STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2020-00282

March 10, 2021

MAINE PUBLIC UTILITIES COMMISSION
Amendments to Chapter 420 of the Commission's Rules – Safety Standards for Natural Gas and Liquefied Natural Gas Facility Operators

ORDER AMENDING RULE AND STATEMENT OF FACTUAL AND POLICY BASIS

BARTLETT, Chairman; WILLIAMSON and DAVIS, Commissioners

## I. SUMMARY

By this Order, the Commission amends Chapter 420 – Safety Standards for Natural Gas and Liquefied Natural Gas Facility Operators. The proposed amendments are intended to update and modernize the Commission's gas safety rules.

## II. BACKGROUND

Beginning in early 2019, the Commission's Gas Safety Staff engaged in informal discussions with representatives from Maine's local distribution companies (LDCs) regarding possible changes to Chapter 420 of the Commission's Rules. The informal discussions encompassed all portions of Chapter 420, with ideas and suggestions coming from both the LDCs and the Gas Safety Staff.

As a result of those informal discussions, the Commission, on March 12, 2019, opened an Inquiry into possible amendments to Chapter 420. In the Commission's view, the productive nature of the informal discussions made it appropriate to engage in a larger public discussion of Chapter 420. To that end, the Commission requested written submissions and proposed changes to Chapter 420 from any interested person or party. The Commission also continued to hold workshops and discussions regarding Chapter 420 with all interested persons.[1]

The Inquiry process ultimately led to the circulation by the Gas Safety Staff, on May 19, 2020, of a "discussion draft" of Chapter 420, which contained the Gas Safety Staff's proposed revisions to the Rule. The Gas Safety Staff's proposals were based on the discussions with the LDCs both before and after the commencement of the Inquiry, and written submissions during the Inquiry. After the circulation of the discussion draft, the parties made additional written suggestions, and the Gas Safety Staff and the parties had continued dialogue regarding Chapter 420.

On December 1, 2020, based on this cooperative process both prior to and during the Inquiry, the Commission issued a formal Notice of Rulemaking. The Rule

[1] The only parties that chose to participate in the Inquiry were Maine's LDCs.

proposed by the Commission was based in large measure on the discussion draft circulated during the Inquiry.

On December 18, 2020, the Commission received initial written comments on the proposed amendments to the rule from Bangor Natural Gas Company (BNG), Maine Natural Gas Corporation (MNG), and Summit Natural Gas of Maine, Inc. (Summit).

On January 6, 2021, the Commission held a public hearing on the proposed amendments to the Rule. Participating in the hearing were representatives from BNG, MNG, and Summit.

On January 22, 2021, the Commission received final written comments regarding the proposed amendments to the Rule from BNG, MNG, Summit, and Northern Utilities, Inc. d/b/a Unitil (Unitil).

## III. POSITIONS OF THE PARTIES

As a general matter, all parties to this rulemaking proceeding expressed their appreciation, both in their written comments and at the public hearing, for the extensive and collaborative stakeholder process that led to the proposed amendments to Chapter 420.

### A. Bangor Natural Gas

In its initial comments, BNG provided input into two specific provisions in Section 3(D)(2) of the Rule regarding the location of underground facilities where operators use trenchless technology: Section 3(D)(2)(a) – Exposed Sewer Method and Section 3(D)(2)(c) – Sonde Method. With regard to the exposed sewer method, BNG stated that the requirement that operators have photographic documentation could lead to misleading or distorted images. Instead, BNG recommended other methods of verifying compliance with the Rule including detailed bore logs and the use of manholes to gauge the depth of sewer facilities. With regard to the sonde method, BNG recommended that the Commission change the proposed 3-foot separation from other underground facilities to an 18-inch separation. This change, in BNG's view, would align Chapter 420 with the Commission's underground damage prevention rules in Chapter 895.

In their final comments, BNG, in addition to reiterating its comments with regard to Section 3(D)(2) of the Rule, also commented on Section 5(C)(4)(c) of the Rule regarding pressure regulators at meters or service piping and Section 5(D)(3)(a) and (b) regarding burial depths for mains and service lines. With regard to Section 5(C)(4)(c), BNG recommends that the Commission change its proposed separation distance between venting gas and building openings from 3-feet horizontally and 8-feet vertically to a uniform 3-foot separation in all directions. BNG states that this would bring 420 into alignment with NFPA 54 which, according to BNG, is used by contractors in both new

buildings and renovations.[2] With regard to Section 5(D)(3)(a), BNG recommends the Commission change the proposed 30-inch burial depth for mains to 24 inches to align with federal requirements. With regard to Section 5(D)(3)(b), BNG recommends that the Commission likewise change the burial depth requirement for service lines to align with federal requirements.

B. Maine Natural Gas

MNG did not have any comments on the proposed amendments to the Rule in its initial comments, other than to express support for the proposed changes. At the hearing and in its final comments, MNG agreed with BNG's position, described above, regarding Section 5(C)(4)(c) of the Rule. In addition, in its final comments MNG recommended that the Commission extend the timeframe in Section 6(C)(1) of the Rule for abandoning and disconnecting unused services from 5 years to 10 years.

C. Summit Natural Gas of Maine

In their initial comments, Summit focused on five areas of the Rule: the definition of "serious accident," trenchless technology, distance from venting gas to building openings, abandonment and disconnection of mains and services, and enforcement procedures.

With regard to the definition of "serious accident," Summit recommended that the Commission change the reference to the term's definition in Chapter 130 of the Commission's Rules to exclude the inclusion of "lost time" within the definition.

With regard to trenchless technology, Summit stated its view that the requirement for exposure of underground facilities when "alternate methods of protecting these facilities are impractical or unavailable" is vague and ambiguous. Summit argued that the Rule is not clear as to what alternate methods would be acceptable. Summit also argued that the Rule imposes a "strict liability" standard on operators with regard to damage caused by the operator when using trenchless technology. In addition, Summit recommended that that Commission add language to the Rule to hold operators harmless if they followed the procedures for trenchless technology described in the Rule. Summit made the same recommendation as Bangor Gas for Section 3(D)(2)(c), described above.

With regard to the proximity of building openings to vented gas, Summit made the same recommendation as both BNG and MNG, as described above.

With regard to enforcement procedures, Summit supports the proposed amendments to the Rule with some clarifications with regard to field inspections, warning letters, and notices of probable violation (NOPVs). Specifically with regard to

[2] "NFPA" is the National Fire Protection Association and the number following NFPA—in this case 54—is the applicable code or standard published by the NFPA.

NOPVs, Summit recommended that the Rule require NOPVs to include the maximum potential penalty to which an operator could be subject, but forbid the inclusion of any specific recommended penalty; in Summit's view, specific penalties should be left to the Commission and not recommended by the Gas Safety Staff.

At the public hearing, Summit reiterated its comments regarding the enforcement procedures in the Rule and emphasized the importance of this issue to Summit.

In its final comments, Summit provided additional detail with regard to enforcement by including brief summaries of Summit's experience with enforcement procedures in other states, summaries which were requested by the Commission at the public hearing.

D. Unitil

Unitil did not submit initial comments in this matter, however in their final comments, Unitil expressed its support for the proposed amendments to the Rule and its appreciation for the process that led to the proposed amendments.

## IV. RULE PROVISIONS

The Commission is making editorial, clarifying, and non-substantive amendments throughout the Rule. Among the editorial, clarifying, and non-substantive amendments, the Commission is amending the Rule to replace the word "shall" in almost all instances with the word "must." The Commission and the Gas Safety Staff have consistently interpreted the word "shall" in the Rule to have the same meaning as "must"; however, to remove any ambiguity, and in keeping with the Federal Plain Language Guidelines, the Commission is now using "must" in Chapter 420 to indicate a mandatory obligation. *See Federal Plain Language Guidelines* at 25-26 (rev. 1, May 2011) (*available at:* https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf (last viewed Feb. 5, 2021)). Likewise, the Commission is amending the Rule where appropriate to incorporate the active voice. *See, id.* at 20-21.

A. Section 1: General Provisions

The Commission is making editorial, clarifying, and non-substantive amendments to Section 1 of the Rule.

B. Sections 2: Definitions

The Commission is amending the Rule to add several definitions to Section 2. Many of these new definitions define terms that are currently in use in Chapter 420 and are, thus, intended to give more clarity to the Rule. Some of the new definitions are terms used in newly proposed Rule language. The newly defined terms are: "Chapter 130"; "Chapter 140"; "Chapter 895"; "Consolidated Rock"; "Critical Valve"; "DIMP"; "Gas Safety Staff"; "Global Positioning System (GPS)"; "NFPA"; "Operator"; "Pipe

Appurtenance"; "Prosecutorial Staff"; and "Underground Obstruction." The Commission is also amending the Rule to remove the definitions of "Business District"; "Commercial Building"; and "Public Building" as those terms are no longer used in the Rule or the concepts are adequately described in the body of the Rule. Further, the Commission is removing the definition of "Gas Pipeline Operator" and replacing it with the more appropriate term "Operator." The Commission is also making editorial, clarifying, and non-substantive changes to several definitions.

The Commission had proposed adding a definition for the term "Serious Accident" to the Rule. However, based on input during the rulemaking proceeding that indicated the term may cause confusion or conflict with obligations under other Commission Rules, the Commission declines to add that proposed definition.

C. Section 3: Participation in Underground Facility Damage Prevention Program

1. Section 3(A): Natural Gas and LNG Operator Participation

The Commission is making editorial, clarifying, and non-substantive amendments to Section 3(A) of the Rule.

2. Section 3(B): Pipeline Facility Locator Training and Qualification

In addition to making editorial, clarifying, and non-substantive amendments, the Commission is amending Section 3(B) to remove redundant language regarding contractors.

3. Section 3(C): Notation of Facilities on System Maps Using GPS Coordinates

The Commission is making editorial, clarifying, and non-substantive amendments to Section 3(C) of the Rule.

4. Section 3(D): Location of Underground Facilities Where Trenchless Technology is Used

The Commission is making substantial changes to Section 3(D) of the Rule. These changes are intended to address the inherent risks in utilizing trenchless technology. Section 3(D) now requires that operators expose underground electric facilities before engaging in a trenchless installation. In addition, Section 3(D) now requires operators to utilize one of the following methods to positively identify underground sewer facilities: exposure, map and record, sonde, relative elevation, or televising. The amended Section 3(D) gives detailed descriptions of each method. For underground facilities other than electric or sewer, Section 3(D) now requires operators to use recognized industry location standards. The Commission is also proposing editorial, clarifying, and non-substantive changes to Section 3(D) of the Rule. Among

the clarifying edits are the addition of "gravity sewer mains" to 3(D)(2), renaming the location method in in 3(D)(2)(a) from "exposed sewer method" to "exposed facility method," and the addition of "punch" and "plow" to the list of trenchless methods in 3(D)(2)(a), (c), and (d).

Section 3(D) was the subject of substantial comment during the rulemaking proceeding. Summit in particular provided substantial comment on this Section. In Summit's view, the more prescriptive and detailed provisions are a positive change that will enhance the safe deployment of trenchless technology. Summit also proposed changes to the Commission's proposed amendments. As proposed, Section 3(D)(2)(b) required operators to have "complete confidence" in the maps and records used by the operators. Summit contended that this provision was vague and immeasurable. The Commission agrees and has removed this language from Section 3(D)(2)(b). In addition, Summit proposed the addition of "safe harbor" language in Section 3(D) that would hold an operator immune from enforcement action if an operator "followed the requirements of [Section 3(D)] in connection with the [trenchless technology] installation." The Commission disagrees with Summit on this point. In the Commission's view, such immunity from enforcement would impede the ability of the Gas Safety Staff to utilize its discretion with regard to enforcement. For example, if an operator used the "map and record method" to locate underground facilities and, nevertheless, damaged a facility, the Gas Safety Staff would be unable to undertake an enforcement proceeding under any circumstances. If, for example, the Gas Safety Staff learned during its investigation that the operator had used outdated maps and records when current maps and records were readily available, the Commission could not commence enforcement proceedings for this clear negligence on the part of the operator. The prescriptive procedures in Section 3(D) are intended to give operators clearer guidance when using trenchless technology. If operators follow the guidance in a responsible and non-negligent manner, the Gas Safety Staff retains the discretion to decline to take formal enforcement action when good-faith mistakes occur.

Summit also objects to Section 3(D)(4), which, in relevant part, requires operators to monitor trenchless technology installations by third parties when the operator determines there is a risk to the operator's underground facilities. Summit argues that the word "proximity" in the requirement that operators' written procedures mandate "mandatory monitoring of these excavations when an operator is notified and the operator determines that the proximity of the proposed excavation could affect the integrity of the gas facility" is vague and does not "provide a measurable standard of guidance." The Commission disagrees with Summit's interpretation that the word "proximity" is vague in this context. The Rule simply requires operators to monitor trenchless installations by third parties when the operator believes there may be a risk to the operator's facilities, and, presumably, operators have presumably been successfully complying with this requirement for some time. Accordingly, the Commission is not proposing to substantively amend Section 3(D)(4); the Commission is only proposing non-substantive editorial amendments to this subsection.

In addition, both Summit and BNG recommend that the Commission halve the proposed three-foot separation from sewer laterals when using a sonde to eighteen inches. This change would mirror the separation requirements in Chapter 895. The Commission declines to adopt this modification. The additional separation is in recognition of the fact that a sonde may not be precise; implementing an eighteen-inch separation could well result in installations of closer than eighteen inches. The additional distance is to ensure proper separation when using a technique where proximity to other facilities cannot be visually verified.

In response to comments submitted by BNG, the Commission has removed the requirement for photographic documentation when using the exposed facility method. The Commission agrees that such photographs could be misleading. Also in response to comments, the Commission has clarified that sondes must be calibrated in accordance with manufacturer specifications.

Finally, Summit has suggested that the amendments to Chapter 420 with regard to trenchless technology imply that the Commission disfavors trenchless installations. The Commission understands that there are circumstances where trenchless installations may be the most practical installation method, and sometimes the only feasible installation method. The revisions the Commission is making to the Rule are intended to ensure that trenchless installations are safe. The Commission's prefatory statement that trenchless technology has inherent risks and that operators have an overarching obligation to not damage other underground facilities is simply an acknowledgement of the reality of trenchless installations. Recent history clearly demonstrates that trenchless installation can be problematic when operators do not take reasonable measures to ensure safety. The Commission's amendments to the Rule, and the Commission's emphasis on the risks of trenchless technology, are not intended to dissuade operators from using the technology as Summit suggests, but rather are intended to protect the people of Maine by giving clear guidance for operators who choose to use the technology.

D. Section 4: Emergency Procedures

The Commission is amending Section 4 of the Rule to remove language that is redundant with Chapter 130 of the Commission's Rules and is adding notification requirements in certain other circumstances. In addition, and in response to comments during the rulemaking proceeding, the Commission is not changing "Emergency Notification" to "Serious Accident Notification" as had been proposed. The Commission had proposed the change to better align Section 4 of the Rule with Chapter 130; however, the Commission agrees with the commenters that this change and the reference to the Chapter 130 definition of Serious Accident could be confusing. The Commission is also making editorial, clarifying, and non-substantive amendments to Section 4 of the Rule.

E. Section 5: Installation and Maintenance Standards

1. Section 5(A): Interruptions of Service

The Commission is making editorial, clarifying, and non-substantive amendments to Section 5(A) of the Rule.

2. Section 5(B): Operator Qualifications (OQ) Program for New Construction

The Commission is making editorial, clarifying, and non-substantive amendments to Section 5(B) of the Rule.

3. Section 5(C): Installation of Meters, Pressure Regulators, and Service Piping

The Commission is amending Section 5(C)(1)(b) to clarify that installation of meters inside a building is only acceptable when an outside location is not feasible.

Both MNG and BNG commented on the Commission's proposed amendments to Section 5(C)(4)(c). During the Inquiry, the LDCs and Staff discussed the distance requirements in Section 5(C)(4)(c) for regulators with overpressure protection that vent gas to atmosphere. The LDCs suggested lowering the distance from an ignition source from 5 feet to 3 feet to bring the requirement in line with NFPA 54.[3] Both BNG and MNG reiterated this view in their comments during this rulemaking proceeding. As cited by BNG and MNG, NFPA 54 – National Fuel Gas Code is used by builders and contractors when constructing or remodeling buildings and applies to piping and appurtenances downstream of service line regulators.[4] The Commission's view, however, is that the more appropriate code with regard to pressure regulators specifically is NFPA 58 – Liquefied Petroleum Gas Code. NFPA 58, § 6.10.1.6 requires 5 feet of separation in any direction from any source of ignition, openings into direct-vent (sealed combustion system) appliances, or mechanical ventilation air intakes.[5] The language in NFPA 58 matches the current Rule language.

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[3] NFPA is the National Fire Protection Association.

[4] This piping is typically operated at a pressure of 2 psig or less, downstream of adequate service line regulation from higher distribution pressures.

[5] The Liquefied Petroleum Gas Code (NFPA 58) typically applies to higher piping pressures than the Fuel Gas Code (NFPA 54). In the Commission's view, the additional separation distance from sources of ignition over and above the NFPA 54 standard is appropriate, because venting gas conditions during a natural gas service regulator failure at higher distribution line pressures are more analogous to the conditions at the typically higher piping pressures addressed by the NFPA 58 standard.

The Commission is, however, adding an exception to the distance requirements in Section 5(C)(4)(c) of the Rule for pressure regulators that utilize overpressure protection shutoff technology.

The Commission is also making editorial, clarifying, and non-substantive changes to Section 5(C) of the Rule.

4. Section 5(D): Installation and Maintenance of Service Lines

In the Notice of Rulemaking, the Commission proposed to reduce the cover depth for mains in rights-of-way from 36 inches to 30 inches. In their comments, both Summit and BNG recommended that the Commission further reduce the cover depth to 24 inches. Summit and MNG pointed out that the federal requirement is 24 inches and that there is no evidence to demonstrate that 30 inches of cover is safer than 24 inches. The Commission agrees with the commenters on this point. The original 36-inch cover depth requirement was intended to standardize the Commission's Chapter 420 requirement with the 36-inch cover depth requirement of the Maine Department of Transportation (MDOT). The MDOT requirement, as the Commission understands it, is to ensure adequate cover in situations where MDOT roads need to be completely rebuilt. This cautionary approach by the MDOT, however, is inapplicable across much of the service territories of Maine's LDCs, and the Commission agrees that lowering the cover depth requirement to 24-inches outside MDOT roadways is likely to have no appreciable effect on safety. For clarity, the Commission is adding language to Section 5(D) that states that the cover depth requirements in Chapter 420 do not supersede any the minimum cover depth requirements of any other applicable authority. The Commission is also applying the 24-inch cover depth requirement to service lines.

The Commission's view that 24-inch cover depth is not likely to have an appreciable safety impact is predicated, however, on all portions of mains and services, and all attachments and appurtenances on mains and services, being at least 24 inches underground.[6] This means that in order to comply with the 24-inch cover depth requirement, the top of any tees, couplings, or other items or equipment permanently affixed to a main must have at least 24 inches of cover. Practically speaking, this will result in mains themselves being buried at depths greater than 24 inches, however this new requirement will still provide LDCs with greater flexibility when installing their facilities.

Further, the Commission is amending Section 5(D) to require shielding and protection for mains or service lines in areas where underground obstructions prevent 24 inches of cover. In addition, the Commission will also use the new definition "underground obstruction" to add clarity to this Section of the Rule. The Commission is also making editorial, clarifying, and non-substantive changes to Section 5(D) of the Rule.

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[6] For service lines, the Commission is retaining the existing exception for prefabricated risers, where cover may be reduced to 18 inches.

5. Section 5(E): Accessibility and Operability of Pipeline System Valves

Based on discussions with the LDCs before and during the Inquiry, the Commission is amending Section 5(E)(2) to allow operators to designate valves that the operator does not intend to utilize as "non-operational." This designation will allow operators to avoid the valve inspection, operation, or remediation requirements of the Rule for those designated valves. The Commission is also creating a distinction between a "critical valve" (*i.e.*, a valve whose use may be necessary for the safe operation of a distribution system) and other valves. These changes should reduce workload and maintenance expenses for operators while having no appreciable adverse impact on safety. Further, the Commission is amending Section 5(E)(4) to create an exemption from minimum valve separation distances at regulator stations where achieving the minimum separation distances is not practicable and where an automated fire-valve is installed at the inlet to the station. The Commission is also making editorial, clarifying and non-substantive changes to Section 5(E) of the Rule.

F. Section 6: Operation Standards

1. Section 6(A): Operator Qualification (OQ) Program Requirements

The Commission is making editorial, clarifying, and non-substantive changes to Section 6(A) of the Rule.

2. Section 6(B): Quality Assurance/Quality Control (QA/QC) Program

The Commission is making editorial, clarifying, and non-substantive changes to Section 6(B) of the Rule.

3. Section 6(C): Scheduling Permanent Abandonment/Disconnection of Inactive Mains and Service Lines

In the Notice of Rulemaking, the Commission proposed to extend the timeframe by which an operator must abandon and disconnect unused service lines from two years to five years. The Commission stated that the proposed amendment was based on feedback from operators regarding the difficulty and expense sometimes associated with obtaining street opening permits from municipalities. As added protection, the Commission also proposed that lines other than plastic or cathodically-protected steel be added to and monitored under operators' distribution integrity management program (DIMP) written plans until the lines are disconnected and abandoned. Consequently, operators must continue to maintain unused service lines as if they were in-service until such time as the lines are disconnected and abandoned.

MNG and Summit both submitted comments on the Commission's proposals, recommending that the Commission further increase the timeframe from 5 years to 10 years. The Commission has reexamined this issue based on the comments submitted

and has concluded that with the addition of unused service lines to operators' DIMP written plans, and the continued maintenance of unused service lines as if they were in-service until such time as the lines are disconnected and abandoned, there is no need for a set timeframe for disconnection and abandonment. The Commission understands that different municipalities have differing requirements for street excavations and finds that allowing operators to disconnect and abandon services according to their own operational timetables will have no appreciable adverse effect on public safety.

The Commission is also removing Section 6(C)(2) from the Rule as that subsection simply restated a federal requirement; notwithstanding the removal of this subsection, operators are still required to comply with all applicable federal requirements.

The Commission is also making clarifying, editorial, and non-substantive changes to Section 6(C) of the Rule.

4. Section 6(D): Leak Detection

Based on feedback from operators during the Inquiry, the Commission is amending Section 6(D)(1)(a) of the Rule to remove the requirement that operators survey all mains on an annual basis, and instead requiring operators to perform leak surveys on risk-based intervals. However, operators may not conduct surveys at intervals that are longer than specified in the federal pipeline safety rules. In addition, the operators' DIMP written plans must provide justification for the leak survey intervals.

The Commission is also amending Section 6(D)(1)(c) of the Rule to remove "commercial buildings" from the list of public assembly buildings that must be surveyed between March 1 and December 1. "Commercial buildings" is a broad term that could include very small businesses in rural areas that do not pose a significant public risk. Instead, the Commission will allow operators to use a risk-based analysis to determine which buildings must be surveyed during the March 1 – December 1 period.

The Commission is also making editorial, clarifying, and non-substantive changes to Section 6(D) of the Rule.

5. Section 6(E): Leak Classification and Repair

Based on feedback from operators during the Inquiry, the Commission is amending Section 6(E)(6)(d) of the Rule to change the way operators approach leak repair on cast iron and unprotected steel pipe. This change is in recognition of the difficulty in obtaining 0% gas concentration readings on leak-prone pipe using sensitive modern leak detection equipment. With this amendment, if an operator is unable to obtain a 0% reading after three checks, the operator will re-grade the leak and monitor the leak according to the new leak grade. This eliminates a common situation where operators must continuously attempt repairs of low-risk leaks on leak-prone pipe. The

overwhelming majority of leak-prone pipe in Maine is scheduled for replacement over the next few years so this provision will eventually become superfluous.

The Commission is also making editorial, clarifying, and non-substantive changes to Section 6(E) of the Rule.

6. Section 6(F): Leak Progression Maps

The Commission is proposing making editorial, clarifying, and non-substantive changes to Section 6(F) of the Rule.

G. Section 7: Documentation and Reporting Requirements

The Commission is removing Section 7(G) of the Rule as the reporting requirements listed therein are also required by other Commission Rules and prior Commission Orders so their inclusion in Chapter 420 is superfluous.

The Commission is also making editorial, clarifying, and non-substantive changes to Section 7 of the Rule.

H. Section 8: Enforcement Procedures

The Commission is undertaking a significant overhaul of the Commission's gas safety enforcement procedures. The changes the Commission is making are not only a result of input from the operators during the Inquiry and this rulemaking proceeding, but also informal discussions with individual operators over the past several years and the accumulated experience of the Gas Safety Staff. In the Commission's view, the amendments to Section 8 will provide a more transparent process and operators will be better informed about how the Gas Safety Staff conducts enforcement while maintaining the Commission's focus on ensuring the continued safe operation of Maine's natural gas infrastructure by Maine's local distribution companies. In addition, the amendments will establish a clear delineation between the Gas Safety Staff who typically act as advocates before the Commission, and other Commission Staff who serve as advisors to the Commission. The Commission is, however, retaining options for operators and the Gas Safety Staff to resolve potential violations on an informal basis, and is expanding the enforcement options available to Gas Safety Staff in the Rule. The following detailed descriptions are in addition to editorial, clarifying, and non-substantive changes to Section 8 of the Rule.

1. Section 8(A): Gas Safety Staff Actions

The Commission is adding reinforcement reminders and requests for information to the actions of the Gas Safety Staff specified in the Rule. A reinforcement reminder is intended to be a simple method of reminding operators of specific requirements, previously agreed upon actions, deadlines, or compliance issues. There is no specific method for the Gas Safety Staff to communicate these reminders to operators.

Requests for information are written requests for additional information regarding safety issues. Operators are expected to respond to information requests within 14 days and the requests and responses may be communicated by email. In addition, the Commission is clarifying that operators may correct apparent violations in the field at the discretion of Gas Safety Staff.

The Commission is also adding warning letters to the actions of the Gas Safety Staff specified in the Rule. A warning letter is intended to communicate to an operator that the operator may have committed a violation of state or federal rules. Warning letters may contain remedial measures the operator should undertake to remedy the violation or avoid future violations.

The Commission is also amending the language in the Rule regarding Notices of Probable Violation (NOPVs). NOPVs will now include the maximum penalty to which an operator may be subject. This change is to conform the Commission's Rules to the federal pipeline safety rules.

In addition, based on feedback from commenters in this rulemaking proceeding, the Commission is no longer distinguishing between "formal" and "informal" actions taken by the Gas Safety Staff. In the Commission's view, it is only the Commission that may take "formal" action against an operator. However, while it is only the Commission itself that may, by order, take "formal" action (*i.e.*, compel an operator to take a specific action), the Commission emphasizes that "informal" actions by the Gas Safety Staff are serious actions that are undertaken using Staff's knowledge, experience, and considered judgment. While operators may on occasion disagree with Gas Safety Staff and request that matters be referred to the Commission for formal adjudication, operators must also take directives from the Gas Safety Staff seriously and respond to those directives in a timely manner. In addition, operators should be cognizant that once a matter is referred to the Commission for formal adjudication, the Commission is not bound by the recommendations of the Gas Safety Staff and may impose conditions and penalties that differ from those recommended by Staff.

Summit provided extensive comments regarding NOPVs. In Summit's view, it is not appropriate for the Gas Safety Staff to assess penalties in an NOPV. Assessing penalties at this point in the process, according to Summit, fails to take into account any mitigating factors that may be revealed by an operator subsequent to the issuance of the NOPV. The Commission disagrees with Summit on this point. First, the Gas Safety Staff is not "assessing" any penalties; the Gas Safety Staff is recommending a penalty based upon its investigation and evaluation of the probable violation. Further, the Gas Safety Staff's inclusion of a recommended penalty is in alignment with the description of NOPVs in the federal pipeline safety rules.

In addition, Summit characterizes the issuance of an NOPV as a "prosecution" and raises due process concerns. To be clear, the issuance of an NOPV is neither formal nor prosecutorial; an NOPV is notice to an operator that it may have committed a violation of state or federal regulations and is a statement of what the Gas Safety Staff believes to be an appropriate recommended penalty and/or action. The NOPV provides

an opportunity for the Gas Safety Staff and the operator to informally reach a mutually agreeable resolution of the issues raised by the NOPV. A probable violation of federal or state regulations becomes "prosecutorial" if the operator contests the recommendations and conclusions of the Gas Safety Staff. At this point, the Commission, not the Gas Safety Staff, may choose to open a formal adjudicatory proceeding regarding the potential violation, and the operator would have the full due process protections that attach to such proceedings.

Further, Summit suggests that the Rule expressly disallow the "docketing" of NOPVs unless and until they are referred to the Commission for formal action. The Commission understands Summit's concern that the docketing of an NOPV can bring unwelcome public scrutiny to what is a probable, but not proven, violation of federal or state regulations. It is the Commission's understanding that the Gas Safety Staff has changed its internal procedures and no longer dockets NOPVs as a matter of course. However, the Commission does not see a need to constrain the Gas Safety Staff in the event that, due to the complexity of a matter or for some other reason, the Gas Safety Staff believes a matter should have a docket.

Finally, the Commission disagrees with Summit's suggestions that the Commission should involve itself in the informal process prior to the referral of a potential violation for formal action. Allowing the Commission to "escalate" or "deescalate" the informal process improperly inserts the Commission into that process, and necessarily would transform the informal process into a formal one. Further, inserting the Commission into the informal process could lead to strategic gaming of the Commission's enforcement mechanism whereby an operator could attempt to "go over the heads" of the Gas Safety Staff to produce an informal resolution more favorable to the operator. This type of gaming is wholly inappropriate. The overwhelming majority of NOPVs are resolved informally by mutual consent of the parties without any Commission action beyond the approval of a consent agreement between the operator and the Gas Safety Manager, and the Commission sees no need to involve itself in the informal process that leads to those agreements.

2. Section 8(B): Response Options Open to Operator

The Commission is amending Section 8(B) of the Rule to align it with the recent changes to the Commission's processing of NOPVs. The Commission will now assign a Hearing Examiner to each NOPV. The Hearing Examiner will be independent from, and not be an attorney assigned to, the Gas Safety Staff.

Further, what was referred to in as an "informal conference" in the Rule is now called a "status conference." The former "informal conference" and the restyled "status conference" serve the same basic purpose: providing a forum for the Gas Safety Staff and an operator to informally resolve a probable violation. However, with the addition of a neutral Hearing Examiner to the process, the status conference will have more structure than informal conferences of the past, and the parties will be expected to inform the Hearing Examiner of the progress the parties have made to date to resolve

the probable violation. This enhanced process should give the parties more incentive to informally resolve probable violations, and the Rule now expressly contemplates informal discussion between the Gas Safety Staff and the operator before the status conference. The status conference will also allow the Hearing Examiner to mediate any disputes and establish further steps toward informal resolution.

3. Section 8(C): Formal MPUC Action

The Commission is proposing to clarify and simplify the formal Commission actions once an NOPV is referred to the Commission by the Hearing Examiner. The Commission is removing the reference to "show cause" orders in favor of Commission investigations pursuant to 35-A M.R.S. § 1303. The Commission is also removing the references to injunctive relief in Superior Court in favor of Commission-issued cease and desist orders. The Commission is also clarifying the roles of the Hearing Examiner and the Gas Safety Staff in formal Commission proceedings.

4. Section 8(D): Hazardous Facility Orders

The Commission is eliminating references to appeals of Hearing Examiner decisions, as any formal action under the Rule will be undertaken by the Commission itself and, consequently, the provisions for review of Commission decisions in Chapter 110 of the Commission's Rules and Title 35-A will apply. The Commission is also clarifying that the Commission may issue a hazardous facility order in addition to other formal Commission enforcement action.

I. Section 9: Federal Regulation Waivers

The Commission is making editorial, clarifying, and non-substantive changes to Section 9 of the Rule.

J. Section 10: State Regulation Waivers

The Commission is amending Section 10 of the Rule to allow the Director of Consumer Assistance and Safety, the Gas Safety Manager, the attorney assigned to the Gas Safety Staff, or the presiding officer assigned to a proceeding related to Chapter 420 to grant waivers. This waiver language is consistent with delegations of waiver authority in the majority of the Commission's Rules. The Commission is also making editorial, clarifying, and non-substantive changes to Section 10 of the Rule.

## V. ORDERING PARAGRAPHS

In light of the foregoing, the Commission

O R D E R S

1. That Chapter 420 – Safety Standards for Natural Gas and Liquefied Natural Gas Operators is hereby amended as described in the body of this Order and as set forth in the amended Rule attached to this Order;

2. That the Administrative Director shall file the amended Rule with the Secretary of State;

3. That the Administrative Director shall notify the following of this Order Amending Rule:

   a. All Local Distribution Companies in Maine;
   b. All persons who have filed with the Commission a written request for notifications regarding Notices of Rulemaking within the past year; and
   c. The Office of the Public Advocate; and

4. That the Administrative Director send copies of this Order Amending Rule and the attached amended Rule to:

   a. The Secretary of State for publication in accordance with 5 M.R.S. § 8053(5); and
   b. The Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine, 04333-0015.

Dated at Hallowell, Maine, this Tenth Day of March, 2021

BY ORDER OF THE COMMISSION

*/s/ Harry Lanphear*

Administrative Director

COMMISSIONERS VOTING FOR: Bartlett
Williamson
Davis

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 9061 requires the Public Utilities Commission to give each party at the conclusion of an adjudicatory proceeding written notice of the party's rights to seek review of or to appeal the Commission's decision. The methods of review or appeal of Commission decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R. ch. 110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S. § 1320(5).

Pursuant to 5 M.R.S. § 8058 and 35-A M.R.S. § 1320(6), review of Commission Rules is subject to the jurisdiction of the Superior Court.

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.