

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

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

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

I. Introduction

The Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency) issued a Notice of Probable Violation (NOPV) and proposed civil penalty to Algonquin Gas Transmission, L.L.C. (AGT or the Company) on July 11, 2019. The NOPV alleges two violations of the Part 192 regulations and proposes a civil penalty of \$341,400. NOPV Item 1 relates to compliance with 49 C.F.R. § 192.481 and proposes a penalty of \$293,700, and NOPV Item 2 relates to recordkeeping requirements at 49 C.F.R. § 192.709(c) for certain valves and proposes a civil penalty of \$47,700.

PHMSA granted AGT an extension of time for responding to the NOPV, and AGT timely responded to contest NOPV Item 2 and requested a hearing through responses dated August 30, 2019 and October 1, 2019. PHMSA issued a Notice of Hearing for January 9, 2020, and set a deadline of December 30, 2019 for submission of prehearing materials. In advance of the Hearing, AGT timely files this Pre-Hearing Brief and supporting exhibits reiterating its request that NOPV Item 2 be withdrawn in its entirety along with the associated proposed civil penalty of \$47,700.

This matter presents a single issue: whether AGT maintained adequate records, under 49 C.F.R. § 192.709(c), of instances in which it inspected and partially or fully operated valves pursuant to 49 C.F.R. § 192.745(a). As set forth below, AGT complied with the applicable law, and there is no factual or legal support for PHMSA to assert otherwise. Further, AGT is compiling all work order records of the inspections at issue, including valve operation, for submission to PHMSA in advance of the Hearing, and AGT is attaching two representative work order records to the Pre-Hearing brief in the interim.¹

¹ AGT is unable to provide all 292 work orders in advance of the December 30, 2019, filing date, due to the holidays. Accordingly, and consistent with 49 C.F.R. § 190.211(d), AGT requests that the Hearing Officer allow submission in advance of or at the Hearing.

II. Background

The NOPV was issued as a result of inspections conducted by PHMSA between May 24, 2018 and June 28, 2018. During the inspections, PHMSA reviewed a valve inspection audit report from 2014 to 2016 which summarizes inspection and maintenance information from emergency valve maintenance work orders. Among other information, the audit report lists the “finish date” for the work and a Yes/No column for whether the “Valve Part Full Operated.” For 292 valves inspected between April and July 2016 listed on the audit report, a finish date confirmed completion of valve operation although the “Valve Part Full Operated” column in the audit report was blank.

During the inspection, AGT provided the PHMSA inspector with examples of work orders for several of those valves. These forms expressly document the detailed steps (or tasks) required during valve maintenance, which includes valve operation, the status of the work at issue, the person responsible for the work, and the finish date for the work performed. Despite this documentation, the 292 valves in the audit report are the subject of NOPV Item 2.

III. AGT Complied with Recordkeeping Requirements at 49 C.F.R. § 192.709(c)

Item 2 of the NOPV alleges one violation of § 192.709(c) for failure to maintain records of a test required by Subpart M of 49 C.F.R. Part 192 – partial operation of emergency valves – for the 292 emergency valves in AGT’s South Plainfield, New Jersey operating area. As set forth below, in the accompanying exhibits and in the supplemental documentation to be provided by AGT, the Company did maintain documentation that each of the 292 valves at issue was operated in accordance with 49 C.F.R. § 192.745(a). Item 2 should therefore be withdrawn.

A. 49 C.F.R. § 192.709(c) Requires 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) is straightforward and simply requires that “a record of each . . . inspection . . . required by subparts L and M . . . be retained . . .” The regulations do not dictate *how* operators must document or maintain these records. There is likewise no guidance or prior enforcement which dictates the form or language used to record valve operation under 49 C.F.R. §§ 192.745(a) and 192.709(c).

Rather, PHMSA’s performance-based rules allow an operator discretion in how best to implement and comply with minimum federal standards through its operation and maintenance procedures (also called SOPs).² PHMSA may issue enforcement for an operator’s failure to follow its procedures, and the Agency has cited operators for failure to follow their valve inspection and maintenance procedures.³

² See *PHMSA Amended Final Order, In re Magellan Midstream Partners, L.P., CPF 4-2006-5020 (Dec. 23, 2009)* (“[P]erformance-based” regulations are “designed to provide operators with the flexibility to tailor their” programs “to the unique conditions presented by their *own* particular systems.”).

³ See, e.g., *PHMSA Final Order, In re CenterPoint Energy Gas Transmission Co., CPF 4-2005-1008 (Feb. 11, 2008)* (alleging a violation of 49 C.F.R. §§ 192.745 and 192.605 due to data entry errors; allegations which were withdrawn in a Final Order based on date-stamped work orders which established that the inspection work had been completed in a timely manner).

B. AGT Work Orders Document Completion of Valve Operation

AGT performs annual inspections of its emergency valves, including valve operation, as outlined in its Standard Operating Procedure (SOP) 5-5010, *Valve Inspection and Maintenance*, in compliance with 49 C.F.R. §§ 192.745(a) and 192.709(c). *Exhibit 1, SOP 5-5010*.⁴ As required by SOP 5-5010, inspections are documented within AGT’s work management system, EAM Solution Database. *Id.*⁵

1. AGT Valve Maintenance Work Orders Generally

The EAM Solution Database includes a series of tasks that the person inspecting the valve must complete and which are documented in work orders. Several of these tasks relate to valve operation.⁶ In relevant part, one task, “Verify valve operation,” directs the technician to “[v]erify valve operation” by “[i]nspect[ing the] valve & fully/partially operat[ing]” the valve “to ensure reliability.” *See, e.g., Exhibit 2, Valve I&M 401018201 Work Order (May 27, 2016); Exhibit 3, Valve I&M 401133343 Work Order (Oct. 18, 2016)*. In order to document that all of the tasks are performed, including operation of the valve, each work order includes a “finish” date which must be entered before the form is closed out. *Id.* The work order also contains an additional data field in the “Verify valve operation” task where the inspector could enter “Yes” or “No” and the date (see Figure 1 below; entire work order attached as Exhibit 3). *See, e.g., Exhibit 3, Valve I&M 401133343 Work Order (Oct. 18, 2016)*. If, for any reason, the inspector did not operate the valve as required by the sequence of tasks, the work order requires entry of that reason in a separate work log tab and follow up work. *Id.*

Figure 1, Work Order Details, Task 0090 Valve 401133343 (see Ex. 3)

0090	FIELD NOT USED	Y	10/18/2016	-
Verify valve operation				
Verify valve operation				
Inspect valve & fully/partially operate to ensure reliability. If it is not possible to stroke a valve 100% due to gas flow conditions, operate the valve partially to validate the inspection. #All non-emergency valves (2 and larger) to be fully or partially operated during inspection and maintenance activities. #If No, enter reason for not operating valve in the Work Log Tab.				

To further attest to this process in advance of the Hearing, John Curran, a Pipeline Specialist II for AGT, will provide an affidavit 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

⁴ *Exhibit 1, SOP 5-5010 at Section 2.0, Valves Requiring Operation (“fully operate all valves 2 [inches] and larger designated as emergency valves per the designated frequency” and “partially operate the valve if gas flow conditions do not allow 100% stroking to meet the functionalist requirement”).*

⁵ Documentation is required as follows: “Document inspection and maintenance activities within the EAM Solution Database.” *Id.*

⁶ Relevant tasks include: Tasks #0090 (to “Verify valve operation. Inspect valve & fully/partially operate to ensure reliability [...]”), #0100 (“Note any operation difficulty. Note any difficulty encountered opening and closing the valve”), and #0110 (“Return to Service. Return the valves to their normal operating position when maintenance is complete”).

he inspected.⁷ Mr. Curran has confirmed that valves must be partially or fully operated in order to complete and close out the work order. This is reflected in the work order tasks noted above and documented in the form itself for which completion is confirmed and reflected in the finish date. Further, the Area Manager for the valve inspections at issue, Peter Seydewitz, will participate in the Hearing, and he can speak to valve maintenance procedures, training, and inspection responsibilities.

2. AGT Valve Maintenance Work Orders at Issue

In 2016, AGT made system modifications to the configuration of the EAM Solution Database to update the task lists for several maintenance activities, including valve inspection and maintenance. These modifications inadvertently resulted in work orders that were generated without the Yes/No entry associated with the “Verify valve operation” task from April to July 2016 (see Figure 2; entire work order attached as Exhibit 2).

Figure 2, Work Order Details, Task 0090 Valve 401018201 (see Ex. 2)

0090	-
Verify valve operation	
Inspect valve & fully/partially operate to ensure reliability. If it is not possible to stroke a valve 100% due to gas flow conditions, operate the valve partially to validate the inspection. #All non-emergency valves (2 and larger) to be fully or partially operated during inspection and maintenance activities.#If No, enter reason for not operating valve in the Work Log Tab.	

The work order finish date entry remained the same, however, as did the final entry which notes whether follow up work is required (see Figure 3; entire work order attached as Exhibit 2).

Figure 3, Work Order Details, Task 0140 Valve 401018201 (see Ex. 2)

0140	FIELD NOT USED	N	05/27/2016	-		
Follow up work required?						
Follow up work required?						
If repairs are identified during PM that require additional labor (greater than 3 hours), parts or materials, create a follow up Work Order. Select the Repair Replace task list.						
Actual Labor						
Operation	Start Date	Finish Date	Time Reported	Type	Performed By	Work Center
0010	05/27/2016	05/27/2016	60.0 MIN	REG	Curran, John	HNS-PLSP

In other words, regardless of whether a Yes or No entry existed in the “Verify valve operation” field,⁸ AGT maintained contemporaneous records of partial or full valve operation through its work orders. This is made clear by AGT SOP 5-5010, the individual work orders, and an affidavit that will be provided from John Curran which explains the implementation of AGT’s procedures and execution of the work orders. Given that PHMSA has previously withdrawn alleged violations based on date-stamped work orders as evidence to prove that valve inspection and maintenance had been performed, it should do the same here.⁹

⁷ AGT is unable to finalize the affidavit in advance of the December 30, 2019, filing date, due to the holidays. Accordingly, and consistent with 49 C.F.R. § 190.211(d), AGT requests that the Hearing Officer allow submission in advance of or at the Hearing.

⁸ In August 2016, AGT itself identified the oversight and made relevant modifications to the EAM Solution Database to include this input field in the work order.

⁹ See, e.g., *PHMSA Final Order, In re CenterPoint Energy Gas Transmission Co., CPF 4-2005-1008 (Feb. 11, 2008)*.

C. PHMSA May Not Require More than the Law Provides

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 requires that an administrative agency “state with ascertainable certainty what is meant by the standards [it] has promulgated.”¹⁰ Further, the Department of Transportation’s (DOT) Office of Chief Counsel issued a recent policy statement directing modal agencies, including PHMSA, to “ensure that the law is interpreted and applied according to its text” and “a reasonable interpretation of the law about which the public has received fair notice and should be made with regard for fairness.”¹¹ Most recently, PHMSA Chief Counsel made a similar comment during advisory committee meetings, “Enforcement actions should derive from the four corners of a regulation or statute.”¹²

Part 192 requires that operators implement the requirement at § 192.709(c) to maintain records of valve inspections, including valve operation, in their procedures. There is no regulation, guidance, or enforcement which indicates *how* an operator must make a record of these activities. Rather, operators have the discretion in how to record and document those inspections.

For the relevant 292 valves at issue, AGT’s work order records expressly detail the task of operating the valves, the status of the work at issue, a “finish date,” and the person responsible for the work. This documentation meets 49 C.F.R. § 192.709(c) and AGT SOP requirements. For PHMSA to suggest that more is required beyond the plain language of the regulations would violate the Agency’s obligation to provide fair notice and due process and would be contrary to the DOT policy and PHMSA’s own statements to the regulated community regarding enforcement.

IV. Proposed Civil Penalty Should be Withdrawn

Because AGT complied with Section 192.709(c), NOPV Item 2 and the proposed civil penalty for NOPV Item 2 should be withdrawn. In the event that NOPV Item 2 allegation is not withdrawn, however, the proposed civil penalty should still be withdrawn or at a minimum significantly reduced. This is an alleged recordkeeping violation based on a database issue that AGT self-identified and addressed in 2016 over three years ago, and two years prior to the PHMSA inspection. If issued at all, the allegation would have been more appropriately issued as a warning item pursuant to PHMSA internal enforcement procedures.¹³

¹⁰ ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp., 867 F.3d 564 (5th Cir. 2017) (citing Diamond Roofing Co. v. OSHA, 528 F.2d 645, 649 (5th Cir. 1976)).

¹¹ DOT Memo Procedural Requirements for DOT Enforcement Actions, p. 6, 10 (Feb. 15, 2019).

¹² Joint GPAC & LPAC Meeting Transcript, pp. 116, Statement of P. Roberti.

¹³ 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 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)”).

PHMSA enforcement procedures further provide that a civil penalty is appropriate when certain criteria are present, *none* of which are apparent here. These include, among others, where the probable violation was a causal factor in an accident/incident; egregious or willful; systemic; significantly increased the likelihood of a pipeline failure; involved the absence of corrective action by the operator over an extended period of time.¹⁴

Finally, 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 factors of circumstances, culpability, good faith, and “other matters as justice requires” are not accurately applied in the Agency’s proposed civil penalty worksheet. Appropriate penalty mitigation should have been applied because (1) PHMSA did not discover the issue—rather, it was discovered and addressed by AGT long before the inspection—and (2) AGT had a reasonable justification for the inadvertent database issue based on the redundancy of valve-operation information in its work orders.

As such, the proposed civil penalty should be withdrawn or significantly reduced.

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.¹⁵ PHMSA has not met its burden of proof with respect to NOPV Item 2.

For the reasons identified in this Pre-Hearing Brief, in AGT’s Request for Hearing, 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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¹⁴ PHMSA Pipeline Safety Enforcement Procedures, Sec. 3, p. 4 (Apr. 27, 2018).

¹⁵ Final Order, In the Matter of Butte Pipeline Co., CPF 5-2007-5008 (Aug. 17, 2009).

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Pre-Hearing Exhibits

1. Standard Operating Procedure (SOP) 5-5010, *Valve Inspection and Maintenance* (rev. May 29, 2015).
2. Valve I&M 401018201 Work Order (May 27, 2016).
3. Valve I&M 401133343 Work Order (Oct. 18, 2016).