

September 12, 2019

Mr. Paul Sukut
Chief Executive Officer and General Manager
Basin Electric Power Cooperative
1717 East Interstate Avenue
Bismarck, North Dakota 58503

Re: CPF No. 3-2018-5002

Dear Mr. Sukut:

Enclosed please find the Final Order issued in the above-referenced case to your subsidiary, Dakota Gasification Company. It makes findings of violation and assesses a civil penalty of \$38,300. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon receipt of payment. Service of the Final Order by certified mail is effective upon the date of mailing, as provided under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Allan C. Beshore, Director, Central Region, Office of Pipeline Safety, PHMSA
Mr. David Sauer, Chief Operating Officer and Senior Vice President, Dakota Gasification
Company, 1717 East Interstate Avenue, Bismarck North Dakota 58503

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

**U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590**

_____)
In the Matter of)

Dakota Gasification Company,)
a subsidiary of Basin Electric Power Cooperative,)

Respondent.)
_____)

CPF No. 3-2018-5002

FINAL ORDER

From January 30 through May 12, 2017, pursuant to 49 U.S.C. § 60117, representatives of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted an on-site pipeline safety inspection of the facilities and records of Dakota Gasification Company (DGC or Respondent) near Beulah, North Dakota. DGC is a subsidiary of Basin Electric Power Cooperative, which operates a coal-gasification facility and synthetic natural gas and carbon dioxide pipelines in North Dakota and Canada.¹

As a result of the inspection, the Director, Central Region, OPS (Director), issued to Respondent, by letter dated May 29, 2018, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that DGC had violated 49 C.F.R. §§ 195.577(a) and 195.440(c), and proposed assessing a civil penalty of \$38,300 for the alleged violations.

After requesting and receiving an extension of time, DGC responded to the Notice by letter dated October 5, 2018 (Response). The company did not contest the allegations of violation, but provided an explanation of its actions and requested that the proposed civil penalty be reduced or eliminated. Respondent did not request a hearing and therefore has waived its right to one.

FINDINGS OF VIOLATION

In its Response, DGC did not contest the allegations in the Notice that it violated 49 C.F.R. Part 195, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 195.577(a), which states:

¹ Dakota Gasification Company website, *available at* <https://www.dakotagas.com/about-us/at-a-glance> (last accessed Feb. 13, 2019).

§ 195.577 What must I do to alleviate interference currents?

(a) For pipelines exposed to stray currents, you must have a program to identify, test for, and minimize the detrimental effects of such currents.

The Notice alleged that Respondent violated 49 C.F.R. § 195.577(a) by failing to alleviate interference currents with a program to identify, test for, and minimize the detrimental effects of such currents. Specifically, the Notice alleged that two locations on DGC's pipelines showed alternating current (AC) voltage readings over four volts. Based on such readings, the Notice alleged that DGC should have reasonably foreseen interference currents at those locations, but did not take protective measures to isolate the pipelines from detrimental current sources.

Respondent did not contest this allegation of violation. Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.577(a) by failing to alleviate interference currents with a program to identify, test for, and minimize the detrimental effects of such currents.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 195.440(c), which states:

§ 195.440 Public awareness.

(a)

(c) The operator must follow the general program recommendations, including baseline and supplemental requirements of API RP 1162, unless the operator provides justification in its program or procedural manual as to why compliance with all or certain provisions of the recommended practice is not practicable and not necessary for safety.

The Notice alleged that Respondent violated 49 C.F.R. § 195.440(c) by failing to follow the general program recommendations, including baseline and supplemental requirements of American Petroleum Institute (API) Recommended Practice (RP) 1162, unless it provided justification in its program or procedural manual as to why compliance with all or certain provisions of the RP is not practicable and not necessary for safety. Section 8.4 of RP 1162 states, in relevant part:

8.4 MEASURING PROGRAM EFFECTIVENESS

Operators should assess progress on the following measures to assess whether the actions undertaken in implementation of this RP are achieving the intended goals and objectives:

- Whether the information is reaching the intended stakeholder audiences
- If the recipient audiences are understanding the messages delivered
- Whether the recipients are motivated to respond appropriately in alignment with the information provided
- If the implementation of the Public Awareness Program is impacting bottom-line results (such as reduction in the number of incidents caused by third-party damage). . . .

Specifically, the Notice alleged that DGC did not perform a written effectiveness evaluation in 2016 for the recipient audience, as required by its own public awareness plan. DGC's records contain only survey responses, with no assessment as to whether the actions undertaken in implementing RP 1162 were actually achieving the intended goals and objectives.

Respondent did not contest this allegation of violation. Accordingly, based upon a review of all of the evidence, I find that Respondent violated 49 C.F.R. § 195.440(c) by failing to follow the general program recommendations, including baseline and supplemental requirements of API RP 1162, and did not provide justification in its program or procedural manual as to why compliance with all or certain provisions of the RP is not practicable and not necessary for safety.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed \$200,000 per violation for each day of the violation, up to a maximum of \$2,000,000 for any related series of violations.² In determining the amount of a civil penalty under 49 U.S.C. § 60122 and 49 C.F.R. § 190.225, I must consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; any effect that the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of \$38,300 for the violations cited above.

Item 1: The Notice proposed a civil penalty of \$19,300 for Respondent's violation of 49 C.F.R. § 195.577(a), for failing to alleviate interference currents with a program to identify, test for, and minimize the detrimental effects of such currents. DGC requested reduction or elimination of the proposed civil penalty, based on AC current readings taken during digs performed after the PHMSA inspection, the lack of adverse impacts caused by the violation, the purportedly minor nature of the violation, and the fact that DGC had "put considerable time and resources into achieving compliance both during and after the inspection."³ DGC indicated that it had contracted with a third-party consultant to model AC interference on the pipeline and that in the event of any abnormalities, it would take necessary mitigative action.⁴

While I acknowledge and commend the corrective actions taken by the company, these actions

² These amounts are adjusted annually for inflation. See 49 C.F.R. § 190.223; Revisions to Civil Penalty Amounts, 83 Fed. Reg. 60732, 60744 (Nov. 27, 2018).

³ Response, at 1.

⁴ *Id.* The company stated that the modeling was expected to be completed by June 30, 2019, and that any mitigative work would be complete before the annual cathodic-protection survey in 2020.

were taken in response to regulatory requirements noted during the PHMSA inspection and were ones that any prudent operator would take. To ensure compliance, PHMSA intends to follow up on these modeling results and the timely completion of any needed mitigation work.

Finally, I would also note that the Violation Report already took into account the reduced gravity of the violation, stating that “pipeline safety was minimally affected.”⁵ Therefore, no further reduction is warranted. Respondent has not shown any other circumstances that would justify any further reduction. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$19,300 for violation of 49 C.F.R. § 195.577(a).

Item 2: The Notice proposed a civil penalty of \$19,000 for Respondent’s violation of 49 C.F.R. § 195.440(c), for failing to follow general program recommendations, including baseline and supplemental requirements of API RP 1162, and did not provide justification in its program or procedural manual as to why compliance with all or certain provisions of the RP is not practicable and not necessary for safety. DGC requested reduction or elimination of the proposed civil penalty, based on a program-effectiveness evaluation performed after issuance of the Notice and the purportedly minor nature of the violation. The company also noted that it had “no prior offenses under 49 CFR § 195.440(c).”⁶ While I acknowledge and commend the corrective actions taken by the company, these actions were taken in response to regulatory requirements after the Notice was issued. I would also note that PHMSA did not propose an enhanced penalty based upon prior violations of this particular regulation.

I must also emphasize the importance of public awareness programs. Of particular significance is the requirement that operators periodically review their programs for effectiveness and enhance the programs as necessary. Finally, Respondent has not shown any other circumstances that would justify reduction of the proposed civil penalty. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of \$19,000 for violation of 49 C.F.R. § 195.440(c).

In summary, having reviewed the record and considered the assessment criteria for each of the Items cited above, I assess Respondent a total civil penalty of **\$38,300**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require such payment to 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: Financial Operations Division (AMK-325), Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 S MacArthur Blvd, Oklahoma City, Oklahoma 79169. The Financial Operations Division telephone number is (405) 954-8845.

Failure to pay the \$38,300 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 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

⁵ Pipeline Safety Violation Report (Violation Report), (May 29, 2018) (on file with PHMSA), at 8.

⁶ Response, at 2.

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 a district court of the United States.

Under 49 C.F.R. § 190.243, Respondent may submit a Petition for Reconsideration of this Final Order to the Associate Administrator, Office of Pipeline Safety, PHMSA, 1200 New Jersey Avenue, SE, East Building, 2nd Floor, Washington, DC 20590, with a copy sent to the Office of Chief Counsel, PHMSA, at the same address, no later than 20 days after receipt of service of the Final Order by Respondent. Any petition submitted must contain a brief statement of the issue(s) and meet all other requirements of 49 C.F.R. § 190.243. The filing of a petition automatically stays the payment of any civil penalty assessed. The other terms of the order, including any corrective action, remain in effect unless the Associate Administrator, upon request, grants a stay. If Respondent submits payment of the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived.

The terms and conditions of this Final Order are effective upon service in accordance with 49 C.F.R. § 190.5.

September 12, 2019

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued