PHED Item 1
February 8, 2021
Worksession

M E M O R A N D U M

February 3, 2021

TO: Planning, Housing and Economic Development Committee

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Expedited Bill 50-20, Landlord-Tenant Relations – Fire Safety - Removal of Mercury Service Regulators

PURPOSE: Worksession – Committee to make recommendations on Bill

Expected Attendees
Aseem Nigam, Director, Department of Housing and Community Affairs

Expedited Bill 50-20, Landlord-Tenant Relations – Fire Safety - Removal of Mercury Service Regulators, sponsored by Lead Sponsor Council President Hucker and Co-Sponsors, Councilmember Riemer, Council Vice President Albornoz, Councilmembers Navarro, Katz, Rice and Jawando, was introduced on December 8, 2020.[1] A public hearing was held on January 26.

The expedited bill would require landlords to schedule the immediate replacement of indoor mercury service regulators, and to provide certain notices to tenants.

BACKGROUND

The purpose of the expedited bill is to facilitate the immediate replacement of indoor mercury service regulators with safer, more modern regulators. Indoor mercury service regulators have contributed to fatal building fires. Therefore, their replacement would improve fire safety. In addition, their removal would reduce mercury in the environment.

SPECIFICS OF THE BILL

Expedited Bill 50-20 would require landlords immediately to determine if their rental properties contain mercury service regulators. If an indoor mercury service regulator is present, the landlord would be required to notify each tenant, and to contact the gas utility to arrange for the immediate replacement of the regulator with a safe alternative. The landlord would notify the tenant once the regulator was replaced.

#GetTheMercuryOut
#MercuryRemovalMD

The requirements of the bill would be enforced by the Department of Housing and Community Affairs (DHCA). In addition, DHCA would maintain a searchable public database regarding premises where landlords have provided initial notice of the service regulators, premises where the regulators have been replaced, and enforcement actions regarding indoor mercury service regulators.

SUMMARY OF PUBLIC HEARING

On January 26, several individuals and organizations spoke in favor of the expedited bill. One individual submitted testimony in opposition to the bill because the bill would increase the responsibilities of landlords. The Apartment and Office Building Association of Metropolitan Washington (AOBA) and Washington Gas Light Company (WGL) jointly submitted a set of requested amendments to the bill (discussed below).

PUBLIC SERVICE COMMISSION ORDER

Subsequent to the introduction of Expedited Bill 50-20, the state Public Service Commission (PSC) issued an order dated December 18, 2020 (the PSC Order) finding that WGL failed to comply with a plan, approved by the PSC in 2003, to replace mercury service regulators within its service area.

The PSC assessed a $750,000 fine against WGL and ordered WGL to follow a revised program to locate and replace all its indoor mercury service regulators.

ISSUES FOR THE COMMITTEE'S CONSIDERATION

1. **Potential Amendments to Eliminate Landlords' Responsibility to Determine Whether Mercury Service Regulators Are Present**

AOBA and WGL jointly have asked the Committee to support a package of amendments that would, among other things, eliminate the requirement under the bill for landlords to determine whether indoor mercury service regulators are present at their properties. AOBA has argued that the PSC Order already provides for a system to identify and replace the regulators, and that landlords should not be put in a position of checking potentially dangerous regulators that belong to WGL.

The amendments proposed by AOBA and WGL would – instead of requiring landlords to determine if the regulators are present – require landlords to allow WGL access to their buildings in order to replace the regulators.

Council staff notes that an amendment to require landlords to facilitate WGL's access to their buildings for regulator replacement is unnecessary. WGL already may access these buildings pursuant to easements. Adding the requirement, however, would increase DHCA's ability to require landlords to provide the access, to the extent that landlords are not already complying with their obligations to do so.

Whether to eliminate a landlord's responsibility to check if a mercury service regulator is present is a policy decision for the Committee. On the one hand, it is true that the regulators are

the responsibility of WGL. On the other hand, WGL was required to replace the regulators beginning in 2003 and has thus far failed to complete the task. Arguably, requiring landlords to facilitate the process by proactively checking if the regulators are present and, if they are present, scheduling their replacement with WGL, would result in the more expeditious replacement of these regulators in the County.

Regarding AOBA's safety concerns about a landlord checking to see if a regulator is present, Council staff notes that WGL's website provides a straightforward, layperson's explanation of how a customer can identify whether a mercury service regulator is present. Information about Mercury Service Regulators (washingtongas.com). The website also allows customers to email WGL a photograph of their regulator for assistance with determining if the regulator has mercury. The website goes on to provide information that customers may use to contact WGL to schedule the replacement of the regulators.

The bill, as written, essentially would require landlords to undertake the straightforward process outlined on the WGL website. It would not require any landlord to touch or interfere with any regulator, or to otherwise engage in any dangerous activity.

If the Committee wishes to eliminate the landlord's obligation to determine if mercury service regulators are present, it could *delete* lines 18-20 and lines 34-45 of the bill. If the Committee wishes to require landlords to allow WGL to access properties, it could adopt the amendment suggested by AOBA and WGL that a landlord must:

> make commercially reasonable efforts to coordinate the replacement of all indoor mercury service regulators on the premises of the rental housing with the gas utility company in an expeditious manner.

2. Tenant Notifications

DHCA, AOBA, and WGL have suggested that – instead of requiring a landlord to notify a tenant immediately once a landlord discovers a mercury service regulator on the property – the bill instead should require tenant notifications only after WGL has confirmed the presence of a regulator. The purpose of the amendment would be to avoid unnecessary cause for alarm by tenants, especially if the landlord is incorrect about the identification of a mercury service regulator.

If the Committee wishes to alter the notification requirements, it could *delete* from the bill lines 21-33, 39-41, and 56.

3. Tenant Obligations

AOBA and WGL have requested an amendment to tenants' obligations under Chapter 29 to clarify that a tenant:

> must not knowingly or willingly touch, damage, remove or alter any indoor mercury service regulator on the premises of any rental property.

4. Noninterference with State or Federal Requirements

AOBA and WGL also have requested an amendment to state that:

> the provisions of this section shall not be construed so as to unlawfully interfere with a gas utility company's mercury regulator replacement program as filed with any federal or state agency of competent jurisdiction.

Council staff believes that this amendment is unnecessary and potentially confusing. Obviously, the bill's requirements may not contravene state or federal law, just as the rest of the County Code may not do so. It is not necessary to codify this requirement.

5. Technical Correction - Replace "remove" with "replace"

In several instances, the bill uses the terms "remove" or "removal" where the more appropriate terms would be "replace" or "replacement". Council staff recommends making these technical corrections to the bill.

NEXT STEPS: The Committee is expected to recommend whether to enact Expedited Bill 50-20.

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Expedited Bill No. 50-20
Concerning: Landlord-Tenant Relations – Fire Safety - Removal of Mercury Service Regulators
Revised: 11/19/2020 Draft No. 3
Introduced: December 8, 2020
Expires: June 8, 2022
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. ____, Laws of Mont. Co. ____

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President Hucker
Co-Sponsors: Councilmember Riemer, Council Vice President Albornoz, Councilmembers Navarro, Katz, Rice and Jawando

AN ACT to:

(1) require landlords to provide certain notices to tenants;
(2) require landlords to schedule the replacement of indoor mercury service regulators; and
(3) generally amend the law regarding landlord obligations and landlord-tenant relations.

By amending
Montgomery County Code
Chapter 29, Landlord-Tenant Relations
Sections 29-30

By adding
Montgomery County Code
Chapter 29, Landlord-Tenant Relations
Section 29-35C

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets**]**	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets**]]**	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Section 29-30 is amended, and Section 29-35C is added, as follows:

29-30. Obligations of landlords.

(a) Each landlord must reasonably provide for the maintenance of the health, safety, and welfare of all tenants and all individuals properly on the premises of rental housing. As part of this general obligation, each landlord must:

* * *

(10) facilitate the removal of any indoor mercury service regulator under Section 29-35C.

* * *

29-35C. Removal of indoor mercury service regulators.

(a) *Definition*. For purposes of this section, an *indoor mercury service regulator* means equipment that:

(1) is installed by a gas utility company to regulate the supply of natural gas to a structure;

(2) contains mercury; and

(3) is located inside a structure.

(b) *Determination*. A landlord must verify whether an indoor mercury service regulator is on the premises of any rental property leased by the landlord.

(c) *Initial notice*. If an indoor mercury service regulator is on the premises of the rental housing, the landlord must notify the Department, and must notify each tenant in writing on a form prescribed by the Director. At a minimum, the landlord must notify the tenant that:

(1) an indoor mercury service regulator exists on the premises of the rental housing;

(2) the landlord has requested, or immediately will request, the removal of the regulator by the gas utility company;

(3) the landlord will notify the tenant once the regulator is removed; and

(4) the tenant may contact the landlord, the gas utility company, or the Office of Landlord-Tenant Affairs with questions, concerns, or complaints.

(d) *Scheduling removal of the regulator*. The landlord must, with due diligence and in good faith, contact the gas utility company to schedule the immediate removal of each indoor mercury service regulator on the premises of the rental housing.

(e) *Follow-up requirements*.

(1) Within 30 days after providing notice under subsection (c), the landlord must update the tenant in writing of the status of the removal of the indoor mercury service regulator.

(2) If the regulator has not been removed within 30 days after providing the notice under subsection (c), the landlord must re-contact the gas service company to arrange for the immediate removal of the regulator.

(f) *Final notice*.

(1) The landlord must notify the tenant in writing once the indoor mercury service regulator is removed.

(2) The landlord must provide a copy of the notice to the Department.

(g) *Enforcement*.

(1) The Department must enforce this section under Section 29-8.

(2) A violation of this section is a Class A violation.

(h) *Database*. The Department must maintain data, in a searchable form available to the public, regarding:

(1) premises subject to an initial notice under subsection (c);

(2) premises subject to a final notice under subsection (f); and

(3) enforcement actions under subsection (g).

Sec. 2. Expedited Effective Date. The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date on which it becomes law.

Sec. 3. Transition. A landlord must comply with the requirements of Section 1, 29-35C(3) of this Act within 90 days after the effective date of the Act.

LEGISLATIVE REQUEST REPORT

Expedited Bill 50-20
Landlord-Tenant Relations – Fire Safety - Removal of Mercury Service Regulators

DESCRIPTION:	Expedited Bill 50-20 would require landlords to provide certain notices to tenants; and require landlords to schedule the replacement of indoor mercury service regulators.
PROBLEM:	The presence of indoor mercury service regulators as a fire safety problem
GOALS AND OBJECTIVES:	Immediate replacement of indoor mercury service regulators
COORDINATION:	DHCA
FISCAL IMPACT:	Office of Management and Budget
ECONOMIC IMPACT:	Office of Legislative Oversight
EVALUATION:	
EXPERIENCE ELSEWHERE:	To be researched
SOURCE OF INFORMATION:	Christine Wellons, Legislative Attorney
APPLICATION WITHIN MUNICIPALITIES:	Does not apply within each municipality
PENALTIES:	Class A Violation

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Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

EXPEDITED BILL 50-20: LANDLORD-TENANT RELATIONS-FIRE SAFETY-REMOVAL OF MERCURY SERVICE REGULATORS

SUMMARY

The Office of Legislative Oversight (OLO) expects Expedited Bill 50-20 (introduced on December 8, 2020) to favorably impact racial equity and social justice in the County.

BACKGROUND

The goal of Expedited Bill 50-20 is to enhance the safety of residential renters in the County. Over four years have passed since the tragic explosion at the Flower Branch Apartments in August 2016. Seven residents died, 65 residents were transported to the hospital, and three firefighters were treated and released from the hospital.[1] According to the National Transportation and Safety Board (NTSB) report, a defective mercury service regulator was the primary reason for the explosion.[2] The use of mercury service regulators in residential properties was widespread in the 1940's and 50's. But due to the toxicity of mercury, the installment of these regulators ended around 1968. [3]

The NTSB report identified that the apartment complex used indoor mercury-containing gas pressure regulators in the residential areas that were not adequately maintained.[4] The mercury service regulator had an unconnected vent line that released natural gas into the indoor meter room, where it accumulated and ignited from an unknown source.[5] The inaccessible indoor location of the mercury service regulators was also noted as contributing to the accident.[6]

Washington Gas is responsible for replacing the mercury service regulators across its jurisdictions; it is estimated that properties with mercury service regulators account for less than ten percent of its customers.[7] The focal point of Expedited Bill 50-20 is "connecting property owners with gas regulators while keeping tenants informed about the progress." It would require landlords to immediately assess their rental properties for mercury service regulators, contact Washington Gas for a replacement if necessary, and inform their tenants with updates. Towards this end, Expedited Bill 50-20 will increase landlord responsibilities and rental property safety standards in the County.[8] If enacted, the bill would:

- Require landlords to provide certain notices to tenants;
- Require landlords to schedule the replacement of indoor mercury service regulators; and
- Generally amend the law regarding landlord obligations and landlord-tenant relations.

DEMOGRAPHIC DATA

A review of demographic data suggests that Black, Latinx, and Indigenous (native American) residents will disproportionately benefit from Expedited Bill 50-20 compared to White and Asian residents. For example, a review of 2019 data from the American Community Survey (ACS) demonstrates higher rental rates among Black, Latinx, and Indigenous households where 50% of Latinx and Indigenous residents and 58% of Black residents lived in rental housing compared to 25% of White and Asian residents.[9]

A review of data comparing average rents for older multi-family properties to newer buildings also suggests that lower income renters will disproportionately benefit from Expedited Bill 50-20. According to CountyStat, the lowest average rent is $1,555 per month in facilities built 50 or more years ago, whereas the lowest average rent is $2,364 per month for facilities under ten years old. Of note, two-thirds of multi-family rental properties in Montgomery County are at least 50 years old.[10]

ANTICIPATED RESJ IMPACTS

OLO predicts that implementation of Expedited Bill 50-20 will favorably impact racial equity and social justice within the County because Black, Latinx and Indigenous residents are over-represented among the rental households that would benefit from enhanced safety standards. Low-income renters are also likely over-represented among residents and therefore will benefit from this bill.[11]

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

This RESJ impact statement and OLO's analysis rely on several sources of information, including the ACS;[12] CountyStat,[13] NTSB Safety Report,[14] OLO Economic Impact Statement and Expedited Bill 50-20.

RECOMMENDED AMENDMENTS

The County's Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequalities are warranted in developing RESJ impact statements.[15] Towards this end, OLO recognizes that on December 18, 2020, the Public Service Commission of Maryland imposed a civil penalty of $750,00 on Washington Gas for failing to file annual reports pertaining to its mercury service regulator removal process.[16] As proposed by Washington Gas' regulator replacement plan and ordered by the Commission, this RESJ impact statement offers four recommended amendments for Expedited Bill 50-20:[17]

- Require Washington Gas to provide the County with an update on projected and annual costs within 60 days of completing its one- and three-year surveys;
- Require within 30 days of commencing its survey that Washington Gas to notify the County of the date of commencement;
- Require Washington Gas to file annual reports by February 10th of each year as to the status of its program; and
- Require Washington Gas to work with the County's Consumer Affairs Division and Engineering Division to adopt a Mercury Service Regulator Replacement Plan customer notification and service termination process.

CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging, analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

OLO staffer Dr. Theo Holt drafted this racial equity and social justice impact statement.

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[1] National Transportation Safety Board. 2019. Building Explosion and Fire, Silver Spring, Maryland, August 10, 2016. NTSB/PAR-19/01. Washington, DC. file:///C:/Users/holtth01/Downloads/637725.pdf

[2] Ibid

[3] EPA, Before You Tear It Down, Get the Mercury Out Recommended Management Practices for Pre-Demolition Removal of Mercury-Containing Devices from Residential Buildings, United States Environmental Protection Agency. https://www.epa.gov/sites/production/files/2015-10/documents/before_you_tear_it_down.pdf

[4] NTSB Report

[5] Ibid

[6] Ibid

[7] Washington Gas, Mercury Regulator Fact Sheet, WGL Holdings Inc. https://www.washingtongas.com/media-center/customer-advisory-mercury-regulators

[8] Montgomery County Council, Expedited Bill 50-20, Landlord-Tenant Relations- Fire Safety- Removal of mercury Service Regulators, Introduced December 8, 2020, Montgomery County, Maryland.

[9] American Community Survey (ACS), Selected Housing Characteristics, The United States Census Bureau, 2019. https://data.census.gov/cedsci/table?g=0400000US24_0500000US24031&tid=ACSDP5Y2019.DP04

[10] CountyStat, Performance Management and Data Analytics, Montgomery County Annual Rental Facility Occupancy Survey, 2018, Montgomery County Maryland Department of Housing and Community Affairs. https://reports.data.montgomerycountymd.gov/stat/goals/qw5z-mdcn/aadg-iy9b/fupp-ze2q

[11] Stephen Roblin, Economic Impact Statement, Expedited Bill 50-20, December 2020, Office of Legislative Oversight, Montgomery County Maryland.

[12] ACS

[13] CountyStat

[14] NSTB Safety Report

[15] Montgomery County Council, Bill No. 27-19 Racial Equity and Social Justice, Effective on March 2, 2020, Montgomery County, Maryland.

[16] The Public Service Commission of Maryland, Order No. 89680, Investigation of Washington Gas Light Company Regarding a Building Explosion and Fire In Silver Spring, Maryland on August 10, 2016, Maryland, December 2020. https://www.psc.state.md.us/wp-content/uploads/Order-No.-89680-Case-No.-9622-WGL-FB-Investigation-Order-Assessing-Civil-Penalty.pdf

[17] Order No. 89680

Economic Impact Statement

Office of Legislative Oversight

Expedited BILL 50-20 Landlord-Tenant Relations – Fire Safety – Removal of Mercury Service Regulators

SUMMARY

The Office of Legislative Oversight (OLO) believes that enacting Expedited Bill 50-20 would potentially increase costs to private organizations and residents subject to any increase in gas utility rates related to the replacement of mercury service regulators. OLO anticipates that the bill could have a negative economic impact on the County.

BACKGROUND

The purpose of Expedited Bill 50-20 is to improve fire safety by promoting "the immediate replacement of indoor mercury service regulators with safer, more modern regulators."[1] If enacted, Expedited Bill 50-20 would change the law regarding landlord obligations in several ways. Landlords would be required to determine whether there are any mercury service regulators (MSRs) on the premises of rental properties they lease.[2] If they identify any MSRs, landlords would be required to contact the gas utility company to schedule the immediate removal of the regulators.[3] Landlords would also be required to provide notifications to tenants during the process of detection and removal of MSRs.[4] Expedited Bill 50-20 would assign the Department of Housing and Community Affairs (DHCA) with enforcing the new regulations, and require DHCA to maintain a public database that includes information on the status of the detection and removal of MSRs and any enforcement actions.[5]

Expedited Bill 50-20 would apply to all rental properties in the County that are subject to the Department of Housing and Community Affairs (DHCA) enforcement. The scope of the law would exclude properties within municipalities that have not opted into Chapter 29 of the Montgomery County Code. DHCA personnel estimate that approximately 690 rental properties and 70,000 units were subject to the department's enforcement in 2017. These figures represent the best estimate of the number of rental properties that would be impacted by the expedited bill.

The requirements set forth in Expedited Bill 50-20 would complement efforts under way to replace MSRs throughout the state. In 2002, Washington Gas and Light Company (WGL) committed to replacing all MSRs in its Maryland service area within 10 years.[6] The Maryland Public Service Commission (hereinafter "the commission"), the entity that regulates gas utilities operating in the state, has *twice* approved the company's requests to increase rates for utility services to recover costs associated with the removal of MSRs.[7] However, the company has not completed the removal of MSRs. In its recent

[1] Christine Wellons to Montgomery County Council, Memorandum, December 3, 2020, https://apps.montgomerycountymd.gov/ccllims/DownloadFilePage?FileName=2688_1_12107_Bill_50-2020_Introduction_20201208.pdf.
[2] Montgomery County Council, Expedited Bill 50-20, Landlord-Tenant Relations – Fire Safety – Removal of Mercury Service Regulators, Introduced on December 8, 2020, 2, https://apps.montgomerycountymd.gov/ccllims/DownloadFilePage?FileName=2688_1_12107_Bill_50-2020_Introduction_20201208.pdf.
[3] Ibid, 3.
[4] Ibid, 2-3.
[5] Ibid, 3-4.
[6] Initial Brief of the Maryland Office of People's Council, Case No. 9622, Filed on October 28, 2020, https://www.psc.state.md.us/search-results/?q=9622&x.x=23&x.y=15&search=all&search=case.
[7] Ibid.

decision to fine Washington Gas in a case relating to the 2016 gas explosion at the Flower Branch apartments in Silver Spring, the commission decided that "the MSR Replacement Program as outlined in the 'Revised Stipulation and Settlement' in Case No. 8920 constituted a *binding commitment* by WGL to remove all indoor MSRs within 10 years" (emphasis added).[8] In addition, the commission approved WGL's new replacement program with modifications and directed the company to:

- "maintain accounts of all capital and operating expenses, including any incremental costs related to the program;"
- "include these expenses in its annual status report;" and
- "record and maintain a list of all requests to remove an MSR from residential properties."

To recover any costs associated with the removal of MSRs, WGL would need to apply and attain approval from the commission to increase base rates. In its ruling, the commission did not "address prudency or recovery of costs associated with this new MSR replacement program since projected costs are not available at this time."

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

The economic impacts associated with replacing MSRs would occur through two primary channels:

- **Change to the utility base rate for customers in the service territories of utility companies.** A future base rate adjustment would be the primary channel through which the costs incurred in the removal of MSRs would be passed from gas utilities to private organizations and residents in the County.
- **Contracts awarded to third-party companies for the removal of MSRs.**[9] Economic benefits would be channeled to local businesses that are awarded contracts to remove MSRs.

At this juncture, it is unknown whether the MSR removal costs will be recovered through an upward adjustment to the base rate. The Maryland Office of the People's Council (OPC) and the Apartment and Office Building Association of Metropolitan Washington (AOBA) have argued that ratepayers should not bear the cost of removing MSRs.[10] If WGL (or any other utility company) applies for a rate change in the future, it would be up to the discretion of the commission on whether to approve the request.

In addition to the occurrence of a rate change, the magnitude of any change to the rate cannot be estimated. A representative from WGL informed OLO that the cost of removing an MSR is approximately $1,800. (Note that this amount is significantly greater than the $200 per unit replacement cost the company has reportedly cited previously.[11]) While

[8] Order No. 89680, In the Matter of an Investigation of Washington Gas & Light Company Regarding a Building Explosion and Fire in Silver Spring, Maryland, Case No. 9622, Issued on August 10, 2016, December 18, 2020, https://www.psc.state.md.us/wp-content/uploads/Order-No.-89680-Case-No.-9622-WGL-FB-Investigation-Order-Assessing-Civil-Penalty.pdf

[9] A representative from WGL informed OLO that the company would contract with third-party vendors for the removal of MSRs. These entities would be the primary beneficiaries of the MSR Replacement Program.

[10] Order No. 89680; Initial Brief of the Maryland Office of People's Council.

[11] The Washington Post recently reported that "[w]hile seeking a rate increase in 2003, the gas provider said it would replace all 66,793 of its indoor mercury gas regulators over the next decade to address age and environmental concerns. The utility said it would deploy a staff of seven to replace more than 6,000 regulators a year for 10 years at a cost of about $200 per regulator." Steve Thompson, "Washington Gas fined $750,000 in case connected to deadly 2016 explosion," December 22, 2020, https://www.washingtonpost.com/local/md-politics/washington-gas-fine-flower-branch/2020/12/21/e502b034-43cb-11eb-a277-49a6d1f9dff1_story.html.

WGL states that no more than 10 percent of its customers are likely to have MSRs,[12] the company does not know the total number of remaining MSRs in the County or state.[13] The company is conducting a survey to identify the remaining ones.[14] Moreover, the commission has already approved two rate increases for WGL to recover expenses associated with its MSR Removal Program. If the commission were to approve a rate increase, the total MSR removal costs and amount collected would likely influence the magnitude of any rate change.

Despite these uncertainties, OLO uses available information to estimate the total cost of replacing MSRs in the County. It is important to emphasize that these estimates are not forecasts. They are instead intended to illustrate the general magnitude of MSR replacement costs in the County. Representatives from WGL have stated that the total costs of removing MSRs in the County and state will not be known until after the survey is complete. The estimates are based on the following assumptions:

- Rental properties will have between one and two MSRs;[15] and
- The per unit cost of replacing MSRs is $1,800.

Figure 1 estimates the cost of replacing MSRs in up to 25% of rental properties affected by Expedited Bill 50-20. The cost of replacing MSRs at or below 10% of the rental properties – WGL's upper-bound estimate – may fall short of $500,000.

Importantly, Expedited Bill 50-20 would not constitute the primary cause of the costs WGL incurs from replacing MSRs. Given that the commission determined that WGL's MSR Replacement Program constitutes a binding commitment, the removal of MSRs on rental properties in the County that receive gas service from WGL would occur in the absence of Expedited Bill 50-20. However, OLO believes it is possible that the requirements set forth in the bill (requiring landlords to detect MSRs and schedule for their immediate removal, and DHCA to maintain a database on the status of MSR detection and removal) could potentially have two results:

- A more complete accounting of all the MSRs in the County; and/or
- Expediting the removal of MSRs.

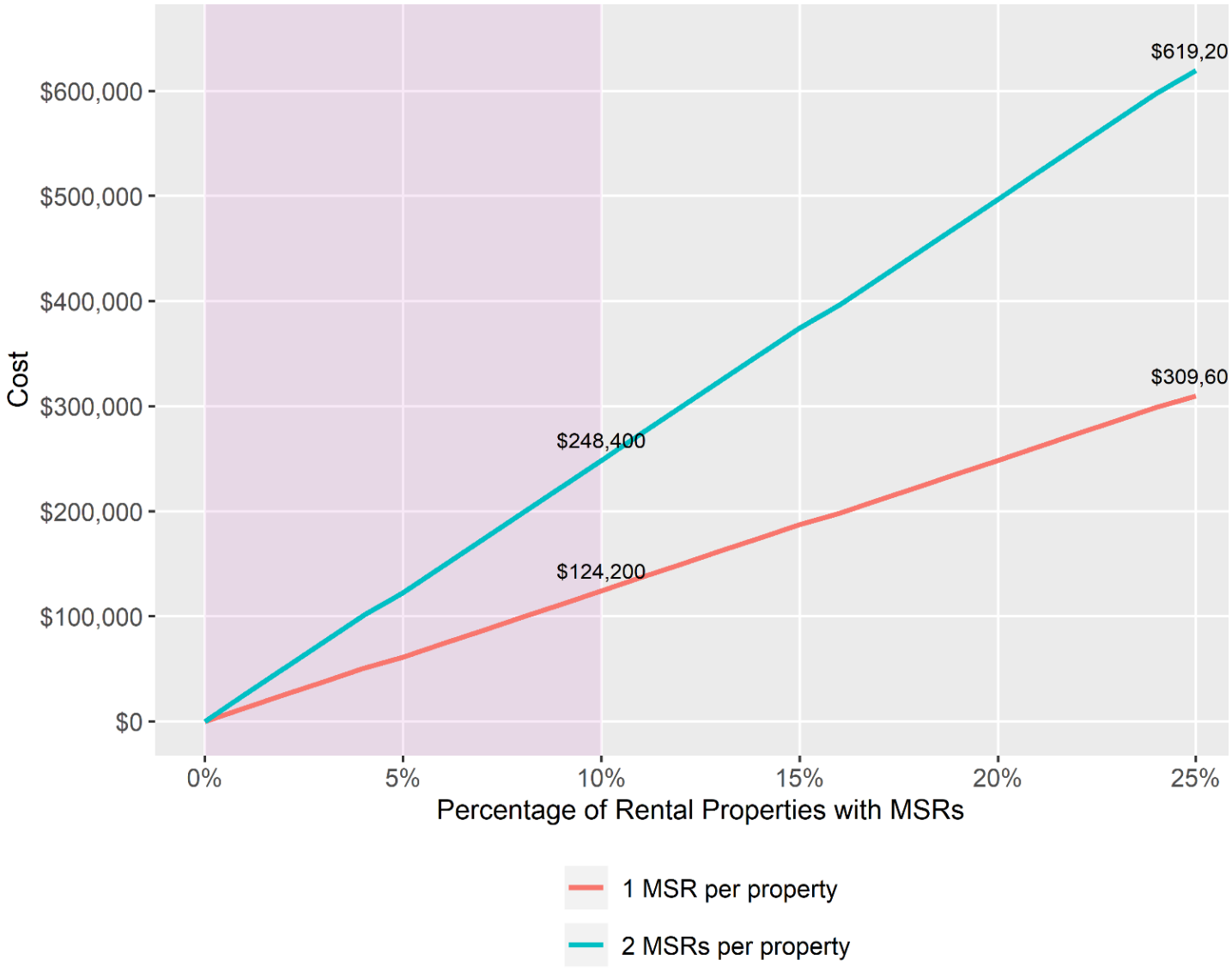
Expedited Bill 50-20 would be responsible for only the costs associated with these potential outcomes, not the total cost of removing MSRs within WGL's service territory in the County.

In terms of other gas utilities operating in the County, the bill may be responsible for the entire costs of replacing MSRs. WGL appears to be the only gas utility that has an MSR replacement program underway. Expedited Bill 50-20 may compel other utility companies to replace MSRs in the County, thereby increasing the number of replaced MSRs that would otherwise not have occurred in the absence of the bill's enactment. However, OLO cannot estimate the number of MSRs that would fall into this category nor the total cost of replacing them, because we have been unable to attain information on the percentage of the approximately 690 rental properties under the enforcement of DHCA that fall within the respective gas utilities' service territories. Nevertheless, it is OLO's understanding that the majority of private organizations and residents who would be affected by Expedited Bill 50-20 are WGL customers.

[12] Washingtongas.com, Information about Mercury Service Regulators, Washington Gas, https://www.washingtongas.com/media-center/customer-advisory-mercury-regulators.
[13] Order No. 89680.
[14] Ibid.
[15] In our correspondence with a representative from WGL, OLO was informed that multi-family rental properties may have up to two MSRs. We were unable to attain any more information that would allow us to make a more precise estimate of the average number of MSRs per rental property.

Ultimately, due to WGL's market share and the MRS Replacement Program that is underway, OLO assumes that the bill would be responsible for a minority portion of any increase in the base rate due to MSR replacement costs.

Figure 1. Cost of Replacing MSRs in the County



VARIABLES

The primary variables that would affect the economic impacts of Expedited Bill 50-20 are:

- Total amount already collected by WGL for MSR detection and removal;
- Number of remaining MSRs in the County and state;
- Per unit cost of replacing MSRs;
- Percentage of affected rental properties within WGL's service territory;
- Total amount of contracts awarded to local businesses for the removal of MSRs;
- Change to base rates to recover MSR removal costs; and
- Percentage of base rate hikes passed on by landlords to tenants.

IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

Businesses, Non-Profits, Other Private Organizations

Expedited Bill 50-20 would have direct economic impacts on landlords of the approximately 690 rental properties subject to DHCA enforcement, and any companies that receive contracts for the removal of MSRs.[16] The bill would require owners of the approximately 690 rental properties subject to DHCA enforcement to determine if there are MSRs on the premises of their properties. However, OLO does not anticipate that there would be significant costs associated with detection. WGL's website provides instructions and support on how to detect MSRS, and states that MSRs "can be identified easily."[17] If this is the case, the direct negative economic impacts of Expedited Bill 50-20 on landlords would instead occur through costs associated with notifying tenants of the status of detection and removal of MSRs (e.g., paper, envelopes, postage). OLO anticipates that these costs would be minimal. These direct costs, as well as any potential indirect costs (see below), could be offset by passing them onto tenants in the forms of higher rents.

Local businesses may also experience direct economic benefits from Expedited Bill 50-20. WGL plans to contract with companies for the removal of MSRs. It is possible that companies based in the County may receive contracts for the removal of MSRs in the County and state. Local businesses awarded contracts would experience a net increase in business incomes.

Furthermore, Expedited Bill 50-20 may result in negative *indirect* impacts on private organizations in the County. These impacts would be mediated by the commission.[18] As previously stated, the commission may approve requests by WGL and/or other utilities to increase base rates to recover costs associated with replacing MSRs, a portion of which may be attributable to the bill. Such an adjustment would apply to all customers subject to the rate schedule. Any upward

[16] For the Council's priority indicators, see Montgomery County Council, Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments, Enacted on July 30, 2019, Montgomery County, Maryland, 3.
[17] Washingtongas.com, Information about Mercury Service Regulators.
[18] Here, I use "indirect impacts" to refer to the effects of a change in law on private organizations/residents that are mediated or transmitted through another entity. This definition is distinct from the one used in Input-Output analysis, in which an "indirect impact" is defined as a "[c]hange in economic activity resulting from the subsequent rounds of inputs purchased by industries affected by a final-demand change." See *RIMS II: An Essential Tool for Regional Developers and Planners*, U.S. Bureau of Economic Analysis, December 2003.

adjustment to the base rate for gas utilities would increase operating costs for the affected private organizations, thereby reducing their net operating income.

OLO does not expect Expedited Bill 50-20 to have impacts on the Council's other priority indicators, particularly taxation policy, property values, private sector capital investment, economic development, or competitiveness.

Residents

Expedited Bill 50-20 could result in direct and indirect economic impacts to residents. In terms of direct impacts, owners and employees of local businesses that are contracted to replace MSRs could experience additional earnings. All residents subject to an increase in utility rates designed to recover MSR replacement costs would experience a net increase in household expenses. Moreover, to the extent that landlords pass on costs caused by the bill to their tenants, these renter households would also experience a net increase in expenses.

QUESTIONS FOR CONSIDERATION

OLO has recently produced economic impact statements for three bills (Expedited Bill 50-20, Bill 51-20, and Bill 52-20) related to rental housing and landlord responsibilities. All three are likely to have a negative economic impact on landlords. Should the Council desire more economic analysis, OLO suggests conducting an examination of the aggregate economic impact of these bills.

WORKS CITED

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Thompson, Steve. "Washington Gas fined $750,000 in case connected to deadly 2016 explosion." *Washington Post*. December 22, 2020. https://www.washingtonpost.com/local/md-politics/washington-gas-fine-flower-branch/2020/12/21/e502b034-43cb-11eb-a277-49a6d1f9dff1_story.html.

Washingtongas.com. Information about Mercury Service Regulators. Washington Gas. https://www.washingtongas.com/media-center/customer-advisory-mercury-regulators.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

Stephen Roblin (OLO) drafted this economic impact statement.

Fiscal Impact Statement
Expedited Bill 50-20, Landlord-Tenant Relations – Fire Safety –
Removal of Mercury Service Regulators

1. **Legislative Summary**

Expedited Bill 50-20 would require landlords to immediately determine if their rental properties contain mercury service regulators. If an indoor mercury service regulator is present, the landlord would be required to notify each tenant, and to contact the gas utility company to arrange for the immediate replacement of the regulator with a safe alternative. The landlord would notify the tenant once the regulator was replaced.

The requirements of the bill would be enforced by the Department of Housing and Community Affairs (DHCA). In addition, DHCA would maintain a searchable public database regarding premises where landlords have provided initial notice of the service regulators, premises where the regulators have been replaced, and enforcement actions regarding indoor mercury service regulators.

2. **An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.**

Expedited Bill 50-20 will not impact County revenues currently assumed in the approved budget. However, this bill requires DHCA to create and maintain a searchable public database. Based on recent systems created, DHCA estimates that this searchable system would require 100-200 hours of staff time, including a senior IT developer, code staff, and licensing staff to create, populate, and host on a public space. The staff time could be cut in half if existing systems, such as eProperty, can be modified to meet the needs. The costs associated with the staff time are estimated at $10,000, which will be one-time expenses. The amount would be $5,000 if existing systems could be utilized. To implement the proposed bill, DHCA anticipates that related expenses would be absorbed within existing appropriation.

Position	Hours	Hourly Rate	Estimated Expenses
Sr. IT Developer	50	$ 100	$ 5,000
Licensing Staff	50	$ 50	$ 2,500
Code Staff	50	$ 50	$ 2,500
Total	**150**		**$ 10,000**

3. **Revenue and expenditure estimates covering at least the next 6 fiscal years.**

Per item #2, it is expected that the expenditures identified are one-time costs, therefore the total 6-year cost would be approximately $10,000 or reduced to $5,000 if existing systems could be utilized. Bill 50-20 does not impact revenue.

4. **An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.**

Not applicable.

5. **An estimate of expenditures related to County's information technology (IT) systems, including Enterprise Resource Planning (ERP) systems.**

   Per item #2, DHCA will first attempt to modify current DHCA IT systems prior to developing a stand-alone system. IT expenditures are estimated at $5,000 for the staffing costs associated with a senior IT developer.

6. **Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

   Bill 50-20E does not authorize future spending.

7. **An estimate of the staff time needed to implement the bill.**

   Per item #2, the estimated staff time is 50 hours for a senior IT developer, code staff, and licensing staff respectively.

8. **An explanation of how the addition of new staff responsibilities would affect other duties.**

   It is expected that these new responsibilities can be managed with current staffing.

9. **An estimate of costs when an additional appropriation is needed.**

   Although cost up to $10,000 may be necessary for implementation of Bill 50-20E, additional appropriation is not needed at this time.

10. **A description of any variable that could affect revenue and cost estimates.**

    Not applicable.

11. **Ranges of revenue or expenditures that are uncertain or difficult to project.**

    Per item #2, DHCA will first attempt to modify current DHCA IT systems prior to developing a stand-alone system. If existing systems can be utilized, it would reduce the estimated expenditures by a half.

12. **If a bill is likely to have no fiscal impact, why that is the case.**

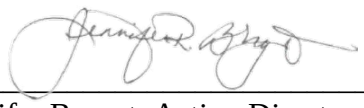
    Not applicable.

13. **Other fiscal impacts or comments.**

    Not applicable.

14. The following contributed to and concurred with this analysis:

Tim Goetzinger, Department of Housing and Community Affairs
Frank Demarais, Department of Housing and Community Affairs
Pofen Salem, Office of Management and Budget



Jennifer Bryant, Acting Director
Office of Management and Budget

1-11-21
Date

TO: Montgomery County Council

RE: Bill 50-20 addressing mercury gas service regulators

FROM: N. Leslie Olson

On 12/8/2020 Bill 50-20E was introduced by Councilmember Hucker. It requires landlords to work with Washington Gas to obtain the replacement of mercury service regulators with spring loaded regulators. Washington Gas states that whether the regulator, which helps regulate the flow of gas into home appliances, is mercury or not, it is a safe and reliable part of the natural gas delivery system.

The sponsor, Councilmember Hucker, feels the mercury service regulator was the cause of a 2016 explosion. The intent of the legislation is to save tenant lives.

I urge to you vote against this bill and opt instead to push for an action that will require the county council, not landlords, to work with the Public Safety Commission (PSC) to complete an already existing mandate with Washington Gas to remove the mercury service regulators and replace them. Mercury has long been considered a hazardous element if not properly contained and this program provides for the proper reclamation of the mercury during the replacement process. In this scenario, the removal of the mercury service regulator provides for the safety of ALL county residents, not just tenants, by eliminating the potential that during work by unqualified individuals mercury could be released. The council has erred in relegating their responsibility to see the completion of this program to county landlords. There should be some embarrassment in the omission of caring for the safety of so many residents who are not tenants, in the attempt to further burden landlords.

Existing information on this subject is as follows:

1. Washington Gas maintains that both mercury and spring regulators are safe and their program was only intended to reclaim the mercury, a potential hazardous material if not properly handled.
2. Washington Gas received a rate increase to do this work.
3. Washington Gas was to provide progress reports to PSC, with a completion date of 2013.
4. Washington Gas neither completed the task nor provided reports as required.
5. In 2020 Washington Gas was fined $750,000 for that failure
6. In 2016 there was an explosion in Silver Spring, resulting in death and displacement of the residents of the multi-family building.
7. There have been no facts (made public) supporting the concept behind bill 50-20 that the mercury service regulator on the building was faulty, and Washington Gas has publically denied any wrongdoing.
8. The explosion did however reveal the failure of both the PSC and Washington Gas to fulfil their responsibility in the monitoring and removal of existing mercury service regulators.

Now with that known failure by PSC and Washington Gas, the Montgomery County Council is poised to throw the matter to landlords to resolve, and in doing so, will create additional expense for the additional reporting and paperwork necessary to document this new action.

This is an inappropriate action, a waste of money, and does nothing toward the bill's mission statement which is to protect lives. The removal of the mercury service regulators, the proper reclamation of the mercury, and the replacement of the regulator will do that for ALL county residents.

Again, I urge the County Council to vote against bill 50-20 and pledge to put its energies toward forcing the PSC (an agency already receiving money for just such activities) to complete its monitoring of the replacement program started, but not yet finished, by Washington Gas.

This is not landlord's responsibility, nor should it ever have been thought to be so.

AOBA Statement on Expedited B50-20, Landlord-Tenant Relations – Fire Safety - Removal of Mercury Service Regulators

January 26, 2021

Good afternoon councilmembers and staff. My name is Nicola Whiteman and I appear today on behalf of the Apartment and Office Building Association of Metropolitan Washington (AOBA). AOBA is a non-profit trade association representing more than 133,000 apartment units and over 24 million square feet of office space in suburban Maryland. Here in the County, AOBA members own/manage over 60,000 of the County's estimated 83,769 rental units and 20,00,000 square feet of office space. I am pleased to testify in support of B50-20 with amendments which are consistent with the stated purpose of the bill to facilitate the replacement of indoor mercury service regulators (MSRs) in multifamily communities.

First, it is important to highlight the Dec. 18, 2020 Maryland Public Service Commission Order ("Order") which addresses many of the concerns that gave rise to the bill.[1] The Commission's Order reaffirmed the *gas company's* obligation to *locate* and *replace* the MSRs. This responsibility includes, notably, conducting a survey of the remaining MSRs. AOBA understands that the gas company will commence this important survey in February. In addition to the instructive PSC Order, pending before the Maryland General Assembly is a bill, HB 345, that will require the gas company to relocate MSRs to the exterior of buildings to address safety concerns.

Given the findings in the December PSC order and likely passage of the state bill, the proposed joint amendments from AOBA and Washington Gas focus on the following issues: (1) access by housing providers to facilitate the gas company's MSR replacement program; (2) resident and Department Housing and Community Affairs (DHCA) notification when the MSRs are located and replaced; (3) clarifying, consistent with the PSC Order, MSR replacement and not just removal; and (4) specifying, for safety reasons, tenants' obligation to refrain from touching, damaging, removing or altering any MSR.

[1]See, for example, Public Service Commission of Maryland Order No. 89680, **¶ 56**. First, the ***Commission finds that the MSR Replacement Program*** as outlined in the "Revised Stipulation and Settlement" in Case No. 8920 ***constituted a binding commitment by WGL to remove all indoor MSR***s within 10 years. ¶ 61. WGL thus unambiguously represented to the Commission, as well as to the settling parties, that the removal of the MSRs over a 10-year period was a commitment WGL would honor. **¶ 67**. The Commission concludes that WGL's proposed program as outlined, and as we expand upon below, is in the public interest. The Commission therefore accepts WGL's new replacement program with the following conditions: (1) WGL shall provide the Commission with an update on projected and annual costs within 60 days of completing its one- and three-year surveys; (2) within 30 days of commencing its survey, WGL shall notify the Commission of the date of commencement; (3) WGL shall file annual reports by February 10 of each year as to the status of its program; and (4) WGL shall work with the Commission's Consumer Affairs Division and Engineering Division to adopt an MSR Replacement Plan customer notification and service termination process as discussed in Staff witness Clementson's direct testimony.

- **Access by housing providers to facilitate the gas company's replacement program:** While the obligation to locate and replace the MSRs are governed by the PSC order, housing providers can and should play an important role in facilitating the gas company's access to rental housing in order to successfully implement the MSR replacement program.
- **Tenant/DHCA notification:** The proposed amendments will require housing providers to, upon notification by the gas company, inform tenants and DHCA that an MSR is located on the premises and replaced.
- **Replacement v. Removal:** The proposed amendment, again consistent with the PSC Order, clarifies that focus is on the replacement of the MSRs.
- **Tenant obligations:** For safety reasons, it is critical that tenants not have any contact with MSRs.
- **Miscellaneous provisions:** Proposed Sec. 29-35C is unnecessary as chapter 29 already specifies that violations unless otherwise stated, will be a Class A violation. *See* Sec. 29-8 Enforcement procedure. (a) Any violation of this Chapter, *unless expressly specified otherwise*, is a class A violation.

Finally, AOBA commends Councilmember Hucker and Washington Gas for the opportunity to collaborate on the proposed amendments. Adopting the bill with these changes will complement the PSC Order by facilitating the MSR replacement program thus ensuring the safety of the residents and employees in multifamily communities.

Expedited Bill No. 50-20
Concerning: Landlord-Tenant Relations – Fire Safety - ~~Removal~~ Replacement of Mercury Service Regulators Revised: 11/19/2020 Draft No. 3
Introduced: December 8, 2020
Expires: June 8, 2022
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. , Laws of Mont. Co.

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President Hucker

AN ACT to:

(1) require landlords to provide the gas utility company access to rental properties to locate and replace indoor mercury service regulators~~certain notices to tenants~~;
(2) require landlords to ~~schedule the replacement of indoor mercury service regulators~~ to provide certain notices to tenants and the Department; and
(3) generally amend the law regarding landlord obligations and landlord-tenant relations.

By amending
Montgomery County Code
Chapter 29, Landlord-Tenant Relations
Sections 29-30

By adding
Montgomery County Code
Chapter 29, Landlord-Tenant Relations
Section 29-35C

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 29-29 and 29-30 are~~is~~ amended, and Section 29-35C is added, as follows:

Sec. 29-29. Obligations of tenants.

Each tenant must, in addition to all other applicable legal requirements:

(g) Must not knowingly or willingly touch, damage, remove or alter any indoor mercury service regulator on the premises of any rental property.

29-30. Obligations of landlords.

(a) Each landlord must reasonably provide for the maintenance of the health, safety, and welfare of all tenants and all individuals properly on the premises of rental housing. As part of this general obligation, each landlord must:

~~(9)~~ (10) facilitate the gas utility company's access to locate and replace ~~the~~ ~~8~~ ~~removal of~~ any indoor mercury service regulator under Section 29-35C.

* * *

29-35C. ~~Removal~~ Replacement of indoor mercury service regulators.

(a) *Definition*. For purposes of this section, an *indoor mercury service regulator* means equipment that:

(1) is installed by a gas utility company to regulate the supply of natural gas to a structure;

(2) contains mercury; and

(3) is located inside a structure.

(b) ~~*Determination*~~*Access*. A landlord must allow the gas utility company access to locate and replace ~~verify whether~~ any indoor mercury service regulator that is on the premises of any rental property leased by

the

landlord.

(c) *Initial notice*. Once the gas utility company has notified the landlord of the presence of any ~~If an~~ indoor mercury service regulator~~s is~~ on the premises of the rental housing, the landlord must notify the Department, and must notify each tenant in writing on a form prescribed by the Director. At a minimum, the landlord must notify the tenant that:

(1) an indoor mercury service regulator exists on the premises of the rental housing; and

~~(2) the landlord has requested, or immediately will request, the removal of the regulator by the gas utility company;~~

(2~~3~~) the landlord will notify the tenant once the regulator is ~~removed~~replaced;

and

(3) the tenant may contact the landlord, the gas utility company, or the Office of Landlord-Tenant Affairs with questions, concerns, or complaints.

~~(d) *Scheduling removal of the regulator*. The landlord must, with due diligence and in good faith, contact the gas utility company to schedule the immediate removal replacement of each indoor mercury service regulator on the premises of the rental housing.~~

(d~~e~~) *Coordination of replacements.* The landlord will make commercially reasonable efforts to coordinate replacement of all indoor mercury service regulators on the premises of the rental housing with the gas utility company in an expeditious manner. ~~Notwithstanding the foregoing, the landlord will undertake no action which interferes with a gas utility company's mercury service regulator~~

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~~replacement program as filed with any federal or state agency of competent jurisdiction, including but not limited to the gas utility company's survey of indoor mercury service regulators in the County, the gas utility company's indoor mercury service regulator replacement schedule and/or the gas utility company's mercury service regulator replacement prioritization~~. Notwithstanding the foregoing, the provisions of this section shall not be construed so as to unlawfully interfere with a gas utility company's mercury regulator replacement program as filed with any federal or state agency of competent jurisdiction.

~~*Follow-up requirements.*~~

~~(1) Within 30 days after providing notice under subsection (c), the landlord must update the tenant in writing of the status of the removal of the indoor mercury service regulator.~~

~~(2) If the regulator has not been removed within 30 days after providing the notice under subsection (c), the landlord must re-contact the gas service company to arrange for the immediate removal of the regulator.~~

(~~e~~f) *Final notice.*

(1) The landlord must notify the tenant in writing once the indoor mercury service regulator is ~~removed~~replaced.

(2) The landlord must provide a copy of the notice to the Department.

~~(g) *Enforcement.*~~

~~(1) The Department must enforce this section under Section 29-8.~~

~~(2) A violation of this section is a Class A violation.~~

(h) *Database.* The Department must maintain data, in a searchable form available to the public, regarding:

(1) premises subject to an initial notice under subsection (c);

(2) premises subject to a final notice under subsection (f); and

(3) enforcement actions under subsection (g).

Sec. 2. Expedited Effective Date. The Council declares that this legislation is necessary for the immediate protection of the public interest. This Act takes effect on the date on which it becomes law.

Sec. 3. Transition. A landlord must comply with the requirements of Section 1, 29-35C(3) of this Act within 90 days after the effective date of the Act.

ORDER NO. 89680

Investigation of Washington Gas Light Company Regarding a Building Explosion and Fire In Silver Spring, Maryland on August 10, 2016	* * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9622

Issue Date: December 18, 2020

ORDER ASSESSING CIVIL PENALTY

I. BACKGROUND

1. On August 10, 2016, a natural gas-fueled explosion and fire partially collapsed an apartment building located in Silver Spring, Maryland, resulting in injuries and fatalities. A formal investigation conducted by the National Transportation Safety Board ("NTSB") found that the probable cause of the explosion was a failure of a mercury service regulator ("MSR") owned by Washington Gas Light Company ("WGL").

2. On September 24-25, 2020, the Commission conducted an evidentiary hearing regarding various aspects of WGL's program to replace its mercury regulators, which was approved by the Commission in 2003. In this Order, the Commission finds that WGL failed to file annual reports informing the Commission of the status of its program and imposes a civil penalty of $750,000 for these reporting violations.

II. PROCEDURAL HISTORY

(Case Nos. 8920 and 8959)

3. On April 29, 2020, the Commission issued a Notice of Evidentiary Hearing, which announced that the Commission would conduct a hearing on the following issues related to WGL's mercury regulator replacement program:

(1) Whether WGL met its stated commitments in Case Nos. 8920 and 8959 to replace all mercury regulators located within its Maryland service territory over a 10-year period;

(2) The conflicting estimates by WGL as to:

a. the number of mercury regulators that existed within its Maryland service territory in 2003;

b. the number of mercury regulators WGL has installed on its system since 2003;

c. the number of mercury regulators that WGL has replaced since 2003; and

d. the number of mercury regulators that remain within WGL's Maryland service territory currently since 2003.

(3) Whether funds collected from ratepayers expressly for this purpose were so used;

(4) Whether the implementation process outlined in WGL's rejoinder comments adequately addresses the need to replace all remaining mercury regulators in Maryland, the likely cost of the proposed implementation program, and the appropriate recovery for these costs (including whether cost recovery should be deferred until a future rate case);

(5) Whether WGL should be assessed a civil penalty for failure to complete its mercury regulator replacement program approved in 2003 and whether WGL should be assessed a penalty for failing to file reports regarding its replacement program;

(6) Any other issues regarding WGL's mercury regulator replacement program addressed by the parties in their briefs submitted subsequent to the Commission's show cause order.[1]

4. In Case No. 8920,[2] WGL presented the written testimony of Richard Cook, Vice President of Construction and Technical Support, that WGL had implemented a program to replace all of WGL's estimated 66,793 MSRs located inside customer's homes in Maryland with spring-type regulators over a 10-year period.[3] As Mr. Cook explained: "[t]his program was instituted because of the age of the mercury regulators, between 40 and 60 years old, and concerns expressed by the Environmental Protection Agency (EPA) about mercury regulators located inside homes."[4]

5. WGL also presented the written testimony in Case No. 8920 of Frederic M. Kline, who testified that "Washington Gas will replace over 66,000 mercury regulators in the Maryland jurisdiction over a ten-year period."[5] Following these representations, on July 29, 2002, several parties entered into a Stipulation and Settlement Agreement.[6] Paragraph 10 of this Agreement provided that "[t]he change out of mercury regulators is in the public interest. The Company [WGL] intends to complete the change out. The current plan is to complete the program as set out in Company Witness Cook's Direct Testimony."[7]

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[1] Order No. 89550 at 5-6.
[2] *In the Matter of the Application of Washington Gas Light Company for Authority to Increase its Existing Rates and Charges for Gas Service and to Implement an Incentive Rate Plan* (March 28, 2002).
[3] OPC Ex. 1 - Case No. 8920, Cook Direct at 13.
[4] *Id.*
[5] OPC Ex. 2 - Case No. 8920, Kline Rebuttal at 33.
[6] Those parties to the Stipulation and Settlement included WGL, Maryland Office of People's Counsel ("OPC"), the Apartment and Office Building Association of Metropolitan Washington ("AOBA"), and the United States Department of Defense and Federal Executive Agencies.
[7] OPC Ex. 3 - July 29, 2002 Stipulation and Settlement at 4.

6. On August 1, 2002, the Commission conducted a hearing on the proposed settlement. At this hearing, then-Commissioner J. Joseph Curran, III raised the issue of whether WGL should file regular reports regarding the progress of the proposed MSR replacement program, and WGL indicated that it was willing to comply with regular reporting requirements.[8]

7. Later in the same hearing, the following exchange occurred between Chief Hearing Examiner Andrew Mosier and WGL witness Adrian Chapman:[9]

> Mosier: Mr. Chapman, if you know, because it refers to another witness' testimony, but at page four, paragraph 10, the line there states that the "current plan" is to complete the mercury change-out, mercury regulated change-out program, as set out in Witness Cook's testimony. That implies to me that there could be a change, and I'm wondering if that's the case, and how the settling parties would be brought into this.
>
> Chapman: I'm not sure if I understand the word change. Witness Cook, I think, identified a 10-year program to completely replace where there are mercury regulators in our service area.
>
> Mosier: And my take on the settlement is that is what the settling parties are signing on to, it is just that terminology there. I'm wondering, is there the potential for a change there? And I guess there is, is it something that is unilateral, or would that be brought back to at least the three settling parties?
>
> Chapman: I don't think the parties or the company intends for there to be a change in how the company implements Witness Cook's, as filed, proposed 10-year change-out.
>
> Mosier: So then we can conclude that the change-out program that will be implemented is outlined in Witness Cook's testimony?
>
> Chapman: Yes. That's how it has been discussed by the parties.[10]

[8] OPC Ex. 4 - August 1, 2002 Hr'g Tr. at 194-196.
[9] Chief Hearing Examiner Mosier was sitting on the three-judge panel to provide a quorum for the Commission. Mr. Chapman was WGL's Vice President, Regulatory Affairs and Energy Acquisition.
[10] OPC Ex. 4 - August 1, 2002 Hr'g Tr. at 263-265.

8. Following the hearing, the parties submitted a "Revised Stipulation and Settlement," which added the reporting requirement, raised by Commissioner Curran and agreed to by WGL, to what had previously been paragraph 10 (now paragraph 11). That additional language provided that "[t]he Company further commits to file a status report on the mercury regulator change out program on an annual basis commencing twelve months after this Stipulation is approved. The reports will continue to be filed until the change out program has been substantially completed."[11]

9. On March 31, 2003, WGL filed a new base rate case, which the Commission docketed as Case No. 8959.[12] The matter was delegated to the Hearing Examiner Division, and was presided over by Hearing Examiner Allen Freifeld.

10. In Case No. 8959, WGL provided the written testimony of Mr. Hardeep Rana, WGL's Chief Engineer. Mr. Rana described the ongoing MSR Replacement Program ("MSRRP"), stating that "[t]he Company has developed an implementation plan to replace mercury regulators at a rate of approximately 550 units per month in Maryland beginning in May 2003."[13]

11. In his Proposed Order in Case No. 8959, Hearing Examiner Freifeld noted that WGL had updated its expense adjustment to $654,000 to reflect the "anticipated level of annual, on-going operation and maintenance expense during the ten-year program

[11] OPC Ex. 5 – "Revised Stipulation and Settlement" at 7.
[12] *In the Matter of the Application of Washington Gas Light Company for Authority to Increase Existing Rates and Charges for Gas Service and to Implement an Incentive Rate Plan* (March 31, 2003).
[13] OPC Ex. 8 - Case No. 8959, Rana Direct at 14.

period."[14] Hearing Examiner Freifeld accepted this adjustment, and no party appealed the Proposed Order.[15]

III. FLOWER BRANCH EXPLOSION

12. On August 10, 2016, a natural gas-fueled explosion and fire partially collapsed a 14-unit apartment building located at 8701 Arliss Street in Silver Spring, Maryland, causing the deaths of seven residents and injuries to 65 others as well as three firefighters. The NTSB investigated this accident and issued its "Pipeline Accident Report" on June 10, 2019, which concluded that the probable cause of the explosion was the failure of an indoor MSR with an unconnected vent line. WGL disputes the findings in the NTSB's report.

13. Pursuant to 49 U.S.C. §1154(b), the Commission concluded that the NTSB Report could not be used as evidence in this Show Cause Proceeding.[16] However, this incident demonstrated that WGL had failed to complete its MSRRP in the 14 years since the Settlement was approved in Case No. 8920. In response to the Commission's inquiry into the status of the MSRRP, WGL has submitted a going-forward replacement program for the remaining mercury regulators, which it urges the Commission to approve.[17] Although the cost of this program is not currently known, WGL proposes to replace all remaining MSRs in Maryland within five years of completing an MSR survey.

14. On April 29, 2020, the Commission issued its Notice of Evidentiary Hearing to address the outstanding issues regarding past and future replacement of WGL's MSRs,

[14] OPC Ex. 10 - Case No. 8959, September 11, 2003 Proposed Order at 58.
[15] *Id.* at 59.
[16] Order No. 89550 at 5-6.
[17] WGL still is not sure how many mercury regulators exist and has proposed a program to survey and identify that number.

and whether the imposition of civil penalties is warranted for any non-compliance. On September 24-25, 2020, the Commission held an evidentiary hearing and subsequently allowed the parties to submit post-hearing briefs.

IV. POSITIONS OF THE PARTIES

A. WGL

1. Compliance with WGL's Replacement Program

15. WGL argued that, largely due to environmental risks, it has proactively attempted to replace all MSRs since the early 2000s. The Company claimed that its replacement program was voluntary and was included in its 2002 and 2003 base rate case as an appropriate cost of service item.[18] WGL also claimed that the language in the Settlement did not create a commitment on behalf of the Company, that instead it was a statement of intent.

16. Throughout the course of these proceedings, WGL also repeatedly characterized its proposed 10-year replacement program as a "plan" rather than a "commitment." Based upon WGL's interpretation of the 10-year plan to replace all MSRs, WGL argued it was within its operational discretion to divert resources away from the MSRRP when it experienced a safety concern involving a significant increase in natural gas leaks in Prince George's County.

17. WGL noted that the "Revised Stipulation and Settlement" in Case No. 9020 contained no tracker or the creation of a regulatory asset. WGL contends that this is evidence that WGL retained the discretion to spend resources on more serious safety

[18] WGL Ex. 6, Reed Direct at 9-10.

issues.[19] Specifically, WGL witness Reed testified that "[t]he use of actual funds derived from the provision of service is subject to management discretion and its responsibility to provide safe and efficient, and economical service."[20] Mr. Reed explained that any alternative conclusion would force a utility's management to spend funds unwisely, possibly resulting in increased safety risks, a problem that would be amplified the longer a utility went without filing a rate case.[21]

18. WGL witness Murphy went further and suggested that, not only did WGL have discretion to redirect funds, but it may have been obliged to do so to comply with its obligation to provide safe and reliable service.[22] Mr. Murphy also testified that the absence in the record of any evidence that MSRs are less safe than spring-loaded regulators further supports WGL's decision to address a significant increase in gas leaks at the expense of the MSRRP.[23]

19. WGL references the specific language in the "Revised Stipulation and Settlement Agreement" submitted to the Commission on August 6, 2002 in Case No. 8920. That language stated that "[t]he Company intends to complete the change out. The current plan is to complete the program as set out in Company [w]itness Cook's Direct Testimony." According to WGL, that language is insufficient to create a contract between the settling parties under Maryland law because the mere intention to perform an act does not create a contractual obligation to perform it.[24] To the extent there was any ambiguity as to the binding nature of the language in the "Revised Stipulation and

[19] *Id.* at 4.
[20] *Id.* at 10.
[21] *Id.* at 12.
[22] Murphy Direct at 8.
[23] *Id.*
[24] WGL Initial Brief at 7-10, esp. FN 28, citing *Rios v. State*, 186 Md. App. 354, 361 (2009).

Settlement", WGL contends that the Commission should not interpret the ambiguity as a binding commitment retroactively.[25]

20. WGL also pointed out that its subsequent rate cases – Case Nos. 8959 and 9104 – do not reference that a stated commitment had been created in Case No. 8920. WGL states that neither Staff's nor OPC's cost of service witnesses in those cases mentioned any commitment by WGL to replace MSRs. WGL claimed this omission is even more notable because WGL filed a rate application in Case No. 8959 only six months after the Commission approved the "Revised Stipulation and Settlement".[26]

21. WGL also pointed out that both OPC and Staff witnesses conceded that WGL had some discretion to adjust the details of the MSRRP as higher priorities arose. WGL contends that this concession comports with WGL's position, with the only remaining issue being the amount of such discretion.[27] Although WGL conceded that it would have been reasonable to expect that it would notify the Commission of a decision to redirect funds, this fact does not "convert the revenues into earmarks."[28]

22. WGL also contended that it never collected revenues from customers that were specifically earmarked for the MSRRP and that its customers received value for all revenues collected through rates. Specifically, Witness Reed testified:

> The rate setting process does not transform revenues derived from the provision of service into specific line-item "appropriations" that must be earmarked specifically for that line-item expense. Stated differently, revenues collected are utilized by the Company to provide safe and reliable utility service to customers, and their use reflects the exercise of management judgment.[29]

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[25] Hr'g Tr. 296:17-19 (Tuoriniemi).
[26] WGL Initial Brief at 13.
[27] Reed Direct at 14; WGL Initial Brief at 15-16.
[28] *Id.*
[29] Reed Direct at 4.

2. Proposed Civil Penalty

23. WGL accepted that the record in this case justifies a civil penalty for failure to file the annual reports referenced in the "Revised Stipulation and Settlement Agreement." However, based upon the arguments set forth above, WGL asserted that the proper exercise of its discretion in diverting funds from the MSR Replacement Program does not warrant any civil penalty under Md. Code Ann., Public Utilities Article ("PUA") *Annotated Code of Maryland,* §13-201 because WGL did not commit any other violation.

24. Additionally, WGL contrasted the $1 million civil penalty that the Commission imposed upon Pepco based upon a large increase in power outages that caused significant additional costs on ratepayers. In the present case, WGL asserted that it has replaced 86% of the estimated 42,745 indoor MSRs in Maryland, and its slower pace of replacement has not imposed any additional costs on ratepayers.[30]

25. WGL stated that under PUA §13-201(d), the Commission "shall" consider various factors when choosing whether a civil penalty is warranted. Specifically, that provision requires the Commission to consider four factors: (1) the number of previous violations; (2) the gravity of the current violation; (3) the good faith efforts of WGL to achieve compliance after notification of the violation; and (4) any other issue the Commission considers appropriate and relevant. WGL contends that all four factors support its contention that no civil penalty is warranted with respect to the completion of its MSR Replacement Program.

[30] WGL Initial Brief at 19-20. However, WGL remains unclear as to how many MSRs remain on its system and reports that it is in the process of conducting an investigation to make that determination.

26. Regarding the first penalty factor, WGL noted that both witness Murphy and Staff witness Valcarenghi testified that they were unaware of any prior violations by WGL.[31] Regarding the second penalty factor, WGL stated that MSRs pose no danger to customers, whereas the natural gas leaks that occurred in Prince George's County in 2003 constituted a potentially grave danger requiring immediate attention.[32]

27. WGL again noted that it received no undue compensation from revenues the Commission approved for its MSR Replacement Program, and has apparently completed over three-quarters of the proposed replacements. Further, WGL noted that it completed the MSR replacements at a lower cost than was originally anticipated.[33]

28. Finally, WGL observed that its 2020 replacement program satisfies the third penalty factor set forth in PUA §13-201(d)(3). WGL argued that its recent replacement program includes an expedited schedule that goes beyond its original program in that it targets *all* MSRs as opposed to only indoor MSRs.[34] Thus, WGL argued that the Commission should recognize its good faith response to the original show cause order.

29. WGL conceded that it failed to file the annual reports required by the MSRRP. According to WGL, its failure to file these reports ended with the filing of Case No. 9104, which occurred four years after Case No. 8959. Although Case No. 8959 did not explicitly address the requirement to file these annual reports, WGL acknowledges that it should have at least confirmed that the Commission no longer required these reports.[35]

[31] Murphy Direct at 8-9; Hr'g Tr. at 438 (Valcarenghi).
[32] Murphy Direct at 9.
[33] WGL Initial Brief at 22-23.
[34] Hr'g Tr. 243-244 (Murphy).
[35] WGL Initial Brief at n. 92.

30. PUA §13-205 provides for a civil penalty of $100 for each day after 30 days that a utility fails to file a required report with the Commission. This amounts to $36,500 per year, and WGL therefore proposed a fine of $146,000 for its failure to a report ($36,500 per year for four years).[36]

3. WGL's Proposed 2020 MSR Replacement Program

31. WGL now seeks Commission approval of its proposed MSR replacement program. Under that Program, WGL proposes to issue two requests for proposals, the first to survey the remaining number of MSRs on its system, and the second to initiate removal of multi-family unit MSRs within three years (as of the end of the survey) and the removal of all other MSRs within five years (of the end of the survey).[37]

32. At present, WGL was unable to provide the Commission with an estimated cost of its replacement program. As a result, WGL did not object to Staff's recommendation that the Commission conditionally approve the program, pending updated estimates. WGL further committed to working with Staff and OPC regarding appropriate reporting requirements as the program unfolds.[38]

B. OPC

1. Compliance with WGL's Replacement Program

33. OPC argued that the 2002 "Revised Stipulation and Settlement" constituted a commitment by WGL to replace all indoor MSRs within a 10-year period. After describing the proceedings in Case Nos. 8920 and 8959, OPC argues that WGL not only failed to complete the program in a timely manner, but still has yet to complete the

[36] Reed Direct at 18; WGL Initial Brief at 25.
[37] Hr'g Tr. 263 (Jackson).
[38] *Id*. at 265 (Jackson).

program. Additionally, OPC noted that WGL does not know how many MSRs remain to be replaced, thus requiring WGL's survey.[39]

34. Contrary to WGL, OPC maintained that the representations WGL made to the Hearing Examiner and the Commission in Case Nos. 8920 and 8959 were commitments to complete the program and make the associated reports. At the very least, according to OPC, WGL should have requested permission from the Commission (and possibly the other settling parties) before unilaterally changing the terms of the parties' settlement.

35. OPC argued that "either WGL has continuously failed to meet its statutory duty to provide 'equipment, services, and facilities' or that WGL's representations to the Commission regarding the need for the program were overstated."[40]

36. OPC argued that failing to hold WGL accountable for representations made during two base rate proceedings would significantly undermine the regulatory process. Such an outcome would send a message to utilities that there will be no consequences for failing to comply with representations they make during regulatory proceedings.[41] Similarly, the Commission would be unable to exercise its oversight function pursuant to, among other provisions, PUA §2-113 if it cannot rely upon these representations.

37. Additionally, OPC argued that the 2002 "Revised Stipulation and Settlement" represented the negotiated compromise of four parties. According to OPC, the provisions were not severable, and WGL's decision to deviate from its settlement obligations violated the terms of that settlement. If WGL's position is allowed, parties will be unable

[39] OPC Initial Brief at 9, citing Jackson Direct at 7.
[40] *Id*. at 11.
[41] Larkin-Connolly Direct at 21.

to negotiate similar future settlement agreements if a utility may rely on "operational discretion" to conclude a particular term of the agreement is non-binding.[42]

38. Regarding WGL's failure to submit annual reports as required by the "Revised Stipulation and Settlement Agreement", OPC agreed that WGL is in violation. However, OPC argued that the failure to submit the required reports did not end with Case No. 9204, but continues to today because WGL has still not completed the MSRRP. OPC witness Brendan Larkin-Connolly previously testified that WGL's response to the Commission's Show Cause Order arguably constituted a report to the Commission on the status of the program. Using Mr. Larkin-Connolly's methodology, WGL violated PUA §13-205 for 5,446 days. Penalizing WGL the statutory $100 per day would thus result in a civil penalty of $544,600.[43]

2. Proposed Civil Penalty

39. As noted above, OPC recommended a proposed penalty of $544,600 for WGL's failure to report. Additionally, OPC recommended an additional penalty in the amount of at least $1 million pursuant to PUA §13-201 for its failure to complete the MSRRP in a timely manner.[44] OPC based this proposed penalty on the need to maintain the integrity of the regulatory process as well as the sanctity of settlement agreements presented to the Commission.

40. OPC argued that such a significant penalty is also warranted by the language of PUA §13-201. Section (b) of that provision provides that the Commission may impose a

[42] OPC Initial Brief at 11, citing ¶s 14 and 16 of the "Revised Stipulation and Settlement."
[43] Connolly Direct at 13-14.
[44] Larkin-Connolly calculates this amount by subtracting the amount actually spent on MSR replacement between 2003 and 2007 ($1,592,864) from the post-test year adjustment in Case No. 8959 over the next four years ($2,616,000 – four years x the adjustment of $654,000). The difference is $1,023,136, which OPC rounded down to $1 million.

civil penalty against a utility that "violates a provision" of the PUA or "an effective and outstanding direction, ruling order, rule or regulation of the Commission." Relying largely on PUA §13-201(d), which grants the Commission discretion to consider "any other matter that the Commission considers appropriate and relevant", OPC argued the Commission should exercise that discretion and impose a $1 million penalty in light of the significance of WGL's neglect of its original promises regarding the MSRRP.[45] Adding both proposed civil penalties, OPC asked the Commission to impose a civil penalty of at least $1.54 million in this case.[46]

3. WGL's Proposed 2020 MSR Replacement Program

41. OPC recommended six adjustments to the replacement program submitted by WGL:

> (1) Within 30 days of a final order, WGL must submit a confidential list of all residences that either likely have MSRs or are known to have MSRs;
>
> (2) WGL must resume annual status reports as of 2020;
>
> (3) WGL must update its list of possible MSR locations as the survey progresses;
>
> (4) WGL must maintain accounts of all capital and operating expenses, including any incremental costs related to the MSR Replacement Program;
>
> (5) WGL shall include these expenses in its annual status report;
>
> (6) WGL should record all customer requests to remove an MSR from their homes.[47]

[45] OPC Initial Brief at 13.
[46] Larkin-Connolly Direct at 24-27.
[47] *Id.* at 31-32.

42. Additionally, OPC recommended the Commission impose certain timelines, including specifically identified penalties for failure to meet these timelines.[48] Finally, OPC argued that the Commission either hold that WGL ratepayers shall not be liable for the costs of the MSRRP or defer the question until a future rate case.[49]

C. Staff

1. Compliance with WGL's Replacement Program

43. Staff agreed with OPC that WGL made a firm commitment to replace all MSRs within a 10-year period. Staff noted that the reporting requirement is contained within the same paragraph of the "Revised Stipulation and Settlement" as the language reflecting WGL's intent to complete the MSRRP within 10 years. Staff also noted that WGL concedes the reporting requirement to be a commitment and argues that the language immediately preceding the reporting requirement should be interpreted no differently.

44. Staff disputed WGL's attempt to distinguish between the language of the "Revised Stipulation and Settlement" and firm commitments such as those that attach to orders by the Commission approving a proposed merger under PUA § 6-105. Citing Merger Commitment 10A from the Commission's approval of the purchase of WGL by AltaGas Ltd., Staff noted that the language of this undisputed commitment is similar to that of the provision creating the MSRRP.[50] Commitment 10A only stated that AltaGas and WGL would "work with" MEA regarding additional natural gas expansion proposals.

[48] *Id.* at 33-34.
[49] OPC Initial Brief at 20-21.
[50] Staff Initial Brief at 9-10.

45. Staff also criticized WGL for deviating from its MSR Replacement Program without notifying the Commission and obtaining consent to do so. Like OPC, Staff also believes the Commission should impose a civil penalty for WGL's failure to comply with its reporting requirements.

2. Proposed Civil Penalty

46. Staff recommended the Commission impose a total civil penalty of $1,870,500. Of this amount, Staff recommended a penalty of $620,500 for WGL's failure to file timely annual reports and $1.25 million for failure to complete the MSR Replacement Program in 10 years. Staff calculated that WGL failed to file its annual report for 17 years (17 x $36,500 per year = $620,500).

47. Staff noted that PUA §13-201 permits a maximum penalty of $25,000 per day for any violation of that statute. Staff then calculates that WGL is seven years late in complying with its MSRRP. Therefore, Staff concluded that the maximum penalty in this case is $63.875 million.[51] Staff did not recommend a penalty of this magnitude, but concludes that a penalty of $25,000 per day for 50 days is appropriate. This results in Staff's recommendation of a penalty in the amount of $1.25 million in addition to $620,500 for failure to file reports.

3. WGL's Proposed 2020 MSR Replacement Program

48. Staff, similar to OPC, recommended the Commission approve WGL's proposed MSR replacement program going forward, but with four modifications:

> (1) WGL shall provide the Commission with an update on projected and annual costs within 60 days of completing their one- and three-year surveys;

[51] *Id.* at 18.

(2) Within 30 days of commencing its survey, WGL shall notify the Commission of the date of commencement;

(3) The Commission should require WGL to file annual reports by February 10 of each year as to the status of its program;

(4) The Commission should require WGL to work with the Commission's Consumer Affairs Division and Engineering Division to adopt an MSR Replacement Program customer notification and service termination process.[52]

D. AOBA

1. Compliance with WGL's Replacement Program

49. AOBA argued that the Commission should impose a civil penalty for WGL's failure to comply with the MSR Replacement. After noting the Commission's extensive and exclusive authority to regulate utilities in Maryland, AOBA observed that traditional ratemaking principles and management discretion cannot supersede the Commission's regulatory authority.[53] AOBA therefore argued that WGL improperly failed to notify the Commission of its intent to prioritize its funding differently than had been shared with the Commission.

50. AOBA criticized several WGL witnesses who testified that WGL's operational decisions are not subject to retroactive review by the Commission.[54] AOBA argued that this position causes the utility, rather than the Commission, to determine the "public interest" in Maryland. AOBA also argued that providing notice and seeking permission from the Commission to re-prioritize their funding would have at least notified the Commission and interested parties that the MSRRP was not proceeding at the expected

[52] Clementson Direct at 3-4. In part, this process intends to address the appropriate means of addressing those customers with indoor MSRs who refuse to provide WGL with access to them.
[53] AOBA Initial Brief at 9.
[54] *Id.* at 10-11, referencing the testimony of WGL Witnesses Reed, Tuoriniemi and Murphy.

pace.[55] AOBA agreed with Staff witness Clementson's testimony that "if emerging priorities required reprioritization, then the Company should have sought relief from the Commission to alter its commitment."[56]

51. Like OPC witness Larkin-Connolly, AOBA argued that WGL has day-to-day discretion to allocate resources without necessarily requiring Commission approval. AOBA noted, however, that WGL failed to notify the Commission over a 16-year period that a Commission-approved program had been significantly altered. Under the facts of this case, AOBA argued that WGL acted unreasonably. AOBA concluded that "if a 16-year delay in notifying the Commission of the reallocation of ratepayer funds is not actionable – then no delay is actionable."[57]

52. AOBA argued—alternatively—that the Commission should penalize WGL for failure to complete its MSRRP by adjusting the Company's approved rates in the next rate case "to reflect the unreasonable deferral of the completion of the program as a penal alternative."[58] AOBA cited several cases that hold ratepayers should not be required to pay for negligent or inefficient use of operating expenses.[59]

53. AOBA also agreed with all parties that the Commission should assess a civil penalty for WGL's refusal to submit annual reports as to the status of the MSR Replacement Program. AOBA referenced the language of the "Revised Stipulation and Settlement", which stated that the "reports will continue to be filed until the change out program has been substantially completed." AOBA therefore rejected WGL's suggestion

[55] *Id.* at 11-12.
[56] Clementson Direct at 6.
[57] AOBA Initial Brief at 15.
[58] *Id.* at 18.
[5959] *See e.g. West Ohio Gas Co. v. Ohio Public Service Commission*, 294 U.S. 63, 67-68 (1938) ("A public utility will not be permitted to include negligent or wasteful losses in its operating expenses.")

that the failure to reference the reporting requirement in subsequent rate cases dissolved its obligation.

2. Proposed Civil Penalty

54. AOBA agreed with Staff's calculation of the appropriate penalty the Commission should assess pursuant to PUA §13-205, noting that WGL filed its only status report on October 20, 2003. As of October 20, 2020, AOBA argued that PUA §13-205 requires a penalty of $620,500.

V. COMMISSION DECISION

A. Compliance with WGL's Replacement Program and Imposition of Civil Penalties

55. PUA § 2-113(a) requires the Commission to "supervise and regulate" utilities to "1. ensure their operation in the interest of the public; and 2. promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination…". In exercising this power, PUA §13-201(a) and (b) state that the Commission "may" impose a penalty not to exceed $25,000 per day against a person that "violates a provision of this division, or an effective and outstanding direction, ruling, order, rule, or regulation of the Commission." PUA §13-201(d) then lists four factors that the Commission shall consider in determining whether to impose a penalty under that provision.

56. First, the Commission finds that the MSR Replacement Program as outlined in the "Revised Stipulation and Settlement" in Case No. 8920 constituted a binding commitment by WGL to remove all indoor MSRs within 10 years. The language of the Settlement explicitly supports such a conclusion with Paragraph 11 of the Settlement

describing the replacement program agreed to by the Settling Parties, and stating that WGL "further" commits to file annual status reports. If this provision of the Settlement was not a commitment, then the word "further" would be superfluous. Maryland law does not permit a reading of contract language that renders words superfluous.

57. Second, it is critically important that the Commission be able to rely upon the representations made to it by utilities in order to effectively perform its regulatory oversight. WGL's commitment to complete the MSR Replacement Program occurred in the context of a settlement agreement between four parties. That agreement, which is a contract, referred to the removal of MSRs, as stated in the testimony of WGL witness Richard Cook – then WGL's Vice President of Construction and Technical Support.

58. Mr. Cook testified that WGL developed the MSR Replacement Program to remove the MSRs in Maryland because they were between 40-60 years old and the EPA had expressed concerns with MSRs containing mercury being located in homes.[60] Mr. Cook also provided a description of the projected costs, resources and the procedures necessary to remove the MSRs.[61]

59. WGL witness Kline also confirmed that WGL will complete the program as described by Mr. Cook. Mr. Kline confirmed that the proposed adjustment to WGL's rate base reflected "one tenth of the cost of the program".[62] The Commission's ultimate approval of the Settlement included the assumption that the full MSR Replacement Program would therefore be completed in 10 years.

[60] OPC Ex. 1 - Case No. 8920, Cook Direct at 13.
[61] Cook Direct at 13-14.
[62] OPC Ex. 2 - Case No. 8920, Kline Rebuttal at 33.

60. In 2002, Chief Hearing Examiner Mosier explicitly asked WGL witness Chapman whether there would or could be any changes to the program or whether the program "will be implemented" as outlined in Mr. Cook's testimony. Mr. Chapman responded: "Yes. That's how it has been discussed by the parties."[63]

61. WGL thus unambiguously represented to the Commission, as well as to the settling parties, that the removal of the MSRs over a 10-year period was a commitment WGL would honor. After adding the annual reporting requirement, the Commission relied upon these representations in ultimately approving the "Revised Stipulation and Settlement."[64]

62. At a minimum, WGL was required to notify the Commission, either informally or through the mandatory annual reports, if unforeseen circumstances might require adjustments to the original timeline. Specifically, the commitment by WGL to provide annual reports to the Commission was to continue until such time when removal of all MSRs had been "substantially completed."[65]

63. In March 2003, approximately six months after Case No. 8920, WGL filed another rate case (*i.e.*, Case No. 8959). In that case, WGL confirmed that the MSR Replacement Program was ongoing. WGL's Chief Engineer – Mr. Hardeep Rana – testified that "[t]he Company has developed an implementation plan to replace mercury regulators at a rate of approximately 550 units per month in Maryland beginning in May, 2003."[66]

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[63] OPC Ex. 4 – Case No. 8920, Aug. 1, 2002. Hr'g Tr. at 265.
[64] Order No. 78041 at 12-13.
[65] "Revised Stipulation and Settlement" at 7.
[66] OPC Ex. 8 – Case No. 8920, Rana Direct at 14.

64. However, WGL now argues that it needed to deviate from its commitment to replace the MSRs to address a more pressing concern involving a surge in natural gas leaks that occurred in Prince George's County beginning in the fall of 2003. WGL explains that these unexpected leaks required the diversion of resources, including qualified technicians, from lower priority commitments, including the replacement of MSRs.[67] While the Commission opened Case No. 9035 in April 2005 to review WGL's response to these leaks, at no time did WGL inform the Commission that it was addressing these leaks at the expense of its commitment to the MSR Replacement Program.

65. The Commission understands the urgency that WGL faced in Prince George's County, and even OPC concedes that the unexpected safety risk associated with the leaks would have justified a temporary halt or reduction in MSR replacement. However, neither the Commission nor any party was made aware that WGL's actions to address the leaks would adversely affect the completion of MSR Replacement Program in any way.

66. The Commission finds that WGL's failure to file annual status reports since 2003 clearly constitutes a reporting violation subject to a civil penalty. Staff and OPC recommend a penalty under PUA §13-205 based on a single report being 17 years late. However, the Commission notes that the reporting requirement contained in the settlement was an ongoing and *annual* requirement. Thus, the Commission finds – as of the date of the evidentiary hearing in this case – that there are in fact 17 reports that are late by a cumulative total of 55,845 days. Under PUA §13-205 the maximum total penalty is $5,584,500. However, the Commission finds that this amount would constitute

[67] WGL Initial Brief at 4.

an excessive penalty for WGL's failure to timely report in this case. Instead, the Commission determines that it is appropriate to fine WGL for late reports totaling 7,500 days, resulting in a penalty of $750,000. The Commission declines to impose a fine under PUA §13-201.

B. WGL's Proposed 2020 MSR Replacement Program

67. WGL, OPC, and Staff request that the Commission approve WGL's 2020 MSR Replacement Plan, with Staff and OPC seeking additional reporting requirements. The Commission concludes that WGL's proposed program as outlined, and as we expand upon below, is in the public interest. The Commission therefore accepts WGL's new replacement program with the following conditions: (1) WGL shall provide the Commission with an update on projected and annual costs within 60 days of completing its one- and three-year surveys; (2) within 30 days of commencing its survey, WGL shall notify the Commission of the date of commencement; (3) WGL shall file annual reports by February 10th of each year as to the status of its program; and (4) WGL shall work with the Commission's Consumer Affairs Division and Engineering Division to adopt an MSR Replacement Plan customer notification and service termination process as discussed in Staff witness Clementson's direct testimony.

68. Additionally, the Commission adopts OPC's recommendation and directs WGL to: (i) maintain accounts of all capital and operating expenses, including any incremental costs related to the program; (ii) include these expenses in its annual status report; and (iii) record and maintain a list of all requests to remove an MSR from residential properties.

69. The Commission does not adopt OPC's proposal that the Commission adopt firm interim guidelines with pre-determined penalties for failure to meet these guidelines. The Commission, however, retains discretion to address any timeliness issues as they arise and determine the appropriate response.

70. The Commission will not address prudency or recovery of costs associated with this new MSR replacement program since projected costs are not available at this time. The Commission will conduct a prudency review in a future rate case.

IT IS, THEREFORE, this 18th day of December, in the year Two Thousand Twenty by the Public Service Commission of Maryland,

ORDERED: (1) Washington Gas Light Company is hereby assessed a fine of $750,000 pursuant to PUA §13-205, to be remitted within 15 business days of the date of this Order; and

(2) Washington Gas Light Company's proposed 2020 MSR Replacement Program is hereby accepted subject to the conditions set forth herein. Additionally, all decisions regarding recovery of costs incurred in the implementation of this Program shall be addressed in a future rate case.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman

Commissioners

Concurring Statement of Commissioner Michael T. Richard

1. I largely concur with the Commission's decision in this case involving an August 10, 2016 natural gas-fueled explosion in Silver Spring, Maryland, resulting in multiple injuries and fatalities. However, I am persuaded by the testimonies of Staff and the OPC that the gravity of WGL's failure to fulfill its commitment to complete its MSRRP, not simply failing to file the annual reports that were required, is the most serious of the Company's infractions in this case. In my opinion, the Company's failure to complete the MSRRP warrants a separate civil penalty in addition to a failure to report penalty, as recommended by both Staff and OPC.

2. While I join the Majority in finding that WGL made commitments in Case Nos. 8920 and 8959, and the explicit rejection of WGL's claims to the contrary, I find OPC witness Larkin-Connolly's testimony compelling – that it is the Company's "not meeting commitments made to the Commission and to its customers ... to be at the hearts of this case."[1] As OPC argued, the Company made "firm representations to the Commission in two separate cases" and "[n]ot only did WGL not complete the MSRRP within 10 years, the Company abandoned the effort to such a degree that [WGL] still cannot ... inform the Commission how many MSRRPs it replaced in Maryland or how many it needs to replace."[2]

[1] OPC Ex. 15 (Direct Testimony Brendan Larkin-Connolly) at 19.
[2] *Id*.

3. I agree with OPC's conclusion that the Company's neglect of its commitments "necessitates a penalty,"[3] because "... at its core, the issue here is to maintain the proper functioning of the regulatory process in Maryland.[4]

4. In Case Nos. 8920 and Case 8959, the Commission increased the Company's base rates at WGL's request, specifically to support the Company's proposed MSRRP. Thus, whether or not the Company's request is termed an "earmark," I believe that WGL customers can rightfully expect that the rates they were and are charged for WGL services do include the necessary funding for the MSSRP.

5. For these reasons, I believe this case would warrant the Commission assessing WGL two separate penalties, one for failing to complete its MSRRP as the Company committed to in Case Nos. 8920 and Case 8959, and another penalty—the one assessed by this Order—for failing to file annual reports regarding the Company's progress as was required.

6. Additionally, in the Commission's Order Denying OPC's Motion for Reconsideration (Order No. 89550), the Commission noted that this would be a "narrowly-focused" proceeding to examine six specific items regarding WGL's MSRRP. However, in footnote 3, the Commission added "Of course, in examining these issues, the Commission will implicitly consider whether WGL has exercised reasonable care to protect the public safety, as obligated under statute and regulation."[5]

7. While I dissented from the Majority decision denying OPC's Request for Reconsideration, based on Paragraph 2 of that order and footnote 3, I anticipated that

[3] Direct Testimony of Brendan Larkin-Connelly, OPC Ex. 15 at 19; *see* PUA § 13-201(b).
[4] Direct Testimony of Brendan Larkin-Connelly, OPC Ex. 15 at 20.
[5] Order 89550 at 2, n.3.

during the hearing the Commission would have explored public safety concerns to a greater extent – in connection with WGL's failure to complete the MSRRP.

8. In this Order, the Commission acknowledges the "urgency" WGL placed on remediating natural gas leaks experienced in Prince George's County—the Company's remediation response reviewed by the Commission in Case No. 9035—however, as OPC noted "the Company could [and should] have sought direction from the Commission on the management of MSR replacements among competing safety issues, but remained silent on this issue."[6]

9. In light of the Flower Branch incident and WGL's failure to apprise the Commission regarding reprioritizing its programs, I remain convinced that further attention should have been given to the public safety deficit associated with WGL's failure to complete the MSRRP.

/s/ Michael T. Richard
Commissioner

[6] Direct Testimony of Brendan Larkin-Connelly, OPC Ex. 15.