser installation, and the overall performance and failures of gas service risers in order to determine whether issues related to gas service risers required the Commission's direction.[2]

As part of that investigation, the Commission ordered the four largest natural gas distribution companies in Ohio, including Columbia Gas of Ohio, to perform two general tasks. The Commission also ordered Columbia and the others to identify a sample num-

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1 "Incident" means an event that involves a release of gas from an intrastate gas pipeline facility and results in any of the following: (1) a death, (2) personal injury requiring inpatient hospitalization, (3) estimated property damage of fifty thousand dollars or more, which is the sum of: (a) the estimated cost of repairing and/or replacing the physical damage to the pipeline facility, (b) the cost of material, labor and equipment to repair the leak, and light up, (c) the cost of gas lost by an operator or person or both. Cost of gas lost shall not include the cost of gas in a planned operational release of gas by an operator, which is performed in compliance with the pipeline safety code, (d) the estimated cost of repairing and/or replacing other damaged property of the operator or others, or both. Ohio Admin. Code § 4901:1-16-01(I) (Anderson 2008).

2 *In re Investigation of Gas Service Risers*, Case No. 05-463-GA-COI (Entry at 1-2) (April 13, 2005).

ber of installed risers and to remove a portion of those risers for submission to a testing laboratory. The results of this testing, ultimately, led the Commission's Staff to find that certain risers are more prone to failure than others.[3] Staff submitted this finding to the Commission with several recommendations. The Commission, currently, has these matters under consideration.[4] The Commission's Chairman sent a letter to Columbia, and the other three large distribution companies, asking them to among other things address the question as to whether they should assume responsibility for customer-owned service lines.

The Commission initiated an investigation of gas risers due to public safety concerns and directed Columbia, and all other LDCs (a total of 26 companies shared the cost of the investigation), to bear the costs associated with the investigation.[5] The Commission indicated that it would consider applications for accounting deferrals for the cost of this investigation.[6]

On April 25, 2007, Columbia filed an application in the present docket for (a) approval, under Section 4929.11, Revised Code, of tariffs designed to recover, through an automatic adjustment mechanism, costs associated with the inventory of risers that was ordered in the COI case, the replacement of customer-owned risers that are identified as

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3 *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry at 1) (July 11, 2007).

4 *Id.* (Entry at 1) (October 4, 2007).

5 *In re Investigation of Gas Service Risers*, Case No. 05-463-GA-COI (Entry at 2-3) (August 3, 2005).

6 *Id.*

prone to failure, and the replacement of customer-owned service lines that are constructed or installed by Columbia as risers or service lines are replaced and (b) accounting authority to permit capitalization of Columbia's investment in customer-owned service lines and risers through assumption of financial responsibility for these facilities and to permit deferral of related costs for subsequent recovery through the automatic adjustment mechanism.[7] That initiated the current proceeding.

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

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7 *In re Columbia Gas of Ohio,* Case No. 07-478-GA-UNC (Entry at 1-3) (July 11, 2007).

On February 4, 2008, the active parties in this proceeding stipulated certain facts as well as the Amended Stipulation into the record without additional supporting testimony. These same parties joined in a motion to cancel the hearing scheduled for testimony on the Amended Stipulation on the same date. The Attorney Examiner granted the motion to cancel the hearing, and accepted the stipulated facts and the Amended Stipulation into the record on February 5, 2008.[8]

ARGUMENT

I. The Amended Stipulation meets the Commission's three-pronged test.

A. The Amended Stipulation is the product of serious bargaining among capable, knowledgeable parties.

Staff's merit brief demonstrated the Amended Stipulation is the product of serious bargaining among capable, knowledgeable parties. While doing so, Staff addressed the complaints raised by Utility Service Partners, Inc. (USP), ABC Gas Repair, Inc. (ABC), and Interstate Gas Supply, Inc. (IGS). For brevity's sake, that discussion will not be repeated here. As a summary, all the parties to this proceeding and their counsel have extensive experience with the natural gas industry related to the issues in this case. Their knowledge and experience is such that no one questions that capable, knowledgeable parties are involved in this matter. While an argument to existence of "serious bargaining" was raised by USP and IGS, the factual background to the Stipulation and the Amended Stipulation show they were the product of serious bargaining. The signatories

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[8] *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC (Entry at 3) (February 5, 2008).

evidence such. The signatories include all facets of the gas distribution chain in Ohio. The signatories included: the distributor/seller, which operates the natural gas distribution system - Columbia Gas of Ohio; all the parties representing the interests of residential natural gas consumers/buyers – Staff, OCC and OPAE; and, the representative of the State of Ohio, which regulates natural gas distribution/sales and the distribution system – Staff. In short, the signatories to the Amended Stipulation evidence the participation of all primary, competing interests in Ohio's natural gas distribution system. That participation shows the Amended Stipulation is the product of serious bargaining.

USP complained the Amended Stipulation did not result from serious bargaining. USP complains because it did not agree to the Amended Stipulation.[9] It complains that the absence of warranty providers such as themselves, plumbers and property owners "from the signature page of the . . . [Amended Stipulation] suggests that there is no serious bargaining in this case."[10] Of course, USP is wrong. It is wrong because all of the representatives of residential property owners are signatories to the Amended Stipulation and USP is wrong because the Amended Stipulation is the result of serious bargaining as the agreement of all those interests attests. The effect of USP's complaint is to claim a veto over any Stipulation. That also is wrong. No one has a veto over Stipulations and no one is a gatekeeper to the Stipulations the Commission may consider.

This case highlights why no one having a veto is important. USP and ABC announced they would not agree to any Stipulation that included Columbia assuming

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9 USP Brief at 19. USP also did not agree to the initial Stipulation.

10 *Id.*

exclusive responsibility for the future maintenance, repair and replacement of hazardous customer service lines.[11] That meant USP would not agree to Columbia assuming such control. That was not acceptable to either Staff or Columbia.[12] Accordingly, the position of USP and ABC conflicted irreconcilably with the position of Staff and Columbia. Staff believes Columbia should assume such control for safety's sake.[13] The plan that will accomplish that goal – that was honed through negotiation – will be put before the Commission because USP and ABC do not have a veto. That is the process and that is what should exist. USP is wrong to advocate what is in effect a veto over the Amended Stipulation.

IGS also complained about its participation in negotiations. IGS acknowledged that it "was invited to participate in the discussions regarding the Stipulation. . . ."[14] Nevertheless, IGS claims it "does not believe that it had an opportunity to meaningfully participate in developing the Stipulation."[15] IGS does not explain the reasons for its belief. That suggests the record does not support this belief. In fact, the record contradicts such a claim. The record shows Columbia and IGS entered settlement discussions prior to the filing of the Stipulation and Recommendation on October 26, 2007.[16]

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11 *In re Columbia Gas of Ohio,* Case No. 07-478-GA-UNC (Agreement at ¶ 5) (February 4, 2008)

12 *Id.*

13 Direct Test. of E. Steele (Staff Ex. 1) at 7-11

14 IGS Brief at 5.

15 *Id.*

16 *In re Columbia Gas of Ohio,* Case No. 07-478-GA-UNC (Agreement @ ¶ 9) (February 4, 2008)

Although IGS did not agree to the Stipulation and Recommendation, IGS participated in the process. Like USP and ABC, and all others, IGS does not hold a veto on Stipulations. IGS's failure to agree to the ultimate Amended Stipulation does not have any meaning beyond it did not agree. That does not suggest, much less show, that meaningful negotiations did not take place.

The Stipulation is the product of serious bargaining among capable, knowledgeable parties. Nothing claimed in opposition to the Amended Stipulation refutes that. The claims of USP and IGS come down to the fact they disagree with Columbia, Staff, OCC and OPAE. That shows nothing about the public interest and it does not show anything about whether the Amended Stipulation is the product of serious bargaining among capable, knowledgeable parties.

B. The Settlement benefits ratepayers and the public interest by protecting the public safety and providing a reasonable means for all customers to afford repair and replacement of natural gas risers and hazardous customer service lines.

1. Public Safety

Staff contends the public benefit of the Amended Stipulation is that it gives Columbia complete responsibility for all pipelines covered by the federal pipeline safety regulations[17] and allows Columbia to uniformly correct all safety issues as required by those regulations.[18] The Amended Stipulation permits Columbia to systematically

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17 49 C.F.R. § 192 (2008).

18 Testimony of Jill A. Henry (Staff Ex. 4A) (adopting Testimony of Edward M. Steele) at 4.

replace, as quickly as practical, all prone-to-fail risers, and to take responsibility for the future maintenance, repair, and replacement of hazardous customer service lines.[19] The terms of the Amended Stipulation address the public safety considerations raised by the Commission's statewide investigation into the types of natural gas risers used; the conditions of installation; riser performance and the cause of riser failures and the series of recommendations Staff made in that case.[20]

All parties agree that a serious situation has been identified as a result of the Commission-ordered investigation. No one disputes that riser failures could impact the public's safety. Both USP's witness Riley and ABC's witness Morbitzer agreed that it was appropriate for Columbia to take over repair and replacement of prone-to-fail gas service risers.[21] Yet, now USP states in its brief that "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."[22] Mr. Riley does not qualify his acceptance of Columbia's proposal to replace and own Design-A risers in his testimony.[23] USP should not be permitted to modify its position on brief without support

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19 Testimony of Jill A. Henry (Staff Ex. 4A) (adopting Testimony of Edward M. Steele) at 4.

20 *In re Investigation of Gas Service Risers,* Case No. 05-463-GA-COI (Entry at 1-5) (April 13, 2005); *Id.* (Staff Report at 14-15) (November 24, 2006).

21 Testimony of P. Riley (USP Ex. 2) at 4; Testimony of T. Morbitzer (ABC Ex. 3) at unnumbered page 2.

22 USP Brief at 32 (emphasis added). Mr. Riley, the President and CEO of Utility Service Partners, stated categorically in his testimony in response to the following question: " Q.11. Does USP object to Columbia's proposal to replace and own Design-A risers? A.11. No. USP objects to Columbia's proposal to assume responsibility for the maintenance, repair and replacement of customer-owned service lines and to own new or replaced service lines." Testimony of P. Riley (USP Ex. 2) at 4.

23 *Id.*

in the record, particularly when the record reflects USP's unqualified support for the Company's proposition regarding Design-A risers. On brief, USP also purports to speak for its customers in terms of the lack of benefits in the Stipulation/Amended Stipulation for them.[24] Yet again, USP's CEO and President, Philip Riley testified that he "can speak on behalf of Utility Service Partners, what our thoughts ideas and concerns are. I don't believe that the customers [USP's customers] have given me any authority to speak on their behalf."[25] In fact, OCC, the only party empowered to speak on behalf of Columbia's customers of whom less than 10%[26] are also USP's customers, joined in the Amended Stipulation filed with the Commission on December 28, 2007.

For all of the reasons recounted in Staff's initial brief, all of the provisions of the Amended Stipulation are in the public interest.[27] The Amended Stipulation contains all of the provisions found in the October 26, 2007 Stipulation (October Stipulation) plus additional provisions to protect the public interest.[28] The two most significant additions are the Riser Material Plan (RMP) found in paragraph 21 and the sunset provision found in paragraph 22. As can be seen from the description of the RMP, Columbia maintains its primary focus on safety by summarizing "the riser materials Columbia will use in its riser replacement program under the IRP and its rationale for that decision. Columbia's deci-

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24 *See e.g.*, USP Brief at 19, 20-25.

25 Tr. IV at 122-123.

26 *Id.* at 123.

27 Staff's Post-Hearing Brief at 9-15.

28 Amended Stipulation at 16-17; Testimony of D. Hodgden (Staff Ex. 3) at 2-7; Testimony of J. Henry (Staff Ex. 4A) at 3-6; *see also*, Staff's Post-Hearing Brief at 9-15.

sion regarding riser materials will primarily focus on safety. Full cost estimates, including but not limited to, material reliability, cost of remediation and operational flexibility will also be considered."[29] As Staff contends in its initial brief, safety is the paramount issue in this case. The RMP provides greater input into the process regarding riser replacement, but leaves the ultimate decision on what material to use and how and when to use it with the Company, subject to review by the Commission. The provision, if adopted, also permits the riser replacement program to go forward beginning March 1, 2008 and stay on a timely and reasonable track.[30]

The other public safety aspect of the Amended Stipulation is the recommendation that Columbia assume the responsibility for repairing or replacing all hazardous customer service lines.[31] In the gas riser investigation and in testimony in this proceeding, Staff recognized and recommended that local distribution company oversight of more of the distribution system, including the customer service line, enhanced the safety of the system to the benefit of all.[32] Columbia witness Brown and Staff witness Steele both testified that to their knowledge, based on their individual and collective many years of experience, ownership and maintenance responsibility of customer service lines in most other states lies with the local distribution company.[33]

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29 Amended Stipulation at 16 (December 28, 2007).

30 *Id.* at 17.

31 *Id.* at 9.

32 Staff Report at 14-15; Direct Test. of E. Steele (Staff Ex. 2) at 8-9.

33 Direct Test. of E. Steele (Staff Ex. 2) at 9; Columbia Ex. 10 at 3.

USP and ABC argue that property owners lose ownership of and choice regarding replacement of a piece of corroded pipe.[34] The local distribution company is better positioned to make decisions about who to hire, how to repair or replace this piece of the pipeline system. Columbia, like all distribution operators, is responsible for qualifying individuals, such as plumbers, to perform repair or replacement of all facets of its distribution system.[35] The qualification regulations were instituted to ensure a qualified workforce to perform operations and maintenance tasks on pipeline facilities and to reduce the probability of and consequence of incidents caused by unqualified operators.[36]

Because Columbia will have managerial oversight of both riser and hazardous customer service line repair and replacement, they will have the authority to fire a plumber who decides to take shortcuts.[37] USP witness Phipps stated that as many as one-third of contractors hired to perform work on service lines or risers may take shortcuts that could lead to leaks.[38] USP witness Phipps agreed that the authority to hire and fire is important in a process such as this.[39] This authority will act as a deterrent to shoddy work by employees and contractors alike. Columbia will know ahead of time that an employee

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34 USP brief at 19; ABC brief at 13, 16.

35 49 C.F.R. § 192.801 (2008).

36 Staff Report at 13.

37 Tr. IV at 104-105.

38 *See* USP Ex. 6 at 1-2; Tr. IV at 103-106.

39 Tr. IV at 99.

or contractor is OQ certified to perform the necessary work.[40] There will be no instances of Columbia arriving on the scene to inspect a replaced customer service line that is in a covered trench with the allegedly OQ certified plumber's card left on site but the plumber nowhere to be found.[41] Columbia will audit its contractor's and employee's work.[42]

USP contends that ratepayers who own relatively new customer service lines are forced to subsidize those who have older service lines and are not benefitted.[43] All customers will benefit from shared cost responsibility for customer services lines, as they benefit from the other parts of the gas distribution system that they support through the rates they pay to Columbia. The record demonstrates that USP and ABC cover both plastic and metal customer service lines and that the fees paid by all customers subsidize the repairs needed by only a fraction of them.[44] Thus, subsidies are present in the gas line warranty industry as well. Contrary to ABC and USP's contentions otherwise, LDC customers as a whole benefit from LDC control and maintenance of customer service lines. Customer service lines can and do present a safety hazard. In fact, USP witness Funk testified under cross-examination that corrosion in bare steel service lines can present a safety hazard.[45] Mr. Phipps also acknowledged that he has seen the results of gas

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40 Tr. IV at 317.

41 Tr. II at 208.

42 Columbia Ex. 5 at 2-3.

43 USP brief at 22-24.

44 Tr. II at 129-31; Tr. III at 19-20.

45 Tr. IV at 93.

line fires at residences and that these fires pose a risk to other residences in the immediate vicinity.[46]

Columbia Witness Ramsey reasonably analogized Columbia's hazardous leak experience with bare steel service lines to the problems experienced with bare steel customer service lines.[47] He testified that in 2006 Columbia experienced numerous grade 1 leaks on bare steel service lines and 9% of those were hazardous.[48] This evidence of hazardous leaks with bare steel service lines further supports the need for Columbia to take over repair and replacement of bare steel customer service lines. Columbia has considerable experience repairing and replacing its own bare steel lines. USP witness Phipps testified that he has a fairly high regard for Columbia's ability to make the safety system work in Ohio.[49] He also testified that he believes that Columbia is very thorough in the way they implement their responsibilities under the current system.[50] Mr. Phipps further testified he has no reason to believe that Columbia would be anything but thorough performing their duties under the Infrastructure Replacement Program (IRP), which only differs in scope from the Amended Stipulation.[51]

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46 Tr. IV at 108-109.

47 Columbia Ex. 5 at 2.

48 *Id.*

49 Tr. IV at 102.

50 *Id.* at 106.

51 *Id.* at 107.

Staff supports the uniform approach to repair and replacement of risers and service lines provided by the Amended Stipulation.[52] The Amended Stipulation reasonably proposes to guard against the risks posed by the current method of dealing with service line repair and replacements. Staff witness Jill Henry testified that, "through this stipulated agreement, repair and replacement work on risers and service lines will be enhanced as a result [of] [sic] a uniform approach to repair and replacement, with clear lines of responsibility for the work performed."[53]

USP argues that adoption of the Amended Stipulation will not provide a uniform approach to repair and replacement of customer service lines.[54] They worry that Columbia's independent inspection of the plumber's work will be lost. These are the plumbers that their own witness, Mr. Phipps, testified as many as one-third take short cuts or do shoddy work.[55] That is the reason that Columbia has to inspect third party plumbers' work. If Columbia is in the position of managing the work and the employees and contractors doing the work, there will be uniform oversight. Columbia will audit the work of both contractors and employees and also currently has field supervisors make weekly visits to observe and inspect employees' work.[56] If service line work is outsourced, Columbia will have construction coordinators regularly monitor contractors'

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52 Testimony of J. Henry (Staff Ex. 4A) at 5.

53 *Id.*

54 USP Brief at 22.

55 *See* USP Ex. 6 at 1-2; Tr. IV at 103-106.

56 Columbia Ex 5 at 2-3.

work. Mr. Ramsey testified that "[t]he standard for the gas industry is to have a quality assurance program for work performed by gas company employees."[57] Columbia's proposal for repairing and replacing risers and hazardous service lines under the Amended Stipulation offers a greater degree of uniformity and clearer oversight than does reliance on the current system.

2. Cost Recovery Mechanism

As the Staff discussed in its initial brief, the Amended Stipulation provides a practicable and reasonable process for Columbia to recover the costs associated with the Company's IRP.[58] Staff witness David Hodgden testified that "[t]he Stipulation contains appropriate regulatory accounting and economic safeguards to protect the public interest while providing a mechanism for Columbia to recover its incremental IRP costs."[59] No cost recovery is requested by Columbia's filing or by the Amended Stipulation. In fact, the Amended Stipulation, just as did the October Stipulation, provides the same safeguards and more. Staff witness Hodgden testified that he believed the accounting provisions of the October Stipulation only applied to Columbia's IRP expenditures and would end at the completion of the program.[60] As paragraph 22 of the Amended Stipulation provides, there is now a sunset provision that memorializes Mr. Hodgden's interpretation of

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57 Columbia Ex 5 at 2.

58 Staff Post-Hearing Brief at 13-15.

59 Testimony of D. Hodgden (Staff Ex. 3) at 2-3.

60 *Id.* at 6.

the accounting provisions. There is now further assurance that these provisions will expire at the end of the program. This additional provision enhances the public benefits of the Amended Stipulation. Contrary to USP's claims, there are economic efficiencies and benefits that accrue to Columbia's customers and the public as a whole. This provision is just one among the other provisions that benefit the public interest as referenced in Staff's initial brief.[61]

C. The Amended Stipulation Does Not Violate Any Important Regulatory Principle or Practice.

USP argues three propositions, none of which is true. USP claims that Revised Code Section 4929.02 somehow applies to its product and the Commission's adoption of the Amended Stipulation will somehow violate the state policies identified in that section.[62] Next, USP asserts "the cost causer . . . should pay" is a universal regulatory principle, presumably inviolate, and USP makes that claim without citing any authority for it.[63] USP asserts the Amended Stipulation will somehow violate that proposition. Finally, USP contends that the Commission does not have the statutory authority to approve the Amended Stipulation because the effects of that approval may affect residential property owners.[64] This creative contention also is erroneous. The Commission's

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61 Staff Post-Hearing Brief at 13-15.

62 USP Brief at 24-27.

63 *Id.* at 27.

64 *Id.* at 27-29.

approval of the Amended Stipulation and the proposed tariffs contained within it do not violate any important regulatory principle.

1. The Amended Stipulation does not offend the policies contained in Revised Code Section 4929.02.

The Amended Stipulation does not violate Revised Code Section 4929.02. USP claims, in effect, that the General Assembly protected the warranty market by making the policy statements concerning diversity and competition contained in that section.[65] This argument, of course, assumes the status quo is one of diversity and competition in the warranty market. The record does not support this assumption; the record contradicts it.

The record shows little, if any, competition really exists in the warranty market. Only a limited number of companies exist *nationally* in the warranty market, according to USP witness Riley.[66] The record does not contain evidence showing that any of those companies, other than those appearing in this case, offer products in Ohio. The record also does not show that any companies, *including* those appearing in this case, offer products in competition with each other.

The record does not support the existence of any competition with USP or ABC, the only two warranty companies offering evidence. While these two companies offer warranties, the record supports only that they do not compete.[67] The two companies offer

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65 USP Brief at 24-27.

66 Tr. II at 167.

67 Tr. III at 27.

different products according to ABC vice-president and witness Mr. Morbitzer.[68] Due to those differences, they sell products in different markets.[69] ABC's product is primarily sold at real estate closings and USP's product is not.[70] Only one other possible warranty provider even appeared in the case and that is IGS. IGS did not offer evidence and none of the evidence in the case describes IGS's activities. The record does not contain any evidence from which to identify the segment of the warrant market in which IGS might offer products. The record does not contain evidence that IGS even offers any warranty products.

The record would not show a diverse and competitive status quo even if it contained evidence showing IGS competed with both ABC and USP. If that evidence existed, and it does not, it would show different markets with only two competitors. Markets with so few competitors are not diverse and they are not competitive. Staff submits that even a record showing ABC, USP and IGS competed, and this does not exist, would not show diverse and competitive markets because of the insignificant number of competitors.

In short, the record contains evidence about only two warranty providers, USP and ABC, and the record supports only the conclusion that they are *not* competitors. Moreover, the evidence allows only the conclusion that few, if any, competitors might be expected in any warranty market. Accordingly, the record reflects a status quo that is *not*

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68 Tr. III at 27.

69 *Id.*

70 *Id.*

diverse and *not* competitive. Any change to such a status quo cannot conflict with goals of diversity or competition because any change cannot adversely affect them. For this reason, alone, the Amended Stipulation does not violate Revised Code Section 4929.02.

Additionally, the Amended Stipulation does not violate any policy contained in Revised Code Section 4929.02 because that statute does not contain any policies relating to warranties.[71] Revised Code Section 4929.02 contains five policy statements concerning "natural gas service" and four policy statements that are not even remotely relevant here.[72] The five policy statements concerning "natural gas service" are not relevant to warranty companies because their warranties are not "natural gas services." Although the definitions section of Revised Code Chapter 4929 does not define "natural gas services," it specifically identifies and defines six services involving natural gas.[73] Staff submits these services collectively are what the General Assembly meant by "natural gas services." These services involve the sale, aggregation, marketing, brokering and distribution of the commodity, natural gas.[74] None of them encompass risk-shifting or risk-shift-

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71 Ohio Rev. Code Ann. § 4929.01 (Anderson 2008).

72 Ohio Rev. Code Ann. § 4929.02 (Anderson 2008). The exceptions not relevant here include statements concerning: 1) natural gas supplies and suppliers [warranty companies and plumbers are neither]; 2) access to information regarding the operation of the distribution system [this case has nothing to do with access to information]; 3) natural gas markets [this case has nothing to do with natural gas markets]; 4) the state's effectiveness in the global economy [this case does not concern the global economy].

73 They are: ancillary services, commodity sales service, comparable service, distribution service, competitive retail natural gas service, and retail natural gas service. Ohio Rev. Code Ann. § 4929.01 (Anderson 2008).

74 *Id.*

ing devices such as warranties.[75] The purpose of a warranty is to shift the risk of repair and replacement of utility service line from the residence owner to the warranty company.[76] As described by USP witness Mr. Riley, the warranty company "accepts the risk of repair and replacement of utility service line in exchange for a monthly fee."[77] Accordingly, it is not involved with selling, aggregating, marketing, brokering or distributing natural gas. That means warranties are not a "natural gas service," and the policies contained in Revised Code Section 4929.02 are not applicable to them.

Even if some evidence exists as to competition in any group relative to inspection, maintenance and repair of gas service lines, such evidence does not rob the Amended Stipulation of its public interest enhancing effect. The Amended Stipulation promotes safety.[78] Even if a conflict arguably exists between any of the policies contained in Revised Code 4929.02 and the Amended Stipulation, the Amended Stipulation should be approved because of the benefits it provides. Occasionally, policies conflict and that conflict cannot be completely resolved. If anyone concludes that occurs in this case, Staff submits that safety should be promoted at the expense of competition and diversity.

The current system is flawed. While a few home owners may shift risks of repair costs to warranty companies, they cannot shift the risk of suffering damage as a result of inadequate repair work on a gas line. That is relevant to this case because many con-

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75 Ohio Rev. Code Ann. § 4929.01 (Anderson 2008).

76 Tr. II at 165.

77 *Id.*

78 Direct Test. of E. Steele (Staff Ex. 2) at 8-12.

tractors doing service-line-repair work, as many as 1 in 3, take short-cuts doing "shoddy work" according to USP's witness Mr. Phipps.[79] That is particularly dangerous because, as Mr. Phipps explained, there are "some bad eggs out there but who knows where they are."[80] The warranty companies do not know. Additionally, the record does not reveal any act the warranty companies take to insure the quality of the repairs. Catastrophe does not occur because of Columbia.[81] Columbia is the lynchpin of the system according to USP witness Mr. Phipps.[82] He has a "high regard" for Columbia's ability to make the safety system work in Ohio.[83] One of the significant benefits that he notes Columbia provides is inspections.[84] The shoddy jobs do not result in catastrophe because Columbia tests everything.[85] Mr. Phipps, reflecting the attitude of at least some involved in the status quo, explained:

> "I am only saying that if somebody comes out there and they take a shortcut, Columbia Gas pulls up and they test everything very thoroughly is what they do and so it is immaterial whether they took a shortcut or not because the gas company checks everything that they do. I have been on both ends of

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79 Tr. IV at 104-105.

80 *Id.* at 104.

81 *Id.* at 106.

82 *Id.* at 102.

83 *Id.*

84 *Id.*

85 *Id.* at 106.

> that, and they are very thorough about their checks. Their people are trained."[86]

Without Columbia, quality assurance does not exist under the status quo.

Left to their own decisions, warranty companies and their contractors might not even follow governmental regulations. The warranty industry is not regulated. It is not regulated by state, or local governments.[87] There is no evidence it is even regulated by the federal government. The industry does not have a trade association or some other centralized body defining acceptable practices.[88] Companies decide what practices they will follow based on business models, not safety codes.[89] What is good for business is the decision-making standard and quality control is not included in the process.

Staff submits the status quo is a dangerous scenario and it should be improved. If any policy applicable to a wide range of circumstances might arguably support the continuation of such a situation, such a policy should give way to a policy of enhancing safety. Surely, the General Assembly did not intend to sacrifice safety to protect the business interests of a few tangentially involved with natural gas delivery, whether they are warranty companies or contractors that Columbia decides it will not use.

Expanding the role of the one company required to provide for safety and quality, Columbia, is wise and that is what the Amended Stipulation accomplishes. Under federal regulation, Columbia is responsible, currently, for the operation and maintenance of dis-

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86 Tr. IV at 106.

87 Tr. II at 166.

88 Tr. III at 28-29.

89 *Id.* at 30.

tribution lines, including service lines.[90] The Amended Stipulation results in Columbia obtaining "better control over the quality of work being performed on riser and service line installation."[91] It also results in "more efficient repair and replacement of hazardous customer service lines and risers."[92] It allows for "[v]erification of materials and replacement of risers and service lines by Columbia personnel."[93] This is significant because Columbia provides training for its employees and contractors.[94] It allows for a clear, uniform line of demarcation between Columbia's responsibility for operation and maintenance and the customer's obligations regarding gas service to the home.[95]

The Amended Stipulation also provides for more efficient repair and replacement of hazardous customer service lines and risers.[96] This will provide a customer benefit by reducing the time the gas to their home is turned off. Columbia will not have to make an additional trip to the site for follow-up leak testing since they will already be there repairing the leak.[97] As Mr. Steele explained:

> If the leak [in a service line] was hazardous, the gas would be terminated immediately. This situation requires the homeowner to contact a plumber or other qualified entity to make

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90 Direct Test. of E. Steele (Staff Ex. 2) at 11.

91 *Id.* at 8.

92 *Id.*

93 *Id.*

94 Tr. IV at 100.

95 Direct Test. of E. Steele (Staff Ex. 2) at 9.

96 *Id.* at 8.

97 *Id.*

> repairs. This can take up to several days to occur, depending on the plumber's schedule and allowing Columbia to come out and test the new line or repair (as required by Federal and State regulations) and reestablish service. This means that a homeowner does not have service during this time.[98]

Assigning Columbia the responsibility for risers and service lines relieves many of these problems. Customers would have only one call to make for any concern about risers or service lines.[99] Decisions about supplying gas service will be left to experts, Columbia, and customers will not have to make decisions about replacements.[100] Columbia can test lines when it, or its contractor, makes the repairs.[101]

In this case, the safest system is also the most efficient system and that is the system provided by the Amended Stipulation, not the status quo. The Amended Stipulation does not conflict with any policy identified by the General Assembly. It should be approved.

2. The Amended Stipulation does not offend any regulatory principle concerning the cost-causer paying the cost.[102]

This claim assumes that the landowner with the customer service line is the only one benefited by the elimination of the risk created by a hazardous leak. That is not true. The testimony of Mr. Phipps, a witness called by USP, showed that many people in addi-

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98 Direct Test. of E. Steele (Staff Ex. 2) at 11-12.

99 *Id.* at 12.

100 *Id.*

101 *Id.*

102 This was discussed in Staff's Merit Brief.

tion to the landowner with the customer service line benefit from the remedy to a hazardous leak even if they do not have an interest in the property containing the leaking service line. Mr. Phipps testified that fire beginning with a single leaking gas service line endangers many residences.[103] Fire does not respect property boundaries or property interests and it threatens everyone in the vicinity. Accordingly, everyone benefits from a program reliably providing for the remediation of such leaks. For that reason alone, it is reasonable to charge every one to remedy the leaks, even under the position advanced by USP.

Moreover, the status of "the cost-causer pays the cost" as a regulatory principle is dubious, at best, in the utility industry. Subsidies have served a purpose in utility industries from the beginning. In an appropriate case such as this one, they can serve legitimate purposes now and in the future. For example, it is well known that the telephone industry was built on long-distance rates subsidizing local rates so that universal service might be obtained. Subsidies can be appropriate. This case does not involve subsidies because of the community benefits as discussed above. Even if it did, however, they would be justified by those same community benefits.

3. The Commission has the statutory authority to approve and adopt the Amended Stipulation.

The Commission has the authority to approve the Amended Stipulation. The Commission has broad authority over Columbia, and all other public utilities under the Commission's jurisdiction.[104] The General Assembly gave the Commission "general

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103 Tr. IV at 109.

104 Ohio Rev. Code Ann. § 4905.05 (Anderson 2008).

supervision over all public utilities within its jurisdiction."[105] More specifically, the General Assembly gave the Commission power to adopt and enforce a gas pipeline safety code through adopting rules and issuing orders.[106] The General Assembly specifically stated: "The commission shall administer and enforce that code."[107] The General Assembly also provided that the Ohio gas pipeline safety code should reflect federal regulation.[108] For example, the General Assembly required the Commission's regulation of gathering lines reflect the federal regulations.[109] The General Assembly also authorized the Commission to accept funds from the federal government to carry out the federal Natural Gas Pipeline Safety Act.[110]

As Mr. Steele noted, "Columbia is responsible for the operation and maintenance of those lines [all jurisdictional pipe, including service lines, to the outlet of the meter at the customer's premises]" under the regulations.[111] Obviously, the Commission has the authority to direct Columbia to perform the operations for which Columbia is responsible and that should be beyond dispute. By approving and adopting the Amended Stipulation and the included tariffs, the Commission is doing nothing more than approving a plan by

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105 Ohio Rev. Code Ann. § 4905.06 (Anderson 2008).

106 Ohio Rev. Code Ann. § 4905.91(A) (Anderson 2008).

107 *Id.*

108 Ohio Rev. Code Ann. § 4905.91(B)(c) (Anderson 2008).

109 Ohio Rev. Code Ann. § 4905.91(C) (Anderson 2008).

110 Ohio Rev. Code Ann. § 4905.91(B) (Anderson 2008).

111 Direct Test. of E. Steele (Staff Ex. 2) at 10-11.

which Columbia will perform the maintenance of service lines, a responsibility it has under law.

The change in the status quo that USP disputes is a dispute about policy; a dispute about which actions Columbia *ought* to undertake to meet its responsibilities. The method provided in the Amended Stipulation is consistent with that existent in the large majority of states.[112] It results in many benefits discussed by Mr. Steele in his testimony and it is recommended by representatives of those directly involved in gas service: the buyers, sellers and regulators – those being the Commission Staff, OCC, OPAE and Columbia. The Commission has ample reason to adopt it.

USP seeks to advance its business interests behind the veil of advocating "customer ownership of service lines." But, there is no evidence the customers need or want USP's protection. Residential customers have not intervened in the case to complain about the Amended Stipulation. USP, ABC and IGS have not presented any residential customers as witnesses, much less for the purpose of complaining about Columbia assuming responsibility for performing the maintenance of service lines. All the representatives of residential customers in the case are signatories to the Amended Stipulation and recommend it to the Commission. The lack of complaint is understandable. The Amended Stipulation removes the burden of arranging for repairs from the property owners and requires experts to do it. It also increases the speed with which repairs may be completed and gas service returned, as discussed elsewhere. It has only benefits for resi-

[112] Direct Test. of E. Steele (Staff Ex. 2) at 9.

dential property owners. Standing issues aside, residential property owners are not negatively impacted.

The Commission has the authority to approve and adopt the Amended Stipulation as a matter of law. The record shows the Amended Stipulation is in the public interest as a matter of fact. Staff believes the Commission should approve and adopt the Amended Stipulation as a matter of policy.

II. The Commission has the authority to adopt the Amended Stipulation that would give Columbia the responsibility to repair or replace hazardous customer service lines including gas risers identified as prone-to-leak.

A. Adoption of the Amended Stipulation will not substantially impair USP or ABC's contracts.

Both USP and ABC attempt to argue that the Commission's adoption of the IRP, the Stipulation or the Amended Stipulation would impair their contracts with consumers and run afoul of the restrictions in the Ohio and United States Constitutions.[113] While the parties are correct that both constitutions protect against impairment of contracts, only ABC recognizes the principle that " 'the laws which subsist at the time and place of making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' "[114] ABC goes on to state that given this principle, the Framers of the Constitution wanted to ensure that government was forbidden from pass-

[113] USP Brief at 51-53; ABC Brief at 21-23.

[114] ABC Brief at 21 (citing *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 429-30).

ing laws impairing the obligations of already existing contracts.[115] The Supreme Court in *Blaisdell* firmly recognizes the corollary that:

> Not only is the constitutional provision qualified by the measure of control which the state retains over the remedial process, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' [Citation omitted] Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order....a government which retains adequate authority to secure the peace and good order of society.[116]

In other words, the police power of the state must also be read into contracts. Ohio constitutional law is in accord with all of these principles. In *Board of Com'rs of Franklin County v. Pub. Util. Comm'n*, the Ohio Supreme Court stated that "it must be kept in mind that all applicable statutory provisions are read into such contracts, including all statutes existing at the time the contracts are executed and all statutes thereafter executed pursuant to lawful exercise of the police power".[117] The Ohio Supreme Court went on to state that "[s]uch contracts being at all times subject to public regulatory authority, the reasonable and lawful exercise of such authority in the interest of the public welfare,

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115 ABC Brief at 21 (citing *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 429-30); *Blaisdell*, 290 U.S. at 429-30.

116 *Blaisdell*, 290 U.S. at 434-435.

117 *Board of Com'rs of Franklin County v. Pub. Util. Comm'n*, 107 Ohio St. 442, 450-55 (1923).

though it might do violence to some of their express terms, would not amount to an impairment of their obligations."[118]

With specific regard to the legislative power delegated to the Public Utilities Commission, the Ohio Supreme Court stated that:

> It is one of the prime essentials of the principles of public policy that freedom of contract and private dealing may be restricted by law for the good of the community."[119] Further, the Court opined that "[i]t is a corollary to this proposition that all contracts when made are subject to the paramount rights of the public and that all contracts whose subject-matter involves the public welfare will have read into them with the same force and effect as if expressed in clear and definite terms all public regulations then existing or thereafter to be enacted which tend to the promotion of the health, order, convenience, and comfort of the people and the prevention and punishment of injuries and offenses to the public.[120]

The court upheld the Commission's order in the *Franklin County Com'rs* case and noted that "the police power would lose very much of its potentiality if its operation could be defeated contracts whose continued operation would be detrimental to the public welfare."[121] More recently, the court has stated in *Ohio Edison Co. v. Power Siting Commission,*[122] that the prohibition against the impairment of contracts "must bow to valid police power legislation designed to protect public health, safety and welfare, as long as the

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118 *Board of Com'rs*, 107 Ohio St. at 450.

119 *Id.*

120 *Id.* at 450-51.

121 *Id.* at 453.

122 56 Ohio St. 2d 212, 217-18 (1978) (quoting *Benjamin v. Columbus,* 167 Ohio St. 103, 110 (1957).

exercise of that police power 'bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.'" In *Ohio Edison* the court found that the Power Siting Commission's denial of an application for a certificate of environmental compatibility and public need, based on evidence that the utility's proposed expansion plans would have a greater than minimum adverse recreational impact, was a "valid exercise of the police power."[123]

As USP recognizes in its brief, the U.S. Supreme Court in a more recent case established a three-part test to use in determining whether a state has impaired a contract in violation of the Contract Clause.[124] In *Energy Reserves Group* the Court determined whether a Kansas statute regulating gas prices impaired two intrastate purchase contracts entered into by a natural gas supplier and a public utility.[125] In examining the first part of the test, "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship,"[126] the Court considers the severity of the impairment and whether the relevant industry has been subject to regulation.[127]

In this case, Staff contends neither USP nor ABC's contracts will be impaired if the Commission adopts the Amended Stipulation. ABC's warranties cover more than the customer service line in question here. ABC offers warranty coverage on outside water

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123 *Ohio Edison,* 56 Ohio St. 2d at 219.

124 *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.,* 459 U.S. 400, 410-13 (1983).

125 *Id.* at 410.

126 *Id.* at 411.

127 *Id.*

lines,[128] inside gas lines and associated venting, outside gas lines to barbeques, and to gas appliances inside the home.[129] If the Commission adopts the Amended Stipulation ABC will still be able to cover inside gas lines and appliances and outside gas lines to outdoor appliances. Staff submits that this does not rise to the level of impairment of contracts or even, as ABC argues on brief, "completely [wiping] out ABC Gas's contractual relationships."[130] Both ABC and its customers would still have the value of the warranty for these other items as well as for any warranties sold covering outside water lines.

USP argues that adoption of the Amended Stipulation would destroy their contractual relationship with their customers."[131] USP does not discuss its other possible business relationships with these customers. Mr. Riley testified that USP offered customers the option to transfer their gas service line warranty coverage to other coverages, such as water line, sewer lines and inside gas lines should the Commission adopt the IRP.[132] Even if they do lose some business, it is only for part of a year.

Even assuming that ABC's and USP's contracts would be substantially impaired by adoption of the Amended Stipulation, both of these companies recognize that they entered into the realm of a highly regulated industry. Both Mr. Riley and Mr. Morbitzer

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128 Tr. III at 14.

129 ABC Ex. 3 at 3-4.

130 ABC Brief at 22.

131 USP Brief at 51.

132 Tr. II at 120-21.

were cognizant of U.S. Department of Transportation regulation of gas pipeline safety.[133] They also were familiar with the State of Ohio's regulation of the gas utility industry and gas pipeline safety as they filed comments in the riser investigation docket, intervened and participated fully in the instant proceeding. In other words, they entered into an enterprise already regulated in the particular to which they now object and were subject to further regulation upon the same topic.[134] In *Hudson County Water Co. v. McCarter,*[135] the Court found that "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them."[136] Knowing that gas pipelines are subject to state and federal regulation ABC and USP embarked upon their current enterprises and they cannot now complain that they are subject to further regulation by adoption of the Amended Stipulation.

Again, assuming that a substantial impairment would exist if the Amended Stipulation is adopted, there is a significant and legitimate public purpose behind the regulation in question. The second part of the test announced by the Court is that if a substantial impairment exists, the state "must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem."[137] Further, the Court found that "the public purpose need not be

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133 USP Ex. 2 at 2; ABC Ex. 3 at 2.

134 *See, Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940).

135 209 U.S. 349 (1908).

136 *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

137 *Energy Reserves Group*, 459 U.S. at 411-12.

addressed to an emergency or temporary situation."[138] In the present cases, the record supports the finding that adoption of the Amended Stipulation meets this second prong of the Court's test. Staff witness Steele testified regarding his knowledge of customer confusion in dealing with issues surrounding customer service lines.[139] Further, Columbia witness Ramsey testified that bare steel customer services lines are the same in character and age as the steel service lines that Columbia now services, and that Columbia experienced a significant number of hazardous leaks on such lines in 2006.[140] USP witness Phipps offered his insight that as many as one-third of plumbers who perform repairs or replacements of customer service lines take shortcuts or do shoddy work that could lead to leaks.[141] Further, USP witness Funk testified that corrosion and bare steel service lines can present a hazard.[142] And Mr. Phipps related that he has seen gas line fires at residences and that these fires pose a risk to other residences in the immediate vicinity.[143] Surely the Commission has a significant and legitimate public purpose in regulating the safety of customer service lines as a part of the gas pipeline distribution system.

The third part of the test announced in *Energy Reserves Group* once a significant and legitimate public purpose is identified is: whether the adjustment of "the rights and

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138 *Energy Reserves Group*, 459 U.S. at 412.

139 Direct Test. of E. Steele (Staff Ex. 2) at 8-11.

140 Columbia Ex. 5 at 2.

141 Tr. IV at 103-106.

142 *Id.* at 93.

143 *Id.* at 108-109.

responsibilities of contracting parties [is based] upon reasonable conditions and of a character appropriate to the public purpose justifying adoption."[144] The extension of Columbia's responsibility over customer service lines is a both reasonable and appropriate measure to further gas pipeline safety. Finally, the Court found that where the state is not a party to the contract under examination, the Court defers to "legislative judgment as to the necessity and reasonableness of a particular measure."[145] Here the interest served is public safety and the proposed measures are an appropriate means of achieving this end. The Commission should adopt the Amended Stipulation.

USP recognizes the test announced in *Energy Reserves Group* but then fails to properly apply it. In discussing the "public purpose" prong of the test USP cites to *United Gas Co. v. Mobile Gas Corp.*[146] There USP proceeds to confuse the *Mobile-Sierra* doctrine with the "public purpose" prong of the *Energy Reserves* case. The *Mobile-Sierra* doctrine takes its name from the United States Supreme Court's decisions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* and *FPC v. Sierra Pacific Power Co.*[147] *Mobile-Sierra* permits parties to enter into contractual arrangements that have the effect of prohibiting FERC from later modifying the terms of a filed agreement unless FERC finds that the "public interest" so requires. This doctrine limits FERC's

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144 *Energy Reserves Group*, 459 U.S. at 411-412.

145 *Id.* at 412-13.

146 350 U.S. 332 (1956).

147 350 U.S. 348 (1956).

authority under the Federal Power Act, and has no relevance to an impairment of contract claim asserted under either the state or federal Constitutions.

There is evidence in the record to support the adoption of the Amended Stipulation. Prone-to-leak risers are a significant safety issue and customer service lines should be treated like the integral part of the natural gas distribution system that they are. Having the local distribution company responsible for customer service lines from the curb to the outlet of the meter is a clearer delineation of responsibility than the present system. Staff recommends adoption of the Amended Stipulation to achieve the reasonable and appropriate goal of a safe gas pipeline system.

B. The Amended Stipulation does not result in a "taking" of property for which compensation is necessary and it does not violate the U.S. or Ohio Constitutions.

1. The Amended Stipulation does not result in a permanent "taking" of property requiring compensation contrary to ABC's claim.

ABC claims the Amended Stipulation results in a compensable taking under the U.S. and Ohio constitutions and that taking without compensation violates regulatory principles.[148] ABC bases its argument entirely on the claim that the Amended Stipulation results in a *permanent physical occupation* of a residential property owner's land. Due to that premise, ABC cites the U.S. supreme court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*,[149] as authority for its compensable-taking claim; *Loretto* being a

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148 ABC Brief at 17-21.

149 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982)

decision finding a compensable-taking based solely on the existence of a *permanent physical occupation* of property. Significant differences exist between the facts surrounding the Amended Stipulation and the facts of *Loretto*. The most significant difference is this case does not involve a *permanent physical occupation* that was the basis of *Loretto*. Because a *permanent physical occupation* does not result from the Amended Stipulation, the factual predicate of ABC's argument does not exist. As a result, ABC's claim must fail.

Most governmental acts do not result in compensable takings even if they involve curtailing the use of property or the destruction of property rights. Compensable takings do not necessarily result from governmental intrusions on someone's ability to use or possess their property.[150] As the U.S. Supreme Court noted:

> [G]overnment regulation – by definition – involves the adjustment of rights for the public good. . . . To require compensation in all such circumstances would effectively compel government to regulate by *purchase*. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." (Citations omitted).[151]

Living in a civilized community involves costs and sometimes citizens must bear those costs to secure the benefits of a civilized community.[152] In holding a compensable taking did not exist, the U.S. Supreme Court made this point, stating:

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150 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

151 *Andrus v. Allard*, 444 U.S. 51, 65, 100 S. Ct. 318, 327, 62 L. Ed.2d 210 (1979).

152 *Id.* at 328.

> It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing business in a civilized community." (Citations omitted).[153]

The Takings Clause is not a restriction on governmental authority; it preserves that authority and subjects it only to "the dictates of justice and fairness."[154]

Following *justice and fairness* as guides, the determination of a compensable taking ultimately rests on the facts of each case and "ultimately call as much for the exercise of judgment as for the application of logic."[155] Nevertheless, the U.S. Supreme Court has developed factors and formulas to conduct the analysis.[156] Certain factors have particular significance and include: the economic impact of the regulation on the party seeking compensation; the extent to which the regulation has interfered with distinct investment-backed expectations; and, the character of the government action.[157]

The application of these factors to this case show that a compensable taking does not exist. First, there is little, or no, economic impact on the customers. Property values before and after the state action should remain relatively unchanged, as well as the costs of maintaining and servicing the lines. Second, the regulation cannot be said to have interfered with the "distinct investment-backed expectations" of the customers. The

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153 *Andrus v. Allard*, 444 U.S. 51 at 327.

154 *Id.*

155 *Id.*

156 *Id.*; *Penn Central Transportation Co.*, 438 U.S. at 104, 98 S.Ct. at 2646.

157 *Penn Central Transportation Co.*, 438 U.S. at 124, 98 S.Ct. at 2646; *State ex. rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 71 (1998).

customers do not profit from the gas service lines. The regulation in this case advances the state's interest in the health and safety of its citizens, which the courts have repeatedly recognized as a legitimate interest. Further, the regulation does not deny the customers an economically viable use of their property. Because the three factors appear to suggest that there is no taking, and the state is validly exercising its police power to protect the welfare of the general public, the state is not required to provide just compensation to residential customers. ABC has not even argued that the result of such an analysis indicates a compensable taking.

ABC attempts to characterize the Amended Stipulation as a *permanent physical occupation*. ABC is correct that Courts have held that such an occupation is an extraordinary situation where the typical analysis is not applied and the permanent physical occupation, alone, is enough to determine a compensable taking exists. ABC is wrong with its claim such an occupation exists in this case. This case does not involve a permanent physical occupation.

Permanent physical occupation is exactly that; it results from a governmental act, it is permanent and it is physical. *Loretto* is an example. *Loretto* involved a New York *statute* that *required* landlords to permit the installation of cable television facilities on their rental properties.[158] Pursuant to that statute CATV Corp. attached its cable facilities to the roof and side of Ms. Loretto's apartment building. Ms. Loretto objected to the equipment, at least without greater compensation. She also objected to the requirement

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158 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982).

and brought a class action suit for damages and an injunction.[159] The court held in her favor and reasoned: "The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall."[160] The court held that the New York statute resulted in a "taking" because it allowed a permanent physical invasion of Ms. Lorreto's property.[161] The nature of the governmental action in *Loretto* is not present in this case. Additionally, the nature of the invasion in *Loretto* is not the same as in this case.

The difference between this case and *Loretto* is the difference between taking one strand of a full bundle of property rights and chopping through the entire bundle, taking a slice from every strand.[162] The first situation is analyzed under the *Penn Central* factors analysis while the latter involves a permanent physical taking.[163] The denial of traditional property rights does not necessarily amount to a compensable taking.[164] Using the metaphor of a bundle of strands, the U.S. Supreme Court explained:

> "But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses the full "bundle" of property rights, the destruction of

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159 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982.

160 *Id.* at 437.

161 *Id.*

162 *Id.* at 435, 102 S. Ct. 3164, 3167.

163 *Id.*

164 *Andrus v. Allard*, 444 U.S. at 327.

> one "strand" of the bundle is not a taking, because *the aggregate must be viewed in its entirety.*"[165]

The *Loretto* court employed this metaphor to explain that with a compensable taking "the government does not simply take a single 'strand' from the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand."[166]

This case involves only one strand, if any. The Amended Stipulation does not require a physical occupation. Nothing changes except those directing repair and maintenance activities, which, of course, does not involve any kind of taking. The gas service lines have already been installed and, presumably, the property owners want those lines in the ground. The owner still owns all the land and enjoys all the fruits of ownership. This is even true where Columbia must replace a gas line. When such repairs are necessary, the pipe stays on Columbia's books as an asset. Nevertheless, that accounting does not change anything relevant to the property owner. The only difference to the property owner is an improved gas line occupies the space previously occupied by a defective one.

The only strand is the one ABC complains about, who chooses those that repair the gas line if it ever needs to be repaired. That is not a permanent physical occupation as that in *Loretto.* Because this is a condition of a tariff rather than a statute, the owner even retains the right to avoid this by abandoning gas service, unlike the facts of *Loretto.* This situation is not analogous to the landlord in *Loretto.* The Amended Stipulation would result in only the destruction of one strand (*i.e.*, the right to choose the company that

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165 *Andrus v. Allard,* 444 U.S. at 327 (citations omitted) (emphasis added).

166 *Loretto v. Teleprompter Manahattan,* 458 U.S. at 419, 435 102 S. Ct. at 3176.

repairs the gas service lines) of each owner's bundle of property rights, which is not a taking.[167]

2. The Amended Stipulation does not result in a "taking" of USP's contract rights for which compensation is necessary.

USP argues that the Amended Stipulation violates the Takings Clause of the Ohio Constitution because it "results in a direct appropriation of USP's contracts" and contracts can constitute property protected from government takings without just compensation.[168] However, a claimant must hold a direct interest in the res that is taken; otherwise, just compensation is not granted for the loss or destruction of a contract.[169] USP does not hold a direct interest in the gas service lines and thus its taking claim is without merit.[170]

Further, the Amended Stipulation would not result in a direct appropriation of USP's contracts. There is no proposal that the actual, existing contracts be appropriated by the state and assigned to Columbia. Rather, this is a case of mere frustration of contractual rights. In *Ohio Valley Advertising*,[171] the court distinguished between direct appropriations of contractual rights and appropriations of other property that incidentally

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167 *Andrus v. Allard*, 444 U.S. at 65–66, 100 S.Ct. at 327.

168 USP Brief at 53-54.

169 *Bd. of Park Com'rs of Columbus v. DeBolt*, 15 Ohio St. 3d 376, 378-79 (1984).

170 Aside from full ownership rights, courts have recognized leaseholds and easements as interests sufficient to entitle the holder to just compensation. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303, ,96 S. Ct. 910, 916, 47 L. Ed. 2d 1 (1976) (leasehold); *State ex rel. McKay v. Kauer*, 156 Ohio St. 347, 351 (1951) (easement); *Cincinnati v. Spangenberg*, 35 Ohio App. 2d 168, 170 (Ohio Ct. App. 1st D. 1973) (leasehold).

171 *Ohio Valley Advertising Corp. v. Linzell*, 168 Ohio St. 259 (1958).

frustrate contractual rights relating to that other property.[172] The former are protected against government takings, whereas the latter give "rise to a claim for compensation only where the contract thus frustrated is deemed to be a part of the res taken."[173] The court found that it is "well settled that where real property is taken for public use, a person other than the owner in fee is not entitled to compensation, or to a share in the compensation unless he has some 'estate' or 'interest' in the property, a mere contractual right, without such 'estate' or 'interest,' not being sufficient."[174]

USP also addresses the public use requirement of the Takings Clause and states that the "appropriation directly benefits the Commission, which under the *Norwood* case is not a permissible public purpose."[175] In *Norwood*, the court held that "an economic or financial benefit *alone* is insufficient to satisfy the public-use requirement."[176] Rather, "a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents."[177] Because the safety of the public is in fact the impetus for the Amended

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172 *Ohio Valley Advertising Corp. v. Linzell*, 168 Ohio St. at 263–64.

173 *Id.* at 264.

174 *Id.*; *see also Omnia Commercial v. U.S.*, 261 U.S. 502, 513, 43 S.Ct. 437, 439, 67 L. Ed 773 (1923) (distinguishing between appropriation and frustration); *cf. Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 121, 44 S.Ct. 471, 474, 68 L. Ed. 934 (1924) (finding a taking by the government's appropriation of a ship building contract where the "government requisitioned the incomplete vessel with the purpose of requiring the completion in accordance with the existing contract; it did require the carrying out of that contract (with slight modifications); it took plaintiff's right to have the vessel; it received the vessel and appropriated plaintiff's partial payments thereon to its own use and benefit").

175 USP Brief at 54.

176 *Norwood v. Horney*, 110 Ohio St. 3d 353, 378 (2006) (emphasis added).

177 *Id.* at 369.

Stipulation, and assuming those safety concerns are justified, the public use requirement is satisfied.

Finally, with respect to the U.S. Constitution, USP relies on the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, stating that a taking occurs when a property 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."[178] But the Court's statement is actually directed to the "owner of real property," not any property owner.[179] As USP admits, nowhere in *Lucas* does the Court address contractual rights.[180] In cases actually involving contractual rights, the Court has stated that "the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking" and "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."[181] Rather than *Lucas*, which pertains only to land use regulations, the Court's general rule from *Omnia Commercial*, which pertains to contractual rights, is applicable to the proposed state action in this case.[182] In *Omnia Commercial*, the Court cautioned against confusing the

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178 USP Brief at 55.

179 *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 2895, 120 L. Ed. 2d 798 (1992).

180 USP Brief at 55.

181 *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224, 106 S.Ct. 1018, 1025, 898 L. Ed. 2d 166 (1986); *Omnia Commercial*, 261 U.S. at 508.

182 *See Omnia Commercial*, 261 U.S. at 510, 43 S. Ct. at 438 ("If, under any power, a contract . . . is taken for public use, the government is liable; but, if injured or destroyed by lawful action, without a taking, the government is not liable."); *see also Lucas*, 505 U.S. at 1016, 112 S.Ct. at 2894 (stating that "the Fifth Amendment is violated when *land-use regulation* . . . denies an owner economically viable use of his land") (emphasis added).

contract with its subject matter.[183] Noting that the "essence of every executory contract is the obligation which the law imposes upon the parties to perform it," the Court found no taking where "there was no acquisition of the obligation or the right to enforce it."[184] Because the Amended Stipulation does not authorize the appropriation of USP's actual, existing contracts, and the state is acting lawfully, there is no taking.[185]

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183 *Omnia Commercial*, 261 U.S. at 510, 43 S.Ct. at 438.

184 *Id.* at 510–11, 43 S. Ct. at 438.

185 USP also argues that the Amended Stipulation would result in a taking of its customers' gas service lines. The counter-arguments, applied above to ABC, apply likewise to USP.

CONCLUSION

The Amended Stipulation is a reasonable means of meeting the goal of achieving a safe and reliable system of delivering natural gas to Columbia's customers. The Commission has the authority to adopt the Amended Stipulation which is supported both by the record and the majority of the active parties in this proceeding. Staff recommends that the Commission adopt the Amended Stipulation.

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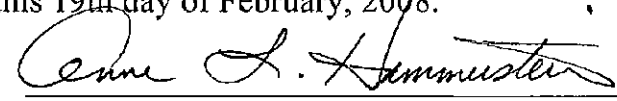
PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Post-Hearing Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, hand-delivered, and/or delivered via electronic message to the following parties of record, this 19th day of February, 2008.



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