

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

_____ )	
In the Matter of )	
Algonquin Gas Transmission, L.L.C. )	CPF No. 1-2019-1004
Respondent. )	Notice of Probable Violation
_____ )	

**Algonquin Gas Transmission, L.L.C.  
Post-Hearing Brief**

**I. Introduction**

Algonquin Gas Transmission, L.L.C. (AGT or the Company) is committed to pipeline safety and takes any allegation of non-compliance seriously. With respect to recordkeeping, AGT believes that it is important to prepare and retain robust documentation of maintenance activities. For those reasons, AGT maintains procedures that implement Part 192 maintenance activities and applicable recordkeeping requirements, trains relevant personnel with respect to those procedures, and requires that the activities are recorded in detailed work order documentation.

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV) and proposed civil penalty to AGT on July 11, 2019. The NOPV alleged two (2) violations of the Part 192 regulations and proposed a civil penalty of \$341,400. AGT timely requested a hearing to contest NOPV Item 2, which alleged a failure to maintain records demonstrating that emergency valves were partially or fully operated (49 C.F.R. § 192.709(c)) and the associated proposed civil penalty of \$47,700. A telephonic administrative Hearing took place on January 9, 2020, and the Hearing Officer set a deadline of February 10, 2020, for AGT's Post-Hearing submission. Thus, this submission is timely.

The issue in this case is whether AGT's emergency valve work order documentation demonstrates that the one hundred and twenty-four (124) valves at issue were partially or fully operated during inspection as required by 49 C.F.R. § 192.709(c). AGT believes that it complied with the applicable law and that PHMSA has not met its burden to prove otherwise, as reflected below and in AGT's Request for Hearing and Pre-Hearing submissions. Accordingly, AGT respectfully requests that NOPV Item 2 and the associated proposed civil penalty be withdrawn or in the alternative that it be issued as a warning item.

## **II. Background**

### **A. AGT Recordkeeping and Valve Inspection Work Order Documentation**

AGT maintains detailed standard operating procedures (SOPs) for its operation and maintenance (O&M) activities, including express recordkeeping requirements. AGT trains its personnel on those procedures. As set forth in the SOPs and training, qualified technicians in the field complete the required tasks and fill out the comprehensive work order details, which are then stored in a work management database. Specific to emergency valve inspections, AGT technicians use a mobile handheld device in the field to contemporaneously document the completion of valve inspection and operation, which includes over ten (10) detailed tasks, three (3) of which relate expressly to valve operation.

The technician completes multiple entries in the work order including, but not limited to: (1) the name of the qualified technician responsible for the valve operation; (2) a “finish date” (for completion of all tasks, including valve operation); (3) the “status” of the work performed (whether the tasks, including valve operation, have been completed and the work order has been closed); (4) a summary of the duration required for the work performed to inspect and operate the valve (“time reported”); and (5) a “Yes/No” entry whether follow-up work is required. Comments regarding necessary follow-up or other details are entered in a separate work tab field, and additional documentation can be attached.

The work order serves as AGT’s “document of record” for valve inspection and operation. Although not required by the regulations or AGT procedures, a redundant “Yes/No” entry is typically included in one (1) of the three (3) valve operation tasks. In 2016, AGT made system modifications to its document management system that inadvertently resulted in work orders that were generated without the duplicative “Yes/No” entry associated with one (1) of the three (3) valve operation tasks. This impacted one hundred and twenty-four (124) valve work orders in New Jersey over a three (3) month period (*i.e.*, valves with inspection due dates that fell between June and August 2016) until AGT discovered the issue and reinstated the redundant entry. The modification did not, however, alter the required tasks to be completed or alter the record of their completion in the work orders.<sup>1</sup>

### **B. PHMSA Inspection and AGT Emergency Valve Operation Records at Issue**

During PHMSA’s inspection of the AGT’s South Plainfield, New Jersey operating area in 2018,<sup>2</sup> PHMSA reviewed a valve inspection audit report that summarized inspection and maintenance

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<sup>1</sup> As noted in the Company’s written response to the NOPV dated August 30, 2019, AGT acknowledges that the redundant “Yes/No” column was not contained on the work order form for the several month period. In acknowledging that fact, AGT has not acknowledged and does not acknowledge that no record was maintained of the operation of the valves during inspections for that three (3) month period.

<sup>2</sup> This inspection was part of a larger inspection of the AGT system that also covered a large portion of the Texas Eastern system. The inspection spanned numerous states and PHMSA regions, and the inspection team included eleven (11) inspectors from the PHMSA Southwest Region, the Eastern Region, interstate agent New York Department of Public Service, interstate agent Ohio Public Utilities Commission, and interstate agent Connecticut Public Utilities Regulatory Authority.

information from emergency valve maintenance work orders for 2014 to 2016. *PHMSA PSVR Exhibits A-12 and A-13*. The audit report is not the Company's "document of record" of emergency valve inspections but it is a report prepared by AGT to summarize the relevant maintenance for the convenience of PHMSA or state inspector(s).

The audit report provided initially to the PHMSA inspector listed, among other information, the "finish date" for the work and the redundant "Yes/No" column under "Valve Part Full Operated." For certain valve inspections on the audit report that occurred during the three (3) month period, a finish date confirmed completion of valve operation although the duplicative "Valve Part Full Operated" column was blank. During the inspection, AGT identified certain updates to the audit report through review of the underlying work order documentation with respect to the "Valve Part Full Operated" column entries.<sup>3</sup> *Post-Hearing Exhibit 1, Valve Inspection Audit Report (2018)*. Specifically, AGT verified the work order documentation and made relevant handwritten notations to the audit report for the purpose of communicating updates to the PHMSA inspector. *Id.* AGT maintains a copy of the manually updated audit report and believes that this information was shared with the inspector consistent with how the Company approaches inspections and follow-up.<sup>4</sup> In addition, certain work orders were provided to PHMSA during the inspection to illustrate the detailed information that is reviewed and entered by AGT technicians to confirm valve inspection and operation.

As part of its Pre-Hearing submission, AGT submitted over 300 work orders that document the valve inspections at issue in the NOPV allegations. *Pre-Hearing Exhibit 5, Work Orders Relative to NOPV Item 2*. Further, AGT included an Excel spreadsheet summarizing all of the underlying work order documentation which confirms that the duplicative "Yes/No" entry for one (1) of the three (3) valve operation tasks did not appear for one hundred and twenty-four (124) valves with inspection due dates between June 11, 2016 and August 26, 2016. *Id.* AGT's comprehensive work order documentation clearly reflects – regardless of the inclusion or omission of the redundant "Yes/No" column – that for those one hundred and twenty-four (124) valves, valve operation was performed, the inspection and operation of the valve was completed, and the results of the valve operation, among other information.

### **III. AGT Complied with 49 C.F.R. § 192.709(c)**

The issue in this case is whether AGT's emergency valve work order documentation demonstrates that the one hundred and twenty-four (124) valves at issue were partially or fully operated during inspection as required by 49 C.F.R. § 192.709(c). PHMSA does not allege that an emergency valve inspection was missed or that a valve was not operated. Further, there is no allegation that there was a missing work order record or that a work order was filled out incorrectly. There is also no allegation that AGT maintained deficient recordkeeping procedures.

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<sup>3</sup> During the inspection, AGT determined that the 2016 changes to its work management system also caused the "Yes/No" entry that was contained in the work order details for some valves not to appear in the audit report.

<sup>4</sup> As set forth in Post Hearing Exhibit 1, AGT communicated updates regarding the number of valves where the redundant "Yes/No" entry associated with 1 of the 3 valve operation tasks did not appear in work orders. In making these handwritten updates, some "Yes/No" notations for certain valves were overlooked. As explained below, AGT has since confirmed that the duplicative "Yes/No" entry for the relevant valve operation task did not appear for 124 valves with inspection due dates between June 11, 2016 and August 26, 2016.

The comprehensive work order documentation makes clear that (1) valve operation was completed; (2) the results of the valve operation; and (3) that the inspections were closed. The fact that a redundant column was left blank in some instances in a summary audit report and a duplicative “Yes/No” entry did not appear for technicians filling out certain work orders for a brief three (3) month period is without significance. Regardless of that duplicative entry, the comprehensive work orders document that the valves at issue were partially or fully operated during inspection. The law requires nothing more.

**A. Section 192.709(c) Requires Only that “Records” Be Retained**

Section 192.745(a) requires that every emergency valve “*be inspected and partially operated*” within a specified timeframe. With respect to recordkeeping, PHMSA regulation 49 C.F.R. § 192.709(c) simply requires that “*a record of each . . . inspection . . . required by subparts L and M . . . be retained . . .*” There is no regulation which dictates *how* an operator must document emergency valve operation. PHMSA’s performance-based rules allow an operator discretion with respect to implementing minimum federal standards through its O&M (which AGT refers to as SOPs), including recordkeeping.

**B. No PHMSA Enforcement or Guidance Suggests that More is Required**

There is no prior enforcement or guidance which dictates the form or notation required to record valve operation under 49 C.F.R. §§ 192.745(a) and 192.709(c). Prior PHMSA enforcement precedent confirms that operators demonstrate compliance with 49 C.F.R. § 192.709(c) through records that establish completion of the test performed and results of the test. This enforcement does not suggest, however, that an extra step such as a check box, drop down menu, or other feature is required to demonstrate emergency valve operation during inspection *if* the documentation makes clear that valve operation is performed. The PHMSA Final Orders do not so much as reference such work order features.

The method by which one operator chooses to implement performance-based regulations does not have any bearing on the minimum legal requirements. Further, most maintenance work involves different regulatory requirements and tasks, which vary in terms of the time and criteria involved. Full or partial operation of an emergency valve does not require calibration of equipment, measurements, or readings. The test is simply whether the valve is operable. In addition, depending on the size of the pipeline, execution of full or partial operation of an emergency valve can be performed quickly.

That said, a review of prior enforcement is instructive in that it confirms that AGT’s records are as or more robust than those records that are deemed by PHMSA to be sufficient. *Compare Pre-Hearing Brief Exhibit 2 with Post-Hearing Briefs Exhibits 2-4.*

**1. PHMSA’s Findings of Violation for Insufficient Records**

PHMSA’s findings of violation for insufficient work order records support that AGT’s records are comprehensive and sufficient. In a 2010 Final Order, PHMSA found that an operator violated 49 C.F.R. § 192.709(c) for records that “did not reflect whether emergency valves were actually

operated” during the inspections and where the operator admitted errors or omissions when personnel were entering data into the recordkeeping system. *In re: Florida Gas Transmission Co, CPF 2-2008-1003 (Jul. 26, 2010)*. In 2011, PHMSA issued a Final Order finding a violation of 49 C.F.R. § 192.709(c) where an operator could not provide pressure transmitter work order records during an inspection. *In re: ONEOK Partners, L.P., CPF 3-2011-1007 (Dec. 14, 2011)*.<sup>5</sup> PHMSA found that records produced after the inspection were insufficient because they failed to establish that the test at issue was conducted and the results of the test. *Id.* (“Because these records cannot establish that the test was indeed conducted and that the device was determined to be in working order, I cannot withdraw this violation.”).

## **2. PHMSA’s Withdrawal of Alleged Violations for Sufficient Records**

PHMSA’s withdrawal of alleged violations for sufficient work order records further demonstrates that AGT’s records are adequate and robust. In a 2012 Final Order, PHMSA withdrew an alleged violation of a corollary recordkeeping provision under Part 195 based upon submission of work order records of performance checks of a rectifier because the records demonstrated that the inspection was performed and the results of the inspection. *In re: Buckeye Partners, L.P., CPF 1-2011-5003 (Jun. 15, 2012)* (“Buckeye also submitted work order records demonstrating that the rectifier was checked [...] at the required intervals and was found to be operating normally on both occasions.”).<sup>6</sup> In addition, PHMSA issued a Final Order in 2008 withdrawing four (4) alleged instances of violations of an operator’s emergency valve inspection recordkeeping procedures where work orders that were submitted to PHMSA after an inspection were (1) dated; (2) showed that the valves were in fact operated; and (3) the work order status was listed as closed. *In re: CenterPoint Energy Gas Transmission, CPF 4-2005-1008 (Feb. 11, 2008)*.<sup>7</sup> By contrast, PHMSA upheld violations where an operator’s work orders were not dated and/or did not indicate that the valve had been operated. *Id.*

### **C. AGT Valve Operation Work Order Documentation Satisfies PHMSA Regulations and Enforcement Precedent**

As a matter of law and fact, AGT maintained contemporaneous records of partial or full valve operation of the one hundred and twenty-four (124) valves at issue through its work orders in compliance with the relevant regulations 49 C.F.R. §§ 192.745(a) and 192.709(c) and its

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<sup>5</sup> See *Post-Hearing Brief Exhibit 2, In re: ONEOK Partners, CPF 3-2011-1007 Emergency Valve Work Orders*. As compared to the ONEOK documentation, Enbridge’s emergency valve work order documentation submitted to the record is much more extensive and includes more content which confirms that valve operation was performed and the results of that test (i.e., whether the valve could be operated or whether follow up work was required).

<sup>6</sup> See *Post-Hearing Brief Exhibit 3, In re: Buckeye Partners, L.P., CPF 1-2011-5003 Rectifier Performance Check Work Orders*. As compared to the Buckeye documentation, Enbridge’s emergency valve work order documentation submitted to the record is more comprehensive and includes additional details which confirm that valve operation was performed and the results of that test (i.e., whether the valve could be operated or whether follow up work was required).

<sup>7</sup> See *Post-Hearing Brief Exhibit 4, CenterPoint Energy Gas Transmission, CPF 4-2005-1008 Emergency Valve Work Orders*. As compared to the CenterPoint documentation, Enbridge’s emergency valve work order documentation submitted to the record is more detailed and includes more entries that confirm that valve operation was performed and the results of that test (i.e., whether the valve could be operated or whether follow up work was required).

procedures (SOP 5-5010). *Pre-Hearing Exhibit 5*. AGT procedures require full or partial operation of emergency valves and documentation of those inspections in its work management system. *Pre-Hearing Exhibit 1, SOP 5-5010; Pre-Hearing Exhibit 4, Affidavit of J. Curran*. AGT personnel are trained on those procedures which require that a technician perform all of the relevant work order tasks and enter a finish date prior to closing out a work order. *Id.* This is further confirmed by the affidavit provided by John Curran, a Pipeline Specialist II for AGT, that details the tasks involved in implementing the valve inspection, operation, and documentation pursuant to AGT SOP-5-5010, including many of the valves at issue which he inspected. Mr. Curran expressly noted that valves must be partially or fully operated in order to complete and close out the work order; otherwise follow-up work would be required and noted in the work order.

AGT's emergency valve work order documentation contrasts with prior PHMSA enforcement above where the Agency found the operator's documentation to be insufficient. Further, AGT's work order documentation is in line with prior enforcement where PHMSA withdrew its alleged violations. Specifically, AGT's work order documentation makes clear that the test of valve operation was performed and the results of that test as follows:

1. Valve operation was performed – The work order details outline relevant tasks that are expressly associated with valve operation (i.e., Task 0900 Verify valve operation, Task 0100 Note any operation difficulty, and Task 0110 Return to Service). In particular, Task 0900 requires notation in a separate work log tab and follow-up if a valve cannot be operated, and Task 0100 requires notation of any difficulty opening and closing the valve. In addition, Task 0140 includes a “Yes/No” entry to indicate whether follow up is required (i.e., a valve cannot be operated) and the date.
2. Completion of the valve operation and results of the test – The work order details include a “start date” and “finish date” as well the duration of the test (“time reported”). As noted above, there are several places where a technician is required to note where he is unable to operate a valve (Task 0900, Task 0100, and Task 0140). In particular Task 0140 includes a “Yes/No” entry. A “Yes” indicates that the valve has been operated, and a “No” indicates that follow-up work is required for the valve. Finally, as discussed above, a technician is trained to enter a “finish date” and close out the work order *only* when all of the listed tasks have been performed.

In sum, AGT's comprehensive work order documentation clearly reflects that valve operation was performed, the inspection and operation of the valve was completed, and the results of the valve operation. The law requires nothing more, nor does prior enforcement or Agency guidance. As such, PHMSA has not met its burden of proof.

#### **IV. PHMSA Must Provide Fair Notice and Allow for Due Process**

Administrative agencies, including PHMSA, must comply with fair notice and due process requirements of the Administrative Procedure Act, 5 U.S.C. § 554, and the U.S. Constitution, U.S. Const. amend. V. Fair notice dictates that an administrative agency “*state with ascertainable certainty what is meant by the standards [it] has promulgated.*” ExxonMobil Pipeline Co. v. U.S. Dep't of Transp., 867 F.3d 564 (5th Cir. 2017) (emphasis added) (citing Diamond Roofing Co. v. OSHA, 528 F.2d 645, 649 (5th Cir. 1976)). Further, the Department of Transportation's (DOT)

Office of Chief Counsel recently codified its policy memorandum directing its modal agencies, including PHMSA, to “*ensure that the law is interpreted and applied according to its text*” and includes “*a reasonable interpretation of the law about which the public has received fair notice and should be made with regard for fairness.*” 49 C.F.R. Part 5 (emphasis added) (codifying DOT Memo, Procedural Requirements for DOT Enforcement Actions (Feb. 15, 2019)).

PHMSA has established performance-based recordkeeping requirements for which the plain language is clear: *records of the test must “be retained.”* 49 C.F.R. § 192.709(c). There is no enforcement or guidance which suggests that an additional step, form, notation or technology is required to document emergency valve operation *if* the documentation makes clear that valve operation is performed. If PHMSA is now going to require additional duplicative verification of valve operation or other maintenance tests, the Agency must provide AGT and the regulated community with notice and an opportunity to comment through the rulemaking process. As the Supreme Court explained:

*It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demand deference.*

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 158-59 (2012).

For PHMSA to find that more is required beyond the plain language of 49 C.F.R. § 192.709(c) would violate the Agency’s obligation to provide fair notice and due process.

#### **IV. Proposed Civil Penalty Should be Withdrawn**

Because AGT complied with Section 192.709(c), NOPV Item 2 and the associated proposed civil penalty should be withdrawn. In the event that NOPV Item 2 is not withdrawn, the proposed civil penalty should still be withdrawn or at a minimum significantly reduced.

This alleged recordkeeping violation is simply a database issue, not a gap in documentation recording an inspection. Further, AGT self-identified the database issue and addressed it in 2016, over three (3) years ago and two (2) years prior to PHMSA’s inspection in 2018. If issued at all, the allegation would have been more appropriately issued as a warning item pursuant to PHMSA’s internal enforcement procedures. *PHMSA Pipeline Safety Enforcement Procedures, Sec. 3.1.2.1, p. 5 (Apr. 27, 2018)* (advising that a warning item is appropriate when the circumstances do not warrant a proposed civil penalty or proposed compliance order and “is generally used for lower risk items”); *see also PHMSA NOPV, In re: North Slope Borough Public Works, CPF 5-2019-0002 (Jan. 15, 2019)* (treating Item 9, an alleged violation of 49 C.F.R. § 192.709(c), as a warning item with no penalty so long as the operator “promptly correct[ed] the[] issue(s)”).

Further, the proposed civil penalty of \$47,700 does not accurately reflect the statutory and regulatory penalty assessment criteria. 49 U.S.C. § 60122(b) (outlining civil statutory penalty factors); 49 C.F.R. § 190.225 (detailing civil penalty assessment considerations). In particular, the following factors are not accurately applied in the Agency’s proposed civil penalty worksheet:

circumstances, gravity (the potential number of violations is less than half of what was alleged), culpability, good faith, and “other matters as justice requires.” The penalty amount should have been zero for certain factors and/or PHMSA should have applied appropriate penalty mitigation. PHMSA did not discover the issue – it was discovered and addressed by AGT long before the inspection. In addition, AGT had a reasonable justification for the inadvertent database issue based on the redundancy of valve operation information in its work orders.

**V. Conclusion and Request for Relief**

PHMSA bears the burden of proving by a preponderance of the evidence all elements of a proposed violation in an enforcement proceeding. PHMSA has not met its burden of proof with respect to NOPV Item 2. AGT has provided detailed work orders that directly contradict the Agency’s allegations. The content in these work orders fully document that the test of partial or full valve operation was performed and the results of that test.

PHMSA has not established that AGT’s documentation is out of compliance with 49 C.F.R. § 192.709(c). Rather, the enforcement that the Agency cites supports the sufficiency of AGT’s documentation. For the reasons identified in this Post-Hearing Brief and in the record, and for other reasons as justice may require, AGT respectfully requests that PHMSA withdraw NOPV Item 2 and the proposed civil penalty of \$47,700.

Respectfully submitted,



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### **Post-Hearing Brief Exhibits**

1. Post-Hearing Brief Exhibit 1, AGT Valve Maintenance Updated Audit Report (May 2018).
2. Post-Hearing Brief Exhibit 2, ONEOK CPF 320111007 Emergency Valve Work Order.
3. Post-Hearing Brief Exhibit 3, Buckeye CPF 120115003 Rectifier Check Work Order.
4. Post-Hearing Brief Exhibit 4, Centerpoint CPF 420051008 Emergency Valve Work Order.