

**JUL 22 2011**

Mr. Jon Peterson  
President  
PAPCO, Inc.  
213 West Third Avenue, Room 305  
Warren, PA 16365

**Re: CPF No. 1-2008-0001**

Dear Mr. Peterson:

Enclosed please find the Final Order issued in the above-referenced case. It makes findings of violation and assesses a reduced civil penalty of \$56,500. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is deemed effective upon the date of mailing, or as otherwise provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese  
Associate Administrator  
for Pipeline Safety

Enclosure

cc: Mr. Alan Mayberry, Deputy Associate Administrator for Field Operations, Pipeline Safety  
Mr. Byron E. Coy, PE, Director, Eastern Region, PHMSA

Mr. Norman J. Kennard, Esq., Thomas, Long, and Kennard, 212 Locust Street, Suite 500  
P.O. Box 9500, Harrisburg, PA 17108-7600

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED [7005 1160 0001 0075 9343]**

**U.S. DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
OFFICE OF PIPELINE SAFETY  
WASHINGTON, D.C. 20590**

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**In the Matter of** )

**PAPCO, Inc.,** )

**CPF No. 1-2008-0001**

**Respondent.** )  
\_\_\_\_\_ )

**FINAL ORDER**

On June 11-13, 2007, pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of PAPCO, Inc. (PAPCO or Respondent) in Warren, Pennsylvania. PAPCO operates a small gas distribution system consisting of 6.0 miles of plastic pipe and 0.25 miles of steel pipe and had six employees at the time of the inspection.

As a result of the inspection, the Director, Eastern Region, OPS (Director), issued to Respondent, by letter dated March 20, 2008, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that PAPCO had violated 49 C.F.R. §§ 192.463(a) and 199.115 and proposed assessing a civil penalty of \$58,000 for the alleged violations. The Notice also proposed finding that Respondent had committed a probable violation of 49 C.F.R. § 192.603(b) and warning Respondent to take appropriate corrective action or be subject to future enforcement action.

Respondent responded to the Notice by letter dated May 16, 2008, as supplemented by letter dated April 27, 2009 (Response). PAPCO contested the allegations and requested a hearing. A hearing was subsequently held on April 30, 2009 via teleconference, with an attorney, PHMSA Office of Chief Counsel, presiding. At the hearing, PAPCO was represented by counsel. After the hearing, Respondent submitted a written objection to a refusal by the OPS inspector to answer a question during the hearing by letter dated May 4, 2009. Respondent provided a post-hearing statement, financial statements, and other materials for the record, by letter dated May 28, 2009 (Closing). Respondent provided further materials including maps for the record on November 17, 2009.

**FINDINGS OF VIOLATION**

The Notice alleged that Respondent violated 49 C.F.R. Part 192 as follows:

**Item 2:** The Notice alleged that Respondent violated 49 C.F.R. § 192.463(a), which states:

**§ 192.463 -- External corrosion control: Cathodic protection**

(a) Each cathodic protection system required by this subpart must provide a level of cathodic protection that complies with one or more of the applicable criteria contained in appendix D of this part. If none of these criteria is applicable, the cathodic protection system must provide a level of cathodic protection at least equal to that provided by compliance with one or more of these criteria.

Specifically, the Notice alleged that at four cited locations, Respondent's cathodic protection system did not provide a level of cathodic protection meeting the applicable -0.85V acceptance criteria for pipe-to-soil readings. These locations included: (1) Williams Southwell Meter; (2) Public Way Valves; (3) West End RR Bridge; and (4) 300 Yards East of Mohawk Valves. The Notice alleged that in three of the four locations, the readings remained below acceptance criteria for over two years and at the West End RR Bridge location the readings remained below acceptance criteria for over three years.

In its Response and during the hearing, PAPCO acknowledged that the cathodic protection was "below the negative -.85 volt level" at three of the four locations cited in the Notice. With respect to the Williams Southwell Meter location, Respondent provided maps and information demonstrating that at the time of the inspection, the Williams Southwell Meter was located on a gathering line located outside the city limits of Warren, Pennsylvania. Under the regulations in effect at the time, the Williams Southwell Meter location was therefore exempt from the regulations.<sup>1</sup>

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 192.463(a) by failing to provide a level of cathodic protection meeting the applicable criteria at: (1) Public Way Valves; (2) West End RR Bridge; and (3) 300 Yards East of Mohawk Valves. I further find that Respondent did not violate 49 C.F.R. § 192.463(a) with respect to the Williams Southwell Meter location. To the extent Respondent provided information and explanations that may be relevant to mitigation of the proposed civil penalty for this violation, this information will be discussed in the Assessment of Penalty section below.

**Item 3:** The Notice alleged that Respondent violated 49 C.F.R. § 199.115, which states:

**§ 199.115 – Contractor employees**

With respect to those employees who are contractors or employed by a contractor, an operator may provide by contract that the drug testing, education, and training required by this part be carried out by the contractor provided:

(a) The operator remains responsible for ensuring that the requirements of this part are complied with; and

(b) The contractor allows access to property and records by the operator, the Administrator, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purpose of monitoring the operator's compliance with the requirements of this part.

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<sup>1</sup> Amendments have since been made to the regulations that may have impacted the exemption status of this line.

Specifically, the Notice alleged that between 2002 and 2007 PAPCO engaged a contractor that did not have its own drug and alcohol plan to perform maintenance on its pipeline without including the contractor in PAPCO's drug and alcohol plan.

In its Response and during the hearing, PAPCO acknowledged that the contractor was not enrolled in its drug and alcohol program and that its assumption that the contractor was enrolled in a contractor drug and alcohol program was incorrect.

Accordingly, after considering all of the evidence and the legal issues presented, I find that Respondent violated 49 C.F.R. § 199.115 by engaging a contractor that did not have its own drug and alcohol plan to perform maintenance on its pipeline without including the contractor in PAPCO's drug and alcohol plan. To the extent Respondent provided information and explanations that may be relevant to mitigation of the proposed civil penalty for this violation, this information will be discussed in the Assessment of Penalty section below.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

### **ASSESSMENT OF PENALTY**

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$100,000 per violation for each day of the violation, up to a maximum of \$1,000,000 for any related series of violations. In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$58,000 for the violations cited above.

In its Response and during the hearing, PAPCO advanced general arguments about the total proposed penalty level as well as specific arguments about how the penalty assessment factors should be applied to Items 2 and 3 individually. In particular, PAPCO took issue with OPS' characterization of its compliance efforts as being reactive and not proactive, and objected to this characterization being part of the final determination of whether or at what level civil penalties should be assessed. PAPCO also argued that the total penalty amount proposed in the Notice was excessive given the company's financial condition and the fact that PAPCO was a small operator and only operated a single six-mile length of plastic pipe, albeit with steel risers.

During the hearing, OPS stated that it believed the proposed penalty amount was appropriate in part because while PAPCO took action to correct the alleged non-compliance, it was being "reactive" to OPS inspections as opposed to being proactive on compliance. PAPCO's counsel immediately objected to OPS' characterization of it as being reactive and responded by questioning the OPS inspector on whether he believed PAPCO to be a generally good and responsible operator. The inspector refused to respond to this question, stating that he felt any

response he gave would be subjective. PAPCO pointed out that three previous OPS inspections in 2000, 2002, and 2004 resulted in no findings of violations and only one warning item and went on to repeat its question about whether the inspector considered PAPCO to be a generally good and responsible operator. The inspector again refused to respond. In light of OPS' statement that PAPCO was being reactive and not proactive on compliance, PAPCO objected to the inspector's refusal to respond to this question.

By letter dated May 4, 2009, PAPCO renewed its objection stating that the inspector's refusal to respond to its questions during the hearing constituted a refusal of the prosecuting office "to allow examination of the testimony of its witness in violation of due process and the hearing procedures at 49 C.F.R. § 190.211." These procedures state that:

The Respondent may also examine the evidence and witnesses presented by the government.<sup>2</sup>

PAPCO stated that the government's attempt to justify the proposed penalty amount in part on the grounds that PAPCO was being reactive not proactive, coupled with the inspector's refusal to answer the questions asked by PAPCO's counsel in probing this statement, amounted to cutting off critical examination and unfairly prejudicing PAPCO's ability to defend itself.<sup>3</sup> The Presiding Official noted PAPCO's objection and stated that a determination on this issue would be made in the Final Order.

First, it should be noted that the Federal Rules of Evidence are not controlling in administrative proceedings unless made so by statute or agency rule.<sup>4</sup> Under 49 U.S.C. 60122 and 49 C.F.R. Part 190, pipeline enforcement hearings are conducted "informally without strict adherence to rules of evidence."<sup>5</sup> Respondents are entitled to contest the proceeding and examine the evidence and witnesses presented by the government. While technical rules of evidence are not applicable in this proceeding, to the extent the probative value of evidence proffered by the government is outweighed by the potential adverse effects of its being confusing, misleading, or prejudicial, such evidence will not be considered. The statement made during the hearing by OPS that PAPCO was being reactive not proactive on compliance may have reflected the opinion of the individual who made the statement. However, I find that this statement was not supported by the information available in the record concerning PAPCO's compliance history. Accordingly, PAPCO's objection is sustained and OPS' statement that PAPCO was being reactive on compliance is hereby stricken. Any civil penalty assessment shall not be based on this statement in any way or on OPS' opinion about PAPCO's general intentions to comply.

With respect to the total penalty level, PAPCO argued that the penalty amount proposed in the Notice was excessive given the size of the company and the fact that it only operated a six mile

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<sup>2</sup> 49 C.F.R. § 190.211(d).

<sup>3</sup> Letter from Norman J. Kennard, Esq., Thomas, Long, Niesen & Kennard to Larry T. White dated May 4, 2009 at page 2.

<sup>4</sup> See for example, 10 C.F.R. Part 2, Subpart G (NRC); 12 C.F.R. § 622.8 (Farm Credit Administration); 14 C.F.R. § 13.222(b) (FAA, civil penalty actions); 16 C.F.R. § 3.43(b) (FTC); 18 C.F.R. § 385.509 (FERC); 45 C.F.R. § 81.78 (Health & Human Services, Part 80 proceedings).

<sup>5</sup> 49 C.F.R. § 190.211(d).

plastic pipe, albeit with steel risers, along with the absence of a history of prior offenses. PAPCO cited previous cases in which OPS cited large pipeline operators with nationwide systems consisting of thousands of miles of steel pipe for violating the same regulations and noted that if the penalties assessed by PHMSA to these large operators were proportional based on pipeline miles or throughput, these operators would have been fined in the hundreds of millions of dollars but were only fined in the \$4,000 to \$5,000 range.<sup>6</sup> In response OPS pointed to a case involving a large operator where higher penalties were assessed.<sup>7</sup> Having considered these arguments, pipeline operators should understand that the circumstances, gravity, and culpability are different in every case because different facts are involved, and penalty levels in one case are generally not predictors of penalty levels in another case even if the same regulation is involved. There is no penalty schedule in the regulations and nothing in the regulations requires that the same penalty levels be imposed for violations in different cases.<sup>8</sup>

With respect to its ability to pay, PAPCO stated that Hurricane Ike had caused hundreds of thousands of dollars in damage to its facilities, severely impacting its ongoing profitability. PAPCO submitted financial statements for the year ending October 31, 2008 and for the six-month period ending April 28, 2009. These statements consisted of balance sheets, statements of income/loss, and statements of shareholder equity but were unaudited and did not include cash flow statements and other disclosures required by generally accepted accounting principles. The transportation of hazardous products by pipeline is a regulated industry and companies choosing to engage in this business need to have the financial ability to deal with all regulatory and compliance matters as part of being a safe operation. While the financial statements provided by Respondent have been made part of the record and are being considered to the extent they constitute some evidence of PAPCO's financial condition, they do not demonstrate an inability to pay regulatory penalties of the levels involved in this case. Accordingly, I am not persuaded that civil penalties for the violations in this case should be reduced on the grounds of ability to pay.

**Item 2:** The Notice proposed a civil penalty of \$38,000 for Respondent's violation of 49 C.F.R. § 192.463(a) for failing to provide a level of cathodic protection meeting the -0.85V acceptance criteria at four specified locations. With respect to the nature, circumstances, and gravity of this violation, maintaining adequate levels of cathodic protection is a fundamental part of protecting a pipeline from corrosion. In its Response and during the hearing, PAPCO argued that the non-compliance was inadvertent and while the cathodic protection was below acceptance criteria, it was in place and working and there was no immediate threat to the public. PAPCO further explained that its cathodically protected sites were scheduled to be remediated in October 2007 but due to hurricane damage its crews were transferred to other facilities and remediation was delayed until Spring 2008. I acknowledge that PAPCO took action to correct the cathodic protection deficiencies and come into compliance. However, that does not negate the violation. Moreover, PAPCO was culpable for the violation as pipeline operators are obligated to monitor cathodic protection levels and promptly correct any deficiencies. In this case, the cathodic

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<sup>6</sup> Specifically, the cases cited by Respondent were *In the matter of Colonial Pipeline Company*, CPF No. 2-2005-5012 (Sept. 1, 2006) and *In the matter of Brea Canyon Oil Company, Inc.*, CPF No. 5-2004-0005 (Sept. 13, 2006).

<sup>7</sup> *In the matter of Exxon Mobil Pipeline Company*, CPF No. 1-2006-5005 (Nov. 24, 2008).

<sup>8</sup> The compliance history was known by OPS and the proposed penalty amounts in the Notice did not include any additional penalty amounts for prior offenses.

protection was not deficient for days or even weeks but for a period of many months. As discussed above, however, Respondent showed that with respect to the Williams Southwell Meter location, the meter was located on a gathering line located outside the city limits of Warren, Pennsylvania and was exempt from cathodic protection requirements under the regulations in effect at the time. Accordingly, I find that a proportional reduction in the penalty amount proposed in the Notice for this Item is warranted on this basis. Based upon the foregoing, I assess Respondent a reduced civil penalty of \$36,500.

**Item 3:** The Notice proposed a civil penalty of \$20,000 for Respondent's violation of 49 C.F.R. § 199.115 by engaging a contractor that did not have its own drug and alcohol plan to perform maintenance on its pipeline without including the contractor in PAPCO's drug and alcohol plan. With respect to the nature, circumstances, and gravity of this violation, drug and alcohol testing of all personnel who perform work tasks on a pipeline is a key part of pipeline transportation safety. In its Response and at the hearing, PAPCO stated that the individual concerned was a sober, reliable person who had never been involved in any erratic behavior. Drug and alcohol testing, however, is not only required to be performed on personnel who appear to be under the influence on a given occasion or after an accident, rather continuous, ongoing testing is required. PAPCO was culpable for this violation as all pipeline operators are obligated to ensure all personnel performing work on their pipelines are covered by a drug and alcohol program. Moreover, this violation continued for a period of five years. Having considered Respondent's arguments, I am not persuaded that a reduction in the penalty amount proposed in the Notice for this Item is justified. Based on the foregoing, I assess Respondent a civil penalty of \$20,000 for its violation of 49 C.F.R. § 199.115.

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **\$56,500**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to be made by wire transfer through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, Oklahoma 73125. The Financial Operations Division telephone number is (405) 954-8893.

Failure to pay the \$56,500 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a district court of the United States.

### **WARNING ITEM**

With respect to Item 1, the Notice alleged a probable violation of Part 192 warned Respondent to promptly correct this item or be subject to future enforcement action. The warning was for:

49 C.F.R. § 192.603(b) (**Item 1**) — Respondent's alleged failure to maintain records demonstrating that the required annual valve inspections of the distribution valves at the Glade Bridge Valve Station were conducted for 2004.

PAPCO presented information in its Response showing that it had taken certain actions to address the cited item. In the event that OPS finds a violation of this provision in a subsequent inspection, Respondent may be subject to future enforcement action.

Under 49 C.F.R. § 190.215, Respondent has the right to submit a petition for reconsideration of this Final Order. Should Respondent elect to do so, the petition must be sent to: Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2<sup>nd</sup> Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address. PHMSA will accept petitions received no later than 20 days after receipt of service of the Final Order by the Respondent, provided they contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.215. The filing of a petition automatically stays the payment of any civil penalty assessed but does not stay any other provisions of the Final Order, including any required corrective actions. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

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Jeffrey D. Wiese  
Associate Administrator  
for Pipeline Safety

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Date Issued