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.
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> 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.
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> 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?
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> 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.
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> 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]

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[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.