

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

In the Matter of

Blue Racer Midstream, LLC,

Respondent.

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CPF No. 1-2017-5027

**PRE-HEARING BRIEF OF BLUE RACER MIDSTREAM, LLC
APRIL 23, 2018**

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I. Introduction

Pursuant to 49 C.F.R. § 190.211(d), Blue Racer Midstream, LLC (Blue Racer or the Company), respectfully submits this pre-hearing brief regarding the Notice of Probable Violation and Proposed Civil Penalty (Notice) that the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued on November 24, 2017, in the above-captioned proceeding. The Notice alleges that Blue Racer committed two violations of the Pipeline Safety Regulations¹ in operating a pipeline that delivers hazardous liquids from a plant in Lewisville, Ohio, to a plant in Proctor, West Virginia (B2N Pipeline). The Notice proposes that the Company pay a total civil penalty of \$71,800 for committing the alleged violations.

As explained in more detail below, PHMSA cannot substantiate the violations alleged in the Notice for a simple reason—the regulations cited do not apply to the B2N Pipeline. Moreover, even if those regulations applied, PHMSA has not presented sufficient evidence to prove that one of the alleged violations occurred, or to support the proposed civil penalties. Accordingly, Blue Racer respectfully requests that PHMSA issue an order withdrawing the Notice in its entirety. In the alternative, the Company respectfully requests that PHMSA issue an order finding that PHMSA failed to meet its burden of proof with respect to at least one of the alleged violations, and eliminating or reducing the civil penalties for both of the violations.

A. Summary of PHMSA Allegations

The Notice alleges that Blue Racer committed two violations of the Pipeline Safety Regulations. First, PHMSA alleges that Blue Racer failed to review and update the manual of written procedures for addressing operations, maintenance, and emergencies for the B2N Pipeline (49 C.F.R. § 195.402(a)) (Item #1). PHMSA proposes that the Company pay a civil penalty of

¹ 49 C.F.R. Parts 190 to 199.

\$19,300 for committing that alleged violation. Second, PHMSA alleges that Blue Racer failed to properly inspect and test an overpressure protection safety device, PSV-100, for the B2N Pipeline (49 C.F.R. § 195.428(a)) (Item #2). PHMSA proposes that the Company pay a civil penalty of \$52,500 for committing that alleged violation.

B. Summary of Response and Request for Relief

Blue Racer is committed to pipeline safety and takes any concerns raised by the Agency seriously. However, PHMSA cannot substantiate the violations alleged in the Notice for the following reasons.

- i. *The regulations at issue do not apply to the B2N Pipeline.*

The B2N Pipeline is a rural gathering line and only a portion of the line is regulated under Part 195. The regulations cited in the Notice, 49 C.F.R. §§ 195.402(a) and 195.428(a), do not apply to rural gathering lines, whether regulated or not. Accordingly, PHMSA cannot meet its burden of proof as a matter of law.

- ii. *Even if the regulations applied to the B2N Pipeline, the inspection and testing requirements for overpressure protection systems would not apply to PSV-100.*

The inspection and testing requirements in § 195.428(a) only apply to devices that are an integral part of the overpressure pressure protection system for a regulated hazardous liquid pipeline. The device identified in the Notice, PSV-100, is not an integral part of the overpressure protection system for B2N Pipeline. Therefore, PHMSA could not meet its burden of proof even if Blue Racer had an obligation to comply with §195.428(a).

- iii. *Even if PHMSA could prove that Blue Racer committed the alleged violations, the proposed civil penalties would need to be reduced or eliminated.*

PHMSA's proposed civil penalties are not consistent with the applicable statutory and

regulatory factors. As such, the elimination or reduction of those civil penalties would be necessary even if PHMSA could prove that a violation occurred.

iv. *The Notice must be withdrawn.*

Because the regulations cited do not apply to the B2N Pipeline, Blue Racer respectfully requests that PHMSA withdraw the allegations in the Notice. To the extent the allegations are not withdrawn, Blue Racer respectfully requests that the proposed civil penalty be reduced or eliminated. Blue Racer makes this alternative argument regarding the penalties to preserve these issues in the event that further proceedings occur in this case.

II. Procedural History

PHMSA issued the Notice to Blue Racer on November 24, 2017. On November 29, 2017, Blue Racer requested a copy of the violation report and documentation used by PHMSA to calculate the proposed civil penalty. By letter dated November 30, 2017, Blue Racer received a copy of PHMSA's Violation Report, Civil Penalty Worksheet, and PHMSA's Pipeline Safety Enforcement Procedures Sections 3 (Selection of Administrative Enforcement Actions) and 4 (Administrative Enforcement Processes). On December 21, 2017, counsel for Blue Racer submitted a timely request for an in-person hearing, a preliminary statement of issues, and a second request for documents. PHMSA responded by scheduling this matter for an informal hearing on May 3, 2018, at the Eastern Region Office in Trenton, New Jersey.

Blue Racer notes that the Company has not received any other materials that the Eastern Region relied on to develop the Notice, or that the Associate Administrator will use to adjudicate this matter. Of particular importance, Blue Racer has not received any documents in response to its request for "any correspondence, electronic communications, records or other documents that Gerhard Bauman, Office of Pipeline Safety, Central Region, or any other PHMSA personnel,

prepared, reviewed, relied upon, exchanged, or considered in connection with the emails that Mr. Bauman sent to Jeff Burdette, Regulatory Compliance Coordinator, Blue Racer between June 1, 2011, and June 15, 2015, concerning the alleged applicability of 49 C.F.R. Part 195 to the B2N Pipeline and associated upstream and downstream facilities.”²

As part of its pre-hearing submission, the Company is introducing a copy of certain email exchanges that occurred between Mr. Bauman and Mr. Burdette on the dates in question.³ To the extent that PHMSA intends to introduce any additional evidence or testimony regarding the information exchanged in these emails, or any other documents that Mr. Bauman relied upon or considered in developing his email responses to Mr. Burdette, Blue Racer respectfully requests that the Presiding Official exclude that evidence or take other appropriate action under 49 C.F.R. § 190.212(c) to address the Agency’s failure to provide a timely response to the Company’s document request.

III. Background

Constructed in 2013, the B2N Pipeline is a 28-mile, 8-inch pipeline located in Ohio and West Virginia. The B2N Pipeline transports stabilized condensate and natural gas liquids (NGLs) from the Berne Plant to two fractionation units at the Natrium Plant.⁴ The stabilized condensate is received from a pipeline system that originates at wells located in Noble County, Ohio. The NGLs are received from separate gas pipelines that originate at wells located in Noble, Washington, Guernsey, Belmont, Harrison, and Tuscarawas Counties, Ohio. A brief discussion of the upstream facilities relevant to the regulatory status of the B2N pipeline is provided below.

² Blue Racer requested this information in its Request for Documents dated December 21, 2017.

³ Exhibit A (Email Exchange between Mr. Bauman and Mr. Burdette).

⁴ Exhibit B (PI&D of the B2N Pipeline).

A. Condensate System

Two systems deliver condensate to the Berne Plant: (1) the northern system and (2) the southern system.⁵

The northern system receives condensate from six wells. At three of those wells, fluids produced at the wellhead are sent through a heater treater and low pressure separator on the well pad where vapors are flashed off. The condensate is then temporarily stored in a surge tank on the well pad before being pumped in 4-inch and 6-inch pipelines to the NFS1 station. At the NFS1 station, the condensate from is temporarily stored again in onsite tanks before being pumped in a 6-inch pipeline to the Berne Plant.

At the other three wells in the northern system, produced well fluids are periodically commingled with the gas stream and delivered to a slug catcher at the NFS1 station. When the slug catcher is drained, the fluids are commingled with the condensate stream and pumped in the 6-inch pipeline to the Berne Plant. All of the condensate delivered to the Berne Plant in the northern system is sent through a stabilizer before entering the B2N Pipeline.

In the southern system, condensate from a single well pad flows through a heater treater and low pressure separator where the vapors are flashed off. The condensate is then temporarily stored in a surge tank on the well pad before being pumped to the Berne Plant in 4-inch, 6-inch, and 8-inch pipelines. At the Berne Plant, condensate from the northern system is commingled with condensate from southern system and sent through a stabilizer before entering the B2N Pipeline.

B. Gas System

Production flowlines move gas produced at the wellhead to the Berne Plant for processing

⁵ Exhibit C (Map of Condensate Production System).

(either after passing through satellite production compressors or by way of direct deliveries). At the Berne Plant, the gas enters cryogenic plants where NGLs are separated from the natural gas stream. After processing, the NGLs enter the B2N Pipeline for delivery to the Natrium Plant.

IV. Discussion and Argument

The Federal Pipeline Safety Laws provide PHMSA with the authority to regulate the safety of pipeline facilities and persons engaged in the transportation of hazardous liquids.⁶ Pursuant to a longstanding statutory exemption, the federal safety standards in 49 C.F.R. Part 195 (Part 195) do not apply to (1) production facilities⁷ or (2) onshore rural gathering lines that do not meet the definition of a “regulated rural gathering line.”⁸ That exemption, originally enacted in 1979 and amended in 1992, is codified in the statutory definition for the term “transporting hazardous liquid.”⁹ A corresponding exception is also recognized at the outset of the Part 195 regulations.¹⁰

As explained in more detail below, the B2N Pipeline is a rural gathering line that transports petroleum from a production facility and Part 195 only applies to the portion of the pipeline that meets the definition of a “regulated rural gathering line” under § 195.11. The regulations cited in the Notice, 49 C.F.R. §§ 195.402(a) and 195.428(a), do not apply to rural gathering lines, whether regulated or not. Furthermore, even if 49 C.F.R. § 195.428(a) applied to the B2N Pipeline, the

⁶ 49 U.S.C. § 60102(a)(2) (2016).

⁷ 49 U.S.C. § 60101(a)(22)(B)(ii)–(iii) (exempting “onshore production, refining, or manufacturing facilities” and “storage or in-plant piping systems associated with onshore production, refining, or manufacturing facilities”); 49 C.F.R. § 195.1(b)(8) (2018) (exempting “[t]ransportation of hazardous liquid or carbon dioxide through onshore production (including flow lines), refining, manufacturing facilities or storage or in-plant piping systems associated with such facilities.”).

⁸ 49 U.S.C. § 60101(a)(22)(B)(i) (exempting “gathering lines (except regulated gathering lines) in a rural area”); 49 C.F.R. § 195.1(b)(4) (exempting “[t]ransportation of petroleum through an onshore rural gathering line that does not meet the definition of ‘regulated rural gathering line’ as provided in § 195.11 . . .”).

⁹ 49 U.S.C. § 60101(a)(22)(B)(ii)–(iii).

¹⁰ 49 C.F.R. § 195.1(b)(8).

device identified in the Notice, PSV-100, would not be subject to that regulation because it is not an integral part of the overpressure protection system. Accordingly, the allegations of violation in the Notice must be withdrawn.

A. The Exemption for Onshore Production Facilities Applies from the Wellhead to the Outlet of the Berne Plant.

PHMSA does not have statutory authority to regulate the movement of hazardous liquids through onshore production facilities.¹¹ The Pipeline Safety Laws provide that “transporting hazardous liquid” does not include the movement of hazardous liquid through “onshore production . . . facilities . . . or storage or in-plant piping systems associated with onshore production . . . facilities.”¹² The statute does not define the term “production facility”, but PHMSA has done so in the Part 195 regulations for hazardous liquid pipelines.¹³

Part 195 defines production facility as “piping or equipment used in the production, extraction, recovery, lifting, stabilization, separation or treating of petroleum or carbon dioxide, or associated storage or measurement.”¹⁴ “Flow lines,” which are part of production, are “found at production sites and are used to move produced hydrocarbons from a well to a point where gas, oil and water are separated.”¹⁵ PHMSA has said that to be part of a production facility, “piping or equipment must be used in the process of extracting petroleum . . . from the ground . . . and

¹¹ 49 U.S.C. § 60101(a)(22)(B)(ii)-(iii). A corresponding exemption is found in PHMSA’s regulations at 49 C.F.R. § 195.1(b)(8).

¹² 49 U.S.C. § 60101(a)(22)(B)(ii). PHMSA has codified the statutory exemption for onshore production facilities in the Part 195 regulations at 49 C.F.R. § 195.1(b)(8).

¹³ 49 C.F.R. § 195.2.

¹⁴ *Id.*

¹⁵ *Transportation of Hazardous Liquids by Pipeline: Regulation of Intrastate Pipelines*, 50 Fed. Reg. 15,895, 15,896 (Apr. 23, 1985).

preparing it for transportation by pipeline.”¹⁶ PHMSA has also made clear that the “number of interconnected leases from which hydrocarbons are produced is not a factor in identifying a facility as a production facility.”¹⁷ Rather, “[f]acilities are designated as production facilities according to their usage, not the location of wells from which hydrocarbons are being produced.”¹⁸ For purposes of the Part 195 production facility definition, separation and treatment includes the processes of gas sweetening and liquids extraction from hydrocarbon gas.¹⁹

A review of PHMSA’s historical interpretations indicates that the production function generally ends under Part 195 at (or very near) the outlet of the first facilities where produced fluids are permanently separated into oil, gas, and water.²⁰ However, PHMSA found in at least one recent interpretation that the production function can extend beyond the point of initial separation to a central facility if additional processing (*e.g.*, stabilization and temporary storage of condensate) occurs at that location.²¹

Specifically, in a 2007 letter of interpretation, PHMSA addressed a pipeline system that originated at a series of wells where produced fluids were separated into condensate, natural gas, and water. The system then transported the condensate through a dedicated pipeline to a central station where stabilization and temporary storage occurred. According to the information provided

¹⁶ 49 C.F.R. § 195.2.

¹⁷ *Transportation of Hazardous Liquids, Gathering Lines in Rural Areas*, 51 Fed. Reg. 15,005, 15,007 (Apr. 22, 1986).

¹⁸ 51 Fed. Reg. at 15,007.

¹⁹ *Id.*

²⁰ See PHMSA Letter of Interpretation to Barney V. Dotson, BP Exploration (Alaska), Inc., #PI-94-030 (Oct. 11, 1994); PHMSA Letter of Interpretation to James S. Teater, BP Exploration (Alaska), Inc., #PI-96-015 (July 22, 1996); PHMSA Letter of Interpretation Gary E. Carlson, Forest Oil Corp., #PI-02-0100 (May 17, 2002).

²¹ See PHMSA Letter of Interpretation to Andrew K. Soto, Sutherland Asbill & Brennan LLP, #PI-07-0104 (June 4, 2007).

by the operator, separation occurred at the wellhead and other points downstream from that location, including at the central station. PHMSA considered these facts and found that the production function extended from the wellhead to the stabilization facilities at the central station.²²

A similar scenario is presented in this case. Like the system at issue in the 2007 interpretation, the northern and southern systems both carry condensate that undergoes initial separation at the well pad. The condensate is then delivered in 6-inch and 8-inch pipelines to the Berne Plant for further processing, separation, and stabilization. There are no material facts that distinguish the operations in the northern and southern systems from the scenario that PHMSA considered in the 2007 interpretation and there is no indication that the interpretation is no longer valid.²³

NGLs are also stripped from the production flow lines in the gas system and commingled with the condensate from the northern and southern systems at the Berne Plant. As previously noted, separation and treatment for purposes of the Part 195 production facility definition includes the process of extracting liquids from hydrocarbon gas.²⁴ That aspect of the production function

²² *Id.*

²³ See Exhibit A (Email Exchange between Mr. Bauman and Mr. Burdette). Blue Racer notes that Mr. Bauman provided the Company with erroneous information about the legal status of the 2007 letter of interpretation in a June 2015 email. Specifically, Mr. Bauman indicated that the 2007 letter of interpretation had been superseded by the provisions in a 2011 final rule for low-stress lines, *Pipeline Safety: Applying Safety Regulations to All Rural Onshore Hazardous Liquid Low-Stress Lines*, 76 Fed. Reg. 25,576 (May 5, 2011). Contrary to Mr. Bauman's assertions, nothing in the 2011 final rule affected the Part 195 definitions for a production facility or gathering line, or the exceptions that apply to those facilities in 49 C.F.R. § 195.1. 76 Fed. Reg. at 25,581 ("This final rule revises Sections 195.1(a) and (b) to include the rural low-stress pipelines brought under Part 195 regulations in phase two. *The changes to this section do not affect any of the other covered or excluded pipelines previously identified in § 195.1.*") (emphasis added). The 2007 letter of interpretation is also still available on the Agency's website, illustrating that it continues to reflect PHMSA's position on the applicability of the production facility exemption to pipeline systems that condensate to central locations for processing. <https://www.phmsa.dot.gov/regulations/title49/interp/PI-07-0104> (accessed Apr. 16, 2018).

²⁴ 51 Fed. Reg. at 15,007.

applies to the NGLs that are stripped from the gas system at the Berne Plant. Therefore, all of the wells, piping, and equipment located upstream of the Berne Plant are properly classified as production facilities under Part 195.

The foregoing conclusion is supported by the American Petroleum Institute's Recommended Practice 80 (RP 80), a consensus industry standard that is incorporated by reference in 49 C.F.R. Part 192.²⁵ RP 80 is based on recognized and generally accepted industry practices, and its definition of "production operation" is very similar to the definition of "production facility" in 49 C.F.R. § 195.2.²⁶

The Berne Plant is a gas production facility that processes liquids associated with natural gas production, which is discussed in RP 80. Specifically, RP 80's "Central Production Handling Facility with Satellites," addresses the appropriate classification of a pipeline system that is analogous to the Berne Plant production facilities:

Gas production from 15-20 wells is brought through individual flowlines to a satellite station where initial separation occurs. Production compressors used to reduce backpressure on the wells send the gas to a central production handling facility through production piping . . . for further separation, sweetening, and dehydration before leaving the production operation for gathering to a gas processing plant. Likewise, condensate and water from the satellite station is pumped separately to the central production handling facility for water removal and condensate storage.²⁷

RP 80 further states that "[i]n this application, the furthestmost downstream point of the production operation happens to be the final gas volume meter at the central production handling

²⁵ 49 C.F.R. § 192.7(b)(4).

²⁶ In previous letters of interpretation, PHMSA has cross-referenced the gas and hazardous liquid pipeline safety regulations in determine the status of production facilities. *See, e.g.*, PHMSA Letter of Interpretation to Lance Fellhoalter, OXY USA Inc., #PI-93-060 (Oct 8, 1993) (stating that "Although Parts 40, 191, 192, and 199 do not define gas production facilities, the definition of 'production facility' in 49 C.F.R. 195.2 provides a reasonable guide to use in distinguishing facilities used in gas production.").

²⁷ AM. PETROLEUM INST., RECOMMENDED PRACTICE 80 § 3.1.4.1 (1st ed. 2000).

facility.”²⁸ RP 80 provides that “[t]he determinative factor is that the production operation—the preparation of the gas and condensate for transportation—was not complete without the processes performed at the central production handling facility.”²⁹ In this case, the Berne Plant is serving the same function as the central production handling facility, *i.e.*, the separation and processing of incoming raw gas and condensate. Accordingly, all of the facilities located upstream from the outlet of the Berne Plant are part of a production operation under RP 80 and Part 195.

B. The B2N Pipeline is a Rural Gathering Line, and Part 195 Only Applies to Certain Portions of that Pipeline.

Having established that the production function extends to the outlet of the Berne Plant, the Part 195 status of the B2N Pipeline turns on the resolution of two additional questions: (1) whether the B2N Pipeline is a gathering line located in a rural area and, (2) if so, whether the B2N Pipeline meets the definition of a “regulated rural gathering line.”³⁰ Each of these questions is addressed below.

i. *The B2N Pipeline is a gathering line located in a rural area.*

As a preliminary matter, the B2N Pipeline is located in a rural area.³¹ Part 195 defines “rural area” as “outside the limits of any incorporated or unincorporated city, town, village, or any other designated residential or commercial area such as a subdivision, a business or shopping center, or community development.”³² The B2N Pipeline does not pass through any of the former

²⁸ *Id.*

²⁹ *Id.*

³⁰ 49 C.F.R. § 195.11(a).

³¹ Exhibit D (B2N Pipeline Map).

³² 49 C.F.R. § 195.2.

locations between the Berne Plant and Natrium Plant.³³ Accordingly, the line is located entirely in a rural area for Part 195 purposes.

The B2N Pipeline is also a gathering line. Part 195 defines a gathering line as “a pipeline 219.1 mm (8 5/8 inches) or less in nominal outside diameter that transports petroleum from a production facility.”³⁴ This definition requires consideration of three basic elements, *i.e.*, (1) diameter, (2) hazardous liquid type, and (3) a functional component, each of which is clearly satisfied by the B2N Pipeline.

According to the rulemaking history, the maximum outside diameter requirement (8 5/8 inches or less in nominal outside diameter) in the definition reflects the general historic difference in size between gathering lines and trunk lines, as well as the need to establish a specific termination point for gathering lines.³⁵ The B2N Pipeline is constructed entirely with 8-inch pipe and clearly meets the applicable diameter threshold. Therefore, its status as a gathering line turns on whether the line is transporting petroleum from a production facility.³⁶

Petroleum is defined in Part 195 as “crude oil, condensate, natural gasoline and natural gas liquids, and liquefied petroleum gas.”³⁷ The B2N Pipeline transports stabilized condensate and NGLs, both of which are considered “petroleum” for purposes of the gathering line definition.³⁸

³³ Exhibit D (B2N Pipeline Map).

³⁴ 49 C.F.R. § 195.2.

³⁵ 51 Fed. Reg. at 15,006–07.

³⁶ 49 C.F.R. § 195.2.

³⁷ *Id.*

³⁸ *Id.* PHMSA has acknowledged in letters of interpretation that “condensate” qualifies as “petroleum” as that term is used in the Part 195 gathering regulations. *See* PHMSA Letter of Interpretation to George Williamson, BP American Production Co., #PI-04-0107 (Apr. 20, 2004); PHMSA Letter of Interpretation to Andrew K. Soto, Sutherland Asbill & Brennan LLP, #PI-07-0104 (June 4, 2007).

Accordingly, the line's status as a gathering line depends solely on the last element, the functional component.³⁹

A gathering line must transport petroleum from a production facility.⁴⁰ The B2N Pipeline transports petroleum from the Berne Plant, which is part of a production facility, to the Natrium Plant. The pipeline does not pass through any points that might serve to end the gathering function between these two locations.⁴¹ Thus, the B2N Pipeline qualifies as a gathering line from its point of origin at the Berne Plant to its point of termination at the Natrium Plant under Part 195.

Finally, Blue Racer notes that the B2N Pipeline would still be a gathering line even if the production function ended at a point prior to the Berne Plant. In that scenario, the pipelines upstream of the Berne Plant would qualify as rural gathering lines,⁴² and the gathering function would continue until the product reaches the Natrium Plant.⁴³ Accordingly, the B2N Pipeline's

³⁹ Blue Racer notes that the petroleum in the B2N Pipeline is a highly volatile liquid (HVL). Part 195 defines HVL as "a hazardous liquid which will form a vapor cloud when released to the atmosphere and which has a vapor pressure exceeding 276 kPa (40 psia) at 37.8 °C (100 °F)." 49 C.F.R. § 195.2; *Transportation of Liquids by Pipeline; Procedures for Operations, Maintenance, and Emergencies*, 44 Fed. Reg. 41,197, 41,198 (July 16, 1979). All of the hazardous liquids regulated under Part 195 can qualify as an HVL, and it is not unusual for petroleum substances (e.g., ethane, propane, butane, and pentane) that can be classified as an HVL to be transported from the wellhead to a downstream location in a gathering line. The fact that a pipeline is (or is not) carrying an HVL has no relevance under the gathering line definition. The only pertinent question is whether the line is transporting petroleum, which is clearly the case here.

⁴⁰ 51 Fed. Reg. at 15,006. Pipelines that originate at points of origin other than a production facility, such as a refinery or manufacturing facility, are not gathering lines. *Id.*

⁴¹ Exhibit B (PI&D of the B2N Pipeline). PHMSA precedent recognizes that gathering function can be terminated if pipeline connects to a line that is greater than 8 5/8 inches in nominal outside diameter, to another line that does not originate at a production facility, or to a non-jurisdictional facility, like a refinery. 51 Fed. Reg. at 15,007. None of these potential points exists between the outlet of the Berne Plant and the inlet of the Natrium Plant.

⁴² The fact that the condensate moves through 4-inch, 6-inch, and 8-inch pipelines in the southern system would not affect the classification of those lines as gathering lines under Part 195. All of the lines are less than 8 5/8 inches in nominal diameter and would meet the two other basic elements in the gathering line definition. PHMSA Letter of Interpretation to Legacy Reserves Operating, #PI-14-0015 (May 6, 2015) (concluding that, while the 10-inch diameter portion of a line should be classified a low-stress line, the 6 and 8-inch portions could continue to be classified as unregulated gathering lines so long as they meet all the criteria in Part 195).

⁴³ Nothing happens at the Berne Plant that would impact the status of the incoming and outgoing pipelines under the gathering line definition. To the contrary, condensate and NGLs are commingled into a common pipeline system at the Berne Plant for delivery to a downstream processing facility, which is a well-established feature of the gathering

status as a gathering line would not be affected even if the production function ended at a point upstream of the Berne Plant.

ii. *A portion of the B2N Pipeline is a regulated rural gathering line.*

Part 195 only applies to the portions of the B2N Pipeline that meet the definition of a “regulated rural gathering line”. To be a “regulated rural gathering line,” all three of the following criteria must be met: (1) the pipeline must] have a nominal outside diameter from 6 5/8 inches to 8 5/8 inches; (2) the pipeline must be located in or within one-quarter mile of an unusually sensitive area (USA); and (3) the pipeline must operate at a stress level greater than 20 percent of SMYS or, in certain cases, at a pressure of more than 125 psig.⁴⁴

The B2N Pipeline extends for approximately 28 miles from the Berne Plant to the Natrium Plant. The nominal outside diameter of the pipeline is 8-inches, and a 13-mile segment is located in a USA as defined in § 195.6.⁴⁵ The B2N Pipeline operates at a stress level of 54% of SMYS. Accordingly, the 13-mile portion of the B2N Pipeline satisfies all three of the criteria necessary to qualify as a regulated rural gathering line.⁴⁶

The remaining 15-mile portion of the B2N Pipeline is an unregulated rural gathering line. The movement of hazardous liquids in an unregulated rural gathering line is expressly excluded from PHMSA’s jurisdiction by statute, and 49 C.F.R. § 195.1(b)(4) contains a clear exception stating that Part 195 does not apply to unregulated rural gathering lines.⁴⁷ As explained elsewhere

function under Part 195.

⁴⁴ 49 C.F.R. § 195.11(a).

⁴⁵ *Id.* § 195.6 (defining an unusually sensitive area as “a drinking water or ecological resource area that is unusually sensitive to environmental damage from a hazardous liquid pipeline release.”). See Exhibit E (B2N Pipeline HCA Maps).

⁴⁶ 49 C.F.R. § 195.11(a).

⁴⁷ 49 U.S.C. § 60101(a)(22)(B)(i); 49 C.F.R. § 195.1(b)(4).

in this pre-hearing brief, nothing in the Pipeline Safety Laws authorize PHMSA to override that exception in individual enforcement cases.

C. The Regulations Cited in the Notice Do Not Apply to the B2N Pipeline.

Blue Racer is only required to comply with the limited safety requirements in § 195.11(b) for the 13-mile portion of the B2N Pipeline that qualifies as a regulated rural gathering line. The only operations and maintenance provisions that apply to regulated rural gathering lines are those specifically identified in § 195.11(b): (1) the maximum operating pressure requirements in § 195.406, (2) the line marker requirements in § 195.410, (3) the public education program requirements in § 195.440, and (4) the damage prevention program requirements in § 195.442.⁴⁸

The Notice alleges that Blue Racer violated two regulations in operating the B2N Pipeline: (1) § 195.402(a), the general requirement to prepare and follow a procedural manual for operations, maintenance, and emergencies, and (2) § 195.428(a), the requirement for overpressure safety devices and overfill protection systems. Neither of these regulations is included in the list of applicable safety requirements for regulated rural gathering lines in § 195.11(b). Because §§ 195.402(a) and 195.428(a) do not apply to any portion of the B2N Pipeline, PHMSA cannot substantiate the violations alleged in the Notice as a matter of law. Accordingly, Blue Racer respectfully requests that PHMSA issue a final order dismissing the Notice.

D. Even if the Regulations Cited in Notice Apply to the B2N Pipeline, § 195.428(a) would not Apply to PSV-100.

The Notice alleges that Blue Racer violated § 195.428(a) by failing to meet the inspection criteria for “overpressure safety valve #100” (PSV-100).⁴⁹ Section 195.428(a) requires that “each

⁴⁸ 49 C.F.R. § 195.11(b).

⁴⁹ Notice of Proposed Violation at 2.

operator shall . . . in the case of pipelines used to carry highly volatile liquids, at intervals not to exceed 7 ½ months, but at least twice each calendar year, inspect and test each pressure limiting device, relief valve, pressure regulator, or other item of pressure control equipment to determine that it is functioning properly, in good mechanical condition, and is adequate from the standpoint of capacity and reliability of operation for the service in which it is used.”⁵⁰ To substantiate the violation alleged in the Notice, PHMSA must demonstrate that PSV-100 is pressure control equipment subject to § 195.428(a).

PHMSA has the burden of proof in a pipeline safety enforcement proceeding to demonstrate that a violation occurred.⁵¹ PHMSA must satisfy this obligation for all elements of each proposed violation.⁵² This responsibility 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.”⁵³

⁵⁰ 49 C.F.R. § 195.428(a).

⁵¹ See *In re Air Products and Chemicals, Inc.*, Final Order, CPF # 4-2013-1001, 2015 WL 6758819, at *3 (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 ExxonMobil Pipeline Co.*, Final Order, CPF # 5-2013-5007, 2015 WL 780721, at *12 (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 # 3-2008-1005, 2011 WL 7006614, at *4 (Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF # 4-2008-1017, 2011 WL 1919517, at *5 (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 # 5-2007-5008, 2009 WL 3190794, at *1 (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.”).

⁵² *In re ANR Pipeline Co.*, Final Order, CPF # 3-2011-1011, 2012 WL 7177134, at *3 (Dec. 31, 2012). See also *In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF # 4-2007-5010, 2011 WL 7517716, at *5 (Dec. 29, 2011).

⁵³ *Schaffer 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 # 5-2007-5003, 2009 WL 7796887, at *1 (Apr. 2, 2009).

To satisfy the burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation.⁵⁴ For the burden of persuasion, PHMSA must demonstrate that “the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent.”⁵⁵ A respondent will prevail under this standard where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.⁵⁶ If the Agency fails to provide evidence of an element of the alleged violation, PHMSA has not met its burden of production and the allegation of violation must be withdrawn.⁵⁷ Likewise, if the evidence is “closely balanced”, the Agency has not met its burden of persuasion and the allegation must be withdrawn.

Two recent cases indicate that PHMSA applies an “integral part” test in determining whether a pressure device is subject to § 195.428(a). In the first case, *In the Matter of Bridger Pipeline Company*, PHMSA alleged that the operator failed to inspect “pressure transmitters that send pressure data to a SCADA center” in accordance with the inspection requirements of § 195.428(a).⁵⁸ The operator contested the alleged violation, arguing that § 195.428(a) does not apply to pressure transmitters. PHMSA took the opposite view, stating that pressure transmitters are subject to § 195.428(a).

⁵⁴ See e.g., *In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at **6-7 (May 13, 2010); *In re Plains Pipeline, L.P.*, Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, at **4-5 (Mar. 15, 2011); *In re Bridger Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 5-2007-5003 2009, WL 2336991, at *5-6 (June 16, 2009).

⁵⁵ *In re Butte Pipeline Co.*, 2009 WL 3190794, at * 1.

⁵⁶ *In re ANR Pipeline Co.*, 2012 WL 717134, 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.”

⁵⁷ *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 #1-2009-5002, 2012 WL 3144486, at *7 (May 30, 2012) (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

⁵⁸ *In the Matter of Bridger Pipeline Company*, 2009 WL 7796887, at *9.

In the original Final Order, the Associate Administrator for Pipeline Safety agreed with PHMSA, finding that that “the regulation is not so limited as to exclude other types of devices used to monitor and control operating pressure on the pipeline.”⁵⁹ The Associate Administrator said that the ordinary meaning of “pressure control equipment . . . include[s] devices used to control pipeline operating pressure.”⁶⁰ The Associate Administrator further concluded that “the regulation does not differentiate between devices used to control emergency overpressures and those used to control pressure during normal operations.”⁶¹

However, the Associate Administrator reversed his finding in a subsequent Decision on Reconsideration.⁶² The Associate Administrator explained that although the ordinary meaning of “pressure control equipment” could be applied broadly to include all devices “used by a pipeline operator to restrain and control pressure within a pipeline,” he was deciding as a matter of policy that § 195.428(a) “should not apply indiscriminately to all pressure transmitters but only to those that are integral to a pipeline’s overpressure protection system.”⁶³ The Associate Administrator also acknowledged that a broad application of § 195.428 failed to recognize “certain distinctions” between pressure control equipment.⁶⁴ The Associate Administrator conceded that in the Final Order he failed to consider the distinction between pressure transmitters used to send informational data to the operator and transmitters used to “automatically control pressure to avoid an

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *In the Matter of Bridger Pipeline Company*, CPF # 5-2007-5003, Decision on Reconsideration, 2009 WL 2336991, at * 5 (June 16, 2009).

⁶³ *Id.*

⁶⁴ *Id.*

overpressure event.”⁶⁵ The Associate Administrator then concluded that the Agency failed to provide sufficient evidence to show that the pressure transmitters “were integral to the pipeline’s overpressure control system.”⁶⁶ The Associate Administrator also found that the operator had provided evidence that the pressure transmitters were not integral to the pressure control system because the devices operated independent of such system.⁶⁷ Accordingly, the Associate Administrator withdrew the alleged violation.

In the second case, *In the Matter of Butte Pipeline Company*, the Associate Administrator discussed the pressure control equipment intended to be covered under § 195.428(a).⁶⁸ The Associate Administrator reiterated that § 195.428(a) was not intended to cover devices “that might not be an [integral] part of a particular pipeline’s overpressure protection system.”⁶⁹ The Associate Administrator again concluded that § 195.428, as a matter of policy, should not be applied so broadly to cover any device “to the extent they control pipeline pressure.”⁷⁰

In this case, PSV-100 is not an integral part of the B2N Pipeline’s overpressure protection system. The B2N Pipeline has existing pressure control devices located on the Process Safety Management side of the Berne Plant. These devices serve as the B2N Pipeline’s overpressure protection system and will automatically provide relief in the event of overpressure on the line. Similar to the case in *Butte*, the B2N Pipeline has overpressure protection devices that

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *In the Matter of Butte Pipeline Company*, Final Order, CPF # 5-2007-5008, 2009 WL 3190794, at *5 (Aug. 17, 2009).

⁶⁹ *Id.* at *6.

⁷⁰ *Id.*

automatically shut down the system when pressure reaches a certain level that are distinguished from the pressure control provided by PSV-100.⁷¹ Nor is PSV-100 intended to prevent accidental overpressuring of the B2N Pipeline during normal operations. PSV-100 acts as a thermal relief valve for the barrel of a launcher and is isolated from the B2N Pipeline during normal operations. As in *Bridger*, PSV-100 is not part of the B2N Pipeline’s “overpressure protection system, and as such [is] not intended to be covered by § 195.428(a).”⁷²

In summary, PSV-100 is not an integral part of the overpressure protection system for the B2N Pipeline.⁷³ The B2N Pipeline has a separate and distinct overpressure protection system that does not rely on PSV-100.⁷⁴ For these reasons, PHMSA cannot meet its burden of proof with respect to the violation alleged in Item 2 of the Notice.

E. Voluntarily Referencing Part 195 Does Not Provide PHMSA with Jurisdiction Over a Statutorily-Exempt Rural Gathering Line.

The Pipeline Safety Laws only provide PHMSA with jurisdiction to set “minimum safety standards for pipeline transportation and pipeline facilities.”⁷⁵ As a result of a longstanding statutory exemption, production facilities and unregulated rural gathering lines are not used for “transporting hazardous liquid” as that term is defined in the Pipeline Safety Laws.⁷⁶ Voluntarily referencing Part 195 in operating a pipeline neither repeals the statutory exemption that is provided

⁷¹ *Id.*

⁷² *In the Matter of Bridger Pipeline Company*, 2009 WL 2336991 at * 5.

⁷³ In the event that PHMSA intends to abandon the integral part test and pursue an alternative interpretation of the applicability of § 195.428(a) in this case, Blue Racer notes that the Company cannot be subject to civil penalties in an enforcement action without first having fair notice of the Agency’s new interpretation. *ExxonMobil Pipeline Co. v. United States Dep’t of Transportation*, 867 F.3d 564, 578-579 (5th Cir. 2017).

⁷⁴ Exhibit F (PI&D of PSV-100).

⁷⁵ 49 U.S.C. § 60102(a)(2).

⁷⁶ 49 U.S.C. § 60101(a)(22)(B).

for these facilities in the Pipeline Safety Laws, nor amends the corresponding exceptions that are codified in PHMSA's regulations.⁷⁷ Such a change requires action from Congress in the form of new legislation or the Agency in a duly-authorized rulemaking proceeding. Nothing in the Pipeline Safety Laws allows PHMSA to exercise jurisdiction over facilities that Congress has excluded from the scope of its authority in individual enforcement cases, or to disregard the limitations established in its own regulations.⁷⁸ Moreover, punishing operators who voluntarily consider Part 195's safety standards in circumstances where the regulations do not otherwise apply is bad policy. PHMSA should be applauding operators who consider Part 195 as a best practice in operating and maintaining non-jurisdictional facilities, not subjecting them to enforcement actions.

Blue Racer voluntarily chose to reference Part 195 in operating the B2N Pipeline. That decision was based, in part, on discussions with PHMSA regarding a return-to-service agreement for the B2N Pipeline where Blue Racer was erroneously informed that the B2N Pipeline was a jurisdictional line. At that time, Blue Racer made a commitment to return the B2N Pipeline to service in a safe manner and agreed to treat the line as subject to the Part 195 requirements as a best practice for ensuring pipeline safety. However, that voluntarily commitment does not change

⁷⁷ 49 C.F.R. § 195.1(b)(4), (8).

⁷⁸ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (“... an agency’s decreed result [must] be within the scope of its lawful authority”) (citing *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)); *Arlington v. FCC*, 569 U.S. 290, 307 (2013) (concluding that “[w]here Congress has established a clear line, the agency cannot go beyond it”); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2241 (2014) (“An agency may not reorder federal statutory rights without congressional authorization.”); *Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (in discussing the FDA’s attempt to regulate cigarettes—“a significant portion of the American economy”—the Court concluded that “[g]iven the history and breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.”); *ETSI Pipeline Project v. Mo.*, 484 U.S. 495, 517 (1988) (agencies are “not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law”); *La. Pub. Service Comm’n v. FCC*, 479 U.S. 355, 374-75 (1986) (stating that “an agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power upon itself.”); *Lyng v. Payne*, 476 U.S. 926, 937 (1986) (“an agency’s power is not greater than that delegated by Congress”). See also 5 U.S.C. § 706(2)(C) (agency actions are unlawful if found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

the fact that only a 13-mile portion of the B2N Pipeline is subject to PHMSA's limited safety requirements for regulated rural gathering lines. In short, PHMSA cannot substantiate the violations alleged in the Notice because the Agency does not have the power to enforce the underlying regulations.

F. The Proposed Civil Penalty for Item # 2 Must be Withdrawn or Reduced.

Section 195.428(a) does not apply to the B2N Pipeline because it is a regulated rural gathering line only subject to the safety requirements in § 195.11(b). Accordingly, the proposed civil penalty associated with Item # 2 must be withdrawn. To the extent that PHMSA makes a finding that § 195.428(a) applies to the B2N Pipeline and PSV-100, the proposed civil penalty must be reduced for the following reasons.

i. *Gravity*

In its civil penalty calculation, PHMSA indicates that the § 195.428(a) violation occurred “in an HCA or an HCA ‘could affect’ segment.”⁷⁹ The requirements for high consequence areas (HCA or HCAs) are part of PHMSA's integrity management (IM) regulations and do not apply to rural gathering lines, whether regulated or not. PHMSA cannot increase the gravity of an alleged violation based on the potential interplay of regulatory requirements that do not even apply to a pipeline system. If that were the case, PHMSA could consider completely unrelated regulatory programs administered by other federal or state agencies in assessing civil penalties for alleged pipeline safety violations. There is nothing in the Pipeline Safety Laws or Regulations that permits such an interpretation. Accordingly, the Agency must correct the gravity factor for this allegation of violation and reduce the point value from 17 to 0.

⁷⁹ Exhibit G (Civil Penalty Worksheet).

ii. *Culpability*

In its civil penalty calculation, PHMSA states that Blue Racer “failed to comply with a requirement that was clearly applicable.” As discussed above, § 195.428(a) is not clearly applicable to devices that do not serve an integral part of a pipeline’s pressure control system. Blue Racer could not identify any requirement, interpretations, or guidance to suggest that § 195.428(a) would cover PSV-100 because it is not an integral part of the pipeline’s pressure control system. In fact, in an overpressure situation during normal operations, PSV-100 would be isolated and would not have any mitigative effect on the B2N Pipeline. The Agency must correct the culpability factor for this allegation of violation and remove the point value of 2.

iii. *Good Faith*

In the Violation Report, PHMSA states that Blue Racer did not have a reasonable justification for its actions.⁸⁰ As set forth above, § 195.428(a) is not intended to cover devices that are not an integral part of a pipeline’s overpressure protection system. The B2N Pipeline is not subject to the requirement of § 195.428(a) because only a 13-mile portion is a regulated rural gathering line subject only to the safety requirements of § 195.11(b). Nonetheless, Blue Racer acted reasonably by including PSV-100 in its O&M Manual to ensure it would function properly when used for its intended purpose of providing thermal relief during pigging operations. PHMSA has not presented any evidence that § 195.428(a) required Blue Racer to apply § 195.428(a) to a device located on a regulated rural gathering line not subject to the requirements of § 195.428(a), or, in the alternative, to a device that is not an integral part of the pipeline’s overpressure protection system. In the event that PHMSA does not withdraw the alleged violation of § 195.428(a), Blue Racer’s good faith application of § 195.428(a) to an unregulated device warrants a 10-point good

⁸⁰ Violation Report at 18.

faith credit.

G. The Proposed Civil Penalty for Item # 1 Must be Withdrawn.

Because § 195.402(a) does not apply to the B2N Pipeline as it is a regulated rural gathering line only subject to the safety requirements in § 195.11(b), the proposed civil penalty associated with Item # 1 must be withdrawn.

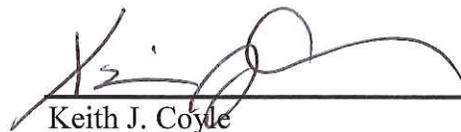
H. Right to Supplement

Blue Racer reserves the right to supplement its positions based on any additional facts or arguments discussed at the hearing or provided by PHMSA in this case.

V. Conclusion

Based on the foregoing, Blue Racer respectfully requests that PHMSA withdraw the allegations of violation and proposed civil penalties in this case. If PHMSA determines that violations occurred, the Agency must reduce the civil penalties in accordance with the arguments discussed in this brief.

Respectfully submitted this 23rd day of April
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