

**U.S. DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
OFFICE OF PIPELINE SAFETY**

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<b>In the Matter of</b>	)	
	)	
<b>Natural Gas Pipeline Company of America LLC,</b>	)	<b>CPF No. 3-2015-1002</b>
	)	
<b>Respondent.</b>	)	
	)	

**POST-HEARING BRIEF  
OF NATURAL GAS PIPELINE COMPANY OF AMERICA**

**I. Introduction**

Natural Gas Pipeline Company of America LLC (“NGPL”) respectfully submits this Post-Hearing Brief in the above-referenced matter in accordance with 49 C.F.R. § 190.211(g) (2015). NGPL reiterates its request that the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) withdraw the allegation and proposed civil penalty set forth in the Notice of Probable Violation and Proposed Civil Penalty (“Notice”) issued on April 30, 2015.<sup>1</sup> A hearing was held on the Notice on March 3, 2016, at PHMSA’s offices in Kansas City, Missouri (“Hearing”). A transcript of the Hearing was prepared and a copy has been provided to PHMSA. NGPL has attached a copy of the Hearing transcript, including errata, hereto as Exhibit A for inclusion in the record.

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<sup>1</sup> NGPL understands that the allegation of violation in the Notice pertains only to NGPL (OPID # 13120).

NGPL hereby adopts and advances all arguments set forth in its February 22, 2016 Pre-Hearing Brief, as though set forth fully herein. NGPL's Pre-Hearing Brief is attached hereto as Exhibit B. The arguments in this Post-Hearing Brief supplement the arguments contained in the Pre-Hearing Brief.

## **II. Statement of the Case**

This is a straightforward case. The sole issue in dispute is the date on which NGPL discovered certain immediate repair conditions on its gas pipeline. PHMSA asserts that discovery occurred on May 6, 2010, the date that NGPL received the In-Line Inspection (ILI) vendor's final report ("ILI Report"). NGPL asserts discovery occurred five business days later, on May 13, 2010, when NGPL completed its process of aligning the data from the ILI Report with existing company information about the pipeline.

PHMSA has the burden of proving, by a preponderance of the evidence, that NGPL possessed adequate information on May 6, 2010 to discover the dents with metal loss. The discussion and evidence elicited at the Hearing makes clear that PHMSA has not met this burden. At the Hearing, PHMSA acknowledged that the ILI Report did not contain adequate information to discover that the dents with metal loss were immediate repair conditions, and that alignment with other NGPL data was necessary.<sup>2</sup> When NGPL asked PHMSA whether discovery required first knowing whether an anomaly was located within an HCA, PHMSA responded "Yes. I would [...] agree with that..."<sup>3</sup> When NGPL asked PHMSA whether it should have checked the ILI data for locational accuracy, PHMSA stated "Now, admittedly, you

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<sup>2</sup> Transcript at page 25, lines 13-17.

<sup>3</sup> *Id.* at page 14, lines 11-25 and page 15, lines 1-8. PHMSA went on to admit that data alignment was necessary, but that it could be performed "easily."

would have to put in there—you know, associate that with an HCA.”<sup>4</sup> The record clearly indicates that NGPL worked diligently in accordance with the regulations and its detailed written procedures to perform necessary alignment of the data from the ILI Report with existing company data, including data on the locations of HCAs and prior repairs.<sup>5</sup> This process was necessary because it allowed NGPL to determine where the dents with metal loss were located in relation to HCAs, and to determine if they had been evaluated or repaired before. This process was also necessary because the numerous pieces of locational information contained within the ILI Report needed to be correlated with and validated against known locational information in NGPL’s historical pipeline records. NGPL has experienced inaccuracies in locational information included in ILI tool vendor reports. When it gets a vendor report it checks that information against its own data for accuracy. Adequate information about the conditions was not available until the conclusion of this brief process.

NGPL discovered the dents with metal loss within 70 days of the ILI tool run, which is well before the prescriptive 180-day outer discovery limit set forth in 49 C.F.R. § 192.933(b). NGPL’s actions were in good faith and were compliant with the regulations.

### **III. Discussion and Argument**

#### **A. Legal Framework**

The Gas IM regulations relating to temporary pressure reductions for immediate repair conditions only apply to lines located in High Consequence Areas (HCAs).<sup>6</sup> Section 192.933(a)

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<sup>4</sup> *Id.* at page 15, lines 1-8.

<sup>5</sup> Exhibit 1 to Pre-Hearing Brief; and Transcript at page 100, line 25 through page 109, line 20.

<sup>6</sup> 49 C.F.R. § 192.903.

makes clear that a pressure reduction is only triggered upon discovery of anomalous conditions. “Discovery of a condition occurs when an operator has adequate information about a condition to determine that the condition presents a potential threat to the integrity of the pipeline.”<sup>7</sup> Discovery must occur “promptly” but within an outer limit of 180 days from conducting an integrity assessment.<sup>8</sup>

As detailed in NGPL’s Pre-Hearing Brief, PHMSA has explained that “discovery of a condition” is a performance-based standard designed to provide an operator with flexibility in deciding when it has adequate information to determine that an immediate repair condition exists.<sup>9</sup> The time it takes to obtain sufficient information during the discovery process can vary depending on the circumstances, and will not occur at the same time for every operator and every pipeline.<sup>10</sup> PHMSA has stated that the IM rules “give the operator flexibility in what information it uses, and what analysis it needs to discover a condition.”<sup>11</sup>

**B. PHMSA has the burden of proving a § 192.933(d)(1) violation.**

In a case involving a Notice of Proposed Violation, PHMSA “bears the burden of proof as to all elements of the proposed violation.”<sup>12</sup> PHMSA can only carry that burden “if the

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<sup>7</sup> 49 C.F.R. § 192.933(b) (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> Pre-Hearing Brief at page 10-12.

<sup>10</sup> *See* Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Repair Criteria), Final Rule, 67 Fed. Reg. 1,650, 1,653 (Jan. 14, 2002).

<sup>11</sup> *Id.* at 1654.

<sup>12</sup> *See* Pre-Hearing Brief at pages 5-7 for a more detailed recitation of PHMSA’s burden of proof. *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, at \*3 (D.O.T. Dec. 31, 2012); *see also In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at \*5 (D.O.T. Dec. 29, 2011).

evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”<sup>13</sup> Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.<sup>14</sup>

**C. PHMSA has not met its burden of proof that NGPL had adequate information on May 6, 2010 that immediate repair conditions existed.**

The May 6, 2010 ILI Report did not include adequate information to determine that the six dents with metal loss were immediate repair conditions. As PHMSA acknowledged at the Hearing, the ILI Report did not include any information about whether the anomalies were located within an HCA.<sup>15</sup> In addition, the ILI Report did not include any information about whether any of the anomalies had been evaluated or repaired previously. PHMSA has not met its burden of proof because it acknowledged that the ILI Report did not include adequate information to discover the conditions, and has failed to explain why the brief period of time NGPL took to confirm the accuracy of the ILI Report was inappropriate.

***1. Anomalies Located in HCAs.***

The evidence and PHMSA’s statements at the Hearing make clear that NGPL did not have “adequate information” upon receipt of the ILI Report on May 6, 2010 to determine that the reported anomalies were within an HCA. PHMSA admits that an operator must know the locations of anomalies in relation to the HCAs to determine whether a § 192.933(b) immediate

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<sup>13</sup> *Id.*

<sup>14</sup> See e.g., *In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at \*\*6-7 (D.O.T. May 13, 2010); *In re Plains Pipeline, L.P.*, Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, at \*\*4-5 (D.O.T. Mar. 15, 2011); *In re Bridger Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 5-2007-5003 2009 WL 2336991, at \*\*5-6 (D.O.T. June 16, 2009).

<sup>15</sup> Transcript at page 12, line 12 through page 13, line 4.

repair condition exists.<sup>16</sup> PHMSA also admits, appropriately, that the regulations do not require the immediate repair of dents with metal loss outside of an HCA.<sup>17</sup> Further, PHMSA admits that the ILI Report does not contain any indication of whether the anomalies were located in an HCA.<sup>18</sup>

Despite these admissions, PHMSA's statements at the Hearing suggest that it believes a violation occurred because NGPL could have "easily" aligned its ILI Report and its pipeline mapping information to make a rough guess whether the anomalies were within an HCA. Specifically, PHMSA states at the Hearing that the combination of latitude and longitude data, aboveground marker references (AGM), and stationing data contained in the ILI Report, along with NGPL pipeline alignment maps would have allowed NGPL to determine "**close enough**" that the anomalies were located within an HCA.<sup>19</sup>

PHMSA also states that while it is necessary for NGPL to align its data with the ILI Report to determine whether the anomalies are located in an HCA, "the majority of the mileage in this particular section was in an HCA."<sup>20</sup> PHMSA is not correct that the majority of the mileage is in an HCA. Less than half of the segment is in an HCA and the HCA locations are spread throughout the length of the segment, and not in a continuous block.<sup>21</sup> PHMSA suggests

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<sup>16</sup> Transcript at page 14, line 23 through page 15, line 8.

<sup>17</sup> Transcript at page 14, lines 5-9. Mr. Curry "[Would you agree that] the regulatory response criteria to dents with metal loss are different both within and outside of an HCA?" Ms. Washabaugh: "Yes. Correct."

<sup>18</sup> *Id.* at page 12, lines 14-25 and page 13, lines 1-4.

<sup>19</sup> *Id.* at page 11, line 12 through page 12, line 6 and page 13, line 13-24.

<sup>20</sup> *Id.* at page 25, lines 13-17.

<sup>21</sup> *Id.* at page 11, lines 24-25 and page 137.

that the actual location of the anomalies doesn't matter if it is merely possible that some of them are in HCAs.<sup>22</sup> PHMSA states "while we can appreciate that [NGPL wants] to find where these anomalies actually are located, the vendor's report did show that there were dents with metal loss. . . . [G]iven the fact that it was a 45-mile segment and almost half of that was in an HCA . . . chances are that they are likely -- there might be one, at least, in an HCA."<sup>23</sup>

PHMSA's position is inconsistent with the legal standard. The standard is not that you must take action if there "might be" an anomaly in an HCA. NGPL is not required to make assumptions or guesses about whether there is an anomaly in an HCA. The IM repair and pressure reduction requirements only apply in HCAs. NGPL therefore has the obligation to determine, not to guess, whether the anomalies are located in HCAs.

## ***2. Previously Remediated Anomalies.***

At the Hearing, PHMSA admitted that if a dent with metal loss has already been evaluated and remediated in the past it no longer triggers the requirements of a § 192.933 immediate repair condition.<sup>24</sup> The ILI Report did not include any information about prior anomaly evaluations or repairs. NGPL reviewed historical repair and evaluation records as part of the data alignment process. NGPL demonstrated that it was reasonable to take a brief period of time to inquire whether an anomaly had been repaired or evaluated previously before there was adequate information to discover the condition.

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<sup>22</sup> *Id.* at page 22, line 23 through page 23, line 6 and page 25, line 18 through page 26, line 5. *See also, Id.* at page 72, lines 5-7.

<sup>23</sup> Transcript at page 35, lines 11-20.

<sup>24</sup> *Id.* at page 15, line 25 through page 16, line 4. Mr. Curry: "Do you agree if a dent with metal loss has already been evaluated and remediated appropriately that it's no longer triggering an immediate response?" Ms. Washabaugh: "That's correct, yes."

**D. NGPL provided detailed evidence that data alignment was necessary because of the potential for inaccuracies in locational information from ILI reports. PHMSA was unable to refute this evidence or otherwise show that data alignment was not appropriate before discovery could occur.**

**1. NGPL's data alignment was necessary.**

NGPL's contention from the outset is that it did not violate § 192.933(d)(1)(ii) because it needed to first take reasonable, indeed essential, steps to align the data from the May 6, 2010 ILI Report with other key pipeline data before there was "adequate information" to determine that immediate repair conditions existed. At the Hearing, NGPL specifically addressed the potential for inaccuracies in the locational data in ILI reports, and why such reports, absent alignment with its other data, are inadequate to classify an anomaly as an immediate repair condition.<sup>25</sup> NGPL also explained that it used to have its ILI vendors do this work, but that it took longer and resulted in errors.<sup>26</sup>

NGPL explained that its discovery process includes "a pipeline centerline alignment and . . . establishing engineering station for each of the features . . . so that [NGPL] can establish whether they're in an HCA and whether they've previously been repaired."<sup>27</sup> The data alignment process consists of using information from the ILI Report, centerline data, and PODS data to determine the location of each anomaly.<sup>28</sup>

There are a variety of pieces of locational information from an ILI report that need to be validated against existing company data in order to confirm that anomalies are located

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<sup>25</sup> Transcript at page 94, line 20 through page 95, line 17.

<sup>26</sup> *Id.* at page 95, line 18 through page 96, line 13.

<sup>27</sup> *Id.* at page 48, lines 2-11.

<sup>28</sup> *Id.* at page 49, line 7 through page 51.

accurately, and have not been evaluated or repaired before. The key pieces of location information are set out below:

**a. Centerline Data**

ILI data may have inaccurate pipeline centerline information, which can skew the actual location of pipeline features and anomalies, and prevent accurate comparison with other data sets like HCA data and prior evaluations and repairs. Centerline data is depicted by Global Positioning System (GPS) coordinates contained in the ILI vendors report. The ILI tool provides GPS coordinates based on the GPS coordinates of its initial starting point. Importantly, the ILI tool does not produce GPS readings from a connection to a GPS satellite, as the GPS device in a smartphone or automobile would. The ILI tool produces GPS coordinates for the tool run based on odometer wheel count, and readings from gyroscopes and accelerometers located on the tool itself. Thus, the GPS readings are subject to error caused by odometer wheel slippage (discussed below) and other factors.

Centerline data correction compares GPS data collected from the ILI tool with existing pipe centerline information to help confirm accurate locational data.<sup>29</sup> Centerline data correction serves as a pre-alignment check, before NGPL compares the ILI data with information about its pipeline, such as HCA location and prior repairs and evaluations. The centerline correction process provides a high-level preview of whether there are significant discrepancies that would prohibit alignment of the ILI data and PODS data.<sup>30</sup>

**b. Odometer Wheel Count Data**

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<sup>29</sup> Transcript at page 49, line 7 through page 50, line 6.

<sup>30</sup> *Id.* at page 50, lines 13-17 and page 56, lines 3-16.

ILI location data can be inaccurate as a result of erroneous odometer wheel readings. An odometer wheel measures distance traveled by the ILI tool. Odometer wheels often experience slippage, leading to inaccurate locational data.<sup>31</sup> They also are susceptible to electronic malfunction which can skew locational data.<sup>32</sup> In some cases, the odometer data has been so flawed that NGPL has required new ILI tool runs.<sup>33</sup> This is just one reason that NGPL has prepared and implemented a data alignment process and why locational data contained in an ILI report does not, without data alignment, constitute “adequate information” under § 192.933. In other words, if the ILI locational data is inaccurate, NGPL will be unable to align it with its PODS data, preventing an accurate location of a reported anomaly.<sup>34</sup>

### **c. Stationing Data**

Generally, stationing is a measurement of distance along a pipeline. At the Hearing, NGPL explained the logic of engineering stationing in detail and NGPL personnel demonstrated that stationing is not a pure linear measurement, and includes adjustments to account for changes to the pipeline over time.<sup>35</sup> NGPL has attached a copy of an example stationing drawing made during the Hearing as Exhibit C. NGPL uses stationing as a means of locating a variety of different features along its pipelines. These pipeline features include HCA information, pipeline repairs, coating information (which can be an indicator of a prior repair), wall thickness, SMYS,

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<sup>31</sup> Transcript at page 55, line 22 through page 56, line 3.

<sup>32</sup> *Id.* at page 65, lines 16-25.

<sup>33</sup> *Id.* at page 58, lines 10-13; page 61, lines 2-7.

<sup>34</sup> *Id.* at page 50, line 17 through page 51, line 10.

<sup>35</sup> Stationing Drawing made by Toby Fore of NGPL During March 3, 2016, Hearing, attached here as Exhibit C; *see also*, Transcript at page 89, line 22 through page 95.

valves and appurtenances, and other specific information about the pipe.<sup>36</sup> These features are stored in NGPL's PODS database and each feature has a stationing number based upon known historical information. After centerline correction is performed on the ILI data, that data is compared to the data in PODS. This alignment enables NGPL to "establish the station numbers for each featured location relative to the HCAs. . . ."<sup>37</sup>

The ILI Report included odometer wheel count information for the anomalies. As discussed above, odometer wheel counts can be inaccurate for a variety of reasons. Also, because of the complexity of stationing, and the many adjustments to stationing over time, even with accurate odometer wheel counts, locational information from ILI reports may differ from the stationing figures in NGPL's PODS database. This is yet another reason that NGPL aligns the ILI data with its PODS data, to correct the locational information found in the ILI report and to obtain accurate stationing for anomalies.

#### **d. Above Ground Marker Data**

Before an ILI tool is run, the ILI vendor places Aboveground Markers (AGM) along the pipeline right of way. The purpose of AGMs is to detect the passage of the ILI tool and to calculate the speed of the tool during the tool run. When the vendor places the AGMs they identify the location of each one through a rough stationing number that they determine by reference to a known feature on or near the pipeline. The AGM locations are included in the ILI Report. As with other locational data, AGM data can include errors.<sup>38</sup> Because of the rough assignment of a station number to the AGM, its stationing may be inconsistent with the actual

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<sup>36</sup> Transcript at page 50, line 21 through page 51.

<sup>37</sup> *Id.* at page 51, lines 3-10. *Id.* at page 63, line 22 through page 64, line 2.

<sup>38</sup> *Id.* at page 98, line 14-25 through page 99, line 3.

stationing of pipeline features and HCAs in NGPL's PODS system. Also, NGPL has seen instances where AGM's experience false trips-where they signal the passage of the ILI tool when it has not actually passed. These false trips can be caused by nearby power line interference or the passage of another metal object near to the AGM (for e.g. steel toed boots can trip an AGM).<sup>39</sup>

**2. NGPL could not rely on the ILI Report without data alignment.**

NGPL could not have relied solely on the ILI Report here. The potential inaccuracies in the locational data discussed above prevented NGPL from classifying an anomaly as an immediate repair condition without first performing centerline correction and data alignment.<sup>40</sup> It is irrelevant in this case whether the location information in the ILI Report at issue was accurate or not. What is important is that NGPL, knowing that ILI Report locational data is often inaccurate, went through the process of confirming its accuracy. NGPL must follow its procedures and § 192.933(b) to obtain "adequate information." NGPL's testimony makes clear that it was necessary for NGPL to apply its established data alignment process to the ILI vendor's Final Report to: 1) establish the correct location of each anomaly on the segment, 2) determine whether the anomaly was located within an HCA, and 3) determine whether each anomaly had previously been evaluated or repaired. At the hearing, PHMSA offered no rebuttal to NGPL's arguments and evidence other than the post-hoc judgment that NGPL should have aligned its data faster. If NGPL relied upon an ILI report without first aligning data and confirming anomaly and HCA locations, and misidentified anomalies that should have been

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<sup>39</sup> Transcript at page 88-89.

<sup>40</sup> *Id.* at page 60, line 9 through page 61, line 24.

located within HCAs, there is little doubt that PHMSA would pursue enforcement action. PHMSA has found that the “sufficient information” necessary for operators to discover a condition “means enough information to allow an operator to accurately and reliably identify, locate, validate and evaluate pipeline anomalies detected by the integrity assessment and to properly classify them for repair, if necessary. . . .”<sup>41</sup>

**a. NGPL aligned its data promptly.**

PHMSA admits that NGPL was required to align its data with the ILI Report in order to determine whether the reported anomalies were located in an HCA.<sup>42</sup> However, PHMSA contends that it should have happened faster, but they aren’t sure how much faster. PHMSA states that “I don’t think we’re saying you shouldn’t follow your process, I think we’re saying it should have been expedited in this instance.”<sup>43</sup> When pressed for a timeframe on how long data alignment should have taken, PHMSA responded, “I don’t know what the right answer is.”<sup>44</sup> PHMSA never provided an answer. This makes clear that PHMSA has not met its burden of proving by a preponderance of the evidence that NGPL violated § 192.933(d)(1)(ii). PHMSA has admitted that NGPL did not have adequate information on May 6, 2010, the date of receipt of the ILI vendor’s Final Report, to trigger “discovery” under § 192.933(b) of the immediate repair conditions. In addition, contrary to PHMSA’s assertion, NGPL did, in fact, expedite the

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<sup>41</sup> See *In the matter of Alyeska Pipeline Service Company*, Final Order at 5, CPF No. 5-2006-5018 (Jan 13, 2010) (The subsequent procedural history in *Alyeska* did not alter PHMSA’s findings. A February 8, 2010 Petition for Reconsideration and March 1, 2010 Decision on Petition for Reconsideration addressed the penalty amount and compliance order. The November 16, 2011 Compromise Agreement and Order related to the penalty amount).

<sup>42</sup> Transcript at page 23, lines 11-22

<sup>43</sup> *Id.* at page 71, lines 1-3.

<sup>44</sup> *Id.* at page 23, lines 18-22.

data alignment process in this case. As explained in the Pre-Hearing Brief, NGPL instructed its data alignment contractor to “Please expedite delivery of the aligned data as much as possible...”<sup>45</sup>

PHMSA has failed to demonstrate why the brief period of additional time NGPL took to align the data, in accordance with its detailed procedures, in order avoid location errors and confirm that the anomalies were located in HCAs, was inconsistent with the requirements of § 192.933(b). Finally, NGPL asked PHMSA why the NGPL case is different from the *Sunoco* case, in which PHMSA indicated a brief period of time after receipt of the ILI vendor report in which to conduct data alignment was reasonable.<sup>46</sup> PHMSA responded that because the ILI Report contained GPS coordinates, and NGPL has maps that depict the HCA locations, no additional time was appropriate.<sup>47</sup> PHMSA did not acknowledge NGPL’s extensive explanation in the Pre-Hearing Brief and during the Hearing that it has found errors in GPS coordinates and other location data from ILI reports, which is why it developed and implements a written procedure for data alignment.

**E. PHMSA’s position would create an industry-wide disincentive for operators to take reasonable steps to confirm the accuracy of ILI data.**

Discovery must occur “promptly” but within an outer limit of 180 days from conducting an integrity assessment.<sup>48</sup> NGPL discovered the dents with metal loss within 70 days of the ILI

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<sup>45</sup> Pre-Hearing Brief, Exhibit 4, Email from Dennis Johnson to Deanna Sperry, New Century Software (May 7, 2010, 8:51 AM).

<sup>46</sup> Transcript at page 34, line 14 through page 35, line 3. *In re Sunoco Pipeline, L.P.*, Order Directing Amendment, CPF No. 4-2007-5007M, 2009 WL 5538651, at \*2 (D.O.T. Dec. 1, 2009).

<sup>47</sup> Transcript at page 35, lines 6-20.

<sup>48</sup> 49 C.F.R. § 192.933(b).

tool run, which is well before the prescriptive outer discovery limit set forth in § 192.933(b).<sup>49</sup> PHMSA proposes to punish NGPL because it took an extra five (5) business days for NGPL to diligently align its data with the ILI Report. PHMSA's position in this matter creates a disincentive for NGPL to continue its practice of obtaining ILI vendor reports early and aligning data in-house. This position disregards the fact that ILI vendor final reports would take significantly more time, and would be less accurate, if NGPL relied on vendors to align the data.<sup>50</sup>

If PHMSA finds that NGPL's actions constitute a violation of the regulations the agency would also send a significant, negative message to the pipeline industry. It would discourage operators from performing quality control on ILI data and confirming anomaly locations. Such a finding would encourage operators to shift data alignment work to ILI vendors so that it would be included in the "final" report, to avoid a misunderstanding as to when discovery takes place. Ironically, this would likely result in longer time periods before discovery because it would take the vendor longer to align the data than the operator or a contractor with the specialized software and expertise necessary to accurately and efficiently perform data alignment. NGPL urges PHMSA not to find a violation here because to do so would create a disincentive to positive, safety-focused behaviors like NGPL's.

#### **IV. Proposed Civil Penalty**

##### **A. As No Violation Occurred, No Civil Penalty is Appropriate**

PHMSA has failed to demonstrate by a preponderance of the evidence that the alleged

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<sup>49</sup> Transcript at page 75, lines 4-11. For a detailed recitation of the facts, timeline, and procedural posture of this matter, see the Pre-Hearing Brief at pages 2-4.

<sup>50</sup> Transcript at page 95, line 18 through page 97, line 14.

violation occurred. Therefore, the civil penalty proposed in the Notice must be withdrawn. If PHMSA withdraws the allegation of violation, then no further analysis is necessary in this case. If PHMSA does not withdraw the allegation, then NGPL's concerns with PHMSA's penalty process and the specific amount of the penalties in this case must be addressed. NGPL offers its penalty arguments here to preserve its rights should a Petition for Reconsideration of this case under 49 C.F.R. § 190.243, or a Petition for Review, under 49 U.S.C. § 60119, become necessary.

### **B. PHMSA's Penalty Process**

There are significant legal issues with PHMSA's process for the development and assessment of administrative civil penalties. Specifically, PHMSA's penalty process relies on secret evidence and undisclosed instructions to staff, provides for prohibited ex parte communications from agency prosecutorial staff to Presiding Officials, and is not consistently followed by agency officials. All of these flaws reflect a process that does not provide adequate due process and which produces penalties that are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). NGPL incorporates and adopts the arguments made in its November 13, 2016 Motion to Require Production of Documents as though set forth fully herein. Additionally, it supplements those arguments as set forth below.

#### **1. *PHMSA's refusal to disclose its penalty worksheet allows for the use of secret evidence against operators.***

PHMSA's failure to provide the civil penalty worksheet to NGPL prior to the Hearing deprived the company of its "opportunity to offer facts, statements, explanations, documents, testimony or other evidence that is relevant and material to the issues under consideration[.]" and to fully and fairly "examine the evidence and witnesses presented by the other party" under 49

C.F.R. § 190.211(e). PHMSA’s policy requires the Compliance Officer to use the process prescribed in the civil penalty worksheet to determine a proposed civil penalty, and PHMSA testified at the Hearing acknowledged it used the civil penalty worksheet for that purpose in this case.<sup>51</sup> The information included on the civil penalty worksheet is not subject to any privilege, and the Compliance Officer admitted at the Hearing that the worksheet contains the actual rationale that PHMSA followed in determining the proposed penalty in this proceeding.

Part 190 requires the Presiding Official to provide a respondent with “opportunity to offer facts, statements, explanations, documents, testimony or other evidence that is relevant and material to the issues under consideration” at the Hearing.<sup>52</sup> The issue of whether the civil penalty proposed by PHMSA is appropriate given the factors prescribed in 49 C.F.R. § 190.225 in light of the facts of this case is clearly relevant and material. Indeed, PHMSA bears the burden of proof on that issue. Despite that fact, PHMSA has refused to disclose the civil penalty worksheet to NGPL, thereby depriving the respondent of its opportunity to offer rebuttal evidence on that issue at the Hearing. Instead, NGPL was forced to guess what of the broad range of rebuttal evidence in its possession might have some bearing on how the Compliance Officer actually calculated the proposed penalty and to hope that the evidence that the company chose to introduce had such bearing. The respondent in an enforcement action should not be left in such a position.

More importantly, if NGPL knew the actual methodology that the Compliance Officer used in calculating the proposed civil penalty, the company would have been able to fully and

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<sup>51</sup> Transcript at page 140, lines 7-14

<sup>52</sup> 49 C.F.R. § 190.211(e).

fairly cross-examine that witness on that question at the Hearing. For instance, NGPL would have been able to ask the Compliance Officer whether the approach he used was consistent with the one followed in previous cases with similar circumstances, whether he properly understood and assessed all of the relevant facts and evidence in arriving at the proposed civil penalty, and whether he relied on any impermissible or inappropriate factors. Because PHMSA failed to disclose the civil penalty worksheet prior to the Hearing, NGPL was clearly deprived of its opportunity to conduct that cross examination.

The Presiding Official's most important charge is to "conduct a fair and impartial Hearing,"<sup>53</sup> and that simply cannot occur where PHMSA, the party who initiated the proceeding and who bears the burden of proof, including with respect to the appropriateness of a proposed civil penalty, fails to disclose relevant and material evidence to a respondent prior to a Hearing. Such conduct deprives the respondent of its opportunity to offer evidence and examine witnesses about the actual rationale and approach that PHMSA used in determining the proposed civil penalty in that case. PHMSA has never explained why it will not provide the penalty worksheet, except to say that it is its policy not to do so. The agency never cites any legal authority or public policy rationale for withholding this material. It defies logic and common notions of transparency that PHMSA has chosen to keep secret the very document that most clearly supports the agency's proposed civil penalty.

***2. PHMSA's refusal to disclose its penalty worksheet violates NGPL's constitutional right to procedural due process.***

**a. Constitutional Procedural Due Process requires that NGPL be afforded the opportunity to review and rebut**

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<sup>53</sup> 49 C.F.R. § 190.212(c).

**PHMSA's Penalty Worksheet as it is evidence that  
PHMSA is using against NGPL.**

PHMSA's use of undisclosed Penalty Worksheets clearly violates NGPL's procedural due process rights as it creates a substantial risk of an erroneous deprivation of NGPL's private interests. The Supreme Court's decision in *Mathews v. Eldridge* sets out the following three-pronged balancing test for determining whether the process the government has provided passes constitutional muster:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>54</sup>

The application of the *Mathews v. Eldridge* balancing test here makes clear that PHMSA's policy of keeping the Penalty Worksheet a secret is a violation of NGPL's procedural due process rights. The remedy for this violation is for PHMSA to provide the worksheet. It would be wholly without burden for PHMSA to provide this document, particularly since the agency has never said why it keeps it a secret.

**i. Private Interest Affected by the Official Action**

It is without question that NGPL's private interests here are significant and these interests are affected by PHMSA's policy of secrecy. PHMSA's civil Penalty Worksheet provides the basis for the substantial, \$47,500 proposed civil penalty in this case.<sup>55</sup> NGPL has a substantial

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<sup>54</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See also, *Ralls Corp. v. Committee On Foreign Investment In the United States*, 758 F.3d 296, 317-318 (D.C. Cir. 2014); *ASSE International, Inc. v. Kerry*, 803 F.3d 1059, 1073-1075 (9<sup>th</sup> Cir. 2015); and *Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 979 (9<sup>th</sup> Cir. 2011).

<sup>55</sup> The D.C. Circuit and other federal courts have found that monetary interests and the assessment of civil penalties are significant private interests. *Ralls*, F.3d at 318 (citing *Nat'l Council of Resistance of Iran v. Dep't of State*, 251

interest in any civil penalties levied against it by the federal government. Aside from their economic impact, civil penalties also have reputational impacts on NGPL. NGPL has a significant private interest in understanding the full basis for PHMSA's proposed civil penalty so that NGPL can determine how to respond.

**ii. Risk of Erroneous Deprivation and Value of Additional Procedural Safeguards**

The Supreme Court has found “[w]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”<sup>56</sup> This principle is also evidenced by the Supreme Court’s decisions in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*<sup>57</sup> and *Ohio Bell Telephone Co. v. Public Utilities Comm’n of Ohio*.<sup>58</sup> Federal courts have found that the opportunity to refute unfavorable evidence is an “immutable” principle of procedural due process.<sup>59</sup>

In *Ralls Corp.*, a corporation owned by two Chinese nationals was ordered by the federal government to divest a windfarm project located near U.S. Naval operations on the basis of national security.<sup>60</sup> The corporation challenged the order claiming that it violated its procedural due process rights as it was not presented with, among other things, unclassified evidence that

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F.3d 192 (D.C. Cir. 2001)); *Al Haramain*, 686 F.3d at 980.

<sup>56</sup> *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

<sup>57</sup> 419 U.S. 281, n.4 (1974).

<sup>58</sup> 301 U.S. 292 (1937).

<sup>59</sup> *ASSE International*, 803 F.3d at 1075; *Ralls Corp.*, 758 F.3d at 318; *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 64 (D.C. Cir. 1999); and *Ralphy v. Bell*, 569 F.2d 607, 628-629 (D.C. Cir. 1977)

<sup>60</sup> 758 F.3d at 301-302.

supported the government’s order.<sup>61</sup> In analyzing the claim, the *Ralls* Court reiterated that “[d]ue process ordinarily requires that procedures provide notice of the proposed official action and ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’”<sup>62</sup> This requires, the Court reasoned, “the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action. . . .”<sup>63</sup> The D.C. Circuit concluded that the government’s order “deprived Ralls of its constitutionally protected property interests without due process of law. [As the caselaw it cited and prior discussion] makes plain, due process requires, at the least, that an affected party be informed of the official action, be given access to unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence.”<sup>64</sup>

In *Williston Basin Interstate Pipeline Co. v. FERC*, the D.C. Circuit considered whether Williston Basin’s procedural due process rights were violated when FERC approved a rate increase based on data not presented at the Hearing.<sup>65</sup> The court found a due process violation on the basis that “[i]t is well-established that ‘[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.’”<sup>66</sup>

Other Circuits have applied this analysis and reached similar conclusions in cases where

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 318 (citations omitted).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 319.

<sup>65</sup> 165 F.3d at 63.

<sup>66</sup> *Id.*

the government relies on evidence not provided to a respondent.<sup>67</sup> The Ninth Circuit made clear “as we have held previously with respect to the use of classified information without disclosure: ‘One would be hard pressed to design a procedure more likely to result in erroneous deprivations.’”<sup>68</sup> It reasoned that “the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.”<sup>69</sup> If the court found a risk of erroneous deprivation in *Al Haramain* in spite of the government’s interest in withholding classified information, it is easy to discern that the PHMSA’s interest in withholding unclassified information, like penalty worksheets, is that much lower.

PHMSA’s policy of keeping its Penalty Worksheets secret creates a substantial risk of an erroneous deprivation of NGPL’s private interests. NGPL has repeatedly asserted that the worksheets are evidence, used against NGPL. PHMSA has never asserted that the worksheets are not evidence or why they are being withheld. The Compliance Officer used the Penalty Worksheet to determine the proposed civil penalties here. And the proposed penalty serves as a starting point for any penalties eventually assessed by PHMSA. There is no question that the Penalty Worksheet is evidence. In the Penalty Worksheet, PHMSA weighs the various statutory penalty assessment criteria in light of the alleged facts. PHMSA also articulates in the Penalty Worksheet the relative contribution of each assessment to the total proposed penalty. That is, which factors were significant and which were not. Without an understanding of PHMSA’s relative weighting of the factors, or how the worksheet weights each factor individually in light

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<sup>67</sup> *Al Haramain*, 686 F.3d at 980; *U.S. v. Owen*, 415 F.2d 383, 388 (8<sup>th</sup> Cir. 1969).

<sup>68</sup> *Al Haramain*, 686 F.3d at 980 (citations omitted).

<sup>69</sup> *Id.*

of the facts alleged, NGPL is unable to determine if PHMSA has made errors in its development of the proposed penalty. In addition, the Penalty Worksheet itself constitutes instructions to staff on how it is to be completed. Without access to the Penalty Worksheet, NGPL is unable to determine if PHMSA erred in filling out the worksheet. Due process required that PHMSA provide the Penalty Worksheet to NGPL before the Hearing and provide the opportunity to examine and rebut how PHMSA weighed the facts, applied the statutory criteria and developed the penalty in this case. There is manifest value in an additional procedural safeguard in which PHMSA simply stands behind its proposed civil penalty and provides the Penalty Worksheet to respondents.

PHMSA may argue that a combination of the Violation Report and its “Civil Penalty Summary” document provides all that NGPL needs to defend itself. This is incorrect. PHMSA’s refusal to stand behind the Civil Penalty Summary as agency guidance,<sup>70</sup> the disclaimer language on that document,<sup>71</sup> and PHMSA’s statements that the Civil Penalty Summary is not a substitute for the worksheet<sup>72</sup> only make more clear the value of the worksheet as a piece of evidence.

**iii. The Government’s interest in any additional procedural requirements, including the function involved and any burden on the Government.**

PHMSA has never articulated what interest it is protecting by keeping the Penalty Worksheets a secret; and none is evident given the agency’s stated goals of enforcement transparency and consistency. There is no burden on PHMSA of disclosing the Penalty

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<sup>70</sup> Transcript at page 142, lines 7-23 and page 168, line 25 through page 172.

<sup>71</sup> PHMSA Civil Penalty Summary 09 06 14, Exhibit D.

<sup>72</sup> Transcript at page 170, lines 7-19 and page 173, lines 14-22.

Worksheet. With a few moments of effort, PHMSA could simply provide the document to a respondent on request, by e-mail, or include it with the Violation Report as a matter of course. No additional administrative process is required, the staff resource impact is minimal, and there is no fiscal impact. The information included in the Penalty Worksheet is not subject to any privilege, and the information does not relate to an issue of national security. There simply is no cognizable interest in PHMSA's policy of secrecy. NGPL is concerned that PHMSA maintains this policy simply to make it more difficult for respondents to defend themselves in enforcement cases.

Based upon the foregoing, a balancing of all of the factors enunciated in *Mathews v. Eldridge* and applied by the D.C. Circuit and other courts indicate that PHMSA's policy of secrecy violates NGPL's procedural due process rights. As such, no civil penalty is appropriate in this case.

**b. The use of "secret evidence" such as the Penalty Worksheet clearly denies NGPL the opportunity to meaningfully respond to or rebut evidence used in the calculation of penalties.**

Apart from the *Mathews v. Eldridge* framework, the Supreme Court has held that due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>73</sup> That is, as indicated by the D.C. Circuit, "[d]ue process ordinarily requires that procedures provide notice of the proposed official action and 'the opportunity to be heard at a

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<sup>73</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted). *See also, Al Haramain*, 686 F.3d at 985.

meaningful time and in a meaningful manner.”<sup>74</sup> Both the Supreme Court and [the D.C. Circuit] have recognized that the right to know the factual basis for the action and the opportunity to rebut the evidence supporting that action are “essential components of due process. . . .”<sup>75</sup>

The use of secret evidence violates the most fundamental due process right. In *Ralpho v. Bell*, Ralpho filed a claim under the Micronesian Claims Act, which set up a fund for compensation for losses incurred by Micronesians during World War II.<sup>76</sup> Ralpho claimed that the Commission’s calculation of his compensation was incorrect and was based upon evidence he was not presented with and unable to rebut.<sup>77</sup> Ralpho claimed that his procedural due process rights were violated when the government used “‘secret’ extra-record evidence in determining his award.”<sup>78</sup> The Court agreed, reasoning that “[a]n opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process.”<sup>79</sup> The *Ralpho* Court cited another D.C. Circuit case, *American and European Agencies v. Gilliland*,<sup>80</sup> where a claimant was refused access to a staff memorandum the agency used in calculating the value of his claim.<sup>81</sup> The *Ralpho* Court agreed with *Gilliland* when it recognized that it is constitutionally impermissible for an administrative decision to be based upon evidence

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<sup>74</sup> 758 F.3d at 319 (citations omitted).

<sup>75</sup> *Id.*

<sup>76</sup> 569 F.2d at 611.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 628.

<sup>80</sup> 247 F.2d 95 (D.C. Cir. 1957), cert. denied, 355 U.S. 884 (1957).

<sup>81</sup> 569 F.2d at 628.

that was not disclosed.<sup>82</sup> As such, the court concluded that Ralpho “should have been given an opportunity to meet evidence which the Commission intended to consider in making its decision.”<sup>83</sup> The Court also concluded that “[w]e can discern from the record no public policy that was perceptibly furthered by the Commission’s reticence, and surely mystery without purpose has no place in government.”<sup>84</sup>

PHMSA’s policy of secrecy is identical to the governmental action in *Ralpho* and *Gilliland*. PHMSA’s proposed penalty is based upon the Penalty Worksheet, and that document contains both a process for developing a penalty and a specific set of judgments about NGPL’s conduct in light of the facts and the statutory assessment criteria. If a civil penalty is assessed in this case, it will be violation of NGPL’s right to due process of law because NGPL was unable to assess and rebut the Penalty Worksheet.

***3. The Presiding Official should reverse his January 22, 2016 Decision on Request for Production of Information.***

Contrary to the Presiding Official’s January 22, 2016, Decision on Request for Production of Information, the District Court’s decision in *Don Ray Drive-A-Way Co. v. Skinner*,<sup>85</sup> supports disclosing the civil penalty worksheet to the respondent. The Presiding Official ruled that *Don Ray* was distinguishable because the Notice, Violation Report, and other documents disclosed by PHMSA, as well as the civil penalty assessment factors listed in the Pipeline Safety Laws and Regulations, gave the respondent notice of the reasons for its legal

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<sup>82</sup> *Id.* (citations omitted).

<sup>83</sup> *Id.* at 629.

<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> *Don Ray Drive-A-Way Co. of California, Inc. v. Skinner*, 785 F. Supp. 198 (D.C. Cir. 1992).

status. NGPL respectfully requests that the Presiding Official reconsider his ruling.

First, the Presiding Official did not acknowledge that, just like in a PHMSA case, the motor carriers in the *Don Ray* case also had the ability to review and challenge the factual determinations that the Federal Highway Administration (“FHWA”) made before applying the algorithm that determined the safety rating. Just like the Violation Report in a PHMSA proceeding, FHWA inspectors complete a lengthy questionnaire during motor carrier safety inspections.<sup>86</sup> Motor Carriers were provided access to the FHWA’s completed safety questionnaire, and were able to challenge the factual findings in an administrative Hearing.<sup>87</sup> The infirmity the court found in the *Don Ray* case was that motor carriers could not see how the FHWA weighed the facts from the questionnaire to arrive at the safety rating.<sup>88</sup> In this case, NGPL faces precisely the same infirmity-it does not have access to the worksheet in which PHMSA weighed the facts and arrived at a proposed civil penalty.

Secondly, just as NGPL has access to the civil penalty assessment criteria in the pipeline safety regulations, the respondents in *Don Ray* had access to the safety rating factors, which were published in the motor carrier safety regulations.<sup>89</sup>

Third, although the motor carrier in *Don Ray* had access to the very same kinds of information cited by the Presiding Official as available to NGPL here, the District Court concluded that merely having access to the facts and the regulations was not enough to provide

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<sup>86</sup> *Id.* at 199.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See* 49 C.F.R. Part 385 (1990). At the time *Don Ray* was decided, and today, Section 385.7 of the motor carrier regulations contains a list of several safety factors to be considered in determining safety fitness and assigning a safety rating.

the motor carriers with an understanding of why they were being punished. In the District Court's view, having access to the algorithm itself, which contained the FHWA's actual rationale for weighting the factors and imposing the punishment, was critical:

The weighting of the various factors is crucial to the carriers' understanding of why they are being assigned a particular legal status. Without that information, their right to appeal the agency action is severely impaired, in that they will not know the reason for their rating and hence cannot direct their attack to facts crucial to a successful appeal. A person should not have to guess why he is being punished, even if the government ultimately says that the punishment is attributable to one or more of several reasons.<sup>90</sup>

Finally, and perhaps most importantly, NGPL's legal rights are clearly impaired by PHMSA's failure to provide the civil penalty worksheet. As the court found in *Don Ray* an unsatisfactory safety rating had "certain immediate results" such as being barred from certain types of work, such as hauling hazardous materials or work for the Department of Defense.<sup>91</sup> As previously discussed, NGPL's opportunity to introduce rebuttal evidence and examine the Compliance Officer at the Hearing were diminished by PHMSA's failure to disclose the civil penalty worksheet.

**4. PHMSA's process allows for prohibited ex parte communications.**

PHMSA's failure to provide the civil penalty worksheet to NGPL, when combined with its policy of allowing the Presiding Official to obtain and review that document and apply the worksheet methodology to develop a revised penalty,<sup>92</sup> is also a clear violation of the prohibition

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<sup>90</sup> *Don Ray Drive-A-Way Co. of California, Inc. v. Skinner*, 785 F. Supp. 198, 200 (D.C. Cir. 1992).

<sup>91</sup> 785 F. Supp. at 199-200.

<sup>92</sup> PHMSA, Pipeline Safety Enforcement Procedures, Section 4 (June 5, 2015), attached here as Exhibit F. "Upon request, the Enforcement Division will provide a copy of the original penalty worksheet to the Presiding Official..." Section 4.1.4, p. 30. "If the attorney determines that the evidence may support an assessed penalty reduced from the propose, the attorney will obtain the proposed civil penalty worksheet from the Enforcement Division. The attorney will use the same consistent methodology that was previously applied to determine the proposed penalty, to

on ex parte communications in 49 C.F.R. § 190.210(b). Section 190.210(b) states, in relevant part, that:

A party to an enforcement proceeding, including the respondent, its representative, or an agency employee having served in an investigative or prosecutorial capacity in the proceeding, may not communicate privately with the Associate Administrator, Presiding Official, or attorney drafting the recommended decision concerning information that is relevant to the questions to be decided in the proceeding.

PHMSA is a party to this enforcement proceeding, the Compliance Officer is clearly serving in a prosecutorial capacity for PHMSA, the civil penalty worksheet that the Compliance Officer prepared in determining the proposed civil penalty in this case is clearly a “communication,” and the information on the worksheet is clearly relevant to the basis for the civil penalty amount, which is a question to be decided in this proceeding. Accordingly, the regulation prohibits PHMSA from sharing, and the Presiding Official from reviewing, the civil penalty worksheet in private without providing respondent with prior notice and the opportunity to review and respond to that evidence at the Hearing.

Notwithstanding the ex parte prohibition, and PHMSA’s refusal to provide the worksheet to respondents, PHMSA’s official policy is that the Presiding Official can request and review the civil penalty worksheet at any time, including after the record has closed in a proceeding.<sup>93</sup> PHMSA’s development and implementation of a policy that directly violates its own ex parte rules raises serious questions about PHMSA’s commitment to the due process rights of respondents. The Presiding Official should rule that PHMSA’s policy of withholding the worksheet is inconsistent with the Part 190 regulations and cannot be applied in this

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calculate and provide a revised recommended civil penalty. Section 4.1.8, p.40-41. *Emphasis added.*

<sup>93</sup> *Id.*

enforcement proceeding.

The Presiding Official should also recommend that the Associate Administrator initiate an investigation into whether PHMSA has violated the prohibition on ex parte communications. To the extent those violations have occurred, the Presiding Official should recommend that the Associate Administrator notify the respondents in those cases and take appropriate action to protect their due process rights.

**5. PHMSA does not consistently follow its own penalty procedures.**

PHMSA's testimony regarding the application of its penalty procedures is inconsistent with testimony the agency provided in a previous Hearing in a different enforcement case issued to El Paso Natural Gas Company, L.L.C.<sup>94</sup> PHMSA's inconsistent application of its penalty procedures, which are specifically intended to bring about consistency in civil penalties, is arbitrary and capricious and provides a basis for withdrawal of the proposed civil penalties in this case.

The United States Court of Appeals, for the District of Columbia Circuit has held that agencies must apply their own procedures uniformly or with reasoned distinction, and a failure to do so may be evidence that the agency acted in an arbitrary and capricious manner. In *Hooper v. Nat'l Transp. Safety Bd.* ("NTSB"), the court held that the NTSB's failure to enforce its procedures uniformly was arbitrary and capricious.<sup>95</sup> In *Greene Country Mobilephone v. FCC*, the court stated "...once an agency agrees to allow exceptions to a rule, it must provide a rational

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<sup>94</sup> *In the Matter of El Paso Natural Gas Company, L.L.C.*, CPF No. 3-2015-1008, Hearing Held February 3, 2016 and Continuation Hearing dated February 18, 2016. The transcript of the EPNG Hearing ("EPNG Hearing Transcript and the Continuation Hearing ("EPNG Continuation Transcript") are attached hereto as Exhibit E.

<sup>95</sup> *Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150, 1151 (D.C. Cir. 1988).

explanation if it later refuses to allow exceptions in cases that appear similar.<sup>96</sup> A “sometimes-yes, sometimes-no, sometimes-maybe policy . . . cannot . . . be squared with our obligation to preclude arbitrary and capricious management of [an agency’s] mandate.” Courts also have found that “departures from [agency guidelines that are not contained in rules] are evidence that the sanction imposed may be arbitrary and capricious.”<sup>97</sup>

At the EPNG Hearing, PHMSA stated that in developing proposed civil penalties it followed no other procedures other than the instructions contained in the Worksheet.<sup>98</sup> Later, at the EPNG Continuation, the PHMSA witness stated again that he only used the Worksheet, but then clarified that he “occasionally” referred to PHMSA’s Pipeline Safety Enforcement Procedures.<sup>99</sup> In contrast, at the NGPL hearing, the PHMSA witness stated that the Pipeline Safety Enforcement Procedures were developed to promote consistency and that PHMSA expects its staff to consistently follow them.<sup>100</sup>

At the EPNG Continuation, the PHMSA witness stated that there were base penalty amounts associated with each of the assessment criteria, and that those amounts served as the starting point for any penalty.<sup>101</sup> In contrast, at the NGPL hearing, PHMSA denied that such

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<sup>96</sup> *Green Country Mobilephone, Inc. v. F.C.C.*, 765 F.2d 235, 237 (D.C. Cir. 1985) (quoting *NLRB v. Washington Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984)).

<sup>97</sup> *Dale and Selby Superette & Deli v. U.S. Dept. of Agriculture*, 836 F. Supp. 669, 672 (D. Minn. 1993) (finding that a departure from the Food and Nutrition Services Handbook was evidence that an agency sanction imposed may be arbitrary and capricious ) (citing *Sims v. U.S. Dept. of Agric. Food and Nutrition Serv.*, 860 F.2d 858, 861 (8<sup>th</sup> Cir. 1988)).

<sup>98</sup> EPNG Transcript at page 145, lines 16-25.

<sup>99</sup> EPNG Continuation Transcript at page 4, line 20 through page 5, line 22.

<sup>100</sup> NGPL Transcript at page 141 lines 24-15 through page 142 line 1; page 146, lines 3-11.

<sup>101</sup> EPNG Continuation Transcript at page 14, line 12 through page 15, line 7.

base penalties existed, but refused to otherwise explain the monetary starting point for a civil penalty.<sup>102</sup>

Section 4 of PHMSA's Pipeline Safety Enforcement Procedures includes information on the development of a civil penalty recommendation and its incorporation into the Notice of Probable Violation.<sup>103</sup> PHMSA's procedures also allow the Enforcement Division to provide the penalty worksheet to the Presiding Official, and require the Presiding Official to obtain that worksheet if he determines that the penalty must be adjusted from the proposed amount.<sup>104</sup> PHMSA's procedures require that the Presiding Official "use the same consistent methodology that was previously applied to determine the proposed penalty, to calculate and provide a revised recommended civil penalty."<sup>105</sup>

PHMSA provided no explanation at either the EPNG or NGPL Hearing of why the agency follows its procedures in some cases and not in others. Given these revelations at the Hearings, and in the absence of the penalty worksheet or further insight on PHMSA's inconsistent practices, NGPL is unable to determine whether PHMSA followed its own procedures in this case as it is required to do under the case law cited above. Based on the foregoing, any penalty in this case would be arbitrary and capricious.

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<sup>102</sup> NGPL Transcript at page 159, lines 3-20.

<sup>103</sup> PHMSA, Pipeline Safety Enforcement Procedures, Sections 4.1.3.3 – 4.1.3.5.

<sup>104</sup> *Id.* at Section 4.1.4; 4.1.8.1.

<sup>105</sup> *Id.* at Section 4.1.8.1.

**6. PHMSA's penalty worksheets constitute instructions to staff that affect a member of the public and must be disclosed.**

At the Hearing it became evident that, in addition to constituting evidence against NGPL, PHMSA's Penalty Worksheets also constitute instructions to staff in how to develop a proposed civil penalty.<sup>106</sup> The Penalty Worksheets set out a framework that instructs staff in how to apply factual information from the Violation Report to produce a proposed penalty. The Freedom of Information Act ("FOIA") requires that PHMSA make available to the public those "administrative staff manuals and instructions to staff that affect a member of the public."<sup>107</sup> The D.C. Circuit has held that an agency's obligation to disclose staff manuals and instructions under 5 U.S.C. § 552(a)(2)(C) "clearly does not require a FOIA request."<sup>108</sup>

The Presiding Official's conclusion that NGPL is not entitled to the penalty worksheets as the "request for information is essentially a request for pre-hearing discovery"<sup>109</sup> is incorrect. NGPL's request for the penalty worksheets is not a discovery request. It is a request for evidence and procedures that PHMSA is already required to disclose as a matter of law, both under the affirmative disclosure obligations of FOIA and the due process analysis set out earlier.

In *Smith v. National Transportation Safety Bd.*, the D.C. Circuit found that staff manuals setting out guidelines for sanctions clearly "affect" the public and must be affirmatively provided to the public.<sup>110</sup> The court vacated and remanded the sanction at issue in *Smith* because the

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<sup>106</sup> Transcript at page 139, line 10 through page 140, line 14.

<sup>107</sup> 5 U.S.C. § 552(a)(2)(C)(2012).

<sup>108</sup> *Food Chem. News v. Dep't of Health & Human Servs.*, 980 F.2d 1468, 1472 (D.C. Cir. 1992).

<sup>109</sup> January 22, 2016 Decision on Request for Production of Information at page 2.

<sup>110</sup> *Smith v. Nat'l Transp. Safety Bd.*, 981 F.2d 1326, 1328 (D.C. Cir. 1993).

National Transportation Safety Board (“NTSB”) had relied upon and unpublished Federal Aviation Administration staff manual in developing the sanction.<sup>111</sup> The court rejected the NTSB’s argument that release of the manual would compromise agency enforcement activities, concluding that public disclosure of a sanctions manual “poses no such threat.”<sup>112</sup> The court observed that publication of the sanctions manual is essential to an agency’s goal of deterring undesired conduct.<sup>113</sup>

PHMSA’s Penalty Worksheet is analogous to the sanctions manual at issue in *Smith* because it sets out the framework that staff are required to follow in developing a civil penalty. The Penalty Worksheet clearly affects the public because it is used to determine the amount of a proposed civil penalty that serves as the maximum penalty an enforcement case. Under *Smith*, affirmative disclosure of the Penalty Worksheet is required, no FOIA request is necessary to obtain it, and there is no basis for withholding these materials from NGPL.

PHMSA is precluded from relying upon documents that are required to be provided to the public under FOIA, but which have not been made available.<sup>114</sup> In *Checkosky v. SEC*, the D.C. Circuit held that the “Freedom of Information Act, 5 U.S.C. § 552(a)(2), forbids agencies from relying on, using, or citing as precedent, opinions or interpretations that have not been made available to the public in accordance with agency rules.”<sup>115</sup> PHMSA’s Penalty Worksheet is

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<sup>111</sup> *Id.* at 1329. See also *DiBiasio v. Nat’l Transp. Safety Bd.*, 36 F.3d 127 (D.C. Cir. 1994).

<sup>112</sup> *Smith v. Nat’l Transp. Safety Bd.*, 981 F.2d at 1328-29.

<sup>113</sup> *Id.* at 1329.

<sup>114</sup> *Checkosky v. SEC*, 23 F.3d 452, 482 (D.C. Cir. 1982).

<sup>115</sup> *Id.* Although certain holdings of *Checkosky* were later superseded by an SEC rule, the court’s finding regarding reliance on documents not made available to the public remains applicable.

clearly an agency interpretation of the means by which it will exercise its penalty authority, i.e. weigh the penalty criteria against the facts and the relative importance of each criteria to the analysis. PHMSA's FOIA "reading room" website was prepared to comply with FOIA by providing affirmative disclosure materials to the public.<sup>116</sup> If PHMSA does not provide the Penalty Worksheet to NGPL, it may not assess a civil penalty in this case.

At the Hearing, PHMSA referred to a Civil Penalty Summary document that provides "information" on how PHMSA *may* apply its penalty authority.<sup>117</sup> When the respondent raised concerns about the disclaimer language in the Civil Penalty Summary, which prohibits its use to calculate a penalty in any specific case, PHMSA refused to characterize that document as a guidance document.<sup>118</sup> Critically, PHMSA further clarified that the Civil Penalty Summary is not a substitute for the Penalty Worksheet.<sup>119</sup> These statements make clear that the Civil Penalty Summary has little to no value as a guidance document, and that the Penalty Worksheet remains the only accurate reflection of PHMSA's policy on how it will weigh the civil penalty assessment criteria in light of the facts and what the relative weighting of each criteria will be. As such, PHMSA's provision of the Civil Penalty Summary is no substitute for the Penalty Worksheet itself.

### **C. Analysis of the Proposed Penalty in the Notice.**

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<sup>116</sup> DOT FOIA regulations mirror 5 U.S.C. § 552(a) and provide that PHMSA will give the public access to "reading room" materials electronically. 49 C.F.R. § 7.5(a) (2014). PHMSA Electronic Reading Room, <http://www.phmsa.dot.gov/foia/e-reading-room> (last accessed March 17, 2016).

<sup>117</sup> Transcript at page 142, lines 7-23

<sup>118</sup> *Id.* at 173, line 14 through page 175, line 13.

<sup>119</sup> *Id.* at 175, lines 4-9.

If PHMSA finds that NGPL violated the regulations as alleged, which it should not do given the record evidence in this case, no civil penalty is appropriate under an application of the statutory penalty assessment criteria to the facts of this case. NGPL respectfully asserts that the proposed civil penalty does not reflect the record in this case. In the table set forth below, NGPL offers a series of arguments for withdrawal of the penalty in light of the statutory penalty criteria at 49 U.S.C. § 60122(b). NGPL’s makes these arguments specifically in rebuttal of the material in PHMSA’s Violation Report. NGPL’s arguments above and in the Pre-Hearing Brief in response to PHMSA’s substantive allegation also bear on the penalty here and must be considered along with the material below.

Penalty Criterion	PHMSA Weight from Violation Report	NGPL Assessment of Weight	Reason(s) for NGPL Assessment	NGPL Evidence
<b>E7 - Gravity<sup>120</sup></b>	4 of 7	Reduce to 7 of 7	<ul style="list-style-type: none"> <li>• No evidence that pipeline safety compromised because wealth of evidence shows that NGPL followed its procedures and worked diligently to align its data to determine whether the anomalies were immediate repair conditions.</li> <li>• NGPL followed the regulations by promptly obtaining adequate information to discover conditions.</li> </ul>	<ul style="list-style-type: none"> <li>• O&amp;M 916.</li> <li>• Pre-Hearing Exhibit 13 (data alignment)</li> <li>• Pre-Hearing Exhibit 1 (Discovery Timeline)</li> <li>• Pre-Hearing Exhibits 2-11 (E-mail exchanges during data alignment)</li> <li>• Testimony from NPGL that data alignment was necessary and that ILI Report alone did not</li> </ul>

<sup>120</sup> PHMSA Gravity Scale from Violation Report: (1): The violation was a causal factor in an accident/incident; (2): The violation increased the severity of an accident/incident; (3): Pipeline safety or integrity was significantly compromised in an HCA or an HCA “could affect” segment; (4): Pipeline safety or integrity was comprised in an HCA or an HCA “could affect” segment; (5): Pipeline safety or integrity was significantly comprised in areas other than an HCA or an HCA “could affect” segment; (6): Pipeline safety or integrity was compromised in areas other than an HCA or an HCA “could affect” segment; (7): Pipeline safety or integrity was minimally affected.

Penalty Criterion	PHMSA Weight from Violation Report	NGPL Assessment of Weight	Reason(s) for NGPL Assessment	NGPL Evidence
			<ul style="list-style-type: none"> <li>Operating pressure was immediately reduced upon discovery of the immediate repair conditions.</li> </ul>	<p>contain adequate information.<sup>121</sup></p> <ul style="list-style-type: none"> <li>PHMSA was unable to say how long discovery should have taken, just that alignment could have been done “easily” and should have been faster.<sup>122</sup></li> <li>Lack of testimony from PHMSA at the Hearing to rebut the need for NPGL data alignment.</li> <li>Lack of testimony from PHMSA at the Hearing to rebut testimony that ILI Report alone was inadequate.</li> </ul>
<b>E8 Culpability</b> <sup>123</sup>	3 of 7	NGPL took action to comply and did comply, so there must	<ul style="list-style-type: none"> <li>At the Hearing, NGPL demonstrated that the application of its data alignment procedures was required to obtain the</li> </ul>	<ul style="list-style-type: none"> <li>O&amp;M 916.</li> <li>Pre Hearing Exhibit 13 (data alignment)</li> <li>Discussion in Pre-</li> </ul>

<sup>121</sup> Transcript at page 94, line 20 through page 95, line 17.

<sup>122</sup> *Id.* at page 13, line 16; page 23, lines 18-22; and page 71, lines 1-3.

<sup>123</sup> PHMSA Culpability Scale from Violation Report: (1): The operator took egregious action (such as manipulation of records or reconfiguration of equipment) that evidenced an effort to evade compliance or conceal non-compliance; (2) The operator made a conscious decision not to comply with a requirement that was clearly applicable; (3) The operator failed to take appropriate action to comply with a requirement that was clearly applicable; (4) The operator took action to comply with a requirement but did not achieve compliance; (5) The Operator took action to comply with a requirement but failed to achieve compliance for reasons such as unforeseeable events/conditions that were partly or wholly outside its control; (6) After the operator found the non-compliance the operator took documented action to address the cause of the non-compliance, and was in the process of correcting the non-compliance before PHMSA learned of the violation; and (7) After the operator found the non-compliance, the operator took documented action to address the cause of the non-compliance, and corrected the non-compliance before PHMSA learned of the violation.

Penalty Criterion	PHMSA Weight from Violation Report	NGPL Assessment of Weight	Reason(s) for NGPL Assessment	NGPL Evidence
		be no culpability input to the penalty	“adequate information” required by the discovery regulation.	and Post-Hearing Brief concerning NGPL’s alignment efforts. <ul style="list-style-type: none"> <li>• Testimony from NPGL that data alignment was necessary and that ILI Report alone did not contain adequate information.<sup>124</sup></li> </ul>
<b>E9 - Good Faith</b> <sup>125</sup>	2 of 2 (no good faith)	Change to 1 of 2 (good faith present)	<ul style="list-style-type: none"> <li>• NGPL acted in good faith because its interpretation of the regulations was reasonable.</li> <li>• NGPL followed its procedure for alignment of data.</li> <li>• NGPL expedited its data alignment efforts.</li> </ul>	<ul style="list-style-type: none"> <li>• NGPL’s O&amp;M 916 sets out detailed, good faith procedure.</li> <li>• The rulemaking history indicating operator has flexibility when determining adequate information exists.</li> <li>• Pre-Hearing Brief Exhibit 4 (Request to expedite data alignment)</li> <li>• Discussion in Pre- and Post-Hearing Brief concerning NGPL’s alignment efforts.</li> </ul>
<b>E10 – Additional considerations</b>	Compliance Officer testified that	This factor should be used to	<ul style="list-style-type: none"> <li>• NGPL’s procedure was consistent with the regulations and no harm</li> </ul>	<ul style="list-style-type: none"> <li>• O&amp;M 916.</li> <li>• Pre Hearing Exhibit 13 (data alignment)</li> </ul>

<sup>124</sup> Transcript at page 94, line 20 through page 95, line 17.

<sup>125</sup> PHMSA Good Faith Choices: (1) The operator’s interpretation of the requirement was reasonable, and it had credible justification for its actions or lack of actions; (2) The operator did not make a reasonable interpretation of the requirement or did not have credible justification for its actions or lack of actions.

Penalty Criterion	PHMSA Weight from Violation Report	NGPL Assessment of Weight	Reason(s) for NGPL Assessment	NGPL Evidence
(as justice may require)	this factor was not used in this case	support elimination of penalty in this case	<p>resulted, or is likely to result in the future, from NGPL’s choice to align data itself to obtain more accurate results, more quickly than an ILI vendor is capable of providing.</p> <ul style="list-style-type: none"> <li>• NGPL took proactive efforts to align its data because of poor experiences with ILI vendor data alignment, and it should be rewarded for these efforts, not punished.</li> </ul>	<ul style="list-style-type: none"> <li>• Testimony from NPGL that data alignment was necessary and that ILI Report alone did not contain adequate information.<sup>126</sup></li> <li>• NGPL testimony that its data alignment is more accurate than if outside vendor completed.<sup>127</sup></li> </ul>

**V. Conclusion**

Based on the foregoing, NGPL respectfully requests that PHMSA withdraw the allegation of violation and proposed civil penalty in this case. NGPL reserves the right to supplement its arguments and the record in this case on the basis of any further submittals by PHMSA.

Respectfully submitted

/s/ James B. Curry

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<sup>126</sup> Transcript at page 94, line 20 through page 95, line 17.

<sup>127</sup> Transcript at page 95, line 25 through page 96, line 25.