**Before the**
**U.S. Department of Transportation**
**Pipeline and Hazardous Materials Safety Administration**
**Office of Pipeline Safety**
**Washington, D.C.**

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| In the Matter of | ) | |
| | ) | CPF No. 1-2018-1001 |
| Tennessee Gas Pipeline Company | ) | Notice of Probable Violation |
| | ) | |
| Respondent. | ) | |

# REQUEST FOR HEARING, PRELIMINARY STATEMENT OF ISSUES, AND REQUEST FOR DOCUMENTS

## I. Request for Hearing

Tennessee Gas Pipeline Company, L.L.C. (TGP or the Company) respectfully requests an in-person hearing on Item 2 of the above referenced Notice of Probable Violation (Notice or NOPV), which includes a Proposed Compliance Order, pursuant to 49 C.F.R. Parts 190.208(a)(4) and 190.211(b). The NOPV was issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) and received by TGP on February 13, 2018. Therefore, this request is timely pursuant to 49 C.F.R. Part 190.208.

As required by 49 C.F.R. Part 190.211(b), this Request for Hearing includes a Written Response and Statement of Issues. Please be advised that the Troutman Sanders law firm, along with TGP Counsel Jessica Toll, will represent the Company at any hearing that is scheduled for this matter.

As set forth below, the Company respectfully requests that Item 2 and the Proposed Compliance Order items associated with Item 2 be withdrawn.

## II. TGP Written Response to NOPV Item 2 Allegation

### A. PHMSA Allegation

**§ 192.706 Transmission Lines: Leak surveys.**

**Leakage surveys of a transmission line must be conducted at intervals not exceeding 15 months, but at least once each calendar year.**

TGP failed to conduct leakage surveys of a transmission line at intervals not exceeding 15 months, but at least once each calendar year. Specifically, TGP utilized aerial vegetation leak surveys in paved areas where vegetation survey is ineffective at detecting leaks.

During the inspection, the CT DEEP inspector reviewed TGP's procedure for leak detection, O&M 215, *Patrolling and Leak Detection,* Revised 2017-02-01 (Procedure), and TGP's records of leak survey flights from 2015-2016 (Records). The Procedure stated in part:

*"3.5...Conduct leakage surveys by walking, driving, flying or using a water vehicle. Note on the inspection report any construction activity, signs of erosion or sunken backfill and dead vegetation indicating leaks.*

*For pipelines that transport gas without an odor or odorant, use continuous gas monitoring (e.g. flame ionization, Remote Methan Leak Detector, or other leak detection equipment approved by the Technical Services Managers) equipment when:*

- *Surveying Class 3 and 4 areas*
- *Conducting leak surveys at highway and railroad crossings"*

The procedures do not prescribe TGP to use another method (e.g. leak detection device) over areas where no vegetation is present (e.g. large paved areas, dead soil areas, etc.). The procedure prescribes visual observation (erosion and vegetation) to conduct leak surveys in all areas except pipelines without an odor or odorant. The procedure does not provide further instruction on how to perform leak survey over areas where no vegetation exists.

The CT DEEP inspector observed various portions of TGP's transmission line system that travels under paved areas where no vegetation exists. The locations observed were:

1. 41.111581, -73.538991: High Ridge Park, Stamford
    a. Large paved parking lot
2. 41.312891, -73.047492: Hine Terrace, Derby
    a. Paved parking lot and roadway

3. 41.561615, -72.870224: Meridian Waterbury Turnpike, Southington

   a. Paved parking lot

4. 41.931458, -72.713970: Connecticut South Drive, Granby

   a. Paved parking lot

The CT DEEP inspector asked TGP if other types of leak surveys were conducted at locations where no vegetation is present. TGP stated that they do not perform any instrumented leak surveys in these areas. The Records reviewed confirmed that these areas were leak surveyed using only visual, aerial vegetation surveys.

Aerial vegetation survey is inadequate to perform leak surveys in areas where vegetation does not exist, such as these paved areas. Therefore, TGP failed to conduct leak surveys at intervals not exceeding 15 months, but at least once each calendar year in these paved areas.

## B. TGP Response to NOPV Item 2

### 1. *NOPV Item 2 is Incorrect as a Matter of Fact and Law*

Contrary to the NOPV, TGP complied with 49 C.F.R. Part 192.706 and its procedures with respect to the leak surveys it performed. In the above referenced leak surveys of odorized transmission pipelines, TGP timely used aerial leakage survey and patrol, including investigation when the presence of gas odor is detected.

The Part 192.706 regulation simply requires that "leakage surveys of a transmission line must be conducted at intervals not exceeding 15 months, but at least once each calendar year." *49 C.F.R. Part 192.706*. The rule does not specify a method of surveillance for odorized pipelines, but leaves it to operators to identify the most appropriate leak survey method for its pipelines. *Attachment 1, Final Rule, 40 Fed. Reg. 20283, 20285 (May 9, 1975)* ("neither 192.705 nor 192.706 specifics how patrols or leakage surveys are to be accomplished. The rules are written in performance language."). As such, TGP procedures appropriately require that leak surveys be performed by "walking, driving, flying or using a water vehicle." TGP O&M 215, *Patrolling and Leak Detection* (rev. Feb. 1, 2017).

There is no requirement in the rule or TGP procedures that dictates a specific method of leak detection be provided for an odorized transmission line where no vegetation exists, under paved areas, or where there are other hard surfaces over pipelines. For pipelines which transport gas *without odorant* — which are not at issue in NOPV Item 2 — 49 C.F.R. Part 192.706 further requires that leakage surveys "using leak detector equipment" be conducted more frequently depending on the class location. There is no requirement, however, that a transmission pipeline that transports gas *with odorant* employ leak detection equipment.

### 2. *PHMSA's Position is Unsupported*

PHMSA's alleged violation in NOPV Item 2 is not supported by the regulations, Agency guidance, or facts. As noted above, the preamble to this rule expressly states that (1) the regulation is written in performance language and (2) it does not specify how leakage surveys must be accomplished. *Attachment 1, Final Rule, 40 Fed. Reg. 20283, 20285 (May 9, 1975)*. It further notes that the method employed by TGP in the leakage surveys at issue is acceptable: "both aerial patrols and aerial leakage surveys would be acceptable where they are appropriate and effective." *Id.*

PHMSA's predecessor agency promulgated the regulation requiring leakage surveys (Part 192.706) in the same rule as the regulation requiring odorization in a transmission pipeline (Part 192.625). *Attachment 1, Final Rule, 40 Fed. Reg. 20283 (May 9, 1975*). In the preamble to these rules, PHMSA's predecessor clarified their intent: odorized gas (which allows leak detection by the public or an operator 24 hours a day, 7 days a week, 365 days a year) provides a level of safety equal to using leak detector equipment for determining the presence of leaks. *Id.* (emphasis added) ("Gas detector surveys were proposed under 192.706 to provide a compensatory measure of protection for the public where transmission lines carry unodorized gas in Class 3 & Class 4 locations."); ("...leakage surveys using leak detector equipment must be conducted under 192.706 as an alternative safety measure except where gas is odorized...").[1] The preamble makes a single reference to paved areas in conjunction with leak detection equipment regarding the *absence of odorization*; not paved areas where the gas is odorized. *Id.* (emphasis added) ("OPS considers the use of leak detection devices to provide the most satisfactory means of protection in the absence of odorization. Further, many areas subject to the exceptions [from odorization]...have a large amount of pavement and a sparse amount of vegetation. For these reasons, a requirement for using detector equipment is adopted.").

There is no interpretive guidance or PHMSA enforcement which indicates that instrumented leak detection equipment must be employed in lieu of other effective leakage survey methods on odorized pipelines. The only (non-binding) PHMSA interpretation on point clearly states "an operator could potentially utilize an alternate leak patrol method such as an over-the-line vegetation survey in Class 1 and Class 2 locations and for transmission lines with odor or odorant in Class 3 and Class 4 locations if it can be shown to be an effective means of patrolling for indications of leaks." *PHMSA Interpretation, Letter from J. Gale (PHMSA) to B. Wald from (Nov. 5, 2009)*. It notes that in locations without vegetation cover such as road crossings, paved areas, dead soil areas with no vegetation, and other such areas, "additional leakage survey methods [other than vegetation surveys] potentially involving leak detection equipment would be necessary." *Id.* (emphasis added).

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[1] While the proposed rule would have required leak detection equipment in Class 4 locations even where gas is odorized, PHMSA revised this in the final rule stating clearly, "The final rule does not require the use of detector equipment in Class 4 locations where transmission lines carry odorized gas." *Attachment 1, Final Rule, 40 Fed. Reg. 20283 (May 9, 1975*).

### 3. *PHMSA's New Interpretation is Arbitrary and Capricious*

PHMSA's assertion in the NOPV that Part 192.706 requires odorized transmission pipelines in certain areas to employ instrumented leak detection equipment constitutes regulation without due process and fair notice. Such a change to the plain language of 192.706 must be issued through the notice and comment rulemaking process mandated by the Administrative Procedure Act, and due process requirements under the U.S. Constitution. A regulation must provide a regulated entity with fair notice of the obligations it imposes and be issued pursuant to notice and comment rulemaking. *5 U.S.C. § 554(b)*. Fair notice requires the agency to have "state[d] with ascertainable certainty what is meant by the standards [it] has promulgated." *ExxonMobil Pipeline Co v. U.S. DOT, No. 16-60448, 2017 U.S. App. LEXIS 15144 (5th Cir. Aug. 14, 2017)* (citing Diamond Roofing Co, 528 F.2d at 649).

## III. Preliminary Statement of Issues

Without admitting the facts and conclusions set forth in the NOPV, TGP respectfully contests the allegation of violation under NOPV Item 2 and the Proposed Compliance Order items associated with Item 2, and intends to raise the following issues at the Hearing:

1. Whether NOPV Item 2 should be withdrawn because it is incorrect as a matter of fact and law;

2. Whether PHMSA's interpretation of 49 C.F.R. Part 192.706 violates due process and fair notice; and

3. Whether the associated items of the Proposed Compliance Order should be withdrawn because TGP's procedures comply with 49 C.F.R. Part 192.706.

## IV. Request for Documents

To ensure a full and fair hearing, TGP respectfully requests the following documents in advance of a hearing:

1. Copy of the pipeline safety violation report and associated exhibits for this matter (previously requested on March 12, 2018);

2. Copies of any administrative staff manuals or instructions to staff, including guidance, manuals, directions, procedures or any other documents that OPS staff rely on in drafting NOPVs.

## V. Summary

At the hearing in this case, TGP intends to present evidence and engage in discussion with PHMSA on these issues. TGP reserves the right to revise and supplement this Response and Statement of Issues at or before the Hearing. TGP also reserves the right to respond to any new factual assertions or arguments introduced by OPS during the proceeding of the case.

For all of the reasons identified above in this Request for Hearing and Statement of Issues, and in consideration of other matters as justice may require, the Company respectfully requests that PHMSA withdraw Item 2 of the NOPV, including the associated items of the Proposed Compliance Order.

Respectfully submitted,

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