

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

In the Matter of)	
)	
Texas Gas Transmission, L.L.C.,)	CPF No. 2-2015-1005
)	
Respondent.)	
)	

**Response of Texas Gas Transmission, L.L.C.
To Notice of Probable Violation and Proposed Compliance Order**

Texas Gas Transmission, L.L.C. (Texas Gas) submits its Response to the Notice of Probable Violation (Notice) and Proposed Compliance Order issued on October 13, 2015, regarding Texas Gas’s Operator Qualification (OQ) program.

Texas Gas is committed to public safety and operating its pipeline facilities in accordance with the Pipeline and Hazardous Materials Safety Administration’s (PHMSA) regulations. Texas Gas takes PHMSA’s allegations of a violation seriously. In this case, the allegations in the Notice are not supported by the facts or the regulations. Texas Gas respectfully requests that PHMSA withdraw the Notice and Proposed Compliance Order.

I. INTRODUCTION AND BACKGROUND

On October 13, 2015, PHMSA’s Office of Pipeline Safety issued the Notice to Texas Gas by certified mail.¹ On November 11, 2015, counsel for Texas Gas submitted a timely letter request for an in-person hearing, request for documents, and preliminary statement of the issues. By letter dated November 16, 2015, PHMSA provided Texas Gas with a copy of PHMSA’s Pipeline Safety Violation Report (Violation Report) corresponding to the Notice. By letter dated January 13, 2016, PHMSA provided Texas Gas with certain materials used to train inspectors about PHMSA’s OQ requirements.

The Notice alleges that Texas Gas did not follow its written OQ program because it failed to identify the intervals at which individuals’ qualifications to perform covered tasks are reevaluated in accordance with the requirements of the written program. The Notice asserts that,

¹ On October 13, 2015, Texas Gas also received a Notice of Amendment (NOA), CPF No. 2-2015-1006M, related to span of control limits in its OQ procedures. Texas Gas had previously requested that the proceedings for the Notice, Proposed Compliance Order, and NOA be consolidated. On April 12, 2016, Texas Gas submitted written notice to the Presiding Official that Texas Gas is no longer contesting the NOA.

because Texas Gas could not demonstrate that its requalification intervals were “based on task difficulty, task importance, the potential for loss of knowledge or skill over time, and/or manufacturer’s recommendations” as specified in its written OQ program,² Texas Gas violated 49 C.F.R. § 192.805(g) of PHMSA’s regulations.³ The Violation Report states that Texas Gas was unable to provide documentation demonstrating that it complied with the requirements of its OQ program.⁴ PHMSA’s Proposed Compliance Order would require Texas Gas to develop requalification intervals for all covered tasks as required by its written OQ program.⁵

After reviewing the Notice, Violation Report, and other materials, Texas Gas decided to withdraw its request for an in-person hearing and to submit a written response to the Notice. Texas Gas submitted written notice to the Presiding Official on April 12, 2016, of the withdrawal of the hearing request, and now submits its timely response.

II. SUMMARY OF ARGUMENT AND REQUEST FOR RELIEF

Texas Gas has not violated either its written OQ program or section 192.805(g) of PHMSA’s OQ regulations because neither requires that an operator create and maintain documentation justifying the requalification intervals associated with covered tasks. PHMSA’s regulations require that an operator “identify” the requalification intervals. Texas Gas has met that requirement, and there is no legal basis for requiring that an operator document the justification for such intervals. PHMSA has failed to identify any other statutory or regulatory provisions that create this recordkeeping requirement.

By attempting to create a legally enforceable documentation requirement through the Notice, PHMSA ignores the notice and comment requirements of the Administrative Procedure Act (APA) that an agency must follow to establish a binding regulation. The Notice also disregards the history of PHMSA’s OQ program by failing to acknowledge the role of third-party compliance organizations like Veriforce, LLC and the American Society of Mechanical Engineers (ASME) in implementing OQ requirements. PHMSA has long encouraged operators to rely on the ASME B31Q Pipeline Personnel Qualification consensus standard and on common covered tasks lists, including requalification intervals, developed by third-party organizations to satisfy compliance obligations. Operators are not required to produce the deliberative documents generated by such organizations that explain the bases for determining identified requalification intervals. Nor does the Notice describe the types of documentation PHMSA expects operators to maintain. The Notice is contrary to longstanding PHMSA practice, and will have industry-wide implications that negatively affect the safety, portability, and efficiency provided by existing reliance upon uniform industry task lists.

² Notice of Probable Violation and Proposed Compliance Order at 2, CPF 2-2015-1005 (Oct. 13, 2015).

³ *Id.* at 1-2.

⁴ Pipeline Safety Violation Report at 4-5, 7, CPF 2-2015-1005 (Nov. 16, 2015).

⁵ Notice at 4.

Even if PHMSA's asserted documentation requirement exists, Texas Gas's written OQ program details the process that its third-party service provider, Veriforce, uses to evaluate covered tasks and establish requalification intervals in order to ensure that the intervals account for task difficulty and importance, the potential that personnel may lose knowledge or skill over time, and, when appropriate, a manufacturer's recommendations. ASME B31Q extensively describes the process by which requalification intervals were established for each covered task. The requalification intervals for most of the Texas Gas covered tasks are the same or more restrictive than the requalification intervals developed by ASME, and all are consistent with the three-year requalification interval that PHMSA has stated is appropriate. PHMSA has disregarded this information and has failed to satisfy its burden of proving the allegation that Texas Gas's requalification intervals do not satisfy either its written OQ program or the OQ regulations.

III. PHMSA'S OPERATOR QUALIFICATION PROGRAM

A. Overview of the OQ Requirements.

Section 60131 of the Pipeline Safety Laws⁶ and PHMSA's regulations⁷ require that pipeline operators develop and implement written OQ programs to ensure that the individuals performing "covered tasks"⁸ on a pipeline are qualified to do so. Section 192.805 of PHMSA's regulations specifies the elements that an operator's written OQ program must contain. Each operator's written OQ program must "[i]dentify those covered tasks and the intervals at which evaluation of the individual's qualifications is needed."⁹

PHMSA's OQ regulations specify the records that operators must maintain in order to demonstrate compliance. Section 192.807(a) states that operators must maintain records that: (1) identify qualified individuals; (2) identify covered tasks individuals are qualified to perform; (3) provide the dates of current qualifications; and (4) specify qualification methods.¹⁰ Section 192.807(b) sets forth the required record-keeping retention periods.¹¹ The regulations do not require that an operator retain documentation explaining the basis for requalification intervals for covered tasks.

⁶ 49 U.S.C. § 60131 (2012) (setting forth required elements of OQ programs).

⁷ 49 C.F.R. §§ 192.801-809 (2015).

⁸ A "covered task" is an activity, identified by an operator, that meets four criteria. The activity must be one that: "(1) Is performed on a pipeline facility; (2) Is an operations or maintenance task; (3) Is performed as a requirement of [Part 192 of PHMSA's regulations]; and (4) Affects the operation or integrity of the pipeline." 49 C.F.R. § 192.801(b).

⁹ *Id.* § 192.805(g).

¹⁰ *Id.* § 192.807(a).

¹¹ *Id.* § 192.807(b).

B. Development of PHMSA's OQ Regulatory Program.

PHMSA adopted its OQ regulations in 1999 following a negotiated rulemaking process.¹² The non-prescriptive nature of the regulatory provisions resulted in difficulties in PHMSA's ability to assess operator compliance with the new requirements.¹³ In 2003, following the enactment of the Pipeline Safety Improvement Act of 2002, which specified the minimum required elements for operators' programs and required that PHMSA adopt standards and criteria for OQ programs,¹⁴ PHMSA convened public meetings with pipeline operators and other industry stakeholders to address implementation of the regulations and the new statutory provisions.¹⁵

During this time, a number of industry-based organizations, including Veriforce, took the "constructive approach" of forming groups of operators, contractors, labor unions, and other industry stakeholders to develop consistent approaches to implementing OQ requirements and ensuring that personnel performing covered tasks are qualified.¹⁶ Veriforce worked with subject matter experts from the industry to develop a list of "common" covered tasks (CCTL), criteria for evaluating pipeline personnel who perform these tasks, intervals for requalifying such personnel, and "spans of control," *i.e.*, the number of non-qualified personnel who can be supervised performing a covered task by a qualified individual.

Veriforce's CCTL is used by over 175 pipeline operators and contractors, including Texas Gas, for compliance with the OQ regulations.¹⁷ The CCTL, and similar mechanisms developed by other entities, benefit participating operators and contractors by establishing

¹² Pipeline Safety: Qualification of Pipeline Personnel, 64 Fed. Reg. 46,853 (Aug. 27, 1999), Correction, 66 Fed. Reg. 43,523 (Aug. 20, 2001). In 2005, the regulations were modified to incorporate requirements of the Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355 (Dec. 17, 2002) (codified at 49 U.S.C. § 60131); Pipeline Safety: Operator Qualifications; Statutory Changes, 70 Fed. Reg. 10,332 (Mar. 3, 2005); Pipeline Safety: Operator Qualifications; Statutory Changes, 70 Fed. Reg. 34,693 (June 15, 2005). References to PHMSA include its predecessor agency, the Research and Special Programs Administration.

¹³ PHMSA, *Operator Qualification History & Milestones* at 5 (Apr. 2, 2004), http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Pipeline%20Training/5_OQHHistory.pdf.

¹⁴ Pub. L. No. 107-355 § 13 (Dec. 17, 2002) (codified at 49 U.S.C. § 60131). One of the required elements was that qualification programs must include "[a] periodic requalification component that provides for examination or testing of individuals." 49 U.S.C. § 60131(c)(3).

¹⁵ Transcript of Public Meeting at 14 (Dec. 17, 2004) (Presentation of Warren Miller, Office of Pipeline Safety); Public Meeting on Operator Qualification, Talking Points of Stacey Gerard (Jan. 22, 2003), http://primis.phmsa.dot.gov/oq/docs/mtg_12203/OPS_OQ_Public_Meeting_Rev_Stacey_Talking_Points.pdf. PHMSA also convened three other public meetings in early 2003, in Houston, Texas, on February 26, Mesa, Arizona on March 25, and Atlanta, Georgia on April 23.

¹⁶ PHMSA, *Report to Congress: Qualification of Pipeline Personnel* at 15 (Dec. 17, 2006), http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_C4005F513C2404E63A69B34A27BD381468341500/filename/Report%20to%20Congress%20-%20Qualification%20of%20Pipeline%20Personnel.pdf.

¹⁷ See <http://www.veriforce.com/covered-task-lists/> (providing list of companies that use the Veriforce CCTL), attached hereto as Exhibit 1.

consistent tasks and uniform evaluation and requalification criteria. Operator and contractor personnel who are qualified to perform tasks on the Veriforce CCTL can perform these tasks for other operators who also have adopted the CCTL without having to be requalified. This “portability” creates efficiencies, and promotes consistency and safety.

Similarly, ASME developed its B31Q standard as a comprehensive, technically-based voluntary national consensus standard for the qualification of pipeline personnel.¹⁸ ASME’s project team included representatives from federal and state regulatory agencies, including PHMSA; contractors; industry associations; labor; and the hazardous liquid, gas transmission, and local distribution company industry sectors.¹⁹ Over a period of 20 months, ASME utilized the expertise of these subject matter experts to develop a consensus standard to guide industry implementation of OQ and compliance efforts. ASME B31Q provides guidance on identifying covered tasks, properly qualifying individuals to perform such tasks, and managing the qualifications of pipeline personnel. ASME B31Q describes how the covered task list was developed, recommends a requalification interval for each task, and explains the methodology applied to determine the requalification intervals.²⁰

Although PHMSA did not incorporate ASME B31Q by reference into its regulations, PHMSA has stated that operators who comply with ASME B31Q will be deemed to comply with the regulations. For example, PHMSA stated that “[a]n inspector can use . . . your compliance with [B31]Q as a way to check off that you have demonstrated compliance with the regulation.”²¹ PHMSA’s 2007 Report to Congress referred to ASME B31Q as “excellent guidance,” and noted that it was formed to provide an institutionalized approach to OQ and “establish a comprehensive technical basis for personnel qualifications.”²²

PHMSA documents, including the OQ Enforcement Guidance, identify ASME B31Q and other industry standards as references for regulatory compliance.²³ In its OQ Frequently Asked

¹⁸ ASME, *ASME B31Q Pipeline Personnel Qualification* at iv (2014). ASME is a non-profit organization that, among other things, develops codes and standards for various industries, including the pipeline industry.

¹⁹ *Id.*

²⁰ *Id.* Appendix 5A at 21-82.

²¹ Transcript of Technical Pipeline Safety Standards Committee Meeting at 337-38 (Dec. 14, 2005) (statement of Stacey Gerard) (“I think we wanted to make it absolutely clear that we agree that applause is due and that regardless of what additional regulatory action we take or we do not take in any inspection that occurs from the point forward that [B31]Q exists, you have [B31]Q. An inspector can use . . . your compliance with [B31]Q as a way to check off that you have demonstrated compliance with the regulation. Nobody will take that away from you. You have that. That’s there no matter what happens. So I just want to make that perfectly clear.”); Transcript of Pipeline Safety Meeting on Operator Qualification at 225 (Dec. 15, 2005) (statement of Richard Sanders) (“[a]nybody that is presently using [ASME B31Q] or anticipating on using it will have no problems with the regulation.”); *Id.* at 233 (“Some operators want to know whether implementation of B31Q will satisfy the regulation and as we said in the last session, absolutely it will. As long as you’re equal to or greater than the regulation, you’re in good shape.”).

²² PHMSA, *Report to Congress: Qualification of Pipeline Personnel* at 2, 6.

²³ PHMSA, *Operator Qualification Enforcement Guidance* at 27 (Dec. 7, 2015), http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_AE7A55E37DE37617E0A24DF772ABB6DAD91A0700/file

Response of Texas Gas Transmission, L.L.C.
CPF No. 2-2015-1005

Questions (FAQs), PHMSA states that “determination and justification of the reevaluation interval should consider existing consensus standards and industry practice (e.g., OSHA standards, non-mandatory consensus standards).”²⁴ The Gas Piping Technology Committee (GPTC)²⁵ guidance, also referenced in PHMSA’s OQ Enforcement Guidance, states that “[a]n operator may choose to adopt intervals established by vendors that have expertise in qualification issues.”²⁶

Given PHMSA’s longstanding statements encouraging reliance on ASME B31Q and other common task lists created by third-party compliance organizations, an operator that relies upon industry-developed guidance or ASME B31Q can reasonably expect that its OQ program complies with PHMSA’s regulations and that the operator’s requalification intervals are acceptable.

IV. THE TEXAS GAS OQ PROGRAM

Texas Gas is an interstate natural gas pipeline that is a wholly-owned, operating subsidiary of Boardwalk Pipeline Partners, LP (Boardwalk). Texas Gas operates approximately 6,060 miles of pipeline that transport natural gas from the Gulf Coast to on-system markets in the Midwest and off-system markets in the Northeast. Texas Gas also has nine natural gas storage fields located in Indiana and Kentucky, having an aggregate storage capacity of approximately 180.3 Bcf.

Texas Gas implements Boardwalk’s Operator Qualification Plan (OQ Plan).²⁷ Like many pipelines, Texas Gas uses Veriforce as its OQ Service Provider. Veriforce provides a full range of implementation services to Texas Gas, including: oversight and management of personnel

[ame/OQ Enforcement Guidance 12 7 2015.pdf](#); PHMSA, *Operator Qualification Enforcement Guidance* at 27 (June 24, 2014), http://phmsa.dot.gov/pv_obj_cache/pv_obj_id_05A4EEF18035BED3054D5FD75B16E6E344430400/filename/OQ_Enforcement_Guidance_06_24_2014.pdf. The OQ Enforcement Guidance also refers to API 1161 and the Gas Piping Technology Committee (GPTC) standards. *See also* PHMSA, *OQ Rule – Preamble Language vs. Enforcement Criteria (Conflict Resolution)* at 4 (undated) (operators electing to adopt the reevaluation intervals from ASME B31Q “will be deemed to have met this requirement.”), <http://primis.phmsa.dot.gov/oq/docs/PreambleLanguage-versus-EnforcementCriteria.pdf>.

²⁴ PHMSA, *Operator Qualification: FAQs* No. 5.6, <http://primis.phmsa.dot.gov/oq/faqs.htm> (last accessed Apr. 13, 2016);

²⁵ The GPTC is an independent technical committee accredited by the American National Standards Institute, and is comprised of members with expertise in natural gas distribution, transmission, and gathering systems.

²⁶ GPTC, *Guide Material 192.805 Qualification Program* at 2.7(b) (2016). In addition, PHMSA’s OQ training materials acknowledge that many vendors provide qualifications to company and contractor personnel. PHMSA, *Operator Qualification Background and Overview* at slide 14 (Aug. 3, 2015) (listing OQSG [Operator Qualification Solutions Group], MEA [Midwest Energy Association], Veriforce, Energy Worldnet, NCCER [National Center for Construction Education and Research], “and many others”), attached hereto as Exhibit 2.

²⁷ Boardwalk Operator Qualification Plan, Version 3.30 (effective June 10, 2015) (OQ Plan), attached hereto as Exhibit 3.

evaluations and qualifications, evaluator authorization, qualification audits, records maintenance, and data management and reporting. Texas Gas also utilizes the Veriforce CCTL, including its requalification intervals, for most of its covered tasks.²⁸ By adopting the CCTL, Texas Gas promotes efficiency and portability by ensuring that its covered tasks are consistent with those of other participating operators, which allows contractors qualified for a common task to be qualified for all operators who also rely upon the CCTL.

Veriforce began providing OQ support services in 2003, when it initiated efforts to develop the CCTL and supporting evaluation criteria.²⁹ This effort was undertaken over a period of eight months and relied upon subject matter experts “from pipeline operators, contractors, organized labor, and nationally known training providers.”³⁰ This process involved “comparing and reconciling existing covered task lists and evaluation criteria (including span of control and requalification intervals) that each [participating] Operator had developed or adopted individually.”³¹ “Each covered task and associated criteria was finalized only after the [subject matter experts] . . . reached a consensus on the applicability of the evaluation criteria, including span of control limits and requalification intervals.”³² Veriforce’s CCTL has been updated several times, and any additions or modifications to the tasks included in the CCTL are subject to an extensive review and evaluation process by all operators using the CCTL before such changes are finalized.³³

For each covered task, the CCTL includes a requalification interval based upon the subject matter experts’ estimate of “task difficulty, task importance, the potential [for] loss of knowledge or skill over time, and/or manufacturer’s recommendations.”³⁴ Most of the requalification intervals for the tasks on the Veriforce CCTL that Texas Gas uses are at least as restrictive as the requalification interval of the corresponding ASME B31Q task.³⁵ None of the

²⁸ OQ Plan at 45.

²⁹ *Id.*; Veriforce, Common Covered Task List (CCTL) Development History and Maintenance (July 29, 2015) (Veriforce Development History), attached hereto as Exhibit 4.

³⁰ OQ Plan at 45; Veriforce Development History at 1.

³¹ OQ Plan at 45; Veriforce Development History at 1.

³² OQ Plan at 45; Veriforce Development History at 1.

³³ OQ Plan at 46-47; Veriforce Development History at 1-2.

³⁴ OQ Plan at 46; Veriforce Development History at 1.

³⁵ Exhibits 5 and 6 contain charts that compare the requalification intervals of the Veriforce CCTL tasks Texas Gas uses and the requalification intervals of the corresponding tasks contained in ASME B31Q. Exhibit 5 lists those tasks that are performed by Texas Gas personnel, *i.e.*, “internal” tasks. Exhibit 6 lists those tasks that may be performed by contractors working on the Texas Gas pipeline. Two of the tasks (Task 211, Perform plastic fusion inspection; Task 216, Joining of steel pipe – Compression couplings) have requalification intervals longer than the corresponding ASME B31Q task. For these tasks, Texas Gas will be adopting the ASME B31Q task in light of PHMSA’s recent notice of proposed rulemaking that may modify the welder and plastic pipe joining records that an operator must retain and would affect Texas Gas’s ability to use these Veriforce CCTL tasks. Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines, 81 Fed. Reg. 20,722 (Apr. 8, 2016) (proposed §§ 192.227(c) and 192.285(e)). Texas Gas plans to implement this change by June 1, 2016.

tasks on the Veriforce CCTL applicable to Texas Gas are longer than three years, which is the interval PHMSA has stated is appropriate.³⁶

Some of the Texas Gas covered tasks are not included in Veriforce's CCTL. For those "non-common" tasks, referred to as the "9000 Series" tasks,³⁷ the OQ Plan relies upon ASME B31Q for evaluation criteria, requalification intervals, and spans of control.³⁸ The requalification interval for each 9000 Series task matches the interval established in ASME B31Q.³⁹ Taken together, the covered task lists developed by Veriforce and ASME play an integral role in the implementation of the Texas Gas OQ Plan.

V. ARGUMENT

The Notice and Proposed Compliance Order lack legal and factual justification and must be withdrawn. Texas Gas has identified requalification intervals for its covered tasks, and there is no legal requirement that Texas Gas provide independent justification or documentation to support them. Consistent with PHMSA guidance, Texas Gas appropriately relied upon the Veriforce CCTL and the ASME B31Q Standard as the basis for its requalification intervals. By using the Notice to impose an obligation to independently justify and document the basis for requalification intervals, PHMSA is violating the APA's notice and comment requirements applicable to creating a legally binding legislative rule. PHMSA also is diverging from previous agency practice in a manner that will have significant negative implications for how other pipeline operators implement their OQ plans.

A. PHMSA Bears the Burden of Demonstrating That Texas Gas Violated Its OQ Plan or PHMSA's Regulations.

In an enforcement proceeding, PHMSA has the burden of demonstrating that a violation of the pipeline safety regulations occurred.⁴⁰ PHMSA has the "'burden of production,' *i.e.*,

³⁶ PHMSA, *Training Materials for PHMSA-PL3OQ Operator Qualification WBT Course* at 47 ("The OPS position is that, without specific analysis of task difficulty/importance/frequency (DIF analysis) and tracking of performance data through audits or other mechanisms, the time for reevaluation intervals should not exceed three years.") (attached as Exhibit 7); PHMSA, *Report to Congress* at 18 (PHMSA considered setting maximum requalification intervals not to exceed five years, but recognized that operators may find a three-year interval easier to administer); Transcript of Pipeline Safety Meeting on Operator Qualification at 151 (Dec. 15, 2005) (statement of Richard Sanders) ("We're looking at this three-to-five-year window.").

³⁷ OQ Plan at 21.

³⁸ Violation Report at 4.

³⁹ Exhibit 8 contains a chart listing the Boardwalk-specific "9000 Series" tasks used by Texas Gas.

⁴⁰ See 49 C.F.R. § 190.213(a)(1). See also *In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, at *3 (D.O.T. Aug. 10, 2015) (withdrawing alleged violation because PHMSA did not produce "any evidence to support its position" and thereby did not meet its burden of proof); *In re Exxon Pipeline Co.*, Final Order, CPF No. 5-2013-5007, 2015 WL 780721, at *12 (D.O.T. Jan. 23, 2015) (finding that 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 No. 3-2008-1005, 2011 WL 7006614, at *4 (D.O.T. Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation); *In re Golden Pass Pipeline, LLC*, CPF No. 4-2008-1017, 2011 WL

which party bears the obligation to come forward with the evidence at different points in the proceeding,” and the “burden of persuasion,’ *i.e.*, which party loses if the evidence is closely balanced.”⁴¹ PHMSA “bears the burden of proof as to all elements of the proposed violation.”⁴² To meet its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation. Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.⁴³

To meet its burden of persuasion, PHMSA “must prove, by a preponderance of the evidence, that the facts necessary to sustain a probable violation actually occurred.”⁴⁴ This burden is carried “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”⁴⁵ A respondent will prevail under this standard not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.⁴⁶ If “the evidence is closely balanced,” PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.⁴⁷

1919517, at *5 (D.O.T. Mar. 22, 2011) (finding that PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct).

⁴¹ *Schaeffer 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 Butte Pipeline Co.*, CPF No. 5-2007-5008, 2009 WL 3190794, at *1 (D.O.T. 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.”).

⁴² *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, at *3 (D.O.T. Dec. 31, 2012) (finding that evidence in violation report was insufficient to prove that ANR knew of probable existence of safety-related condition based on ILI data alone); see also *In re CITGO Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, at *5 (D.O.T. Dec. 29, 2011) (finding lack of evidence demonstrating that breakout tank was not receiving adequate cathodic protection).

⁴³ See e.g., *In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at *6-7 (D.O.T. May 13, 2010) (finding that OPS did not present evidence or analysis proving that choice of “critical elements” was inadequate or why it was essential to know exact location of pipe transitions); *In re Plains Pipeline, L.P.*, Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, at *4-5 (D.O.T. Mar. 15, 2011) (ordering withdrawal of allegation when limited evidence in the record was not conclusive); *In re Bridger Pipeline Co.*, Decision on Petition for Reconsideration, CPF No. 5-2007-5003 2009 WL 2336991, at *5-6 (D.O.T. June 16, 2009) (finding evidence introduced by PHMSA insufficient to establish whether pressure transmitters were integral to overpressure control system).

⁴⁴ *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, at *3 (D.O.T. Dec. 16, 2009) (citing *In re Butte Pipeline Co.*, 2009 WL 3190794, at *1, n.3; *Schaeffer*, 546 U.S. at 56-58).

⁴⁵ *In re Butte Pipeline Co.*, 2009 WL 3190794, at *1.

⁴⁶ See *In re ANR Pipeline Co.*, 2012 WL 7177134, 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.” *Id.* at *3.

⁴⁷ *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 No. 1-2009-5002, 2012 WL 3144486, at *7 (D.O.T. May 30, 2012) (where neither party

B. Texas Gas Complies With Its OQ Plan and 49 C.F.R. § 192.805(g).

PHMSA has not met its burden of proving that Texas Gas violated either the regulations or its OQ Plan. PHMSA has produced no evidence and points to no legal authority establishing that Texas Gas is required to maintain records justifying the requalification intervals for covered tasks. Texas Gas requests that PHMSA withdraw the Notice and Proposed Compliance Order.

1. Texas Gas Identifies Requalification Intervals for Each Covered Task.

Section 192.805(g) requires that Texas Gas “[i]dentify . . . the intervals at which evaluation of the individual’s qualification is needed.”⁴⁸ Texas Gas has satisfied this requirement by identifying its covered tasks and requalification intervals. For most covered tasks, Texas Gas relies upon the intervals established by Veriforce, its longstanding service provider. Where Veriforce’s CCTL does not address one of Texas Gas’s covered tasks, Texas Gas relies upon the requalification intervals in ASME B31Q. Texas Gas’s covered task lists identify, for most tasks, a requalification interval of three years and, for some tasks, a requalification interval of one year.⁴⁹ For most tasks, the requalification interval established by Veriforce is the same as, or more restrictive than, the interval established by ASME B31Q for the same or similar task.⁵⁰ No task has a requalification interval longer than three years.

As explained below, neither the OQ Plan nor PHMSA’s regulations require that Texas Gas independently document or justify the requalification intervals that have been established by Veriforce or ASME. For the OQ Plan and ASME B31Q, the requalification intervals were developed by subject matter experts using processes that are thorough and robust.⁵¹ Texas Gas is not required to “show the work” of these organizations. Texas Gas has fully complied with the regulations and its OQ Plan, and PHMSA has not met its burden of proving that Texas Gas violated its OQ Plan or PHMSA’s regulations in identifying the requalification intervals for its covered tasks.⁵²

“present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

⁴⁸ 49 C.F.R. § 192.805(g).

⁴⁹ See Exhibits 5, 6, 8.

⁵⁰ See Exhibits 5, 6.

⁵¹ ASME B31Q at iv; Veriforce Development History at 1.

⁵² E.g., *In re Buckeye Partners, LP*, 2012 WL 3144486, at *7 (withdrawing alleged violation when the “record contains no documents, procedures, interview notes or any other evidence to support the allegation that the company’s IMP was devoid of the sort of continuous evaluations required by the regulation”); *In re Exxon Pipeline Co.*, 2015 WL 780721, at *12 (withdrawing alleged violation when OPS did not present any persuasive arguments as to why certain measures were required under the regulation); *In re Plains Pipeline, L.P.*, 2011 WL 1919520, at *4-5 (withdrawing alleged violation for failure to perform timely remedial action when the Notice cited regulation and industry standard that do not establish a time period for remediation).

2. *The OQ Regulations Do Not Require Texas Gas to Document Requalification Intervals.*

Section 192.807(a) of the OQ regulations specifies four types of records an operator must create and maintain to demonstrate compliance with OQ requirements. Documentation justifying requalification intervals for covered tasks is not one of the required records.⁵³ PHMSA's Inspection Protocols, which are guidance tools used by PHMSA during inspections to determine whether an operator's OQ Plan complies with regulatory requirements, specify enforceable elements under each regulation.⁵⁴ Inspection Protocol 5.02 identifies as an "enforceable" element of an operator's OQ Program that the operator "has established intervals for reevaluating individuals performing covered tasks."⁵⁵ The protocols do not specify justifying reevaluation (*i.e.*, requalification) periods as an "enforceable" element.⁵⁶

Texas Gas recognizes that certain PHMSA guidance materials suggest that an operator should maintain documentation justifying requalification intervals.⁵⁷ For example, PHMSA issued a non-enforceable advisory bulletin in 2004 which stated that requalification intervals are to "reflect the relevant factors including the complexity, criticality, and frequency of performance of the task," and asserted that intervals are to "be justified by appropriate documentation."⁵⁸ Despite this statement, PHMSA did not amend the OQ regulations to require that operators "justify the basis for the reevaluation interval established for each covered task,"⁵⁹ based on the conclusion that existing regulations were sufficient to implement the statutory

⁵³ An operator is required to retain documentation of: "(1) Identification of qualified individual(s); (2) Identification of the covered tasks the individual is qualified to perform; (3) Date(s) of current qualification[(s)]; and (4) qualification method(s)." 49 C.F.R. § 192.807(a).

⁵⁴ PHMSA, Operator Qualification Protocols for Compliance Inspection Process, <http://primis.phmsa.dot.gov/oq/protocols.htm>.

⁵⁵ *Id.*, Inspection Protocol 5.02

⁵⁶ *Id.*, Inspection Protocols 5.02, 7.01.

⁵⁷ PHMSA, *Operator Qualification Enforcement Guidance* at 27 (Dec. 7, 2015) (stating a probable violation could include an instance where "[t]he operator has no documentation to support the reevaluation interval."); *see also* PHMSA, *Operator Qualification: FAQs* No. 5.6 ("It is the responsibility of the operator to determine and document the basis for scheduling subsequent evaluations."); Pipeline Safety: Operator Qualification Requirements, 69 Fed. Reg. 69,028, 69,029 (Nov. 26, 2004) (Advisory Bulletin (ADB-04-05)); PHMSA, *Operator Qualification Protocols for Compliance Inspection Process*, Inspection Protocol 7.01.

⁵⁸ Pipeline Safety: Operator Qualification Requirements, 69 Fed. Reg. at 69,029.

⁵⁹ PHMSA, *OQ Rule – Preamble Language vs. Enforcement Criteria (Conflict Resolution)* at 3. PHMSA stated that the contemplated regulatory requirement would have included "an analysis that relate[d] the complexity of the task and the frequency with which it is performed to the anticipated consequences of performance errors." *Id.* PHMSA noted that acceptable justifications would have included "proper application of a 'difficulty-importance-frequency' (DIF) analysis (also known as a 'complexity-consequence-frequency' analysis) or comparable methodologies." *Id.* n.10.

Response of Texas Gas Transmission, L.L.C.
CPF No. 2-2015-1005

requirements.⁶⁰ Because no regulatory requirement exists, operators are not required to maintain such documentation.

PHMSA's compliance guidance documents do not create an enforceable requirement for Texas Gas because they were not adopted pursuant to APA's notice and comment procedures that an agency must follow to establish a regulatory obligation.⁶¹ Guidance materials are not legally binding, enforceable requirements, but are interpretive rules that have no force and effect of law.⁶² PHMSA's Notice cannot be sustained because it would create, and attempt to enforce, a new, legally binding record-keeping requirement in this enforcement proceeding without complying with the notice and comment requirements of the APA.

PHMSA cannot rely on section 60117 of the Pipeline Safety Laws⁶³ as the basis for imposing a documentation requirement under 49 C.F.R. § 192.805(g). Section 60117(b) states that:

To enable the Secretary to decide whether a person owning or operating a pipeline facility is complying with this chapter and standards prescribed or orders issued under this chapter, the person shall—(1) maintain records, make reports, and provide information the Secretary requires; and (2) make the records, reports, and information available when the Secretary requests.⁶⁴

This provision means that an operator must create and maintain records when PHMSA adopts a regulation imposing such a requirement (*i.e.*, when “the Secretary requires”). PHMSA's OQ regulations have not created a requirement to maintain records documenting the justification for the requalification intervals for covered tasks. Section 60117(b) does not authorize PHMSA to require that an operator produce records where no underlying regulatory obligation exists.

PHMSA also cannot interpret section 192.603(b) of its regulations as imposing a requirement to keep records justifying requalification intervals. Section 192.603(b) requires that operators “keep records necessary to administer the procedures established under § 192.605.”⁶⁵ Section 192.605, in turn, requires that Texas Gas establish written procedures for operations and

⁶⁰ Pipeline Safety: Operator Qualifications; Statutory Changes, 70 Fed. Reg. at 10,334.

⁶¹ 5 U.S.C. § 553(b) & (c) (2012); *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716-17 (D.C. Cir. 2015) (stating that a legislative rule imposes a legally binding obligation or prohibition and must be promulgated pursuant to notice and comment).

⁶² *Ass'n of Flight Attendants-CWA, AFL-CIO*, 785 F.3d at 716-17 (explaining that policy statements and interpretive rules are not binding and do not carry the force and effect of law) (citing *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203-04 (2015)); *In the Matter of Sunoco Pipeline L.P., Final Order*, CPF No. 1-2012-5013, 2014 WL 5431181, at *5 (Aug. 27, 2014) (noting that the Part 195 Enforcement Guidance is “informational only” and does not “constitute [a] regulatory standard[] or definition[]”).

⁶³ 49 U.S.C. § 60117(b).

⁶⁴ *Id.*

⁶⁵ 49 C.F.R. § 192.603(b).

maintenance activities.⁶⁶ PHMSA's regulations pertaining to operations and maintenance are found in Subparts L and M of the federal regulations. PHMSA's OQ regulations, however, are found in Subpart N of PHMSA's pipeline safety regulations, and are not operations and maintenance functions. Section 192.603(b) does not apply and cannot be used to create a new recordkeeping requirement under the OQ regulations to justify requalification intervals.

3. *Texas Gas's OQ Plan Does Not Require Documentation of Requalification Intervals.*

Texas Gas's OQ Plan also does not impose an obligation to maintain documentation justifying the requalification intervals for covered tasks. The OQ Plan adopts the Veriforce CCTL, including both the covered tasks for operator qualification and their required requalification intervals.⁶⁷ As stated in the OQ Plan:

Requalification Interval: the time period for which a qualification shall remain in effect before re-evaluation is required. The requalification interval for each covered task was established by [subject matter experts (SMEs)] representing various Operators and other organizations.⁶⁸

The OQ Plan does not require that Texas Gas personnel demonstrate the justification for the requalification intervals.⁶⁹ The OQ Plan explains that “[e]ach covered task developed by this group included a requalification interval based on their estimate of task difficulty, task importance, the potential for loss of knowledge or skill over time, and/or manufacturer's recommendations.”⁷⁰ Contrary to PHMSA's interpretation in the Notice, this statement is a recitation of how Veriforce identified the applicable requalification intervals.⁷¹ Veriforce utilizes the expertise of subject matter experts to develop the CCTL, and included requalification intervals, which can be relied upon by numerous operators to promote the uniformity and portability of OQ requirements necessary to promote a mobile and safe work force. The Notice does not acknowledge the role of Veriforce in establishing the requalification intervals or implementing the OQ requirements on the Texas Gas system. PHMSA has identified no

⁶⁶ *Id.* § 192.605(a).

⁶⁷ OQ Plan at 45.

⁶⁸ *Id.* at 46.

⁶⁹ Notice at 2 (“During the inspection, TGT personnel could not demonstrate that the requalification intervals . . . were ‘based on task difficulty, task importance, the potential for loss of knowledge or skill over time, and/or manufacturer’s recommendations’ as required by the BWP Plan.”).

⁷⁰ OQ Plan at 46 (emphasis added); *see also id.* at 36 (“Evaluation Intervals: Evaluation intervals for each covered task are available at <https://www.veriforce.net>. Each covered task includes a requalification interval based on task difficulty, task importance, the potential for loss of knowledge or skill over time, and/or manufacturer’s recommendations.”).

⁷¹ *Id.* at 46; Veriforce Development History at 1.

provision in the OQ Plan requiring Texas Gas to retain documentation justifying requalification intervals.⁷²

The ASME B31Q standard also does not require Texas Gas to document the justification for requalification intervals. ASME B31Q explicitly states that “[i]f the subsequent qualification intervals in the task list . . . are adopted, further documentation is not required.”⁷³ Like the OQ Plan, ASME B31Q does not support PHMSA’s assertion that documentation of the justification for requalification intervals is required.

4. *The Requalification Intervals Established by Veriforce and ASME B31Q Satisfy Any Documentation Requirement of the OQ Plan and PHMSA Regulations.*

Even assuming that Texas Gas is required to document the justification for its requalification intervals, the detailed explanations contained in the OQ Plan and ASME B31Q satisfy the purported requirement. The OQ Plan explains how Veriforce developed the CCTL and requalification intervals, including the factors considered and methodology used.⁷⁴ PHMSA has acknowledged in guidance documents and agency statements that operators can utilize third-party service providers and ASME B31Q to establish compliance with the OQ regulations.⁷⁵ Most of the requalification intervals for the tasks applicable to Texas Gas that are contained within Veriforce’s CCTL are the same as, or more restrictive than, the ASME B31Q intervals for the corresponding covered tasks,⁷⁶ demonstrating that the Veriforce requalification intervals are

⁷² The OQ Plan includes a provision regarding the management and maintenance of records, and requires the retention of documents on: (1) “[i]dentification of qualified individual;” (2) “[i]dentification of the covered tasks that the individual is qualified to perform;” (3) “[d]ate of the current qualification;” (4) “[m]ethod of qualification;” (5) “[d]ate qualification expires;” and (6) “[d]ocuments supporting the competency of evaluators, if other than due to being qualified to perform covered tasks.” OQ Plan at 36-37. Like PHMSA’s recordkeeping regulation at section 192.807(a), the OQ Plan does not require the retention of documentation justifying requalification intervals.

⁷³ ASME B31Q at 18 (emphasis added).

⁷⁴ OQ Plan at 45-47.

⁷⁵ PHMSA, *Operator Qualification Enforcement Guidance* at 27 (Dec. 7, 2015) (referencing GPTC, API 1161, ASME B31Q); PHMSA, *Operator Qualification: FAQs* No. 5.6 (“determination and justification of the reevaluation interval should consider existing consensus standards and industry practice (e.g., OSHA standards, non-mandatory consensus standards)”; Transcript of Technical Pipeline Safety Standards Committee Meeting at 337-38 (Dec. 14, 2005) (statement of Stacey Gerard) (“An inspector can use . . . your compliance with [B31]Q as a way to check off that you have demonstrated compliance with the regulation”); Transcript of Pipeline Safety Meeting on Operator Qualification at 225 (Dec. 15, 2005) (statement of Richard Sanders) (“[a]nybody that is presently using [ASME B31Q] or anticipating on using it will have no problems with the regulation.”); *Id.* at 233 (“Some operators want to know whether implementation of B31Q will satisfy the regulation and as we said in the last session, absolutely it will. As long as you’re equal to or greater than the regulation, you’re in good shape.”); GPTC, *Guide Material 192.805 Qualification Program* at 2.7(b) (2016) (stating that “[a]n operator may choose to adopt intervals established by vendors that have expertise in qualification issues”); PHMSA, *OQ Rule – Preamble Language vs. Enforcement Criteria (Conflict Resolution)* at 4 (operators electing to adopt the reevaluation intervals from ASME B31Q “will be deemed to have met this requirement.”).

⁷⁶ See tables comparing CCTL and ASME B31Q requalification intervals attached as Exhibits 4, 5.

justified and reasonable, that additional documentation is not necessary, and that Texas Gas's OQ program complies with PHMSA's regulations.⁷⁷ For the two tasks with longer requalification intervals than the corresponding ASME B31Q task,⁷⁸ the interval is no longer than three years, consistent with PHMSA's previous statements.⁷⁹

For its company-specific 9000 Series tasks, Boardwalk derived requalification intervals from ASME B31Q.⁸⁰ ASME B31Q describes how the covered task list was developed and the methodology applied to determine subsequent requalification intervals.⁸¹ In addition, ASME B31Q states that, if an operator adopts the requalification intervals, "further documentation is not required."⁸² Given PHMSA's assurances that compliance with ASME B31Q would constitute compliance with the OQ regulations, Texas Gas reasonably relied on upon the ASME requalification intervals without further evaluation or justification.

PHMSA has failed to satisfy its burden of proving the alleged violation. The Violation Report contains no evidence. It simply states that Texas Gas could not provide documentation

⁷⁷ See PHMSA Letter of Interpretation to Robert Paullin, Associate Director, Office of Operations and Enforcement at 4 (June 17, 1981) ("Inclusion of particular principles or practices in a generally recognized consensus standard, regardless of whether the document is referenced in Part 195, would be a heavy factor to weigh in making a judgment about the appropriateness of an operator's tests or calculations" under § 195.406(a)); *In re Plantation Pipe Line Co.*, Final Order, CPF No. 2-2011-5009, 2013 WL 1718303, at *4-5 (Feb. 28, 2013) (finding that "it was prudent for Respondent to rely on a consensus standard," and that Respondent made a good faith effort to comply with the regulation by "consulting a consensus standard," thus negating a civil penalty); *In re Tenn. Gas Pipeline Co.*, Final Order, CPF No. 4-2008-1008, 2013 WL 6815128, at *6 and n.25 (Oct. 28, 2013) (noting that OPS cited an industry standard that was not incorporated by reference and thus not enforceable, but that the standard "shed some light on the industry consensus"); *In re CITGO Petroleum Corp.*, CPF No. 2-2012-6011, 2013 WL 4406978, at *2-3 (June 17, 2013) (PHMSA inspectors relied on industry standards set forth in Consortium on Operator Qualifications Covered Task Procedures (COOQ) in performing inspection, because CITGO's program appeared to be based on COOQ).

⁷⁸ Two of the tasks (Task 211, Perform plastic fusion inspection; Task 216, Joining of steel pipe – Compression couplings) have requalification intervals longer than the corresponding ASME B31Q task. For these tasks, Texas Gas will be adopting the ASME B31Q task in light of PHMSA's recent notice of proposed rulemaking that may modify the welder and plastic pipe joining records that an operator must retain and would affect Texas Gas's ability to use these Veriforce CCTL tasks. Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines, 81 Fed. Reg. 20,722 (Apr. 8, 2016) (proposed §§ 192.227(c) and 192.285(e)). Texas Gas plans to implement this change by June 1, 2016.

⁷⁹ PHMSA, *Training Materials for PHMSA-PL3OQ Operator Qualification WBT Course* at 47 ("The OPS position is that, without specific analysis of task difficulty/importance/frequency (DIF analysis) and tracking of performance data through audits or other mechanisms, the time for reevaluation intervals should not exceed three years."); PHMSA, *Report to Congress* at 18 (PHMSA considered setting maximum requalification intervals not to exceed five years, but recognized that operators may find a three-year interval easier to administer); Transcript of Pipeline Safety Meeting on Operator Qualification at 151 (Dec. 15, 2005) (statement of Richard Sanders) ("We're looking at this three-to-five-year window.").

⁸⁰ See Exhibit 8.

⁸¹ ASME B31Q at 21-82.

⁸² *Id.* at 18.

demonstrating compliance with its OQ program.⁸³ The OQ Plan explains how Veriforce developed the CCTL, including its requalification intervals, which are consistent with those contained in ASME B31Q and with PHMSA's preference. The requalification intervals of the 9000 Series tasks rely on ASME B31Q. The evidence in this proceeding is not "closely balanced" and does not support the allegation in the Notice. Texas Gas's requalification intervals are reasonable and supported, and the Notice and Proposed Compliance Order must be withdrawn.

C. The Notice Diverges from Prior Practice and Would Affect Industry's Ability to Use the Veriforce and ASME B31Q Common Covered Task Lists.

PHMSA's attempt to impose a requirement that an operator independently justify the requalification intervals contained in an industry standard is contrary to longstanding PHMSA practice. PHMSA has consistently and repeatedly instructed operators to consider consensus standards and industry practice for the determination and justification of requalification intervals.⁸⁴ PHMSA also has supported industry efforts to collaboratively develop uniform tasks lists and requalification intervals in order to create continuity and portability.⁸⁵ Relying upon this guidance, operators have used third-party compliance organizations and industry standards, such as Veriforce and ASME B31Q, to satisfy their OQ compliance requirements.

The Notice reflects a departure from this practice. PHMSA is now unilaterally imposing a requirement that each operator independently calculate, justify, and document the requalification intervals used in its written qualification program. This approach would negate the considerable effort and resources expended to develop common industry covered tasks lists, and would have significant negative repercussions for the pipeline industry. Instead of continuing to rely upon existing industry standards and practice, as has been common practice, each operator would have to undertake its own assessment of covered tasks and identify its own requalification intervals. The costs associated with such an undertaking would be significant and the industry would lose the ability to ensure that covered tasks and requalification intervals are

⁸³ Violation Report at 5; see *In re EQT Corp.*, Final Order, CPF No. 1-2006-1006, 2010 WL 2228558, at *8 (D.O.T. May 13, 2010) (withdrawing alleged violation when OPS failed to provide an explanation for "why, how, or what parts of these documents prove a violation"); *In re ANR Pipeline Co.*, 2012 WL 7177134, at *3 ("Violation Report contain[ed] no evidence which would rebut ANR's argument").

⁸⁴ E.g., PHMSA, *Operator Qualification: FAQs* No. 5.6 ("determination and justification of the reevaluation interval should consider existing consensus standards and industry practice"); PHMSA, *Operator Qualification Enforcement Guidance* at 24 (July 6, 2011) ("Some covered tasks are covered by industry standards or other sections of the regulations and therefore it is important that the operator take these considerations into account when establishing reevaluation time intervals."), http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/E-Reading%20Room/oq_enforcement_guidance.doc; PHMSA, *Operator Qualification Enforcement Guidance* at 28 (Dec. 7, 2015) ("Some covered tasks are identified in consensus standards – which are incorporated by reference."); Transcript of Pipeline Safety Meeting on Operator Qualification at 233 ("Some operators want to know whether implementation of B31Q will satisfy the regulation and as we said in the last session, absolutely, it will.") (statement of Richard Sanders).

⁸⁵ For example, one of the purposes underlying the development of ASME B31Q was to "establish a comprehensive technical basis for personnel qualifications." PHMSA, *Report to Congress: Qualification of Pipeline Personnel* at 2.

uniformly applied across a range of operators and contractors, negating the consistency and portability that now exists, especially for contractors who work on multiple pipeline systems.

The approach PHMSA is taking in this proceeding also increases safety and service reliability risks because it would undermine operators' reliance on mutual assistance programs under which operators help each other restore service or safe operations in emergency circumstances or after severe weather events because of the lack of uniformity in determining which operators have the appropriate qualifications.

D. The Proposed Compliance Order Must be Withdrawn or, in the Alternative, Should be Modified.

The Notice and Proposed Compliance Order must be withdrawn because PHMSA has failed to demonstrate by a preponderance of the evidence a violation of 49 C.F.R. § 192.805(g) or Texas Gas's OQ Plan. If PHMSA does not withdraw the Notice, Texas Gas requests that the Proposed Compliance Order be modified because it does not align with or address the alleged violation.

The Notice alleges that Texas Gas did not comply with its OQ Plan or section 192.805(g) of PHMSA's regulations because Texas Gas could not provide documentation demonstrating that the requalification intervals of its covered tasks were "based on task difficulty, task importance, the potential for loss of knowledge or skill over time, and/or manufacturer's recommendations" as required by the BWP Plan.⁸⁶ The Proposed Compliance Order would require that Texas Gas re-establish the requalification intervals.

The remedy contained in the Proposed Compliance Order, however, does not address the alleged violation. The Notice does not allege that Texas Gas's requalification intervals are inappropriate or unsafe. The three-year requalification intervals are consistent with intervals established for corresponding covered tasks identified in ASME B31Q, PHMSA's inspection computer-based training, and PHMSA's stated expectations at public meetings.⁸⁷ In its 2007 Report to Congress, PHMSA contemplated requiring operators to set maximum requalification intervals that would not exceed five years, but recognized that operators may find three years easier to administer.⁸⁸ Texas Gas's inability to produce records justifying the intervals does not render them inappropriate or unsafe.

If it is not withdrawn, Texas Gas requests that the Proposed Compliance Order be modified to eliminate the requirement to "develop" requalification intervals. Having to

⁸⁶ Notice at 1-2.

⁸⁷ PHMSA, *Training Materials for PHMSA-PL3OQ Operator Qualification WBT Course* at 47 ("The OPS position is that, without specific analysis of task difficulty/importance/frequency (DIF analysis) and tracking of performance data through audits or other mechanisms, the time for reevaluation intervals should not exceed three years."); Transcript of Pipeline Safety Meeting on Operator Qualification at 151 (Dec. 15, 2005) (statement of Richard Sanders) ("We're looking at this three-to-five-year window.").

⁸⁸ Report to Congress at 18.

Response of Texas Gas Transmission, L.L.C.
CPF No. 2-2015-1005

redevelop requalification intervals would constitute a modification of the corresponding covered tasks that would have far-reaching, adverse implications for Veriforce, Texas Gas, and other operators that rely on the Veriforce CCTL.⁸⁹ Such an outcome is not consistent with safety and would create needless inefficiencies and impose unnecessary costs on operators and others who rely on the Veriforce CCTL.

VI. CONCLUSION

Based on the foregoing, Texas Gas requests that PHMSA withdraw the Notice and the Proposed Compliance Order.

Respectfully submitted,

/s/ Michael E. McMahon

Michael E. McMahon
Senior Vice President and General Counsel
Boardwalk GP, LLC
Mercy Carrasco
Vice President and Assistant General Counsel
Boardwalk Pipeline Partners, LP
9 Greenway Plaza, Suite 2800
Houston, Texas 77046
713-479-8059
Mike.McMahon@bwpmlp.com
Mercy.Carrasco@bwpmlp.com

Susan A. Olenchuk
Van Ness Feldman, LLP
1050 Thomas Jefferson St. NW
Washington, DC 20007
(202) 298-1896
sam@vnf.com

Counsel for Texas Gas Transmission, L.L.C.

April 15, 2016

⁸⁹ For example, Veriforce has specific procedures that apply when an operator requests the modification of any task on the CCTL. First, an operator is required to submit a draft proposal to Veriforce, which is then distributed to all Veriforce supported operators for review and comment. During this phase, Veriforce requests that operators have their respective subject matter experts review the proposed changes and respond with technical comments. Veriforce compiles all comments received and produces a written response. If significant modifications to the proposal are proposed in the comments, Veriforce will recirculate the revised proposal for additional review and comment. At the conclusion of this process, Veriforce will issue a final document summarizing the proposal, comments received and action taken. OQ Plan at 46-47.