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of Transportation

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Administration

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DEC 31 2003

Mr. E. Keith Mitchell
President
Ozark Gas Transmission L.L.C.
Suite 600
515 Central Park Drive
Oklahoma City, OK 73105

Re.: CPF No. 2-2002-1004

Dear Mr. Mitchell:

Enclosed is a decision on the Petition for Reconsideration filed in the above-referenced case. The Associate Administrator for Pipeline Safety has denied the petition and therefore, payment of the \$36,600 civil penalty is due immediately. Respondent must also now comply with the terms of the Compliance Order contained in the Final Order issued to your company on April 29, 2003. The penalty payment terms are set forth in the enclosed decision. Your receipt of this decision constitutes proper service under 49 C.F.R. § 190.5.

Sincerely,

James Reynolds
Office of Pipeline Safety
Compliance Registry

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, DC 20590

_____)	
In the Matter of)	
_____)	
Ozark Gas Transmission, L.L.C.,)	CPF No. 2-2002-1004
_____)	
Respondent.)	
_____)	

DECISION ON PETITION FOR RECONSIDERATION

This enforcement action began with a Notice of Probable Violation, Proposed Compliance Order, and Proposed Civil Penalty (Notice) issued to Ozark Gas Transmission, L.L.C. (Respondent), on March 7, 2002. Following issuance of the Notice, Respondent forwarded a letter to OPS explaining the actions that it had taken in response to the proposed compliance order and requesting "elimination or mitigation" of the proposed civil penalty of \$41,000. The Associate Administrator for Pipeline Safety took into account the response and issued a Final Order, pursuant to 49 U.S.C. § 60122, assessing a civil penalty of \$36,600. The Final Order, issued on April 29, 2003, established that Respondent violated 49 C.F.R. §§ 192.517, 192.603, and 192.605.

On May 28, 2003, Respondent filed a Petition for Reconsideration ("Petition") formally requesting reconsideration of the Final Order. Respondent raised several arguments. Respondent first asked that a consent order be executed. Respondent also sought a further reduction in the civil penalty that was assessed based upon the criteria established at 49 C.F.R. § 190.225 including Respondent's "[positive] actions and good faith attempts to be in compliance," and based upon "reliance of Ozark on statements by DOT region personnel" that the penalty would be in a "much lower range" (Petition, p 1) Finally Respondent contended that Arkansas Western Gas Company, not Ozark, is the operator of the pipeline.

Regarding Respondent's first argument, consent orders are considered in very limited circumstances. Consent orders are only executed by the mutual agreement of the parties, and if no compliance order under § 190.213 has been issued. Here, a compliance order under § 190.213 has already been issued. Therefore, a consent order cannot now be executed.

Respondent next argued that it has taken positive steps to come into compliance, and that under 49 C.F.R. § 190.225 it is entitled to "further mitigation of the penalty amount." Respondent is correct that section 190.225(e) specifies, among other factors, that the OPS Associate Administrator shall consider "[a]ny good faith by the respondent in attempting to achieve compliance." Respondent is advised that the appropriate stage for consideration of these factors is when the Final Order is being prepared, and that these factors were fully considered when the penalty amount was established in the Final Order.

Respondent further argued that it relied on “statements by DOT region personnel that the recommendations for penalty were in a much lower range” (Petition, p 1) Although it is not entirely clear, it appears that Respondent is asserting that it did not protest the civil penalty amount proposed in the Notice more strongly because it understood from DOT regional personnel that the final penalty amount would be reduced. Even if DOT personnel did state that the civil penalty would be reduced, such a representation would have created no obligation on the part of the agency because Final Orders are approved and signed at the headquarters level, not at the regional office level. In other words, any written regional recommendations are placed in the enforcement case file before the Associate Administrator receives the file and determines what action is appropriate.

Finally, Respondent asserted that although it acquired interest in the pipeline that is the subject of this action in 1998, a third party, Arkansas Western Gas Company (AWG) operates “certain portions” of the Ozark pipeline. It is not an uncommon practice in the pipeline industry for a pipeline owner to turn over the operation and maintenance responsibilities to a third party. This contractual arrangement does not absolve the owner from responsibility, however. According to the *Definitions* section of Part 192, an “operator” is a person who engages in the transportation of gas. Therefore, by definition owners of natural gas pipelines are subject to regulation under Part 192 since they are engaged in the transportation of gas by pipeline. Whether the owner is an active participant in the business operation or not is of no consequence. Enforcement and compliance actions may be directed to either the owner or operator of pipeline facilities

Ozark next raised specific arguments with regard to the violations in the Final Order. Those arguments, raised in Ozark’s Petition, are addressed below in the order that they were raised.

With respect to Item 3, Ozark wrote that the Final Order incorrectly stated that Ozark had made a commitment to determine required elevation variations for the purpose of determining the pipeline’s maximum allowable operating pressure (MAOP) within 60 days. Although it was not explicitly stated, the Final Order implied that the determination would be made within 60 days of issuance of the Notice. Respondent is correct that the Final Order failed to state that Ozark committed to determining elevation variations within 60 days of issuance *of the Final Order*.

With respect to Items 4(a) through (d), Ozark argued that it submitted certain documentation to OPS after the Notice letter was issued but before the Final Order was issued, and that based on the adequacy of the information submitted and statements made by OPS personnel, it believed that the penalties associated with these items would “be *dropped* prior to the Final Order”.¹ (Petition, p. 2, emphasis added). On page one of its Petition, Respondent said that it was told that the penalties would be *lowered*. This discrepancy raises some question concerning precisely what was said to Respondent’s representatives. Nonetheless, as stated above, regional staff do not make final penalty

¹ The Notice alleged five instances (including Item 4(e) addressed below) in which Respondent failed to maintain adequate records necessary to administer the procedures established under section 192.605.

determinations. Furthermore, following Respondent's discovery of hydrostatic testing records after OPS' issuance of the Notice, the penalty amount for Item 4 was reduced from \$22,000 to \$17,600, or one-fifth of the proposed penalty, to account for the discovery of records required by Item 4(a). There were four other violations (items (b)-(e)) under Item 4. Respondent has not submitted any additional evidence that would support further reduction in the penalty.

Ozark further asserted that third party contractor AWG, rather than Ozark, should have been cited for Item 4(e) because AWG operates the portion of the pipeline where the violation occurred. As stated above, OPS possesses the authority to cite either the owner or operator of pipeline facilities operating in violation of the pipeline safety regulations. Therefore, this violation will not be withdrawn.

Respondent also contested the penalty imposed regarding Item 5(c) in the Notice. Item 5(c) addressed Ozark's failure to record aerial patrols/leak surveys on a required form. Item 5 contained two other violations, one for failure to correct low pipe-to-soil readings, and one for failure to perform annual population density/class location studies. Although Respondent completed the aerial patrol/leak survey reports that were the subject of Item 5(c) after the inspection was performed, the reports were not complete at the time of the inspection. Respondent has not submitted any additional information that would justify reduction of the penalty amount. Therefore, Respondent's request to have this penalty mitigated is denied.

Respondent contested the finding of violation for Item 6, contending that AWG, not Ozark, is the operator of the Mountain Home Lateral line. Ozark specifically pointed to 49 C.F.R. § 192.605(a) which indicates that the *operator* is the party responsible for insuring compliance with this regulation. As stated above, by definition an operator is any party engaged in the transportation of gas. Therefore, Ozark may properly be held responsible for this violation.

Payment of the full civil penalty in the amount of \$36,600 must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Federal Aviation Administration, Mike Monroney Aeronautical Center, Financial Operations Division, (AMZ-320), P.O. Box 25082, Oklahoma City, OK 73125; telephone number (405) 954-4719.

Failure to pay the civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 4 C.F.R. § 102.13 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in an United States District Court.

Respondent is further directed to comply with the terms of the Compliance Order contained in the Final Order within 60 days of receipt of this Petition. This decision on reconsideration is the final administrative action in this proceeding.



Stacey L. Gerard
Associate Administrator
for Pipeline Safety



Date Issued