

ORDER NO. 78196

IN THE MATTER OF THE
INVESTIGATION INTO THE
VIOLATION OF COMAR 20.55.09.07
BY WASHINGTON GAS LIGHT
COMPANY.

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 8923

This matter is before the Public Service Commission (“Commission”) on appeal by Washington Gas Light Company (“WGL” or “Company”) from the Proposed Order of Hearing Examiner that was entered in this proceeding on June 6, 2002. Based upon our examination of the record, the Commission generally will uphold the Proposed Order.

I. Introduction

This matter began in January 2002 with the issuance by the Commission's Engineering Division of a Notice of Probable Violation (“NOPV”), Proposed Compliance Order and Proposed Civil Penalty. Essentially, the Engineering Division maintained that WGL violated COMAR 20.55.09.07(D)(2) in the provision of new gas service to customers residing in the King Farm and Lakeland communities located in Montgomery County, Maryland.¹ That COMAR provision (referred to herein as “Regulation D(2)”), which applies only to residential service lines and meters, states that “[g]as service may not be provided to new or renewed service lines if there is any underground pipeline after the meter, unless the pipeline carries gas only to gas utilization equipment located outdoors.” The NOPV demanded that WGL

bring all meters in these developments into compliance with Regulation D(2) and pay a \$5000 civil penalty.

By letter dated March 6, 2002, WGL responded to the NOPV, opposing both the proposed compliance order and the proposed penalty. WGL maintained in its letter that the regulation in question exceeded the Commission's authority and was preempted by federal law. According to WGL, the regulation impermissibly usurped valid regulation by other entities, including the Maryland State Board of Plumbing, the Washington Suburban Sanitary Commission ("WSSC"), the City of Rockville, and possibly, Montgomery County. WGL requested a hearing to resolve the matter.

By Order dated April 25, 2002, the Commission determined that "a hearing is necessary in this matter although it appears that there are few, if any, facts in dispute." The parties were ordered to file a stipulation setting forth any undisputed facts; and the matter was delegated to the Hearing Examiner Division "for such proceedings as the Examiner deems necessary." The Commission further directed that the Examiner "conclude this matter with a proposed order based on the stipulated facts and such additional findings of fact as are necessary to a complete consideration of the legal issues" within 45 days. Moreover, the Commission invited WSSC, the Maryland State Board of Plumbing, the City of Rockville and Montgomery County to participate in this proceeding.²

¹ The record in this case reflects that the residences in question are connected townhouses, as opposed to detached homes.

² The Commission served a copy of its April 2002 order upon the Chairman of the WSSC, the Montgomery County Executive, the Mayor of Rockville, and the Executive Director, Professional Licensing Boards, Department of Labor, Licensing and Regulation. Although no other party (aside from Commission Staff and WGL) chose to participate in Case No. 8923, these individuals are still designated as interested parties on the

Commission Staff and WGL filed a stipulation as directed by the Commission. However, the Examiner determined that an evidentiary hearing was necessary. Accordingly, a hearing was held on June 3, 2002. On June 6, 2002, the Examiner filed a Proposed Order in which he rejected WGL's legal arguments and upheld the NOPV, the proposed compliance order, and the proposed civil penalty.³ WGL timely appealed the Proposed Order to the Commission.

In its memorandum on appeal, WGL continues to argue that Regulation D(2) is invalid and unenforceable. However, if the Commission concludes that the regulation in question is valid and enforceable, WGL requests that "the compliance portion of the Proposed Order be modified." (WGL Memo at 3) In this regard, WGL asserts that the Company did not knowingly violate Regulation D(2) or any of the Commission's other regulations,⁴ and also points to the inconvenience that will result to customers if the meters must be relocated. According to the Company, it also may not be possible to relocate the meters of some of these customers without violating other restrictions pertaining to the location of gas pipes.⁵ Under

Commission's official service list; and as such, copies of all orders and rulings by the Commission and its Examiner have been sent to them.

³ The Examiner also found that since the NOPV that was the subject of the delegated proceeding only cited a violation of Regulation D(2), he could not find WGL in violation of COMAR 20.55.09.07(D)(1), which states that "[r]esidential customer meters shall be placed as close to the exterior building wall as possible." In its reply memorandum, Staff expressly agreed with the Examiner's assessment of his authority in this regard, and so does the Commission.

⁴WGL argues that the Company complied with COMAR 20.55.09.07(D)(1) by locating its meters on the exterior walls of the customers' garages (which are not attached to the townhouses). Moreover, WGL maintains that the Company complied with COMAR 20.55.04.09, because gas service was not provided until after the customer pipes in question were inspected and approved by WSSC.

⁵ COMAR 20.55.09.07(D)(3) provides that "if it is not possible to comply" with Regulation D(2), "written permission shall be obtained from the Commission before placing the meter." It is undisputed that WGL did not seek such written permission before placing the meters in question.

these circumstances, WGL maintains that "the least intrusive and most defensible result would be to require Washington Gas to include all customer-owned underground piping at the addresses covered by the NOPV in the Company's leak surveys, and to prospectively assume the ongoing responsibility for repairing any gas leak found in such piping." (*Id.* at 4)

In its reply memorandum, Staff maintains that the Examiner's decision was correct and supported by the record evidence. Moreover, Staff asserts that any inconvenience to customers associated with relocating the meters should be modest, especially when balanced against safety concerns. Staff also notes that while WGL engaged in such speculation at hearing, the Company presented no evidence that any of the meters in question actually could not be relocated.⁶ As to the degree of culpability, Staff notes that WGL did not present any witness who was involved in the decision as to where to locate the meters in question, and expresses skepticism that any WGL employee would not understand that the meter installations violated Regulation D(2). Also, Staff notes that the record shows that many of the non-compliant meter installations were completed after the NOPV was issued. Staff urges the Commission to adopt the Examiner's finding the Company intentionally violated Regulation D(2), thereby taking the risk that this regulation would be found to be valid and enforceable.

However, "if the Commission is remotely inclined to grant WGL's request that the remedy be limited to regular leak surveys," Staff requests the opportunity for full discovery

⁶ Staff also notes that there is no right to obtain gas service if it cannot be provided in conformance with the Commission's regulations. However, Staff would be willing to consider a waiver of the regulation if the Company "clearly demonstrates the physical impossibility of alternative designs and accepts ownership and responsibility for non-complying lines that are transferred to WGL." (Staff Reply Memo at 7) Alternatively,

and hearing as to culpability and the appropriate penalty, which previously was not available because of the limited delegation of authority and expedited schedule adopted for this case. (Staff Reply Memo at 9) In that event, Staff also requests permission to issue a second NOPV, so that non-compliant meter installations that WGL completed after the original NOPV was issued in January 2002 also may be covered.

II. Interpretation of Regulation D(2) and Validity under State Law

COMAR 20.55.09.07 states as follows:

20.55.09.07 Pipeline Location.

A. Burial. All pipelines shall be buried a minimum of 24 inches, or 18 inches in solid rock, where the term solid rock indicates the necessity for blasting or the use of pneumatic equipment.

B. Exceptions. Burial depths less than that specified but not less than 12 inches will be allowed if underground obstructions preclude those depths, if special line protection as accepted by the Commission is provided. The above requirements shall be applicable to existing pipelines within a reasonable period of time upon discovery of burial depth 12 inches or less, or of burial depths less than specified and deemed to be hazardous.

C. Identification.

(1) Tracer wire shall be installed with all plastic pipe.

(2) When the open trenching method of pipeline construction is used, suitable identification tape shall be installed at a minimum of 12 inches above the top of the pipe.

D. Location of Residential Service Lines and Meters.

(1) Residential customer meters shall be placed as close to the exterior building wall as possible.

(2) Gas service may not be provided to new or renewed service lines if there is any underground pipeline after the meter, unless the pipeline carries gas only to gas utilization equipment located outdoors.

(3) If it is not possible to comply with §D(2) of this regulation, written permission shall be obtained from the Commission before placing the meter.

Staff suggests that WGL should bear the cost of obtaining electric appliances for customers who do not agree to transfer ownership. (*Id.*)

(4) If a residential service line is replaced, the new service line shall be installed as provided in §D(1)—(3) of this regulation.

(Emphasis added.)⁷

Initially, the Commission believes that the requirements of Regulation D(2) of COMAR 20.55.09.07 are clear. Gas utilities operating in Maryland may not provide service to new or renewed residential service lines if there is any underground piping located downstream of the utility's meter, unless such customer-owned piping is used for outdoor gas equipment.

When it was initially adopted in 1995, Regulation D(2) provided that “[i]f the meter is placed outdoors, the meter shall be located not more than 3 feet from the exterior building wall.”⁸ Regulation D(2) was amended in 1997,⁹ in response to reports of explosions involving underground pipes carrying gas to homes in the United States. Applicable only to residential service lines that are new or renewed, Regulation D(2) now imposes the responsibility upon the utility to own and maintain any underground pipes carrying gas to homes in Maryland (as opposed to secondary or branch lines carrying gas to outdoor equipment). Regulation D(2) thereby advances the public safety by ensuring that such

⁷ “Pipeline” is defined in COMAR 20.55.01.04B(14) as “all parts of those physical facilities through which gas moves in transportation, including pipe, valves, and other appurtenances attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies.”

⁸ COMAR 20.55.09.07D, Location of Residential Service Lines and Meters, was initially proposed in late 1994 and adopted in early 1995. *See* 21:25 MD Reg. 2125 (12/9/94); 22:7 MD Reg. 538 (3/31/95). COMAR 20.55.09.07D(1) then provided (as it does today) that “[r]esidential customer meters shall be placed as close to the exterior building wall as possible.” Also, COMAR 20.55.09.07D(3) provided that “[i]f it is not possible to place the meter within 3 feet of an exterior building wall, written permission shall be obtained from the [Engineering] Division before placing the meter.”

⁹ *See* 24:26 MD Reg. 1760 (12/19/97); 24:16 MD Reg. 1178 (8/1/97). In addition, COMAR 20.55.09.07D(3) was amended to provide that “[i]f it is not possible to comply with § D(2) of this regulation, written permission shall be obtained from the Commission before placing the meter.” (*Id.*)

underground pipes are in the hands of the entity that possesses the knowledge and resources to deal with gas pipeline safety issues (i.e., the gas utility), instead of the residential service customer.

As the Examiner noted, residential customers may not have the knowledge or the funds available to ensure that the underground lines remain safe. It may be true that local authorities can order a customer to fix any leaks in their underground lines, and the utility may cut off the gas in the event of a leak. However, Regulation D(2) reflects the Commission's conclusion that (as a general rule) the residential customer should not be placed in the position of having to own and properly maintain underground pipes, in order to continue to have gas delivered to the home for indoor use.

WGL maintains that the Commission has exceeded its jurisdiction by promulgating Regulation D(2), because it prohibits this group of residential service customers from owning underground gas pipes (unless they carry gas to outdoor equipment). This argument lacks merit. By Regulation D(2), the Commission is directly regulating the conduct of the gas utility providing service in Maryland. The Commission clearly has the authority and responsibility to supervise and regulate gas distribution utilities like WGL to ensure the provision of safe and adequate gas service in the public interest at just and reasonable rates, and to adopt standards and regulations like Regulation D(2) for this purpose.¹⁰ The fact that the Commission's direct regulation of the gas utility also impacts the rights and responsibilities of the residential gas customer obviously does not provide a basis for setting

¹⁰ See: MD. PUB. UTILITY COS. CODE ANN., §§ 2-112; 2-113; 2-121; 4-102; 5-101 (1998).

aside Regulation D(2), any more than it would provide a basis for setting aside a Commission rate order. This is what happens when one of the parties in a contractual relationship is regulated by a State agency.

Likewise, the Commission is not persuaded by WGL's argument that Regulation D(2) conflicts with other State laws (and is therefore invalid). In this regard, § 9-102(a) of Article 29 of the *Maryland Annotated Code* (1997) provides in part that the "WSSC may adopt rules and regulations that the WSSC considers necessary or desirable for the construction, installation, and equipment of gas fixtures, devices and connections from the outlet of the meter supplying any building in the Maryland-Washington Metropolitan District." This statute only gives the WSSC authority to regulate gas lines "from the outlet of the meter"; the statute does not give the WSSC authority over meters and upstream gas lines owned by a gas utility providing service in the Maryland-Washington Metropolitan District ("District"). More particularly, the statute does not mandate that gas customers in the District must be given the option to own underground gas lines (subject to the WSSC's regulation); or give the WSSC the authority to determine the location of meters supplying gas to buildings located in the District. As the agency with the authority to regulate all gas utilities operating in Maryland, the Commission has decided that (as a general rule) gas meters should be located so that the utility owns and maintains all underground gas pipes that carry gas to residential customers' homes. As shown by WSSC's decision not to accept our invitation to participate in this proceeding, the WSSC's authority to regulate "gas fixtures, devices and connections from the outlet of the meter supplying any building in the [District]" remains undisturbed by the Commission's Regulation D(2).

Similarly, the General Assembly gave the State Board of Plumbing the authority to regulate persons who are engaged in “the installation, maintenance, extension, alteration, and removal of piping . . . in connection with a natural gas supply system downstream of the gas utility point of delivery.”¹¹ No provision of this statutory delegation of authority mandates that customers must be given the option of owning underground gas lines carrying gas to their homes; or purports to determine, or to give the State Board of Plumbing the power to determine, where the utility is to deliver the gas to the residential customer (i.e., the location of the meter). However, the Commission has jurisdiction to determine where the utility is to deliver gas to residential customers; and the Commission has decided that (as a general rule) the delivery point for residential customers should not be upstream of underground pipes carrying gas to homes. As indicated by the decision of the State Board of Plumbing not to accept the Commission’s invitation to participate in this proceeding, its authority to regulate persons engaged in “the installation, maintenance, extension, alteration, and removal of piping . . . in connection with a natural gas supply system downstream of the gas utility point of delivery” remains undisturbed by Regulation D(2).

In sum, WGL has cited no statute in which the Maryland General Assembly has mandated that customers must be given the option of owning underground pipes that carry gas to the home, or has restricted the Commission’s authority to determine in the first place where gas meters should be placed or where gas delivery points should be located. By Regulation D(2), the Commission has mandated that for new and renewed residential service lines, the

¹¹ See: MD. BUS. OCC. & PROF. CODE ANN. §§ 12-101(m)(1); 12-301(a)(4); 12-401(c); 12-403 (2002 Supp.).

meter/delivery point location, as a general rule, should not be upstream of underground pipes carrying gas to homes. Local authorities retain their jurisdiction over all downstream facilities and connections, including customer-owned underground pipes that carry gas to outdoor equipment. This division of authority is totally consistent with the General Assembly's various statutory enactments.

III. Consistency with Federal Law

WGL claims that the COMAR regulation at issue is preempted by the Revised Pipeline Safety Act, 49 USC §§ 60101 *et seq.* ("RPSA"). In this regard, it is clear that state regulation has not been totally preempted by RPSA. More particularly, § 60104 of RPSA provides in part that "[a] State authority that has submitted a current certification under 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter." However, as observed by the United States Supreme Court:

Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Pacific Gas & Electric Company v. Energy Resources Commission, 461 U.S. 190, 204 (1983)

(Citations omitted.)

Section 60113 of RPSA requires the Secretary of Transportation to "[p]rescribe standards requiring an operator of a natural gas distribution pipeline that does not maintain customer-owned natural gas service lines up to building walls to advise the customers of" the need to maintain those lines (and the potential hazards of failing to maintain them), any known resources that "could assist the customers in carrying out the maintenance," and any "information the operator has on operating and maintaining its lines that could assist customers." The Secretary of Transportation duly promulgated these regulations as directed by RPSA; and they are codified at 49 CFR § 192.16. Essentially, these regulations impose specific notification obligations on "each operator of a service line who does not maintain the customer's buried piping up to entry of the first building downstream, or, if the customer's buried piping does not enter a building, up to the principal gas utilization equipment or the first fence (or wall) that surrounds that equipment."

The Commission agrees with Staff and the Hearing Examiner that the COMAR provision does not impermissibly conflict with the federal law. Nothing in the federal statute or regulation cited by WGL mandates that customers must be given the option of owning and maintaining buried gas pipes in the first place. Rather, 49 USC § 60113 and 49 CFR § 192.16 simply set forth specific notification requirements that are applicable to pipeline operators in the event that customers do own buried piping that is not maintained by the operator.¹²

¹²It should be noted that the federal regulation does exclude certain customer-owned buried piping from the notification requirements. Specifically, the regulation provides that "for the purpose of this section, 'customer's buried piping' does not include branch lines that serve yard lanterns, pool heaters, or other types of secondary equipment." 49 CFR § 192.16(a)

Regulation D(2) states that "[g]as service may not be provided to new or renewed service lines if there is any underground pipeline after the meter, unless the pipeline carries gas only to gas utilization equipment located outdoors." Thus, the Commission has imposed a stricter requirement upon intrastate pipeline operators/retail gas distributors operating in Maryland; i.e., the gas utility must own and maintain any buried gas pipes used in connection with new or renewed residential service lines, except for buried pipes carrying gas to outdoor equipment (like barbecues, lanterns, pool heaters, etc.)

As Staff notes, the pipeline operator is not being forced to choose between complying with Regulation D(2) and complying with 49 USC § 60113 and 49 CFR § 192.16. In cases governed by Regulation D(2), there simply will be no buried gas pipes owned and maintained by the customer to which the federal notification requirements would apply. Hence, it is entirely possible for WGL to fully comply with both the federal law and the Commission's regulation. Since Regulation D(2) also does not stand as an obstacle to the accomplishment or execution of any congressional objectives or purposes behind the enactment of RPSA, WGL's position that there is an impermissible conflict between Regulation D(2) and federal law is wrong.

IV. Remedy

The Commission agrees with the Hearing Examiner that Regulation D(2) is enforceable, and that WGL clearly has violated Regulation D(2) by locating its gas meters upstream of customer-owned underground pipes which do not lead to outdoor gas utilization equipment. Moreover, although the NOPV only extends to the Regulation D(2) violation, the

Commission is not persuaded by WGL's argument that placing the gas meters on detached garages complies with COMAR 20.55.09.07(D)(1).

As previously noted, COMAR 20.55.09.07(D)(1) was adopted in early 1995 and provides that "[r]esidential customer meters shall be placed as close to the exterior building wall as possible." This regulation reasonably has been interpreted to require utilities to try to place gas meters as close as possible to the exterior wall of individually-metered apartment buildings, townhouses, and homes. Although detached garages are "buildings" in a structural sense, the phrase "the exterior building wall," as used in this gas safety regulation, logically refers to the exterior wall of one particular building; namely, the residential building, inside which the customer's gas utilization equipment typically is located.¹³ Interpreting this regulation to allow the meter to be placed near the outside of *any* building, regardless of where the customer's gas utilization equipment is located, plainly would frustrate the Commission's intent in adopting this regulation to advance the public safety. In addition, this interpretation meshes better with the three-foot restriction that was originally imposed by Regulation D(2), and with Regulation D(2)'s current restriction upon customer-owned underground pipes which do not lead to gas equipment "located outdoors."¹⁴ To the extent

¹³ Indeed, it should be noted that the record contains copies of WGL's own design and construction standards, which state that "COMAR 20.55.09.07D requires that residential customer meters be installed as close as possible to *the* exterior of *the* building and that gas service may not be provided to new or renewed service line if there is any underground pipeline after the meter unless the pipeline carries gas only to gas utilization equipment located outdoors." (Emphasis added.) This language appears consistent with the Commission's interpretation of COMAR 20.55.09.07D(1) as requiring meters to be placed as close as possible to the exterior wall of one particular building (i.e., the residential building).

¹⁴ COMAR 20.55.09.05A provides in part: "Each utility or gas master operator shall establish procedures for making periodic gas leakage surveys as specified in these regulations. For residential customers with meters located outdoors, leakage surveys shall be performed up to the building entry." This regulation also makes no sense unless "building" is interpreted to mean "residential building." The Commission's safety goal is not

possible, residential service meters must be located so as to place the responsibility of owning and maintaining pipes carrying gas to the home for “indoor” use upon the utility, and not the residential customer.

COMAR 20.55.09.07(D)(3) provides a procedure whereby WGL could have obtained a waiver of Regulation D(2), and it was incumbent upon WGL to seek a waiver of Regulation D(2) under that procedure before the Company placed the gas meters in question. It also would have been appropriate for WGL to discuss its novel interpretation of COMAR 20.55.09.07(D)(1) with Commission Staff, before placing gas meters on the detached garages. However, the Company apparently took neither action. By failing to obtain a waiver of Regulation D(2), or to verify that its interpretation of COMAR 20.55.09.07(D)(1) was acceptable, WGL assumed the risk that Regulation D(2) would be found to be enforceable and that its interpretation of COMAR 20.55.09.07(D)(1) would be rejected.

Like the Examiner, the Commission sees no reason to protect the Company from the consequences of its own errors in this regard. Indeed, a different policy might encourage public service companies (or their employees) to ignore possible compliance problems, when that is convenient as a business matter, in hopes that any violations will be missed or forgiven by the Commission. This cannot be tolerated, especially in matters pertaining to safety. Thus, the Commission does not believe that minimizing the Company’s compliance costs is an appropriate consideration in fashioning a remedy in this case.

advanced by requiring the utility to conduct leakage surveys “up to the entry” of a detached garage. Instead, the clear intent of this regulation is to require the utility to conduct leakage surveys of all facilities that carry gas to the homes of residential customers, regardless of ownership.

The Commission is not willing to accept WGL's suggestion that the Company would conduct leak surveys and undertake the responsibility for any necessary repairs to the underground lines subject to the NOPV. Properly interpreted, COMAR 20.55.09.05A already would require WGL to conduct periodic leakage surveys of all of the facilities carrying gas to the townhouses - not just the underground pipes as proposed by the Company. More importantly, if WGL had obeyed the Commission's gas safety regulations in placing its meters in the first place, the Company would own and have the responsibility to maintain the entire line to the exterior wall of each townhouse.

Especially since connected townhouses are involved, the Commission believes that the customers in the King Farm and Lakeland communities should be placed in the same position as they would have been if WGL had fully complied at the outset. To the extent possible, customers should not be required to maintain any portion of the residential gas service lines going to their homes; and they should not have to worry about who is maintaining the lines carrying gas to adjacent townhouses. In accordance with the Commission's regulations, WGL should own and maintain these residential gas service lines, to help prevent catastrophic accidents from destroying an entire string of townhouses. Therefore, the Commission will require WGL to relocate its gas meters as close to the exterior building wall of each townhouse as feasible. Specifically, the residential gas service meter should be hung on the exterior wall of each townhouse.

Depending upon the circumstances, the Commission may consider granting an exemption from this requirement on a case-by-case basis. For example, the Commission would be willing to consider an exemption if this is appropriate as a matter of public safety, or

if relocating the meter somehow would cause a particular customer to incur unreasonable hardship within the meaning of COMAR 20.55.01.02C. WGL should work with the Commission's Engineering Division in identifying such cases and recommending an appropriate solution for the Commission's consideration. Likewise, the Commission would consider granting an exemption if the customer is unwilling to allow WGL to relocate its meter and to assume ownership and maintenance responsibility for the line, or if the customer demands compensation from the Company for this privilege. In this regard, the Commission agrees with the position of Staff and the Examiner that customers are not entitled to gas service, if that service reasonably cannot be provided safely and in compliance with applicable requirements and regulations of the Commission.

IT IS, THEREFORE, this 9th day of December, in the year Two Thousand and Two, by the Public Service Commission of Maryland, ORDERED:

(1) The Proposed Order of Hearing Examiner is hereby affirmed and adopted; and Washington Gas Light Company is hereby ordered to pay a \$5000 civil penalty.

(2) Washington Gas Light Company is hereby ordered to bring all of the meter installations at the King Farm and Lakeland communities located in Montgomery County, Maryland into full compliance with COMAR 20.55.09.07D by relocating its meters to hang on the exterior wall of each of the townhouses.

(3) Washington Gas Light Company may apply to the Commission for an exemption from the requirement imposed by Ordering Paragraph (2), as set forth in this Order.

Commissioners