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**

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

M. Howard Petricoff (0008287)
Stephen M. Howard (0022421)
Michael J. Settineri (0073369)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5414
Fax: (614) 719-4904
E-Mail: *mhpetricoff@vorys.com*

Attorneys for
Utility Service Partners, Inc.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

M. Howard Petricoff (0008287)
Stephen M. Howard (0022421)
Michael J. Settineri (0073369)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5414
Fax: (614) 719-4904
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MEMORANDUM IN SUPPORT

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

I. ARGUMENT

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

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

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

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

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

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

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

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

[1] Finding 20.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First, the Energy Reserves Group case involved state legislation. In this case, we have no legislation, only the *ultra vires* action of the Commission.

Second, the Energy Reserves Group tests indicate that "in determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." Neither USP nor ABC nor IGS are entering a regulated industry. It is the Commission and its Staff that is attempting to extend their jurisdiction over an industry whose individual members have not previously been regulated. While USP, ABC and IGS are required to use qualified USDOT certified plumbers and materials from a Columbia approved materials list, none of the three have been subject to direct state regulation in this area. The Commission failed to consider this in its analysis.

At page 18 of its Opinion and Order, the Commission stated that "we cannot find impairment of contracts where the contracts themselves were not made available for our review." The Commission provides no rule or reason why the actual contracts themselves would have to be filed with the Commission. What would the Commission do with the 100,000 contracts if they were filed? Due process would not allow an off the record investigation and determination by the Commission. Proof as to the meaning and impact of the proposal to grant Columbia a monopoly over the repair of customer owned service lines is best determined by sworn testimony of credible witnesses who are familiar with the contracts and the industry. The record in the matter at bar is clear and uncontested. Phillip E. Riley, Jr. president and chief executive officer of USP testified that USP had 100,000 active contracts to warrant and repair customer owned

service lines in the Columbia service area. That if Columbia took sole responsibility for the maintenance, repair and replacement of customer service lines those 100,000 contracts would be worthless and that USP's Ohio operation would be put out of business (USP Exhibit 2, pp. 6 -8). Mr. Riley was subject to cross examination on his direct testimony and again on rebuttal testimony. There are no facts in the record to counter his testimony. Further, as a matter of logic, if Columbia was granted a monopoly which allowed it exclusively to repair and replace all customer owned service lines in its service area we can say that all providers other than Columbia are excluded from that business. This the Commission admits on page 17 of the Opinion and Order where it noted that the proposal before it "would impair existing contracts to some extent". This inconsistency of position is unreasonable. To deny that USP has had its contracts impaired because it failed to file all 100,000 contracts when there is no requirement to do so is unlawful.

One of the criteria to be applied before accepting a Stipulation is the finding that no important regulatory principle or practice has been violated[2]. Once the facts have been presented that existing warranty service contracts will be impaired, there is a burden of production on Columbia and the signatories to the Amended Stipulation and Recommendation to demonstrate that this impairment does not violate Article I, Section 10 of the United States Constitution which prohibits states from passing laws impairing the obligations of contracts. The Commission unreasonably and unlawfully has transferred the burden of proof to USP.

At page 18 the Commission also erred in applying a standard that "the companies will not be deprived entirely of potential business with their current customers". The test is not whether the Commission's action will totally destroy contractual expectations (United States

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

Trust Co. v. New Jersey, 431 U.S. 1, at 17 (1977)) nor whether it will entirely deprive USP of its potential business with current customers; the test is whether the Commission's action in approving the Amended Stipulation will "operate as a substantial impairment of a contractual relationship." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, at 244 (1978). The Commission erred in applying the "deprivation entirely of potential business" test.

The Commission also stated at page 18 of its Opinion and Order that USP has no assurance in one month that any given contract will be in place for the next month. Again, the Commission applies the wrong test. Neither the term of the contract nor the existence of the right to terminate a contract under certain circumstances is material in applying this test. The Commission failed to take into account that its action substantially impaired the contractual relationships existing between USP and its end use customer (who owns customer service lines and signs a warranty contract).

The Commission at page 18 also states that "the state's regulatory power with regard to pipeline safety must be implied in any contract relating to pipeline warranties." The problem is that the Commission, instead of the General Assembly, has unlawfully and without authority expanded its regulatory power with regard to pipeline safety beyond utilities.

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

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

The Commission misapplied this test. In order to properly apply the test, the Commission must find that there currently exists a broad and general social or economic problem. The

Commission did not find this. The Commission only looked at Columbia Gas customer service lines in this case and conducted no review or analysis of customer-owned services lines in Ohio.

In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Court invalidated a Minnesota pension law which impaired established contractual relations between employers and employees. Allied Structural Steel ("Allied") was an Illinois corporation which maintained an office in Minnesota. Under its pension plan, employees were entitled to retire and receive a pension at age 65 regardless of the length of service, and an employee's pension right became vested if he satisfied certain conditions as to the length of service and age. Allied was the sole contributor to the pension trust fund and each year made contributions to the fund based on actuarial predictions of eventual payout needs. But Allied's plan neither required it to make specific contributions nor imposed any sanction on it for failing to make adequate contributions, and Allied retained the right not only to amend the plan but also to terminate it at any time and for any reason.

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

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

of $185,000. Allied filed suit claiming that the Minnesota law unconstitutionally impaired its contractual obligations to its employees under its pension plan.

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

> This Minnesota law simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution. The law was not even purportedly enacted to deal with a broad, generalized economic or social problem. (Citation omitted.) It did not operate in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken, but invaded an area never before subject to regulation by the State. (Citation omitted.) It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships -- irrevocably and retroactively. (Citation omitted.) And its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees.

The Court in Allied stated that "[I]f the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." 238 U.S. at 242. Utility Service Partners submits that those limits have been exceeded in this case.

The Commission's actions with respect to transferring responsibility and ownership of customer service lines from customers to Columbia was not purportedly taken to deal with a broad, generalized economic or social problem. Warranty service operators, such as USP, operated in a competitive environment that was not subject to state regulation at the time its contractual obligations were originally undertaken. The Commission has now invaded this area by creating a monopoly over repair and replacement of hazardous non-utility customer service lines. The Commission's action did not effect simply a temporary alteration of contractual

relationships, but rather worked a severe, permanent and immediate change in those relationships – irrevocably and retroactively if the Commission's Opinion and Order stands. And the Commission's action was aimed not at all warranty service providers in Ohio but only those operating within the Columbia Gas of Ohio service territory. As the Commission well knows, there are twenty-five other natural gas companies operating in Ohio. USP submits that the factors the Supreme Court found persuasive in the Allied Structural Steel Co. case to invalidate a Minnesota pension law are also applicable here. The Commission should grant rehearing.

In addition, the Commission failed to properly apply this test by placing great weight on the fact that leaks in steel service lines "can" present significant safety hazards. The test is not whether there might or can be a problem; the test is whether there exists a broad and general social and economic problem. Unlike the situation with respect to Design-A risers, there is nothing in the record that demonstrates that the current condition of customer service lines is a broad and general problem in Ohio[3]. The test is not whether the Commission's approval of the Amended Stipulation will improve public safety; the test is whether a broad and general social or economic problem exists. The Commission has identified the existence of no problem -- only stating that "leaks in customer service lines . . . can be a safety hazard." Opinion and Order, at p. 19. The Commission misunderstands and misapplies the test and rehearing should be granted.

There are other erroneous, unreasonable and unlawful statements made by the Commission on page 19 of its Opinion and Order. For example, the Commission states that "proper maintenance of such lines and full compliance with federal and state safety regulations is made more difficult by ownership and responsibility being held by different entities..." No citation is given for this statement. There is no evidence anywhere in the record where any

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

witness pointed to a specific situation where repairs, replacements and inspections could not be safely and efficiently completed because a customer owned his own customer service line.

The Commission also erroneously stated at page 19 that "Columbia, under the existing approach, has no ability to retrain repair personnel, to supervise the actual repair process, or to ensure uniformity in the approach to repair and maintenance." (emphasis added) If Columbia has no ability to do these things, it is doubtful that the mere approval of the Amended Stipulation will give Columbia additional ability. On the other hand, USP submits that Columbia, under the existing approach, does in fact already have the opportunity to train independent contractors through the DOT Operator Qualified training process (overseen by Columbia), inspect the actual repair process, and ensure uniformity in the approach to repair and maintenance. (TR. I, 67-71; II, 192.) The cross-examination of the Staff on the "Yellow Pages" issue should have revealed to the Commission that certain independent contractors are approved by Columbia Gas of Ohio. (TR. II, 58-62.) Further, Columbia, under the existing approach, inspects all repairs and replacements done by independent, qualified contractors. (TR. I, 48-49.) Columbia also has an approved parts list that independent plumbers must use. (TR. II, 44 and 106.) Thus, the Commission's statement that Columbia cannot do these things under the existing approach is unreasonable, unlawful, and wrong.

The Commission also states at page 19 that "where responsibility for the cost of repair is left with customers, those customers may be reluctant to report a suspected leak. We believe that customers may report the odor of gas more readily if they are assured that Columbia will repair any problem without the anticipation of an out-of-pocket payment by the customer." Again, no record support is offered to support this belief. However, if the Commission is going to engage in such speculation, it should have also recognized that the over 115,000 Ohio customers (USP

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

The Commission states at page 19 that "adoption of the Amended Stipulation is likely to result in a safer system, overall."[4] Again, the Court's test is not whether the Commission regulation improves or increases public safety; the test must be whether a general and broad social and economic problem currently exists. The Commission not only failed to find that a current, general and broad problem exists with respect to customer service lines located in the Columbia service territory, it also failed to find the existence of a general and broad problem with respect to all customer service lines in Ohio.

The third prong of the Energy Reserves Group test is:

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

The Commission did not properly apply this test either. The Commission failed to discuss "the rights and responsibilities of contracting parties." Under the Amended Stipulation, property owners will no longer be permitted to select the independent plumbers with the price, terms, conditions and quality options they want to meet their needs – it will be Columbia that selects such contractor to meet Columbia's needs. (TR. I, 64.) A warranty service provider such

[4] The use of the qualifier "overall" appears to be a concession on the part of the Commission that adoption of the Amended Stipulation may not result in a safer system with respect to certain aspects. For example, under the Amended Stipulation, there will be no third-party independent inspection of repairs and replacements of customer service lines. (TR. I, 72; TR. IV, 141-142.) This lack of an independent third-party inspection unreasonably and unlawfully diminishes public safety.

as USP will no longer have the right to serve its contract customers and, will have to terminate the contracts that it has with its qualified independent plumbers to repair or replace customer service lines. None of these factors were discussed by the Commission on pages 19-20 of its Opinion and Order.

Further, the "suitability to purpose" test has to measure "whether the adjustment of the rights and responsibilities of contracting parties is based upon a reasonable condition and is of a character appropriate to the public purpose justifying the legislation's adoption." In this case, we have no legislative adoption -- only the ultra vires action of the Commission.

The Commission states at page 20 that it finds that "it is appropriate to allow that party to supervise a selection of workers, the materials to be used, and the work actually performed." The Commission has ignored the record on this point. Under the current system, Columbia has an approved list of independent contractors. (TR. II, 58-62.) It has an approved list of materials to be used in the repair or replacement of customer service lines. (TR. I, 68.) It currently inspects the work actually performed by independent contractors.[5] (TR. I, 47-48.)

At page 2 of its Opinion and Order, the Commission also finds it "entirely reasonable that public safety will be improved by assigning maintenance responsibility to the party who carries a legal responsibility for complying with safety regulations." Again, no citation to the record is offered in support of this finding because there is none. The signatory parties did not provide evidence that safety improved in other state jurisdictions where ownership of and responsibility for customer service lines was transferred from customers to operators. Thus, the Commission has no basis for making this type of finding.

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

Finally, the Commission, in applying the "suitability to purpose test", merely states at page 20 that the IRP does "appropriately address the need to improve public safety in the gas distribution system," deferring to Staff witness Steele and his rationale. Again, the mere fact that the Commission action purportedly "improves" safety is not what the test requires. The test is that the Commission must identify the existence of a general and broad need in Ohio. The Commission failed to do this and rehearing must be granted.

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

At page 21 of its Opinion and Order, the Commission finds there would be "no taking at all." First, the Commission states that there would be no transfer of ownership to Columbia, only lines repaired or replaced by Columbia would belong to Columbia. This is not accurate. Only that portion of a line that is repaired or patched will become Columbia's property. (TR. I, 49-50.) It is difficult to reconcile the argument that the Amended Stipulation provides a "uniform" system with the fact that only those portions of repairs and not the entire line will be Columbia's property.

The Commission goes on to state at page 21 that "...no homeowner is obligated to allow Columbia to enter the homeowner's private property or to install repair parts on that property. The property owner is welcome to choose not to have those repairs made and to eliminate gas service entirely." This statement flies in the face of the PUCO mission statement.[6] This ultimatum is clearly unreasonable and unlawful. Under the current system, warranty service providers in a competitive market do not provide such an ultimatum to their customers. Instead of Columbia's ultimatum when it comes to repairing or replacing customer service lines, a warranty service provider will work with the property owner to get whichever qualified

[6] "Our mission is to assure all residential and business customers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choice."

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

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

The Commission also unreasonably and unlawfully states that as far as the customer is concerned, the customer is being adequately compensated because in place of a leaking service line, the customer will have the use of a functional service line. Again, the Commission misunderstands the concept of property rights. "The value of property consists of the owner's absolute right of dominion, use, and disposition for every lawful purpose. This necessarily

excludes the power of others from exercising any dominion, use, or disposition over it. Hence, any physical interference by another with the owner's use and enjoyment of his property is a taking, to that extent." City of Mansfield v. Balliett, 65 Ohio St. 451, at 471; 63 N.E. 86 (1902) When the Commission creates a monopoly over the repair and replacement of non-utility customer service lines and gives that monopoly to Columbia, it has clearly interfered with and taken those property rights from the homeowner. The use of a functional service line is not adequate compensation for taking those property rights.

Finally, the Commission failed to recognize that USP purchased its gas line warranty business from a Columbia affiliate in 2003 never realizing that Columbia, would attempt to reclaim a large portion of the business through a regulatory filing in 2007. (USP Ex. 2, p. 7). Indeed, Columbia told the Commission unequivocally in its February 2, 2007 Initial Comments in Case No. 05-463-GA-COI at page 2: "(n)o statute even arguably empowers the Commission to appropriate the private property of a utility's customer and transfer that property to the utility." The Commission unreasonably and unlawfully failed to consider these facts. Rehearing must be granted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. CONCLUSION

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

Respectfully submitted,

M. Howard Petricoff (0008287)
Stephen M. Howard (0022421)
Michael J. Settineri (0073369)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Tel: (614) 464-5414
Fax: (614) 719-4904
E-Mail: *mhpetricoff@vorys.com*

Attorneys for
Utility Service Partners, Inc.

CERTIFICATE OF SERVICE

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

Stephen M. Howard

Stephen Seiple
Daniel Creekmur
Columbia Gas of Ohio, Inc.
200 Civic Center Drive
P. O. Box 117
Columbus, OH 43216-0117
sseiple@nisource.com
dcreekmur@nisource.com

Joseph P. Serio
Associate Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215
serio@occ.state.oh.us

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima St., P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com

Anne L. Hammerstein
Stephen A. Reilly
Assistant Attorney General
Chief, Public Utilities Section
180 E. Broad St., 9th Floor
Columbus, OH 43215-3793
anne.hammerstein@puc.state.oh.us
stephen.reilly@puc.state.oh.us

Vincent A. Parisi
5020 Bradenton Avenue
Dublin, OH 43017
vparisi@igsenergy.com

Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
jclark@mwncmh.com

Carl A. Aveni, II
Carlile, Patchen & Murphy LLP
366 E. Broad St.
Columbus, OH 43215
caa@cpmlaw.com

John W. Bentine
Chester, Wilcox & Saxbe LLP
65 East State Street, Suite 100
Columbus, OH 43215-4213
jbentine@cswlaw.com