

ORDER NO. 89577

Investigation of Washington Gas and
Light Company Regarding a Building
Explosion and Fire in Silver Spring,
Maryland, on August 10, 2016

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9622

Issue Date: July 15, 2020

ORDER DENYING MOTION FOR RECONSIDERATION

1. On April 29, 2020, the Commission issued Order No. 89550, setting forth a list of issues to be addressed at a future evidentiary hearing. That Order reviewed the extensive pleadings of the parties in response to the Commission’s September 5, 2019 Show Cause Order, and concluded that the only issues requiring an evidentiary hearing (and the possibility of sanctions) involve the extent to which Washington Gas Light Company (“WGL”) complied with its 2003 commitment to replace all existing mercury service regulators over a period of ten years (the “Mercury Replacement Program” or “MRP”).
2. The Commission also determined that the evidentiary hearing would not address any issues regarding the cause of the August 10, 2016 explosion or the findings contained in the Pipeline Accident Report issued by the National Transportation Safety Board (“NTSB Report”) on June 19, 2019.¹ The Commission’s determination resulted from the fact that the NTSB Report cannot be lawfully admitted in the Commission’s evidentiary

¹ Order No. 89550 at ¶ 12.

proceeding pursuant to Federal law.² The Commission also acknowledged that the NTSB’s extensive three-year investigation into the explosion officially concluded with the issuance of its report and recommendations, and that all claims related to the explosion have been settled. In recognition of these facts, the Commission ordered a narrowly-focused evidentiary hearing to examine six specific items regarding WGL’s replacement of mercury regulators in its service territory in Maryland.³

OPC’s Motion for Reconsideration

3. On May 29, 2020, Office of People’s Counsel (“OPC”) requested that the Commission reconsider Order No. 89550, contending that the NTSB Report is admissible in regulatory proceedings. OPC contends that the plain language of 49 U.S.C 1154(b) only prohibits the use of an NTSB Report in a civil action for damages. OPC cites Black’s Law Dictionary to define “Damages” as “money claimed by, or ordered to be paid to, a person as compensation for loss or injury.” OPC argues that because the current proceeding does not involve the possibility of a payment for damages, the Commission erred in relying upon § 1154(b) in its Notice of Evidentiary Hearing.⁴

4. OPC distinguishes 49 C.F.R. 835.2 of the NTSB’s regulations on similar grounds. That regulation prohibits use of an NTSB report in a “suit or action for damages.” According to OPC, even if the Commission’s proceeding qualifies as an “action”, no “damages” will result.⁵ Therefore, OPC argues that this regulation also does not prohibit the Commission from relying upon the NTSB Report.

² *Id.* at ¶ 11-12.

³ *Id.* at ¶ 13. 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.

⁴ Maillog No. 230504 (“OPC Motion”) at 2.

⁵ OPC Motion at 3.

5. In support of its belief that § 1154(b) does not absolutely bar an NTSB Report from Commission proceedings, OPC also refers to an opinion by the California Public Utilities Commission (“CPUC”), which involved a gas main explosion in San Bruno, California in 2010 in which the CPUC relied in part upon an NTSB Report in determining the cause of the explosion.⁶

6. As an alternative to relying upon the NTSB Report, OPC contends that Public Utilities Article (“PUA”), *Annotated Code of Maryland*, § 2-113(a)(1) requires the Commission to broadly regulate public service companies as to their safe and efficient provision of service to the public. OPC contends that in exercising this function, the Commission often relies upon its Technical Staff, including its Pipeline Safety Program Group.⁷ In the present case, Commission Staff participated in the NTSB investigation, and OPC claims that “the NTSB’s analysis and findings are an integral part of Staff’s assistance to the Commission.”⁸ In support, OPC cites Staff’s November 18, 2019 Comments: “Staff believes the NTSB did provide an independent and objective accident investigation and accepts the NTSB’s probable cause determination....”⁹

WGL’s Response

7. On June 9, 2020, WGL responded and asked the Commission to deny the Motion. As an initial matter, WGL refers to PUA § 3-203, which states that a decision of the Commission is “prima facie correct” unless it can be “clearly shown” to suffer from one

⁶ *Id.* at 4, citing *Order Instituting Investigation on the Commission’s own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Law, Rules and Regulations in Connection with San Bruno Explosion and Fire on September 9, 2010*, 2012 WL 252505 (Cal. P.U.C.) (January 12, 2012).

⁷ OPC Motion at 6-7.

⁸ *Id.* at 7.

⁹ *Id.*

of six statutorily listed defects.¹⁰ WGL claims that OPC provides no evidence that Order No. 89550 suffers from any of these defects, or even acknowledge the existence of PUA § 3-203 in its motion. WGL contends that the Commission acted well within its discretion in concluding to limit the evidentiary hearing to the issues enumerated in paragraph 13 of Order No. 89550.

8. WGL also claims that OPC's legal arguments are not properly before the Commission. On two occasions before the issuance of Order No. 89550, WGL claims that it provided the Commission with its legal authority demonstrating that the NTSB Report is inadmissible, and that OPC never responded to these arguments despite ample opportunity to do so. WGL cites a Maryland federal District Court case for the proposition that a motion for reconsideration of a final judgment may not contain original arguments for the first time.¹¹ WGL cites this case for the proposition that a party may not unilaterally defer briefing on an issue until after judgment.

9. WGL also claims that Maryland's evidentiary standards support the inadmissibility of the NTSB Report. Citing basic due process protections, WGL claims the admissibility of the NTSB Report would deny due process to WGL.¹²

10. Finally, WGL claims that OPC mischaracterizes several of its legal arguments. First, WGL claims that OPC neglects to address the federal regulations upon which WGL

¹⁰ Maillog No. 230643 ("WGL Response") at 1-2. Those defects are that the Order is (1) unconstitutional; (2) outside the statutory authority or jurisdiction of the Commission; (3) made on unlawful procedure; (4) arbitrary or capricious; (5) affected by other error of law; or (6) if the subject of review is an order in a contested proceeding after a hearing, unsupported by substantial evidence on the record considered as a whole.

¹¹ *Freight Drivers and Helpers Local Union no.557 Pension Fund v. Penske Logistics LLC* (D.Md. Apr. 11, 2014) WL 1428210.

¹² WGL Response at 7.

relies, suggesting that WGL's only federal argument relates to § 1154(b).¹³ Second, WGL claims the Commission is authorized to impose certain types of "damages" beyond those defined by Black's Law dictionary.¹⁴ Third, WGL claims OPC mischaracterized the CPUC opinion, which included a significant independent investigation conducted by the CPUC.¹⁵

OPC's Reply Memorandum

11. On June 17, 2020, OPC filed Reply Comments. OPC repeated its contention that WGL has provided no authority that prevents the Commission from considering the findings in the NTSB Report.¹⁶

12. In response to WGL's arguments, OPC claims that it did not waive its right to contend that § 1154(b) permits the admissibility of the NTSB Report. Because WGL raised this issue for the first time in its Rejoinder Comments, OPC argues that it lacked the opportunity to respond. Further, OPC argues that this case is in its initial stages, and no legal bar exists if the Commission chooses to reconsider a preliminary finding.¹⁷

13. Finally, OPC claims that WGL misrepresented its reliance upon the decision by the CPUC, arguing that it never claimed that the CPUC relied "solely" on the NTSB Report.¹⁸

¹³ *Id.* at 10-11.

¹⁴ *Id.* at 11-12.

¹⁵ *Id.* at 12-13.

¹⁶ Maillog No. 230764 ("OPC Reply") at 1.

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 3-4.

Commission Decision

A. PUA § 3-203 does not apply to OPC's Motion

14. As a preliminary matter, the Commission rejects WGL's argument that OPC must establish that Order No. 89550 failed one of the six criteria set forth in PUA § 3-203. That provision clearly applies to the review of a Commission order by the Circuit Court. PUA § 3-203 is titled "Scope of Review" and follows PUA § 3-202, which is titled "Right to judicial review of orders and decisions". Moreover, § 3-203 states that Commission decisions are "prima facie" correct and shall be "affirmed" unless one of the six factors exists. Finally, § 3-203(6) states that the Commission may not be affirmed if "the *subject of review* is an order entered in a contested proceeding after a hearing, unsupported by substantial evidence in the record." (emphasis added) The Commission may reconsider its own orders on any grounds so long as a party persuades the Commission that reconsideration is warranted.

B. OPC Did not Waive its Argument Regarding the NTSB Report by Failing to Respond to WGL's Rejoinder Arguments

15. As an additional preliminary matter, the Commission concludes that OPC did not waive its arguments regarding the admissibility by raising them for the first time after Order No. 89550. The case law cited by WGL refers to parties raising issues for the first time in a motion for reconsideration after a final judgment.¹⁹ The Commission agrees that this proceeding (as it pertains to the evidentiary hearing) is at an early stage, and no prejudice would result from evaluating the substance of OPC's motion for reconsideration.

¹⁹ See e.g. *Freight Rivers*, *supra* at ¶ 8.

C. The Commission Denies OPC's Motion to Reconsider the Admissibility of the NTSB Report and its Decision Not to Include the Cause of the Explosion in the Evidentiary Hearing

16. The Commission denies OPC's request to reconsider whether WGL's negligence or other misconduct caused the explosion in 2016. OPC's primary argument is that since 49 U.S.C. 1154(b) only applies to civil actions for damages, rather than regulatory proceedings, the NTSB Report is admissible for purposes of the evidentiary hearing.²⁰ That statutory provision states: "No part of a report of [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report." WGL and OPC each cite numerous cases that hold that this statute intends to prevent fact finders from relying too heavily upon a seemingly official report. However, the parties cite no case where a regulatory agency imposed sanctions upon a utility solely based upon an NTSB report. OPC cites to *Fidelity & Cas. Co. of New York v. Frank*, 214 F.Supp. 803, 805 (D.Conn. 1964) for the proposition that "[an NTSB Report] would probably carry an undue amount of weight in the minds of jurors passing upon the rights of parties in such an action."²¹ However, given that civil actions for damages could be litigated before a judge, magistrate or arbitrator, the rationale for Section 1154(b) is broader.

17. The language of 49 U.S.C. 1154 clearly states that the NTSB Report shall not be admitted "into evidence *or* used in a civil action for damages" (emphasis added). It is unclear how the NTSB Report could be used in civil actions for damages if it is not admissible into evidence. No persuasive reason exists to limit this provision to civil actions for damages, as little, if any, difference exists between relying upon an NTSB

²⁰ OPC Motion at 2-5.

²¹ *Id.* at 3.

report to impose civil damages as opposed to regulatory sanctions. In either case, the subject of an investigation is less likely to cooperate with an NTSB investigation if it fears that damages or significant economic consequences might result.²² This result is further supported by 49 C.F.R. 831.4, which states:

NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings are not subject to the Administrative Procedure Act and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings. (citations omitted)

18. Additionally, even in the absence of the restrictions contained in 49 U.S.C. 1154(b), the NTSB Report constitutes inadmissible hearsay to the extent it implicates WGL in the cause of the explosion. Maryland Rule 5-801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter.” The NTSB Report clearly meets this definition. Although regulatory bodies generally enforce the rules of evidence less stringently than courts sitting before an impanelled jury, the Commission must provide due process to any party in a contested case.²³ Relying upon the NTSB Report’s conclusion as to the cause of the explosion would be unfair to WGL and constitute a denial of due process as WGL would be unable to cross-examine the conclusions in the report or the authors of the report.²⁴

²² In that sense, 49 U.S.C. 1154(b) serves almost as the inverse of a *Miranda* warning in that anything a utility says will NOT be used against it.

²³ See *Potomac Electric Power Co. v. Maryland Public Service Commission*, 25 P.U.R. 4th 155, 160 (1978) (“Substantive due process is a basic implied requirement in all administrative proceedings. Though difficult to define, it basically involves the concept of fundamental fairness.”)

²⁴ As noted above, 49 CFR 831.4 states that there are no “adverse parties” in an NTSB investigation, making even the investigative equivalent of cross-examination impossible.

19. As noted above, OPC relies upon the CPUC’s opinion related to the explosion in San Bruno, California, which relied in part upon an NTSB investigation. Whether or not the CPUC was correct to do so, that case is easily distinguishable. As WGL points out, the CPUC conducted its own independent investigation, which resulted in a 171-page report. In the present case, the Commission Staff did not conduct an independent investigation, and launching a second investigation to determine the cause of the explosion would cause considerable delay and not be an effective use of Commission resources. For these reasons, the Commission declines to include the cause of the explosion as an issue in the evidentiary hearing.

20. Additionally, the Dissent references the 2018 BART case in California,²⁵ but as with the San Bruno explosion, the CPUC relied upon multiple sources aside from the NTSB, including its own Safety Enforcement Division (“SED”), which conducted an independent investigation (and issued its own separate report), as well as BART’s own operating manual and several admissions by BART personnel. In its decision of over 100 pages, the CPUC references NTSB findings of fact and recommendations approximately three times, while referring to SED conclusions on almost every page. Additionally, no party appears to have challenged the admissibility of that NTSB report.

D. The Commission also Rejects OPC’s Argument that Staff’s Testimony Could Provide a Basis for Adjudicating the Cause of the Explosion

21. A review of the record reveals that Staff’s conclusions are entirely based upon the NTSB Report. As OPC states in its Motion, Staff “determined that it would be necessary in this instance to rely upon the findings of the NTSB”.²⁶ In fact, on page 8 of OPC’s

²⁵ 2018 Cal. PUC LEXIS 490.

²⁶ OPC Motion at 7-8.

motion, Heading C is titled “This Proceeding is Predicated on the NTSB’s Findings and They are Indispensable to the Evidentiary Record in This Case.” Staff’s testimony therefore would be as inadmissible as the NTSB Report itself. Even if Congress intended to limit Section 1154 to civil actions, any witness could not evade a report’s inadmissibility simply by repeating its conclusions.

E. Clarification Regarding Use of the NTSB Report at the Evidentiary Hearing.

22. The Dissent would clarify “whether WGL exercised reasonable care to protect the public safety as required by COMAR 20.55.09.01 remains (or be reinstated as) an issue in any evidentiary proceedings conducted by the Commission in this case.”²⁷ However, the broad obligation of the Commission under PUA § 2-113 to regulate public service companies to ensure public safety is implicit and it is not necessary to enumerate the Commission’s obligations in every instance.

23. As noted in Order No. 89550, the Commission will receive evidence regarding the replacement of WGL’s mercury regulators on a system-wide basis. To the extent parties have safety or other recommendations, any evidence relevant to this program will be evaluated by the Commission when introduced.

24. Additionally, the NTSB Report includes several safety recommendations, and WGL has agreed to implement those recommendations. The parties may reference facts in the NTSB Report relevant to WGL’s commitment to comply with these recommendations. To the extent the parties wish to raise additional recommendations to ensure public safety, the Commission will consider the admissibility of such evidence, including facts and recommendations in the NTSB Report, on a case-by-case basis.

²⁷ Dissent at 1.

IT IS THEREFORE, this 15th day of July, in the year Two Thousand Twenty, by
the Public Service Commission of Maryland,

ORDERED that the Office of People’s Counsel’s Motion for Reconsideration is
DENIED.

Commissioner Michael T. Richard, dissenting, with a separate statement.

/s/ Jason M. Stanek _____

/s/ Anthony J. O’Donnell _____

/s/ Odogwu Obi Linton _____

/s/ Mindy L. Herman _____

Commissioners

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL T. RICHARD**

1. In this instance I would grant OPC’s Motion for Reconsideration of Order No. 89550 and include the NTSB report in the evidentiary proceedings involving this matter—if the report, or portions of it—is offered as evidence. I would also clarify that the issue: *whether WGL exercised reasonable care to protect the public safety as required by COMAR 20.55.09.01* remains (or be reinstated as) an issue in any evidentiary proceedings conducted by the Commission in this case.¹ If this is “implicit” as suggested by the Majority,² then it seems there should be no harm in simply providing the clarification that was requested by OPC.

2. While I agree that further investigation into the cause of the gas explosion at the Flower Branch Apartment Complex—beyond what has been done by the NTSB has done—is not necessary, I do not read Order No. 89550 as excluding the NTSB report in its entirety from the Commission’s evidentiary proceedings *for any and all purposes*. As I read the Order, the NTSB report should *only* be excluded as grounds for conducting “any further investigation into the cause of the explosion.”³

3. The Commission is not a court, and should not only use its express authority but its "implied and incidental" authority as well under PUA 3-112(b)(2), as broadly as possible to fulfill its obligations under the statute. That said, the Commission has a statutory obligation under PUA § 2-113 to “supervise and regulate” public service companies to “ensure their operation in the interest of the public,” including considering

¹ See Order No. 89248 at 4.

² Majority Opinion at 22.

³ Order No. 89550 at 6.

“public safety.” To the extent that the NTSB report, or any portion thereof, may inform and assist the Commission in undertaking its statutory responsibility under PUA § 2-113, I do not read Order No. 89550 as excluding the introduction and admission of the report for such purpose. Therefore, to the extent the Majority would wholly exclude the introduction and admission of the NTSB report in evidence in its evidentiary proceedings in this matter, I respectfully dissent.

4. OPC’s Motion for Reconsideration brings to light what everyone knows to be the case: That from the beginning of this proceeding to date, the NTSB report has been the basis for every action the Commission has taken in response to this tragic event.⁴ The Commission Staff relied on the NTSB report in its analysis and recommendation to the Commission, and—in turn—the Commission cited the NTSB report in its September 5, 2019 Show Cause Order,⁵ directing WGL to file a response to (1) the findings of the NTSB in its June 10, 2019 “Pipeline Accident Report;” (2) its Implementation Plan pursuant to which Washington Gas Light Company intends to implement the recommendations in the NTSB’s June 10, 2019 “Pipeline Accident Report”; and (3) an evaluation of the risks associated with implementing the Plan as well as all measures Washington Gas Light Company intends to take to minimize these risks.⁶ The Commission *itself* also effectively agreed to the NTSB recommendation that the Commission should audit and verify WGL’s Mercury Service Regulator (“MSR”) replacement process by ordering WGL to provide an implementation plan for the five

⁴ It is Docket Entry No. 1 in the Case No. 9622 Case Jacket.

⁵ Order No. 89248.

⁶ *Id.* (Ordering Paragraphs 1-3).

NTSB safety measures in the report related to the replacement of all MSRs in the WGL system.

5. WGL's reasons for seeking to exclude the NTSB report for the Commission's evidentiary proceedings (other than for any further investigation into the cause of explosion) are not persuasive. WGL's citation to Paragraph 12 of Order No. 89550, noting that "Congress granted the NTSB preeminent responsibility for investigating disasters of the type that occurred in the Flower Branch incident" only explains why the Commission concluded that any further investigation of the gas explosion is not necessary. It does not explain—or suggest—that there may be no other legitimate purpose for considering the NTSB report, in whole or in part.

6. In 2003, WGL committed to the Commission that it would replace all MSRs located inside customers' premises over 10 years; the reason given at the time for the MSR replacement program was for environmental reasons. However, WGL failed to execute that program, leaving in place the MSR at the Flowers Branch location. Importantly, the NTSB probable cause finding linked that MSR to the fatal accident at Flowers Branch, and thus established MSRs as a public safety concern. This in turn created the urgency for implementing the NTSB's recommendation to initiate a replacement program, and the impetus behind the Commission's Show Cause Order and Notice of Evidentiary Hearing - both documents citing the NTSB report.

7. I find it difficult to understand why—based on OPC's arguments against WGL's speculative and soundly disputed legal theories—the Commission would put restrictions on, or tie the hands of, its own staff and OPC to examine whether WGL took "reasonable care" to protect public safety as required by COMAR 20.55.09.01, or resolve the

outstanding issues itemized in the Commission’s April 29 Notice of Evidentiary Hearing by disallowing the hearing’s foundational evidence – the NTSB report.

8. OPC and WGL both cite the CPUC’s investigation of PG&E and the gas main explosion in San Bruno, California in 2010 *for* and *against* the use of an NTSB report in state commission regulatory proceedings. WGL notes that in that case the CPUC was conducting its own investigation regarding the underlying explosion, and that justified the use of the report – whereas that is not the case here. Again, because the Commission is not conducting any further investigation into the Flower Branch explosion itself, I believe WGL’s arguments against use of the NTSB report here are misplaced.⁷ Neither WGL nor OPC, however, discuss the CPUC’s more recent use of an NTSB report in 2018 in its Decision in Investigation 16-06-010 (involving the fatal accident on the Bay Area Rapid Transit District’s Line between the Walnut Creek and Pleasant Hill Stations in the County of Contra Costa, California on October 19, 2013) (“the BART 2013 Case”).⁸

9. In the BART 2018 case, the CPUC relied heavily on the NTSB report in its findings of fact and conclusions of law, in determining under *California Annotated Code*, Pub. Util. Code § 451,⁹ that the violations proven against BAR in that proceeding were serious safety violations and they were aggravated by: (a) BART’s failure to take full responsibility for the violations; (b) BART’s failure to take effective and adequate action to timely identify and address the safety violations of several BART managers, including those who stayed complacent or otherwise looked the other way when a trainer was

⁷ Where the state commission is conducting its own investigation regarding the cause of a gas explosion, in my view, might justify WGL’s arguments for excluding the NTSB report far more than they do in this case.

⁸ 2018 Cal. PUC LEXIS 490.

⁹ “[A] public utility and common carrier ‘... shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities[], as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.’”

violating GO 172 and failing to attentively and directly supervise the trainee; and (c) the fact that the proven violations were committed by BART's high level and veteran managers and senior employees which reflect a troubling safety culture within its management and beyond.¹⁰ The Decision noted the existence of certain non-disclosure provisions (relating to "Information and Guidance for Parties to NTSB Accident and Incident Investigations"),¹¹ but there is no discussion of grounds for precluding the use of NTSB report itself either by the respondent (BART) or the by CPUC staff. The Majority discounts the use of the NTSB report in the CPUC's BART decision as collateral (or cumulative) to the CPUC's own investigation. It, however, ignores the CPUC's Pub. Util. Code § 451 public safety-related findings which were directly tied to the CPUC's reliance on the NTSB report in that case.

10. Finally, the Majority allows that “[t]he parties may reference facts in the NTSB Report relevant to WGL’s commitment to comply with [the NTSB safety recommendations which WGL agreed to implement, and] to the extent the parties wish to raise additional recommendations to ensure public safety, the Commission will consider the admissibility of such evidence, including facts and recommendations in the NTSB Report, on a case-by-case basis.”¹² In my view, this allowance should apply generally to any materially relevant use of the NTSB report that OPC (Staff or any other party) may wish offer the NTSB report—or some portion thereof—as evidence in the Commission’s proceeding, and such offer of evidence for purposes of admission should be ruled on at the time the offer is made, not now.

¹⁰ 2018 Cal. PUC LEXIS 490 at 68.

¹¹ *Id.* at 39.

¹² Majority Opinion at 24.

11. For these reasons I would grant OPC's Motion for Reconsideration, and I would further clarify that the issue: *whether WGL exercised reasonable care to protect the public safety as required by COMAR 20.55.09.01* remain (or be reinstated) an issue in any evidentiary proceedings conducted by the Commission in this case.

12. The Commission should reserve any ruling on the admissibility of NTSB report (or any portion thereof) to the evidentiary hearing, and should not prejudge the report's admissibility as I believe the Commission has done in its Order Denying OPC's Request for Reconsideration.

/s/ Michael T. Richard

Commissioner