



December 11, 2020

Mr. Gregory A. Ochs
Director, Central Region
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
901 Locust Street, Suite 462
Kansas City, MO 64106

**Re: CPF No. 3-2020-1008
Notice of Probable Violation and Proposed Civil Penalty**

Dear Mr. Ochs:

Tallgrass Energy, LP (Tallgrass or the Company) is in receipt of the Notice of Proposed Violation and Proposed Civil Penalty (NOPV) that the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued in the above-captioned case on October 26, 2020. The NOPV alleges four violations of the gas pipeline control room management regulations in 49 C.F.R. § 192.631 and proposes a total civil penalty of \$86,700. On November 24, 2020, PHMSA granted Tallgrass a 15-day extension to respond to the NOPV. Tallgrass appreciates the additional time to prepare its response in this matter. Tallgrass does not contest certain allegations and respectfully requests that PHMSA withdraw other allegations, and withdraw or reduce the associated proposed civil penalties. We request that PHMSA consider the explanations below, and the attached documents, in developing the Final Order in this case.

Tallgrass is requesting confidential treatment of the attached documents in accordance with 5 U.S.C. § 552(b). Attachments 1 and 3 through 6 contain confidential commercial information protected from release under 5 U.S.C. § 552(b)(4). Attachment 2 contains confidential personnel information protected from released under 5 U.S.C. § 552(b)(6).

Tallgrass appreciates PHMSA's feedback during the inspections in this matter, and shares PHMSA's commitment to pipeline safety and continuous program improvement.

Item 1:

§192.631 Control room management.

(a) . . .

(c) **Provide adequate information. Each operator must provide its controllers with the information, tools, processes and procedures necessary for**

the controllers to carry out the roles and responsibilities the operator has defined by performing each of the following:

(1) . . .

(3) Test and verify an internal communication plan to provide adequate means for manual operation of the pipeline safely, at least once each calendar year, but at intervals not to exceed 15 months.

PHMSA allegation: Tallgrass failed to test and verify its internal communication plan to provide adequate means for manual operation of the pipeline safely at least once each calendar year, but at intervals not to exceed 15 months. Specifically, Tallgrass was unable to demonstrate that it tested and verified the plan in the calendar year 2017. During the inspection, Tallgrass stated that it migrated to a new scheduling platform, Enablon, and that the task for the internal test was not entered causing the test not to be scheduled nor conducted.

PHMSA proposed a \$19,000 civil penalty for this alleged violation.

Tallgrass response to Item 1:

A. Allegation

Tallgrass Energy does not contest this alleged violation. As described in the NOPV, Tallgrass migrated to a new scheduling platform called Enablon. As a result of the migration, a task item to test and verify our internal communication plan was not entered. Tallgrass corrected the issue on September 12, 2017, by entering a task item in Enablon for testing and verifying the internal communication plan at least once each calendar year, but not to exceed 15 months (“Attachment 1”). The task item established a completion date for August of 2018, which was when the internal communications plan test for 2018 was completed. This due date has since been changed to April. Tallgrass tested and verified our internal communication plan within the required interval in 2015 and 2016 and in 2018 and 2019.

B. Proposed Civil Penalty

Tallgrass respectfully requests that PHMSA reduce the proposed civil penalty on the basis of the culpability factor.¹ Tallgrass should be afforded the 15-point culpability credit for finding and correcting the non-compliance prior to PHMSA learning of the violation.² PHMSA has applied the culpability credit where an operator took action to address the cause of a non-compliance and was in the process of or completed correcting the non-compliance prior to PHMSA learning of the violation.³ Recently, *In the matter of MIPC, LLC*, PHMSA applied the culpability credit when the operator did not perform a tank inspection within the required interval, but provided reasonable justification for the delay and corrected the issue prior to PHMSA’s

¹ 49 U.S.C. § 60122(b)(1)(B); 49 C.F.R. § 190.225 (2019).

² Proposed Civil Penalty Worksheet at 1. See *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019).

³ *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019).

inspection.⁴ Similarly, although Tallgrass did not complete the 2017 internal communications plan test, it identified and corrected the missing task item, and performed the test in 2018, prior to PHMSA learning of the violation. Accordingly, the 15-point culpability credit is appropriate.

The proposed civil penalty should further be reduced as none of the factors listed in PHMSA's *Pipeline Safety Enforcement Procedures* apply in this case. The *Enforcement Procedures* provide that civil penalties should generally be proposed if the characteristics of the probable violation are consistent with certain criteria, none of which are present here (e.g., causal factor in accident/incident, willful, repeat violation, systemic, increased likelihood of failure, adversely impacted the operator's pipeline safety program, etc.).⁵ This violation involved no incident, was not an intentional violation, and had minimal safety impact as the internal communications plan was tested in years prior to and following 2017.

Similarly, the Department of Transportation's 49 C.F.R. Part 5 regulations support a penalty reduction for this alleged violation. The Part 5 regulations provide that "[w]here applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors."⁶ As noted by PHMSA in the Violation Report, pipeline safety was minimally impacted as the internal communication plan tests were completed in 2015 and 2016.⁷ Tallgrass requests that PHMSA consider these factors by reducing the penalty in this case.

Accordingly, Tallgrass respectfully requests that PHMSA reduce the civil penalty in this case to be consistent with statutory and regulatory penalty assessment criteria by applying the 15-point culpability credit, and by accounting for the factors and considerations set out in its internal guidance and the Part 5 regulations. Together, these reductions would effectively eliminate the proposed civil penalty for this alleged violation.

Item 2:

§192.631 Control room management.

(a) . . .

(d) Fatigue mitigation. Each operator must implement the following methods to reduce the risk associated with controller fatigue that could inhibit a controller's ability to carry out the roles and responsibilities the operator has defined:

(1) . . .

(2) Educate controllers and supervisors in fatigue mitigation strategies and how off-duty activities contribute to fatigue;

(3) Train controllers and supervisors to recognize the effects of fatigue; and . .

⁴ *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019).

⁵ PHMSA, *Pipeline Safety Enforcement Procedures* at § 3.1.1.4 (Sept. 15, 2020).

⁶ 49 C.F.R. § 5.97.

⁷ Violation Report at 8; Proposed Civil Penalty Worksheet at 1.

PHMSA allegation: Tallgrass failed to provide training in 2017 to educate controllers and supervisors in fatigue mitigation strategies and how off-duty activities contribute to fatigue, and to train controllers and supervisors to recognize the effects of fatigue. Tallgrass’s Control Room Management (CRM) Procedure Section 13.5 Table 2, Fatigue Management Training, identifies the training frequency to occur annually, but not to exceed 15 months. Therefore, Tallgrass failed to conduct the training at the requisite interval in accordance with its CRM Procedure.

PHMSA proposed a \$19,600 civil penalty for this alleged violation.

Tallgrass response to Item 2:

A. *Allegation*

Tallgrass respectfully contests this alleged violation with respect to two of the three controllers cited in the Violation Report and requests that PHMSA reduce the proposed civil penalty. The Violation Report provides that three controllers were not provided fatigue mitigation training in 2017: Haugen, Hayslett, and Tracy.⁸ Tallgrass is providing additional evidence demonstrating compliance with 49 C.F.R. § 192.631(d)(2)-(3) with respect to Haugen and Hayslett (“Attachment 2”). Mr. Haugen completed the training on January 1, 2018, which was 14-months after he completed the training on November 07, 2016.⁹ Mr. Hayslett completed training on February 14, 2018, which was 15-months after he completed the training on November 14, 2016.¹⁰ Accordingly, both Haugen and Hayslett completed the fatigue mitigation training within the required 15-month interval.¹¹ Mr. Tracy completed fatigue mitigation training on March 20, 2018, which exceeded the 15-month deadline by three months.¹²

In response to PHMSA’s request for records during the inspection of Tallgrass’s control room management program, Tallgrass provided gas control records on July 27, 2018 titled “Requested Item 37 – Training Records_EWN_GAS”.¹³ Unfortunately, these printouts did not contain the fatigue mitigation trainings completed for certain controllers in 2017 and 2018. As explained above, Tallgrass is providing additional documentation showing Haugen and Hayslett completed fatigue mitigation training in early 2018 within the required 15-month interval in accordance with § 192.631(d)(2)-(3).¹⁴ Tallgrass recognizes that Mr. Tracy did not complete the fatigue mitigation training within the required 15-month interval; however, he did complete the training on March 20, 2018, which exceeded the deadline by three months.¹⁵

⁸ Violation Report at 11.

⁹ Attachment 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Violation Report, Exhibit B, Item 2A.

¹⁴ Attachment 2. Note these records show some additional employees that have not received training since 2015 or 2016, these controllers left the company prior to the 15-month interval to receive fatigue mitigation training.

¹⁵ *Id.*

B. *Proposed Civil Penalty*

Tallgrass respectfully requests that PHMSA reduce the proposed civil penalty on the basis of the culpability and gravity factors.¹⁶ Regarding the gravity factor, Tallgrass requests that PHMSA reduce the instances of violation from 3 to 1. As explained above, the records provided to PHMSA during the inspection unfortunately did not include the 2018 training dates demonstrating that controllers Haugen and Hayslett completed fatigue mitigation training within the required 15-month interval. Tallgrass is providing additional documentation demonstrating that controllers Haugen and Hayslett completed the fatigue mitigation training within the 15-month interval.¹⁷

Additionally, Tallgrass should be afforded the 15-point culpability credit for finding and correcting the non-compliance with respect to Mr. Tracy prior to PHMSA learning of the violation. PHMSA has applied the culpability credit where an operator took action to address the cause of a non-compliance and was in the process of or completed correcting the non-compliance prior to PHMSA learning of the violation.¹⁸ Recently, *In the matter of MIPC, LLC*, PHMSA applied the culpability credit when the operator did not perform a tank inspection within the required interval, but provided reasonable justification for the delay and corrected the issue prior to PHMSA's inspection.¹⁹ Tallgrass discovered the non-compliance with respect to Mr. Tracy and he completed the fatigue mitigation training on March 20, 2018, which was prior to PHMSA learning of the violation. Accordingly, the 15-point culpability credit is appropriate.

Also, the proposed civil penalty should further be reduced as none of these factors listed in PHMSA's *Pipeline Safety Enforcement Procedures* are present here. The *Enforcement Procedures* explain that civil penalties should generally be proposed if the characteristics of the probable violation are consistent with certain criteria, none of which are apparent here (e.g., causal factor in accident/incident, willful, repeat violation, systemic, increased likelihood of failure, adversely impacted the operator's pipeline safety program, etc.).²⁰ This alleged violation did not involve an incident, was not willful or intentional violation, and does not demonstrate a systemic issue in Tallgrass's pipeline safety program. Accordingly, the *Enforcement Procedures* support a penalty reduction for this alleged violation.

Further, the Department of Transportation's Part 5 regulations support a penalty reduction. The Part 5 regulations provide that "[w]here applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors."²¹ As noted by PHMSA in the Violation Report, pipeline safety was minimally affected because the controllers had received training in prior years and practiced fatigue

¹⁶ 49 U.S.C. § 60122(b)(1)(B); 49 C.F.R. § 190.225.

¹⁷ Attachment 2.

¹⁸ See *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019).

¹⁹ *Id.*

²⁰ PHMSA, Pipeline Safety Enforcement Procedures at § 3.1.1.4.

²¹ 49 C.F.R. § 5.97.

management and mitigation regularly.²² Tallgrass requests that PHMSA consider these factors by reducing the penalty in this case.

Accordingly, Tallgrass respectfully requests that PHMSA reduce the civil penalty in this case by reducing the number of instances from 3 to 1, applying the 15-point culpability credit, and by accounting for the factors and considerations set out in its internal guidance and the Part 5 regulations. Together, these reductions would effectively eliminate the proposed civil penalty for this alleged violation.

Item 3:

§192.631 Control room management.

(a) . . .

(e) **Each operator using a SCADA system must have a written alarm management plan to provide for effective controller response to alarms. An operator's plan must include provisions to:**

(1) . . .

(2) **Identify at least once each calendar month points affecting safety that have been taken off scan in the SCADA host, have had alarms inhibited, generated false alarms or that have had forced or manual values for periods of time exceeding that required for associated maintenance or operating activities.**

PHMSA allegation: Tallgrass failed to identify, at least once each calendar month, points in the SCADA host affecting safety that have generated false alarms. Specifically, Tallgrass' CRM Procedure O&M 1100_GL 11 requires monthly review of false alarms. Tallgrass' reporting process is based on a review of the top most frequent alarms for the month and determining whether those alarms are actual events occurring frequently, or false alarms. While reviewing the reports, PHMSA inspectors noted that some alarms were identified as "actual" while others were identified as "faulty" with a follow-up comment. By only reviewing the highest volume of alarms for the month, Tallgrass did not capture all the false alarms that could be occurring on the pipeline system and affecting safety. Therefore, Tallgrass failed to identify, at least once each calendar month, points affecting safety that have generated false alarms due to following a procedure that did not conform with the regulatory requirement.

PHMSA proposed a \$28,500 civil penalty for this alleged violation.

Tallgrass response to Item 3:

Tallgrass maintains that there was a misunderstanding with respect to this alleged violation and respectfully requests that PHMSA withdraw the violation and proposed civil penalty. Tallgrass manages alarms through a multi-pronged approach of addressing all alarms, of any type, as they are received, and also identifying and reviewing all alarms on a monthly basis. Tallgrass takes any necessary corrective actions identified daily or during the review pursuant to §

²² Violation Report at 15; Proposed Civil Penalty Worksheet at 1.

192.631(e)(6). Although not required under § 192.631(e)(2), Tallgrass reviews the highest volume alarms in order to track alarm performance and determine where there are any issues with certain repetitive alarms. Tallgrass believes that this approach meets both the text of 192.631(e)(2) as well as the purpose of that regulation as evidenced by PHMSA’s discussion in the rulemaking history, as explained in more detail below.

A. *Allegation*

1. Regulatory Requirement

Section 192.631(e)(2) requires that an operator’s alarm management plan include provisions for identifying, on a monthly basis, all points affecting safety that have been taken off scan in the SCADA host, have had alarms inhibited, generated false alarms, or that have had forced or manual values for periods of time exceeding that required for associated maintenance or operating activities.

In the proposed CRM rule, PHMSA proposed a prescriptive alarm management program requiring weekly reviews of over ten SCADA and alarm data points.²³ The purpose of the weekly reviews, PHMSA said, was to review “controllers’ response to alarms and appropriately address situations that require immediate or deferred actions to maintain pipeline safety.”²⁴ Notably, the proposed rule did not mention identification of false alarms. However, PHMSA did state that “nuisance alarms” would be required to be reviewed so that the total number of such alarms was not excessive.²⁵ PHMSA’s discussion in the proposed rule indicates that the Agency was concerned with not only confirming that pipeline safety was maintained through appropriate response to alarms, but also that repetitive alarms were reviewed and addressed.²⁶

In the Final Rule, PHMSA departed from the concept of prescriptive weekly reviews, in favor of the current language in § 192.631(e)(2) requiring identification of a generalized set of alarms that could affect safety.²⁷ PHMSA agreed with industry commenters that the proposed prescriptive alarm management review was overly burdensome.²⁸ In the Final Rule, the Agency explained that the monthly requirement in § 192.631(e)(2) was intended to cover “points impacting

²³ Pipeline Safety: Control Room Management/Human Factors, 73 Fed. Reg. 53,076, 53,090, 53,096 (Sept. 12, 2008). The proposed rule required weekly reviews of: “(i) Events that should have resulted in alarms or event indications that did not do so; (ii) Proper and timely controller response to alarms or events; (iii) Identification of unexplained changes in the number of alarms or controller management of alarms; (iv) Identification of nuisance alarms; (v) Verification that the number of alarms received is not excessive; (vi) Identification of instances in which alarms were acknowledged but associated response actions were inadequate or untimely; (vii) Identification of abnormal or emergency operating conditions and a review of controller response actions; (viii) Identification of system maintenance issues; (ix) Identification of systemic problems, server load, or communication problems; (x) Identification of points that have been taken off scan or that have had forced or manual values for extended periods; and (xi) Comparison of controller logs or shift notes to SCADA alarm records to identify maintenance requirements or training needs.” *Id.* at 53,096.

²⁴ *Id.* at 53,090.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 53,096; Pipeline Safety: Control Room Management/Human Factors, 74 Fed. Reg. 63,310, 63,322 (Dec. 3, 2009).

²⁸ Pipeline Safety: Control Room Management/Human Factors, 74 Fed. Reg. at 63,319, 63,322.

safety that are not providing current data to controllers or points that may be triggering erroneous alarms.”²⁹

PHMSA did not discuss or define false alarms in the Final Rule, except in connection with nuisance alarms.³⁰ PHMSA noted that some of the elements from the proposed rule, “particularly ‘nuisance alarms,’ have been generalized to points that have had alarms inhibited (which would likely result if nuisance alarms occur) or which have generated false alarms.”³¹ In both the proposed rule and Final Rule, PHMSA was particularly focused on alarms generated in excessive quantities that may not represent actual events or require no action.³²

In PHMSA’s *Control Room Management Frequently Asked Questions* (FAQs), the Agency explained that once non-functional alarms have been identified pursuant § 192.631(e)(2), operators “should troubleshoot the cause of non-functional alarms, take appropriate corrective actions in a timely manner, and endeavor to return alarm points to service in an expedited manner.”³³ PHMSA’s guidance in the FAQs supports that the purpose of § 192.631(e)(2) is not to require a detailed monthly review of every alarm received, but instead to address and correct those alarms that are non-functional or frequent.

PHMSA has not otherwise provided guidance on implementation of § 192.631(e)(2).

2. Response to Allegation

Tallgrass reviews alarms monthly in a manner that is consistent with § 192.631(e)(2). Under Tallgrass’s Alarm Management Plan (“Attachment 3”), controllers are required to act on, investigate, and correct every alarm that they receive on a daily basis, whether actual or false.³⁴ Tallgrass’s monthly alarm reports then identify every alarm received in the prior month.³⁵ These alarms are subsequently categorized in different tabs based on the categories listed in Tallgrass’s Alarm Management Plan.³⁶ Although not required under § 192.631(e)(2), alarms that become repetitive are captured in the top alarms tab of the monthly excel spreadsheets for review.³⁷ Tallgrass takes any necessary corrective actions identified during the review pursuant to § 192.631(e)(6). Tallgrass therefore manages alarms through a multi-pronged approach of addressing them as they are received, and also identifying and reviewing alarms on a monthly basis. This approach is thorough and designed to address any alarm issues that come up, whether because of a false alarm, repetitive or nuisance alarm, or any other problem with alarms. Tallgrass believes that this approach meets both the text of 192.631(e)(2) as well as the purpose of that regulation as evidenced by PHMSA’s discussion in the rulemaking history.

²⁹ *Id.*

³⁰ *Id.* at 63,315.

³¹ *Id.*

³² *Id.*; Pipeline Safety: Control Room Management/Human Factors, 73 Fed. Reg. at 53,090.

³³ PHMSA, Control Room Management Frequently Asked Questions at FAQ E.14 (Jan. 16, 2018).

³⁴ Tallgrass Alarm Management Plan at 12 (Attachment 3).

³⁵ *Id.* at 18-19.

³⁶ *Id.*

³⁷ *Id.* at 12, 19.

The following sections provide additional detail on our Alarm Management Plan, how Tallgrass implements that plan, and why it complies with § 192.631(e)(2). Tallgrass also provides more information on the “faulty” tags referenced in the Violation Report and NOPV.

a. Tallgrass’s Alarm Management Plan

The NOPV alleges that Tallgrass is “not captur[ing] all the false alarms that could be occurring on the pipeline system and affecting safety. . . due to following a procedure that did not conform with the regulatory requirement”³⁸ Section 192.631(e)(2) requires that operators have an alarm management plan that addresses identification of points affecting safety that have generated false alarms on at least a monthly basis.³⁹ Section 192.631(e)(2) does not prescribe the method of identifying false alarms, and the Agency has not provided guidance on this issue.⁴⁰ And, § 192.631(e)(2) does not require a review or analysis of the identified items; it simply requires that certain points are identified.⁴¹ Tallgrass controllers must action all alarms, of any kind, by investigating them and correcting issues where possible on a daily basis. Tallgrass also captures all alarms it receives each month, again, regardless of type, and it then categorizes them and addresses those that are problematic. Contrary to the allegation here, Tallgrass is “capturing all the false alarms that could be occurring on the pipeline system and affecting safety.” Given the lack of definition in § 192.631 for “false alarm” and the varied philosophical approaches across industry about what a false alarm means, Tallgrass doesn’t draw distinctions in its monthly alarm reports between actual and false alarms. But, as a practical matter, Tallgrass does identify and addresses all false alarms because its process requires controllers to action all alarms and Tallgrass prepares and reviews on a monthly basis a report of all alarms, including any that are false.

Tallgrass’s Alarm Management Plan requires controllers to act on, investigate, and correct every alarm that they receive on a daily basis, whether actual or false.⁴² In most cases, the controllers are able to investigate and resolve the source of alarms during their shift, again regardless of whether they are actual or false.⁴³ In accordance with PHMSA’s guidance, alarms, whether actual or false, are addressed under § 192.631(e)(6) when they pose a potential integrity threat, become repetitive and climb to the top of our top alarm count, or fall within one of the monthly review categories listed below.⁴⁴

Although PHMSA’s allegation is solely limited to identification of alarms under § 192.631(e)(2), Tallgrass is explaining some of the other activities it performs in order to provide context. The Tallgrass Alarm Management Plan requires a monthly review of the alarm system.⁴⁵ In these reviews, Tallgrass personnel evaluate an excel spreadsheet of SCADA system data.⁴⁶ The monthly alarm system reviews include a review of: (1) point to point verifications that have

³⁸ *In the matter of Tallgrass Energy, LP, CPF No. 3-2020-1008, Notice of Proposed Violation at 3 (Oct. 26, 2020) [hereinafter NOPV].*

³⁹ 49 C.F.R. § 192.631(e)(2).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Tallgrass Alarm Management Plan at 12.

⁴³ *Id.* at 9-11.

⁴⁴ *Id.* at 12.

⁴⁵ *Id.* at 18-19

⁴⁶ *Id.* at 18-19; Attachment 4.

occurred that month; (2) all points in configuration error; (3) out of service points (points that are off scan); (4) all monthly alarms; (5) all user changes to alarm limits; (6) disabled alarms; (7) bypassed alarms; and (8) all top repeating alarms.⁴⁷ These items are captured in the different tabs included in the monthly excel spreadsheets.⁴⁸

Tallgrass also tracks alarm performance through a review of top alarms on a monthly, weekly, and daily basis, as well as top alarms by asset.⁴⁹ For example, in the April 2016 Alarm Report that PHMSA noted in the Violation Report, Tallgrass pulled and placed in the top alarms tab any alarm that occurred more than once that month—including more than 360 unique alarm points that were prioritized for follow-up review.⁵⁰ As a practical matter, Tallgrass identifies all alarms monthly and it dedicates additional resources to reviewing those alarms that the Agency has explained warrant more review, such as points impacting safety that are not providing current data to controllers or excessive alarms.⁵¹

b. Clarification of “Faulty” Tags

Tallgrass believes there is a misunderstanding about its review of the top most frequent alarms due to “faulty” tags in the records provided to PHMSA during the inspection.⁵² The NOPV provides that “[w]hile reviewing the reports, PHMSA inspectors noted that some alarms were identified as ‘actual’ while others were identified as ‘faulty’ with a follow-up comment.”⁵³ The alarms listed as “faulty” are not false alarms.⁵⁴ Instead, these are tags used to identify when there is a device fault on a pipeline that has been commissioned, but not yet activated. These devices are functional and show faults simply because they are reading out of normal readings, because the facility has not yet become operational. These are actual alarms showing, the preoperational status of devices and are not false alarms covered by § 192.631(e)(2).

c. Fair Notice

To the extent it is PHMSA’s position that every single alarm be reviewed by an operator on a monthly basis to confirm whether it is false, the Agency has not provided fair notice of such an interpretation to the regulated community. Before PHMSA may deprive a person of property through an administrative penalty or compliance action, the person has a constitutional procedural due process right to receive “fair notice” as to what constitutes a violation of law. As the D.C. Circuit found in *General Electric v. EPA*, “[d]ue process requires that parties receive fair notice before being deprived of property. . . . In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.”⁵⁵

⁴⁷ Tallgrass Alarm Management Plan at 18-19.

⁴⁸ Attachment 4.

⁴⁹ Tallgrass Alarm Management Plan at 12.

⁵⁰ See Attachment 4 at “TopAlaTags.”

⁵¹ Tallgrass Alarm Management Plan at 12, 18-19.

⁵² Exhibit C, Item 3A.

⁵³ NOPV at 3. See also Violation Report at 18.

⁵⁴ Violation Report at 18.

⁵⁵ *General Elec. Co. v. US EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). See also *Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (vacating agency’s denial of license renewal where party did not have

When an agency interprets a regulation through enforcement rather than pre-enforcement efforts, the issue of notice rests on:

[W]hether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.⁵⁶

PHMSA has found that an operator is

considered to have received fair notice of the agency's interpretation if a prudent person familiar with the pipeline industry and the safety purposes of the standard would have recognized the safety requirement. In applying the reasonable person standard to the notice issue, consideration is given to a variety of factors, including the language of the regulation, its purpose, its placement in the overall regulatory scheme, its regulatory history, the agency's enforcement, and OPS' advisory notices and interpretations informing the regulated community of its interpretation.⁵⁷

PHMSA has concluded that an operator lacked fair notice with respect to a regulatory requirement where the alleged violation attempted to establish a new requirement that was not required by the text of the regulation or previously communicated by PHMSA during notice-and-comment rulemaking.⁵⁸

The text of § 192.631(e)(2) requires simply that all points affecting safety that generated false alarms are identified, not that each alarm (which amounts to thousands per month) is individually reviewed by the operator to determine if it is actual, false or of some other variation. PHMSA has not provided guidance on a how to identify and address false alarms. Instead, the regulatory history and PHMSA's guidance demonstrate that false alarms that are excessive or frequently occurring should be reviewed and corrected as soon as possible, in addition to points not providing current data.⁵⁹ Tallgrass' practice of reviewing and correcting all alarms meets the language and intent of the regulation because its review captures false alarms and all other types of alarms.

fair notice of regulatory requirement); *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (invalidating agency's finding of a violation where regulation did not provide adequate notice of prohibited conduct); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (holding that company could not be compelled to implement a vehicle recall when it had inadequate notice of testing requirements).

⁵⁶ *Gen. Elec.*, 53 F.3d at 1329 (reversing agency's finding of liability and fine where regulation did not clearly warn a party what was expected); *see also Chrysler*, 158 F.3d at 1354 (finding that agency cannot find noncompliance with a safety standard without first providing notice of what the standard requires).

⁵⁷ *In the matter of Alyeska Pipeline Serv. Co.*, CPF No. 5-2000-5006, Decision on Petition for Reconsideration at 2-3 (June 23, 2004).

⁵⁸ *In the matter of Tennessee Gas Pipeline Co.*, CPF No. 1-2018-1001, Final Order (Nov. 14, 2019).

⁵⁹ Pipeline Safety: Control Room Management/Human Factors, 74 Fed. Reg. at 63,319, 63,322; PHMSA, Control Room Management Frequently Asked Questions at FAQ E.14 (Jan. 16, 2018).

Tallgrass controllers identify and respond to all alarms, including false alarms, and conduct further monthly review of those that occur frequently. As evidenced in the records provided to PHMSA, the Tallgrass control room receives thousands of alarms per month.⁶⁰ If PHMSA expects operators to implement a program to analyze each individual alarm received by a controller per month to determine if a single alarm was actual or false, it would need to announce such interpretation through a guidance or rulemaking document, not through an enforcement action. Tallgrass has not been provided fair notice of such interpretation regarding alarm management. Tallgrass respectfully offers that our practice of identifying and actioning all alarms, regardless of type, is a far more reasonable and practicable interpretation of the regulations.

Further, it would be impracticable to apply § 192.631(e)(2) in such a manner that would require an operator to meet and review each individual alarm and confirm whether each one is actual or false on a monthly basis. If PHMSA required such a review, Tallgrass and other operators would need to hire additional staff to accommodate such a comprehensive review. A review of this magnitude is not only inconsistent with the risk-based nature of the pipeline safety regulations, but also contrary to the regulatory history on alarm management suggesting a more focused review of alarms presenting potential safety risks.

Accordingly, Tallgrass complied with the regulatory requirement to identify points affecting safety that have generated false alarms in accordance with § 192.631(e)(2). Tallgrass respectfully requests that PHMSA withdraw the alleged violation and proposed civil penalty.

Item 4:

§192.631 Control room management.

(a) . . .

(j) Compliance and deviations. An operator must maintain for review during inspection:

(1) Records that demonstrate compliance with the requirements of this section; . . .

PHMSA allegation: Tallgrass failed to maintain for review during inspection records that demonstrate compliance with the requirements of 49 CFR § 192.631. During the inspection, Tallgrass was unable to produce records for 2015 that showed the monthly review of points affecting safety had been taken off scan in the SCADA host, had alarms inhibited, generated false alarms or had forced or manual values for periods of time exceeding that required for associated maintenance or operating activities in accordance with § 192.631(e)(2).

In an [sic] follow-up email to PHMSA, Tallgrass indicated the reason the monthly reports were unavailable for inspection is as follows: “as [Tallgrass] separated from Kinder [Morgan] in 2013 they continued to utilize [the current SCADA system], but made the decision to transition to [a new system] in 2014. During the implementation of [the new system] it was determined that the system was not the

⁶⁰ Attachment 4.

correct solution for Tallgrass, and therefore made the decision to transition to [a second SCADA system] in 2015. The monthly alarm reports were compiled and stored in various formats during each system implementation. OCC utilized Excel, Info Path, and SharePoint to compile the monthly reports, and late in 2015 a new SharePoint library was created to house all alarm reports as [they] felt [they] now had a stable system in place and could start fresh, but unfortunately during the move [they] lost the reports.” Despite attempts to recover the records from this period, Tallgrass has been unable to do so.

PHMSA proposed a \$19,600 civil penalty for this alleged violation.

Tallgrass response to Item 4:

A. Allegation

Tallgrass is not contesting this alleged violation. The Company recognizes that it does not have all records for 2015 showing the monthly reviews of the items listed in the NOPV. This lack of records is due to unfortunate technical issues while transitioning between SCADA and records management systems. While Tallgrass recognizes that recordkeeping is our responsibility, we offer the following additional information that shows the company made a good faith attempt to comply, was ultimately unsuccessful with regard to certain recordkeeping in 2015, and has long since remedied the issue. We have also included an Affidavit from the Manager of the Operational Control Center who was present at the monthly reviews in 2015 and can attest that the monthly reviews were conducted and records were made demonstrating compliance with § 192.631(j)(1) (“Attachment 5”).⁶¹

As explained in Tallgrass’s June 26, 2019, email to PHMSA, Tallgrass transitioned between multiple SCADA platforms between 2013 and 2015. Following the transition from the prior operator, Tallgrass used a CSI SCADA system, but identified that the SCADA system did not provide sufficient reporting materials. After discovery of this issue, Tallgrass switched to ClearSCADA. While ClearSCADA provided sufficient reporting materials, the monthly alarm management reports from most of 2015 were lost due to an internal software migration issue. Tallgrass attempted to recover the records, but was unsuccessful except we have been able to locate records from August and December of 2015, which demonstrate the monthly reviews were completed in those months. Tallgrass is attaching these records to the response (“Attachment 6”). Tallgrass has long since implemented improved records management systems to house all monthly alarm reports and reviews. As the Violation Report notes, Tallgrass completed work to comply with the requirements in § 192.631(e)(2) during 2015.⁶²

Given the passage of time, Tallgrass’s efforts to comply, and its self-correction of the problem well before the PHMSA audit, we request that PHMSA reduce the civil penalty associated with this item.

⁶¹ *In the matter of Kinder Morgan Liquid Terminals*, CPF No. 1-2018-5005 (Mar. 8, 2019) (explaining that the operator could have supported its request for a penalty reduction by “provid[ing] an affidavit or other credible evidence to support its claim that the calculations were performed but that the records had been lost or destroyed.”).

⁶² Violation Report at 25.

B. *Proposed Civil Penalty*

Tallgrass respectfully requests that PHMSA reduce the proposed civil penalty under the culpability, gravity, and good faith assessment factors.⁶³ First, Tallgrass should be afforded the 15-point culpability credit for finding and correcting the non-compliance prior to PHMSA learning of the violation.⁶⁴ PHMSA has applied the culpability credit where an operator took action to address the cause of a non-compliance and was in the process or completed correcting the non-compliance prior to PHMSA learning of the violation.⁶⁵ Recently, *In the matter of MIPC, LLC*, PHMSA applied the culpability credit when the operator did not perform a tank inspection within the required interval, but provided reasonable justification for the delay and had inspected the tank prior to PHMSA's inspection.⁶⁶ Similarly, Tallgrass found the non-compliance with the CSI SCADA system and took documented action to address the non-compliance by switching to ClearSCADA prior to PHMSA learning of the violation. We also took action to improve our records management system after the software migration issue resulted in records being lost.

Second, the instances of violation under gravity should be reduced from 13 to 11 as Tallgrass is providing newly located records of two alarm management monthly reviews completed in August and December of 2015 ("Attachment 6"). Third, Tallgrass respectfully requests that PHMSA apply a 10-point good faith credit. PHMSA has explained that the good faith credit applies when an operator acts with good faith in attempting to comply with the regulation prior to the inspection.⁶⁷ Tallgrass performed the monthly review, established the required records, lost records due to a migration issue, made a substantial effort to recover the lost records, and immediately improved its records management system. Tallgrass believes these actions demonstrate that it acted in good faith in attempting to comply with § 192.631(j)(1).

The proposed civil penalty should further be reduced as none of the factors listed in PHMSA's *Pipeline Safety Enforcement Procedures* were present here. The *Enforcement Procedures* provides that civil penalties should generally be proposed if the characteristics of the probable violation are consistent with certain criteria, none of which are apparent here (e.g., causal factor in accident/incident, willful, repeat violation, systemic, increased likelihood of failure, adversely impacted the operator's pipeline safety program, etc.).⁶⁸ PHMSA recognizes in the Violation Report that "the work was done in 2015 to meet the requirements of 192.631(e)(2) as evidenced in the September 2017 report. There is data included in a table from 2015 in this report. It is assumed the work was complete [sic] in 2015 to meet the requirement under 192.631 (c)(3)."⁶⁹ The work was completed to meet the regulatory requirement, pipeline safety was minimally

⁶³ 49 U.S.C. § 60122(b)(1)(B); 49 C.F.R. § 190.225.

⁶⁴ Proposed Civil Penalty Worksheet at 1. See *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019).

⁶⁵ *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019). See also *In the matter of Rover Pipeline, LLC*, CPF No. 1-2019-1001, Final Order (May 18, 2020) (In this case, the operator had discovered unacceptable welds and was in the process of repairing or replacing them when PHMSA learned of the violation).

⁶⁶ *In the matter of MIPC, LLC*, CPF No. 1-2018-5012, Final Order at 5 (Aug. 8, 2019).

⁶⁷ See *In the matter of Union Oil Co. of Cal.*, CPF No. 5-2003-5023, Final Order (June 18, 2008); *In the matter of Enterprise Product Operating, LLC*, CPF No. 3-2019-5019, Final Order (Feb. 24, 2020).

⁶⁸ PHMSA, Pipeline Safety Enforcement Procedures at § 3.1.1.4.

⁶⁹ Violation Report at 25.


affected, and the records violation was not intentional. Accordingly, PHMSA should reduce the proposed civil penalty as none of the factors in the *Enforcement Procedures* apply to this alleged violation.

Similarly, the Department of Transportation's Part 5 regulations support a civil penalty reduction in this case. Part 5 provides that "[w]here applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors."⁷⁰ As noted by PHMSA, pipeline safety was minimally affected and this was not a willful violation, but instead an oversight in migrating to a new SCADA platform and a software migration issue.⁷¹

Accordingly, Tallgrass requests that PHMSA reduce the civil penalty by reducing the number of instances from 13 to 11, applying the 15-point culpability and 10-point good faith credits, and by considering the factors and considerations set out in its internal guidance and the Part 5 regulations. Together, these reductions would effectively eliminate the proposed civil penalty for this alleged violation.

Please let me know if you have any questions or would like to discuss this matter further.

Sincerely,



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⁷⁰ 49 C.F.R. § 5.97.

⁷¹ Proposed Civil Penalty Worksheet at 1; Violation Report at 30.