

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

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**In the matter of**

**Tennessee Gas Pipeline, L.L.C.,**

**Respondent.**

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**CPF 1-2016-1003**

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

**I. INTRODUCTION**

Pursuant to 49 C.F.R. § 192.211(d) (2015), Tennessee Gas Pipeline Company, L.L.C. (TGP) respectfully submits this pre-hearing brief in advance of the informal hearing to be held on November 14, 2016 in West Trenton, New Jersey regarding the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued to TGP on February 10, 2016. The Notice 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.

**II. BACKGROUND**

TGP's pipeline system contains approximately 11,900 miles of pipeline that transports natural gas from Louisiana, the Gulf of Mexico and south Texas to the northeast section of the United States, including Pennsylvania, New Jersey, Connecticut, New York, New Jersey and New Hampshire.

**A. Summary of PHMSA's Allegations**

PHMSA alleges one probable violation: that TGP failed to perform an assessment on four and one-half feet (4.5') of underground pipe at a 10-inch interconnect facility located at 749

Meriden-Waterbury Turnpike, Southington, Connecticut, (the Interconnect) as required in §192.921(d).

## **B. TGP's Summary Response and Request for Relief**

TGP is committed to public safety and operating its pipeline facilities in accordance with PHMSA's regulations. TGP takes PHMSA's allegations of violation seriously. In this case, however, TGP contends that the allegations of violation are not supported by the facts. Specifically, the Interconnect is not in a High Consequence Area (HCA) as defined in §192.903 and therefore an assessment was not required by §192.921(d).

Accordingly, TGP respectfully requests that PHMSA withdraw the allegation of violation, the proposed civil penalty, and the proposed compliance order in this case.

## **III. PROCEDURAL HISTORY**

PHMSA transmitted the Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order via Overnight Express Delivery on February 10, 2016 to TGP. On March 9, 2016, TGP submitted a timely Request for Hearing, Request for Documents, and Preliminary Statement of Issues. The hearing is scheduled for Monday, November 14, 2016, at 9:00 a.m.

## **IV. DISCUSSION AND ARGUMENT**

### **A. PHMSA Has Not Met Its Burden of Demonstrating that the Alleged Violations Occurred.**

The key issue in this case is that PHMSA has not introduced sufficient evidence to demonstrate that TGP committed the alleged violation. PHMSA has the burden of proof in a pipeline safety enforcement proceeding of demonstrating that a violation occurred.<sup>1</sup> This

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<sup>1</sup> 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

obligation includes the “burden of persuasion,” i.e., which party loses if the evidence is closely balanced, and the ‘burden of production,’ i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding.”<sup>2</sup> In a case involving a Notice of Proposed Violation, PHMSA “bears the burden of proof as to all elements of the proposed violation.”<sup>3</sup>

To meet its burden of persuasion, PHMSA “must prove, by a preponderance of the evidence that the facts necessary to sustain a probable violation actually occurred.”<sup>4</sup> That burden is carried “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”<sup>5</sup> A respondent will prevail under this standard not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.<sup>6</sup> If “the evidence is closely balanced,” PHMSA has not met its

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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.”).

<sup>2</sup> Schaeffer v. Weast, 546 U.S. 49, 56 (2005), (citing Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994)); see also In re Bridger Pipeline Co., Final Order, CPF No. 5-2007-5003 2009 WL 7796887, at \*1 (D.O.T. Apr. 2, 2009).

<sup>3</sup> 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).

<sup>4</sup> In re Alyeska Pipeline Serv. Co., Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at \*3 (D.O.T. Dec. 16, 2009) (citing In re Butte Pipeline Co., CPF No. 5-2007-5008, 2009 WL 3190794, at \*1, n.3 (D.O.T. Aug. 17, 2009); Schaeffer, 546 U.S. at 56-58).

<sup>5</sup> In re Butte Pipeline Co., 2009 WL 3190794, at \* 1.

<sup>6</sup> See In re ANR Pipeline Co., 2012 WL 7177134, at \*3. In ANR Pipeline, PHMSA found that ANR’s “plausible” explanation regarding the discovery of a reportable condition on its pipeline was sufficient to warrant withdrawal of the allegation of violation because the “Violation Report contain[ed] no evidence which would rebut ANR’s argument.” Id. at \*3.

burden of persuasion and the allegation of violation must be withdrawn.<sup>7</sup> Regarding its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation. Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.<sup>8</sup>

As explained in detail below, PHMSA has not met its burden of proving by a preponderance of the evidence that TGP committed the alleged violations.

**B. TGP Did Not Violate 49 CFR §192.921(d) as alleged in item 1 of the Notice.**

**a. Summary of Regulatory Requirement.**

An operator must prioritize all the covered segments for assessment in accordance with §192.917 and paragraph (b) of §192.921. An operator must assess at least 50% of the covered segments beginning with the highest risk segments, by December 17, 2007. An operator must have completed the baseline assessment of all covered segments by December 17, 2012.<sup>9</sup>

**b. Allegation:** TGP did not complete the baseline assessment for the Interconnect.

**c. PHMSA Has Not Demonstrated That the Interconnect in Question is in a High Consequence Area (HCA) as defined in § 192.903.**

Across the Meriden-Waterbury Turnpike, and 180 feet away from the Interconnect, is a Church of Jesus Christ of Latter Day Saints at 750 Meriden-Waterbury Turnpike, Southington, CT. At the time that the Integrity Management Rule (Amendment 192.95) went into effect,

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<sup>7</sup> In re Alyeska Pipeline Serv. Co., 2009 WL 5538655 at \* 3, (quoting Schaeffer, 546 U.S. at 56). Cf. In re Buckeye Partners, LP, CPF No. 1-2009-5002, 2012 WL 3144486, at \*7 (D.O.T. May 30, 2012) (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

<sup>8</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>9</sup> 49 CFR §192.921(d)

TGP, using the criteria of §192.903(2),<sup>10</sup> had conservatively identified the Church building as an “identified site” and thus an HCA. The segment of the Interconnect to be assessed is a mere four and one-half feet (4.5’) of underground pipe. TGP’s records reflect that the Interconnect was on its list of covered sites requiring assessment by December 17, 2012. The assessment had not been completed at the time of PHMSA’s inspection of TGP’s records and procedures in July 2015. As conclusively demonstrated below, the short four and one-half feet (4.5’) of pipe was in fact not located in a High Consequence Area (HCA) and accordingly the failure to assess it by the regulatory deadline cannot be a violation of law.

In August 2015, and again in February 2016, a TGP representative spoke with Church leadership, most recently a Church Bishop and Facility Manager, regarding the use of the Church building. From these conversations, TGP confirmed that the Church primarily operates, and has always operated, one day a week (Sunday) for a three-hour block of time. It is also used for small meetings of no more than ten people in attendance on some week nights. TGP also confirmed the Church has never operated a daycare facility at this location. These facts were confirmed by Church leadership in writing to TGP on March 17, 2016 (*see* Exhibit A). Based on the foregoing facts, the Interconnect in question is not currently nor has it ever been in a HCA as defined in §192.903. In spite of the fact that TGP had conservatively identified the Church building as an HCA it was not, in fact, an HCA and therefore, the assessment required under §192.921(d) was not required for this particular Interconnect as a matter of law.

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<sup>10</sup> *High Consequence Area* means an area established by one of the methods described in paragraphs (1) or (2) as follows: ... (2) The area within a potential impact circle containing ... (ii) An identified site.

...  
*Identified site* means each of the following areas: ... (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. 49 CFR § 192.903, *emphasis added*.

Given that the 4 1/2' piece of pipe in question was not in an HCA, the failure to assess it cannot be a violation of the regulations because the actual facts do not support a violation of law.

Consider the following analogies:

- If a factory owner believes that the emission limits for a certain pollutant is 25 tons per year, and then emits 26 tons per year of that pollutant, but it turns out the emission limit is actually 30 tons per year, then the factory owner cannot be found in violation of the law. The factory owner's mental state is not relevant. The only fact that is relevant in this hypothetical is whether the factory owner exceeded the emission limit of 30 tons per year.
- A vehicle driver believes that a local township has a law that prohibits no right hand turns on a red light. However, the vehicle driver is in a hurry and decides to make a right hand turn on a red light, despite her belief that such a turn violates the law. It turns out that the local township allows right hand turns on a red light. In this case, the driver is not in violation of the law, despite her belief that she violated the law.
- A taxpayer believes that he is not permitted to deduct an expense on his tax return, but decides to take the deduction anyway. It turns out that the deduction is legitimate. The taxpayer cannot be found in violation of the tax code, despite his belief that he took an unauthorized deduction.

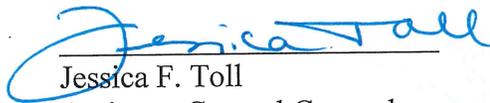
Similarly, if a pipeline operator previously designated a 4.5-foot section of pipe as being located in a HCA, and then did not perform integrity assessments on that 4.5-foot section of pipe, but it turns out the 4.5-foot section of pipe is not located in a HCA, then the pipeline operator

cannot be found in violation of Part 192<sup>11</sup>. Accordingly, PHMSA has not and cannot sustain its burden of proof and the NOPV must be withdrawn.

**C. The Proposed \$11,500 Civil Penalty 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. TGP reserves the right to supplement its penalty arguments on the basis of any additional material provided by PHMSA and on the hearing record in this case. During the hearing, TGP intends to seek additional information from PHMSA regarding the basis for its proposed civil penalty, in light of the penalty assessment criteria.

Respectfully submitted this 3<sup>rd</sup> day of November, 2016



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<sup>11</sup>See United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375, 386 (5<sup>th</sup> Cir. 2003). (It would be illogical to find fraud where a party secretly did not intend to perform the contract when it was signed, but in actuality did perform, as the civil law generally regulates actions, not thoughts alone. [...]Clearly, an intention devoid of an action cannot cause an injury in fact.)

EXHIBIT A

THE CHURCH OF  
**JESUS CHRIST**  
OF LATTER-DAY SAINTS

HARTFORD CT FM GROUP  
130 South Street  
Cromwell, Connecticut 06416-2261  
Phone: 1-860-635-4035  
Facsimile: 1-860-635-4036

March 17, 2016

Jamie Jacobs  
Tennessee Gas Pipeline Company, L.L.C.

Dear Jamie,

To update your historical records, per our conversation on Sunday 2/14/2016 and after your meeting with Bishop Aaron Lawrie, the Church of Jesus Christ of Latter-Day Saints located on the Meriden Waterbury Turnpike in Southington, CT does not have a day care facility and in fact, has never had a day care facility. The Church holds Sunday services for its congregation and uses the facility for other meetings as needed throughout the week.

Please give me a call if you have any further questions.

Sincerely,



Bill Puida  
Facilities Manager  
Hartford CT FM Group