

PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, D.C. 20590

In the matter of

Tennessee Gas Pipeline, L.L.C.,

Respondent.

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CPF 1-2016-1003

**POST-HEARING BRIEF
OF
TENNESSEE GAS PIPELINE COMPANY, L.L.C.**

I. Introduction

Tennessee Gas Pipeline Company, L.L.C. (TGP) respectfully submits this post-hearing brief regarding the above referenced matter for which an informal hearing was held on November 14, 2016 in West Trenton, New Jersey on the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (NOPV) issued to TGP on February 10, 2016. The NOPV arose from an inspection of the procedures and records of TGP in Houston, Texas from July 20-24, 2015 by inspectors from the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), and the Connecticut Department of Energy, and Environmental Protection (CT DEEP) acting as Agent for PHMSA OPS. Tennessee Gas Pipeline, L.L.C. provides this post-hearing brief by the deadline established at the hearing of December 19, 2016.

II. If The Pipe Doesn't Meet The Definition Of HCA Then It Is Not In An HCA As A Matter Of Fact And Law And To Determine Otherwise Would Be Reversible Error.

The only alleged violation in this matter is that TGP failed to conduct a baseline assessment on 4 ½' of a "covered segment" of pipe by December 17, 2012 as required by 49 CFR § 192.921(d). "Covered segment" is defined by 49 CFR § 192.903 as "a segment of gas transmission pipeline located in a high consequence area" which is also referred to as an HCA.

In turn, an HCA is defined by one of two methods described in the definitions. At issue here is method 2 subsection (ii) which provides that an HCA means an area within a potential impact circle containing an “identified site.” 49 CFR § 192.903. Last, but not least, an “identified site” means each of the following areas:

(a) An outside area or open structure that is occupied by twenty (20) or more persons on at least 50 days in any twelve (12)-month period. (The days need not be consecutive.) Examples include but are not limited to, beaches, playgrounds, recreational facilities, camping grounds, outdoor theaters, stadiums, recreational areas near a body of water, or areas outside a rural building such as a religious facility; or

(b) A building that is occupied by twenty (20) or more persons on at least five (5) days a week for ten (10) weeks in any twelve (12)-month period. (The days and weeks need not be consecutive.) Examples include, but are not limited to, religious facilities, office buildings, community centers, general stores, 4-H facilities, or roller skating rinks; or

(c) A facility occupied by persons who are confined, are of impaired mobility, or would be difficult to evacuate. Examples include but are not limited to hospitals, prisons, schools, day-care facilities, retirement facilities or assisted-living facilities.

Id.

As discussed at the hearing the key question in this matter is whether the Church of Jesus Christ of Latter-Day Saints located near the TGP facility fits the definition of “identified site.” If it does not then the 4 ½’ piece of pipe at issue is not in an HCA or a “covered segment” and therefore there can be no violation of 49 CFR § 192.921(d).

At the hearing, PHMSA and the CT DEEP provided no evidence that this particular 4 ½’ of pipe was located within a potential impact circle containing an “identified site” for which TGP was required to conduct a baseline assessment by December 17, 2012 as required by 49 CFR § 192.921(d). In contrast, TGP provided testimony regarding its conversations with Church officials and a letter from the Church which conclusively demonstrates that the Church is not an “identified site.” *See, e.g., Exhibit A to TGP’s Pre-Hearing Brief.* Looking at each prong of the definition of “identified site,” the evidence demonstrates that:

(a) There is no outside area such as a playground or recreational facility at the facility which would fall under prong (a) of the definition.

- (b) The church building holds and always has held services once per week and then meetings with less than 10 people on other days of the week. Thus, the building is not occupied by twenty (20) or more persons on at least five (5) days a week for ten (10) weeks in any twelve (12)-month period.
- (c) The church building is not occupied by persons who are confined, or of impaired mobility, or would be difficult to evacuate. The church does not and never has housed a daycare.

Indeed, at the hearing, PHMSA and CT DEEP *agreed* that the church does not meet the definition of an “identified site.” However, they argued that if TGP made a mistake and identified the church as an HCA that was good enough for the hearing officer to uphold the NOPV. This argument fails.

First, it is well established that PHMSA bears the burden of proof.¹ In this case, PHMSA provided no evidence at all to meet its burden of proof. PHMSA’s failure to meet its burden coupled with its agreement that the Church does not meet the definition of “identified site” requires that the NOPV be withdrawn.

Moreover, PHMSA relies on assumptions. PHMSA’s argument is essentially that if TGP designated this Church as an “identified site” then the Church is an “identified site” as a matter of law. This argument also logically fails. If TGP can, by virtue of its mistaken designation in its own records, make this Church into an “identified site” regardless of the application of the regulatory definition then the reverse would also be true. Namely, under PHMSA’s stated position if TGP made the reverse mistake and failed to identify a site as an HCA then TGP could not be held responsible for violating the regulation because PHMSA’s position is that the definition is irrelevant and the Operator’s determination is absolute. Such a result is absurd.

¹ See 49 C.F.R. § 190.213(a)(1). See also *In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at *3 (D.O.T. Aug. 10, 2015) (PHMSA did not meet its burden of proving a violation when it did not produce “any evidence to support its position”); *In re Exxon Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at *12 (D.O.T. Jan. 23, 2015) (PHMSA failed to meet burden of proving that certain measures were required under regulations); *In re So. Star Central Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, at *4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF No. 4-2008-1017, 2011 WL 1919517, at *5 (D.O.T. Mar. 22, 2011) (PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct); *In re Butte Pipeline Co.*, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (D.O.T. Aug. 17, 2009) (“PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”).

Finally, the NOPV is void for mootness. There is no violation of PHMSA integrity management regulations, including 49 CFR § 192.921(d), because they do not apply to this segment. The Supreme Court has very clearly held that where an actual controversy does not exist a case is moot and that a controversy must exist at all stages of review, not merely at the time a complaint is filed.² In addition, mootness can arise at any time and subsequent events can moot a case where it is absolutely clear that the allegedly wrongful conduct could not be expected to recur.³ Once TGP established, and indeed the agencies agreed, that the pipeline segment at issue is not located in an HCA and thus not subject to the integrity management regulations allegedly violated, this matter was moot as a matter of law, regardless of post hoc interpretations by PHMSA administrative officers.

The regulatory definitions exist for a reason and are binding. TGP did not violate the law because the Church does not meet the definition of “identified site,” and, as a matter of fact and law, the NOPV must fail. Any decision to the contrary by PHMSA is clearly reversible because it is not substantiated by the facts or the law.⁴

III. The Proposed \$11,500 Civil Penalty and Compliance Order Must be Withdrawn.

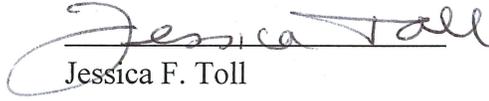
PHMSA has failed to demonstrate by a preponderance of the evidence that a violation of 49 C.F.R. § 192.921(d) occurred, therefore; the proposed civil penalty must also be withdrawn. Additionally, for all of the reasons stated above and particularly because PHMSA and CT DEEP agreed at the hearing that the Church is not an identified site, the Compliance Order must also be withdrawn.

² *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (“To qualify as a case fit for [...] adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.”)).

³ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 170 (2000) (citing *U.S. v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203, (1998) (explaining that a case may be moot where subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.)).

⁴ 5 U.S.C. § 706(2)(A) (2015) (the Administrative Procedure Act requiring courts to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 49, 103 S.Ct. 2856, 77 L.Ed. 2d 443 (1983) (DOT “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made”).

Respectfully submitted this 19th day of December, 2016



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