

**PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
WASHINGTON, D.C. 20590**

In the Matter of)
)
Express Holdings (USA), LLC,) CPF-3-2020-5005
) Notice of Probable Violation
)
Respondent.)

Respondent’s Post-Hearing Brief

I. Introduction

Safety is a fundamental value and the number one priority of Express Holdings (USA), LLC (“Express”), a subsidiary of Enbridge Inc. (“Enbridge”), and compliance with the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) standards and regulations is a foundational principle. Express appealed Items 1, 2, and 8 of the referenced Notice of Probable Violation (“NOPV”) and proceeded to hearing, because the evidence demonstrates that Express operated in compliance with the cited standards and PHMSA’s interpretation of its own regulations is not factually or legally sustainable.¹

A virtual hearing was held on October 23, 2020. Express and PHMSA submitted evidence into the record prior to the hearing, witnesses on each side testified at the hearing, and certain guidance documents and consensus standards were referenced during the hearing. In addition to the pre-hearing submissions, Express attaches hereto and adopts herein the following:

- Marysville Pump Amp Trends (January 2016);
- Merriam-Webster’s Definition of the Word “At”;
- PHMSA’s Part 195 Corrosion Enforcement Guidance;
- API 570 – Piping Inspection Code: In-service Inspection, Rating, Repair, and Alteration of Piping Systems;
- API 574 – Inspection Practices for Piping System Components;
- *In The Matter of Kinder Morgan Energy Partners, L.P.*, CPF No. 3-2007-5020, (Dec. 23, 2009); and
- *Magellan Pipeline Company*, Failure Investigation Report, External Corrosion, Crevice and Atmospheric, Failure Date – 11/25/12 (Mar. 28, 2015, ed. rev. Nov. 8, 2016).

As set forth herein, Express respectfully requests that PHMSA withdraw Items 1, 2, and 8 of the NOPV or that the Hearing Officer recommend dismissal of these Items.

II. Background

Express owns and operates Platte Pipeline (Line 41), a crude oil pipeline system. Platte Pipeline is approximately 933 miles in length, begins in Casper, WY, terminates in Wood River, IL, and consists of nineteen pump stations and six terminals. Platte Pipeline was previously owned by Kinder Morgan, Inc. (“KMI”). In 2013, Spectra Energy Corp. (“Spectra”) acquired Platte

¹ On July 3, 2020, Express submitted a Request for Hearing and Statement of Issues, in which Express appealed Items 1, 2, 3, 6, 7, and 8 of the NOPV. Express accepted Items 4 and 5, which were Warnings. Prior to the hearing, Express withdrew its appeal of Items 3, 6, and 7.

Pipeline from KMI. KMI continued to operate Platte Pipeline until February 2014, at which time Spectra became the pipeline operator. Enbridge (U.S.) Inc. acquired Spectra in February 2017.

PHMSA inspectors conducted an onsite inspection of Express from November 14, 2016 to February 3, 2017, while Spectra was the owner and operator of the pipeline system, and the violations and warnings alleged in the NOPV allegedly occurred during the period that Spectra was the owner and operator. After Enbridge acquired Spectra, Express began adopting Enbridge's Operations and Maintenance ("O&M") procedures and programs over time. As such, Express implemented corrective actions and other best practices prior to PHMSA's issuance of the NOPV. As such, the NOPV does not include any corrective action or compliance orders.

III. Legal Standard

The law is well-settled that PHMSA bears the burden to prove, by a preponderance of the evidence, each element of a proposed violation. 40 C.F.R. § 190.213(a)(1); *In re Inland Corp.*, Final Order, CPF No. 1-2017-5003, 2018 WL 2229383 (DOT Mar. 7, 2018) (PHMSA did not meet its burden of proof that the operator violated pipeline safety regulations); *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134 (DOT Dec. 31, 2012). PHMSA's burden of proof includes the "burden of production," which requires PHMSA to present evidence to support its position. *In re Air Products and Chemicals, Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819 (DOT Aug. 10, 2015) (PHMSA did not meet its burden of proof when it did not produce "any evidence to support its position"). Further, PHMSA's burden of proof also includes the "burden of persuasion" which PHMSA loses if the evidence is closely balanced. *In re Bridger Pipeline Co. LLC*, Final Order, CPF No. 5-2007-5003, 2009 WL 7796887 (DOT Apr. 2, 2009) (the burden of proof includes both the burden of production and burden of persuasion).

As set forth herein, PHMSA failed to meet its burden to prove, by a preponderance of the evidence, each element of the proposed violations, failed to meet its burden of production in that it failed to submit supporting evidence, and failed to meet its burden of persuasion that Express violated the cited standards.

IV. Item 1 – Express Did Not Violate Section 195.401(b)(1)

In Item 1, PHMSA asserts that Express violated Section 195.401(b)(1), which provides:

(b) An operator must make repairs on its pipeline system according to the following requirements:

(1) Non-Integrity management repairs. Whenever an operator discovers any condition that could adversely affect the safe operation of its pipeline system, it must correct the condition within a reasonable time. However, if the condition is of such a nature that it presents an immediate hazard to persons or property, the operator may not operate the affected part of the system until it has corrected the unsafe condition.

In the NOPV, PHMSA asserted that Express violated this section because it allegedly operated the pipeline with a condition that permitted the pressure of the pipeline to potentially exceed 110% of the Maximum Operating Pressure ("MOP") in the event of an inadvertent mainline-valve closure, power failure, loss of communications, or other abnormal operation. In support of its assertion, PHMSA alleged that Express violated this standard because it failed to implement certain recommendations identified in the Kinder Morgan Platte Pipeline Transient Study ("KMI Transient Study") dated June 1, 2011.

It is noteworthy that PHMSA alleged that Express violated the “General Requirements” under Section 195.401(b)(1) by not implementing the recommendations in the KMI Transient Study, rather than the specific standard governing MOP set forth in Section 195.406. Section 195.406(b) expressly provides: “No operator may permit the pressure in a pipeline during surges or other variations from normal operations to exceed 110 percent of the operating pressure limit established under paragraph (a) of this section. Each operator must provide adequate controls and protective equipment to control the pressure within this limit.” (40 C.F.R. 195.406(b).) Indeed, PHMSA alleged violations of Section 195.406 in Items 2 and 3 of the NOPV, so PHMSA’s decision to cite Express for failure to implement the recommendations in the KMI Transient Study under the general standard, rather than the specific standard, was a clear and conscious decision. PHMSA therefore recognizes that Express implemented controls to protect against transient events exceeding 110% of MOP during normal operations, but apparently believes it was necessary to implement the recommendations in the KMI Transient Study to protect against transient events exceeding 110% during abnormal operations.

At the hearing and to Express’s surprise, PHMSA attempted to assert that Express’s alleged violations of this standard were not limited to Express’s failure to implement the recommendations in the KMI Transient Study, but also included other unclear or unspecified alleged transgressions. PHMSA attempted to conflate Item 1 with the violations alleged in Items 2 and 3, both of which relate to MOP exceedances.

In Item 2, PHMSA alleged that Express exceeded the MOP on two occasions in violation of Section 195.406(a)(3). However, as described in greater detail in Section V of this Post-Hearing Brief, those two incidents were allowable surges of brief duration within allowable limits. The pipeline pressure did not exceed 110% of MOP, and, indeed, barely exceeded 100% of MOP. Therefore, the allegations contained in Item 2 are not pertinent to the assertions in Item 1.

In Item 3, PHMSA found that Express violated Section 195.406(b), alleging that it did not provide adequate controls to prevent the operating pressure of the pipeline system from exceeding 110% of the MOP because the pressure (relief) set points for six pressure safety valves (“PSVs”) were set too high. Express acknowledged that the relief set points were set too high, confirmed that the relief set points were corrected prior to the issuance of the NOPV, and accepted the violation, despite that fact that there were no exceedances of 110% of MOP. At the hearing, Jim Ramnes, Senior Compliance Advisor, explained that the incorrect settings that were the basis for Item 3 were on *thermal* PSVs, which do *not* protect the pipeline from potential surge events. Therefore, Mr. Ramnes explained that the incorrect set points on the *thermal* PSVs did not in any way increase or otherwise affect the likelihood or severity of any surge events or other deviations from normal operations. As explained at the hearing, surge protection requires high-capacity and fast-acting relief devices. The *thermal* PSV devices addressed in Item 3 are not high-capacity devices; rather, they are designed to protect the system from thermal overpressure, which does not require high-capacity or fast-acting devices. Therefore, the allegations contained in Item 3 are not pertinent to the assertions in Item 1.

Despite PHMSA’s attempt at the hearing to conflate Item 1 with Items 2 and 3, the language in the NOPV is unequivocal that the alleged violation in Item 1 was limited to the fact that Spectra did not implement the recommendations in the KMI Transient Study when it owned and operated the pipeline. Indeed, it would be improper to bring a violation of Section 195.401(b)(1) for alleged pipeline safety violations that fall under another standard.

Express presented evidence at the hearing that the KMI Transient Study contained only recommendations, not mandates, and Spectra was not required to implement those recommendations. Express presented additional evidence that Spectra operated in compliance with the cited standard.

a. Express Complied with Section 195.401(b)(1)

As stated, the basis of PHMSA’s assertion that Express violated Section 195.401(b)(1) is that Spectra, when it owned and operated Platte Pipeline, failed to implement the recommendations in the KMI Transient Study. Express submitted substantial evidence prior to the hearing demonstrating that it operated in compliance with Section 195.401(b)(1). Express also presented witness testimony further demonstrating compliance. The primary Express witness was Terry Delong, Manager Systems Integrity, who worked for KMI, Spectra, and Enbridge, so Mr. Delong has historical knowledge and was able to provide proper context to the KMI Transient Study. Stan Ziemniak, Technical Services Operations Specialist, also worked for KMI, Spectra, and Enbridge and provided supporting testimony.

The following are the key takeaways from the evidence presented:

- The KMI Transient Study was commissioned by the prior owner/operator of the pipeline, Kinder Morgan, Inc. (“KMI”). The KMI Transient Study was not commissioned by Spectra. Spectra was not required under the law to comply with the terms of a study commissioned by the prior owner.
- The KMI Transient Study contained recommendations, not mandates. This is evident from the plain language in the KMI Transient Study. Under the law, Spectra was not required to implement recommendations.
- One of the primary recommendations in the KMI Transient Study was to install an Automated Pipeline Shutdown (“APS”) to be set up in the SCADA system if the mainline valves fail-closed.
- Of note, there is no regulatory requirement under Part 195, including under the Control Room Management (“CRM”) standard set forth in Section 195.446, for operators to install an APS. The installation of an APS is a voluntary measure.
- KMI installed an APS at the end of the system at Wood River, IL, but did not install APS at other parts of the system and did not implement any other recommendations, even though KMI continued to operate the pipeline until February 2014.
- Likewise, when Spectra assumed ownership of the pipeline in 2013, and operational control in 2014, Spectra elected not to implement the remaining recommendations.
- Mr. Delong explained that the reason KMI installed APS at the end of the system was because there were no tanks at the end of the Platte Pipeline, so Control Center Operators needed to rely on an open flow path to customers’ tanks when flow was directed to them. Although there is a small relief tank at the end of the pipeline, the installation of APS provided an additional layer of protection for the end of the system.
- Mr. Delong further stated that the APS was not considered mandatory, because KMI and Spectra had multiple measures in place to guard against surges exceeding 110% of MOP. Rather, the APS was considered a “belts and suspenders” approach to provide an additional layer of surge protection. Mr. Delong emphasized that the additional control measures were not accounted for in the KMI Transient Study.

- Consistent with Mr. Delong’s testimony, the KMI Transient Study was based on a 2007 model, prior to the CRM standard set forth in Section 195.446 that PHMSA adopted on December 3, 2009.
- Accordingly, the KMI Transient Study did not factor in multiple overpressure controls that were in place when KMI and Spectra operated the pipeline system, including certain CRM controls and procedures.
- Mr. Delong and Mr. Ziemniak provided testimony regarding the multiple procedures implemented by Spectra, which were included in the record as Exhibit 1-A and Group Exhibit 1-B. Mr. Delong provided a detailed explanation why these procedures protected against surges exceeding 110% of MOP.
- Indeed, there is no evidence of surges exceeding 110% of MOP. In Item 2, discussed in greater detail below, the two alleged incidents involved surges that barely exceeded 100% of MOP and did not come close to approaching 110% of MOP. While an operator cannot necessarily prove compliance with a standard by pointing to zero incidents, this does corroborate that the surge protections in place were effective, as required under code.
- The KMI Transient Study concluded that due to no surge mitigation at certain pump stations, the pipeline would not comply with ASME B31.4-2009 (“Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids”) if the mainline valves fail-closed, because the maximum surge pressure would exceed 110% of the MOP.
- The KMI Transient Study did not identify any other alleged non-compliance with ASME B31.4-2009, and did not allege any violations of any PHMSA standards.
- However, ASME B31.4 is not incorporated by reference in Section 195.401(b)(1). ASME B31.4 is only incorporated by reference in Sections 195.110(a) and 195.452(b). (*See* 49 C.F.R. § 195.3). Therefore, it is inappropriate for PHMSA to rely on this consensus standard to support a violation of Section 195.401(b)(1).
- In 2018, after Enbridge assumed ownership of the pipeline asset, Enbridge commissioned its own transient study, which contained recommendations, but not mandates. Enbridge implemented the recommendations set forth in its own transient study, not the KMI Transient Study. While those recommendations were not required to be implemented under Part 195, Enbridge implemented those recommendations as good business practice and to provide an additional layer of overpressure protection in the Platte Pipeline.

b. PHMSA Did Not Meet Its Burden of Proof, Burden of Production, and Burden of Persuasion that Express Violated Section 195.401(b)(1)

PHMSA did not even come close to meeting its burden of proof. Section 195.401(b)(1) provides that an operator must make repairs within a reasonable time whenever it discovers any condition that could adversely affect the safe operation of its pipeline system. However, the KMI Transient Study does not in any way identify a condition that could adversely affect the safe operation of the system for each of the reasons stated above. The KMI Transient Study cannot be read in a vacuum, but rather must be understood in context. It was commissioned in 2007 and dated 2011, and did not factor in multiple other protections to guard against surges exceeding 110% of MOP.

PHMSA relies solely on the actual KMI Transient Study to support the violation. While PHMSA points to the two alleged MOP exceedances alleged in Item 2, those events do not in any way support PHMSA’s position. Those two events were allowable surges that barely exceeded

100% of MOP, were less than two minutes in duration, and did not exceed 110% of MOP. Those types of events are part of normal pipeline operations. PHMSA also attempts to point to the incorrect relief set points for six *thermal* PSVs alleged in Item 3, but those incorrect settings also do not support PHMSA's position. The incorrect set points, which were subsequently corrected, involved a different type of valve which is designed to protect from thermal overpressure and is not designed to protect against surges. Simply put, the *thermal* PSVs identified in Item 3 are not high capacity or fast acting devices.

Of importance, the KMI Transient Study contained *recommendations*, not mandates. The language in the study was clear. Neither KMI, Spectra, nor Enbridge were required to implement those recommendations. Implementation was strictly voluntary. Mr. Delong explained why KMI implemented APS at the end of the pipeline system but did not implement other recommendations, testified that the recommendations were a "belts and suspenders" approach to provide an additional voluntary layer of protection, and further testified that Spectra had other significant protections in place to guard against transient events exceeding 110% of MOP that were not included or considered in the KMI Transient Study. The fact that PHMSA did not reference any transient events (surges) exceeding 110% of MOP reflects that the controls in place were effective.

At the hearing, PHMSA made passionate arguments to explain why it was good practice to install APS, as recommended in the study. Those passionate arguments, however, do not prove a violation of a PHMSA standard. Indeed, under Part 195, there is *no* requirement to install an APS; implementation of APS is strictly voluntary.

In conclusion, there is a fundamental difference between voluntary measures that improve pipeline efficiency and safety, and mandatory measures. Neither Part 195 nor the KMI Transient Study mandates its implementation. There simply is no legal basis to find a violation of Section 195.401(b)(1) for failing to implement *recommendations* set forth in an older study, commissioned by a prior operator, which did not factor in certain controls and protections in the system, to address hypothetical scenarios that did not occur. PHMSA failed to satisfy its burden of proof, burden of production, and burden of persuasion.

V. Item 2 – Express Did Not Violate Section 195.406(a)(3)

In Item 2, PHMSA asserts that Express violated Section 195.406(a)(3), which provides:

- (a) Except for surge pressures and other variations from normal operations, no operator may operate a pipeline at a pressure that exceeds any of the following:
- (3) Eighty percent of the test pressure for any part of the pipeline which has been pressure tested under Subpart E of this part.

In the NOPV, PHMSA alleged that Express exceeded MOP (80% of the test pressure) on twenty-two occasions. Prior to the hearing, Express submitted documentation demonstrating that the twenty-two cited incidents were either surges or other variations from normal operations, as permitted under Section 195.406(a), were permissible calibrations, or otherwise did not exceed MOP. At the hearing, PHMSA either agreed with Express's documentation or otherwise elected not to pursue violations for twenty of the twenty-two alleged incidents. PHMSA stated that it still had questions regarding the following two incidents at Marysville Pump Station:

Month of Pressure Exceedance	Hydrostatic Test Pressure (psi)	80% of Test Pressure	Actual Discharge Pressure (psi)
1/2015	1424	1139.2	1144.138551
1/2016	1424	1139.2	1166.845526

Express presented evidence at the hearing that the two remaining incidents were permissible surges or other variations from normal operations, or otherwise did not exceed MOP.

a. Express Complied with Section 195.406(a)(3)

The language of Section 195.406 is crystal clear that an operator may exceed 100% of MOP, but may not exceed 110% of MOP, if there is a surge or other variation from normal operations. Section 195.2 defines surge pressure as the “pressure produced by a change in velocity of the moving stream that results from shutting down a pump station or pumping unit, closure of a valve, or any other blockage of the moving stream.”

At the hearing, Express presented testimony from Stan Ziemniak, Technical Services Operations Specialist, in which Mr. Ziemniak explained why the two referenced events were not violations of Section 195.406(a)(3). In reviewing the data, Mr. Ziemniak explained that there was a change in the SCADA system after Enbridge became the pipeline owner. In August of 2017, the legacy OASyS SCADA system was replaced by a new CygNet SCADA system. Historical pressure data from the OASyS system was archived to a PI database with a granularity of one-minute intervals.

Regarding the January 2015 incident, Mr. Ziemniak testified that the highest recorded discharge that he was able to identify from the archived SCADA data was 1129.9 psi, which was less than MOP of 1139.2 psi. Mr. Ziemniak recognized, however, that the data provided at the time of PHMSA’s inspection reflected that the highest recorded discharge was 1140.8 psi, which was 100.1% of MOP. To explain this minor discrepancy, Mr. Ziemniak testified that the archived data shows that the duration of the surge was less than one minute, because the discharge spike of 1140.8 psi must have occurred between two consecutive archived pressure data values. This explanation also appears in Note 5 of Exhibit 2-A (updated version). Therefore, Express presented evidence that this very brief incident (less than 1 minute) and very minor exceedance (only 100.1% of MOP) was an allowable surge consistent with Section 195.406(a). PHMSA did not present any evidence to counter Mr. Ziemniak’s explanation.

Regarding the January 2016 incident, the MOP was 1139.2 psi, and the actual recorded discharge was 1166.8 psi, which equates to 102.6% of MOP. In this case, the archived SCADA data matches the data provided to PHMSA at the time of the inspection. Mr. Ziemniak presented evidence and testimony that this incident lasted less than two minutes, which again is consistent with an allowable surge. PHMSA did not present any evidence to refute the evidence presented by Mr. Ziemniak at the hearing.

Following the hearing, Mr. Ziemniak conducted a further review of the amp data for the Marysville pumps and found that a smaller horsepower (“HP”) pump was turned off, and then a larger HP pump was started, which caused the brief pressure surge. More specifically, Main Pump 1 (“MP1”) with 450 HP was turned off, and then MP2 with 1500 HP was started. The brief two-minute surge event was a result of this start-up. (Marysville Pump Amp Trends for January 2016).

In short, Express provided data or an explanation regarding the twenty-two incidents alleged in Item 2 of the NOPV. PHMSA elected to proceed with the hearing regarding only two of the incidents, and Express provided evidence and reasonable explanations of what had occurred in January 2015 and January 2016, demonstrating that both incidents were allowable surges of very brief duration. For the reasons stated, there was no violation of the standard.

b. PHMSA Did Not Meet Its Burden of Proof, Burden of Production, and Burden of Persuasion that Express Violated Section 195.406(a)(3)

At the hearing, PHMSA stated that they needed more information to be satisfied that the two referenced incidents amounted to allowable surges. PHMSA stated that there are various alternative explanations for the exceedances besides an allowable surge, such as intentional manipulation of data. PHMSA, however, did not present any evidence to support its contention that there can be other explanations, and specifically did not present any evidence of intentional manipulation of data. Mr. Ziemniak stated that he has no reason to believe that anyone manipulated data, and further explained that it is not reasonable to believe that raw historical data could be manipulated in this context. Mr. Ziemniak said that to change such data in OASyS would have required specialized knowledge because the data is compressed, as well as specialized security credentials. Furthermore, the 2016 monthly high that was reported to PHMSA matches the monthly high that current data shows, which validates the historical data.

PHMSA acknowledged at the hearing that there should be a substantial reduction of the proposed civil penalty because it only alleged two exceedances instead of 22 incidents. Express contends, however, that there was no violation, as the two incidents were allowable surges under Part 195.

Under the law, PHMSA bears the burden of proof, burden of production, and burden of persuasion. PHMSA failed to satisfy its burden in all respects. Express provided evidence demonstrating compliance, and PHMSA relied on speculation of possible non-compliance, without producing evidence, in an attempt to rebut Express's evidence. Such speculation is clearly inadequate and should be disregarded.

VI. Item 8 – Express Did Not Violate Section 195.583(b)

In Item 8, PHMSA asserts that Express violated Section 195.583(b), which provides:

(b) During inspections you must give particular attention to pipe **at** soil-to-air interfaces, **under** thermal insulation, **under** disbonded coatings, **at pipe supports**, **in** splash zones, **at** deck penetrations, and **in** spans over water.

(49 C.F.R. § 195.583(b)) (emphasis added). Contrary to the unambiguous language of Section 195.583(b), PHMSA alleged in the NOPV that Express failed to give particular attention to three spans by failing to inspect **under the pipe supports** at these three spans.

At the hearing, PHMSA reiterated that Express was required to inspect **under** the pipe supports, not just **at** the pipe supports. PHMSA, however, did not introduce any evidence to support its novel interpretation of the word “at” which is specifically used in the standard.

Express presented evidence that it inspected the pipe supports and the pipe at the pipe supports at the three spans as part of its atmospheric corrosion inspections in accordance with the cited standard. Express also presented evidence that it was not required to move or adjust the pipe to inspect under the pipe supports.

a. Express Complied with Section 195.583(b)

Express conducted atmospheric corrosion inspections at the three spans identified in Item 8, and specifically conducted compliant inspections of the pipe at the pipe supports, as required under Section 195.583(b). At the hearing, Brenden Jehlicka, Regional Compliance Advisor, testified that Express inspected the pipe supports and the area of pipe at the pipe supports at three locations: 1) Meng Span in Hiawatha, KS (inspection conducted by Acuren on March 12, 2014); 2) Span 9-1446+87-9350 in Lincoln County, MO (inspection conducted by Spectra on January 16, 2014); and 3) Span 6-5526+67-5260 in Buchanan County, MO (inspection conducted by Spectra on April 7, 2015). Mr. Jehlicka went through each Atmospheric Corrosion Inspection report to identify the nature and scope of the inspections, specifying that each inspection included the pipe supports and the area of the pipe at the supports. For the Meng Span, Mr. Jehlicka explained that Acuren adjusted the pipe and pipe supports to inspect under two of the nine supports, and further testified that there was no evidence of significant corrosion at the pipe supports, all the wear pads were in good condition, the pipe supports did not show signs of corrosion product buildup, and the pipe support cradles were all in good condition as evidenced by the photographs and the *Condition of the Pipeline and Pipe Supports* section of the report. See Exhibit 8-A at p. 7. The report demonstrated that Spectra and its vendor, Acuren, gave particular attention to the pipe at the pipe supports of the Meng Span. For the other two spans, Mr. Jehlicka explained that it was not necessary to remove the child guards to inspect the pipe at the pipe supports. Mr. Jehlicka also testified that the atmospheric inspections gave particular attention at the child guards as evidenced by the condition reports and photographs. Mr. Jehlicka also testified that there was no sign of corrosion product buildup in any of the atmospheric inspection photographs or in any of the photographs taken during the PHMSA field audits. Mr. Jehlicka testified that in 2017 the child guards were removed from Span 9-1446+87-9350 and an atmospheric inspection only identified minor pitting corrosion at the child guard attachment location. PHMSA acknowledged at the hearing that there was no significant corrosion at this location. See Exhibits 8-A, 8-C, and 8-D, respectively. PHMSA did not rebut Mr. Jehlicka's testimony that Express conducted atmospheric corrosion inspections of the pipe at the pipe supports. Rather, PHMSA asserted that Express was also required to inspect under the pipe supports.

Len Krissa, Supervisor External Corrosion Prevention, testified that Express inspects the pipe supports and the areas at the pipe supports. Mr. Krissa explained that if there is evidence of corrosion product buildup at the pipe support, Express will adjust the pipe support and inspect the interface between the pipe and pipe support. If there is no such evidence, Express will not inspect under the pipe support. Mr. Krissa emphasized that Section 195.583(b) does not require operators to inspect under pipe supports, explained that it is not always feasible or reasonable to inspect under pipe supports, and testified that adjusting or moving a pipe to look under the pipe support can create a greater hazard, so it is not preferable to make these adjustments or movements to the pipe and pipe support unless necessary.

In short, it is unrebutted that Express complied with Section 195.583(b) by giving particular attention to the pipe at the pipe supports. Express was not required to inspect under the pipe supports.

b. PHMSA Did Not Meet Its Burden of Proof, Burden of Production, and Burden of Persuasion that Express Violate Section 195.583(b)

PHMSA did not challenge or present evidence that Express failed to inspect the pipe supports or the pipe at the pipe supports. Rather, PHMSA asserted that operators must inspect under pipe supports, despite the clear language in Section 195.583(b) that operators must inspect at pipe supports. As stated, Section 195.583(b) uses precise language to instruct pipeline operators where to conduct atmospheric corrosion inspections on the pipeline. The regulation specifically states that operators are required to conduct atmospheric corrosion inspections of the pipe as follows:

- **AT** soil-to-air interfaces;
- **UNDER** thermal insulation;
- **UNDER** disbonded coatings;
- **AT pipe supports**;
- **IN** splash zones;
- **AT** deck penetrations; and
- **IN** spans over water.

If PHMSA had intended operators to inspect **under** pipe supports, PHMSA would have specified that requirement clearly in the standard in the same way that PHMSA spelled out that operators are required to inspect **under** thermal insulation and **under** disbonded coatings. We have reviewed traditional dictionary definitions of the word “at” and cannot find any that defines “at” to mean “under,” as each word has a distinct meaning. Copies of several dictionary definitions of the word “at” are attached hereto and incorporated herein. Simply put, **at** does not equal **under**, and Section 195.583(b) is not vague or ambiguous. The law is well-settled that a reviewing court will not afford deference to an agency’s interpretation of its own regulation if the plain language of the regulation is unambiguous. *See Auer v. Robbins*, 519 U.S. 452 (1997); *ExxonMobil Pipeline Co. v. U.S. DOT*, 867 F.3d 564 (5th Cir. 2017). Therefore, PHMSA’s arbitrary interpretation of the word “at” in this enforcement proceeding should not be afforded deference.

Furthermore, to the best of Express’s knowledge and belief, PHMSA has not published any guidance that states that operators must inspect under pipe supports. To the contrary, PHMSA’s Part 195 Corrosion Enforcement Guidance (“Enforcement Guidance”) repeats the language of Section 195.583(b), as follows: “For onshore pipelines, the operator should give particular attention to corrosion at soil-to-air interfaces, under thermal insulation, under dis-bonded coatings, and **at pipe supports**.” (Enforcement Guidance at p. 94, emphasis added.) The Enforcement Guidance is instructive. In the guidance information section, PHMSA provides ten separate informational statements. In the first informational statement, PHMSA expressly recognizes that the “most difficult areas to inspect may be under pipe supports and under thermal insulation. Atmospheric corrosion may be concealed under dis-bonded coatings.” In the next nine informational statements, PHMSA only addresses inspections under thermal insulation, highlighting the difficulties. In the second statement, PHMSA stated in bold font:

Corrosion Under Thermal Insulation – Note: Operators need not completely remove all thermal insulation to satisfy the monitoring requirements for atmospheric corrosion. If an operator does not remove all insulation from thermally insulated pipe, the operator should identify avenues allowing

moisture intrusion into the pipe/insulation system, pipe orientation or junctions between insulated and non-insulated pipe and components. (Enforcement Guidance at p. 94.)

Therefore, PHMSA acknowledges that it is not required to inspect under all the thermal insulation to satisfy the inspection standard, despite the plain language of Section 195.583(b) that operators must inspect under thermal insulation. Further, reading the ten informational statements together and in context, PHMSA instructs operators to employ a common sense approach to inspecting under thermal insulation, taking into account all observable conditions and employing methods set forth in American Petroleum Institute (“API”) 570 – Piping Inspection Code: In-service Inspection, Rating, Repair, and Alteration of Piping Systems; and API 574 – Inspection Practices for Piping System Components, even though PHMSA recognized in the Enforcement Guidance that those API standards are *not* incorporated by reference in Section 195.583(b). Of particular note, the Enforcement Guidance provides zero instruction to operators or PHMSA inspectors on conducting atmospheric corrosion inspections at pipe supports versus under pipe supports, other than acknowledging the difficulty of inspecting under pipe supports. (Enforcement Guidance at pp. 94-97.) Similarly, in the examples of probable violation section of the Enforcement Guidance, PHMSA does not state that a violation should be issued for failing to inspect under pipe supports. To the contrary, PHMSA states that a violation should be issued for failure to give attention at pipe supports, not under pipe supports. The remainder of the examples focus exclusively on inspections under thermal insulation. (Enforcement Guidance at pp. 97-98.) Therefore, PHMSA’s own Enforcement Guidance does not support issuing an NOPV for failure to inspect under pipe supports.

During the open discussion at the hearing, PHMSA personnel deemphasized any risk or hazard associated with adjusting or moving the pipe to inspect under pipe supports, but did not introduce any evidence that it is safe to undertake that task. Of note, PHMSA specifically asked Express personnel if they evaluated API 570 and API 574. First, neither API 570 nor API 574 is incorporated by reference in Part 195, and more specifically, neither is incorporated by reference in Section 195.583(b). Therefore, it is inappropriate to rely on those consensus standards to establish a violation of Section 195.583(b). Second, neither API standard supports adjusting or moving pipe to inspect under pipe supports. To the contrary, API 570 and API 574 are entirely consistent with Express’s approach to atmospheric corrosion inspections of pipe at the pipe support.

API 570 addresses, among other things, pipe inspection methods and practices. Section 5.5.5 of API 570 covers external visual inspections, as follows:

An external visual inspection is performed to determine the condition of the outside of the piping, insulation system, painting, and coating systems, and associated hardware; and to check for signs of misalignment, vibration, and leakage. **When corrosion product buildup or other debris is noted at pipe support contact areas, it *may* be necessary to lift the pipe off such supports for thorough inspection.** When lifting piping that is in operation, extra care should be exercised and consultation with an engineer may be necessary. (Emphasis added.)

This language makes several points abundantly clear: First, visual inspection of corrosion product buildup at the pipe supports is a valid method for determining when it may be necessary to perform further inspection at the pipe supports. Mr. Krissa testified that this is the Company's approach, which is above and beyond PHMSA's requirements in Section 195.583(b) to inspect at pipe supports. Second, API 570 does not mandate inspection under pipe supports. Rather, API 570 states that it *may* be necessary if there are signs of corrosion product buildup. Third, API 570 recognizes the risk of moving pipe to inspect under pipe supports. This risk factor is entirely consistent with the testimony of Express personnel describing the risk associated with moving pipe to inspect under pipe supports. Thus, the clear language of API 570 supports Express's interpretation of Section 195.583(b), and discounts PHMSA's interpretation of its own rule.

API 574 is even more compelling in favor of Express's interpretation. Section 10.1.4 of API 574 addresses inspections of pipe supports. API 574 states repeatedly that the inspections should include the pipe support and signs of corrosion at the touch point (e.g., the area at the pipe support). While API 574 recognizes the potential merits of moving the pipe to check for corrosion under the support, Section 10.1.4.1(b) specifically identifies the risks associated with moving the pipe, and further states:

Lifting pipe from supports or touch points using a crane or other lifting equipment can allow for a more accurate determination of condition and extent of damage. Lifting a pipe, which may already have suffered corrosion, can be hazardous and should be carried out with extreme caution. Safety precautions for lifting the pipe will vary depending on the fluid contained, line pressure, anticipated pipe condition, and location on site/off site. This should involve a job safety analysis prior to performing the task. **In some instances, the pipe lifting may be considered too hazardous for particular fluids (e.g. propane), or for particular services if the line cannot be depressurized.** (Emphasis added).

Atmospheric corrosion inspections in accordance with Section 195.583 are non-destructive visual examinations of the exterior of the pipe. Therefore, these inspections are conducted when the pipe is fully operational and pressurized; the pipeline is not depressurized to perform this task. As such, there is an operational risk, as recognized in API 574, to move or adjust the pressurized pipe.

In sum, API 574 provides that the inspections should include the pipe supports and touch points, does not mandate inspections under the pipe supports, and expressly highlights the risks associated with moving the pipe to inspect under the supports. Because API 570 and API 574 are not incorporated by reference in Part 195, PHMSA cannot rely on these consensus standards to prove that Express violated Section 195.583(b). Nonetheless, these consensus standards clearly support Express's interpretation of Section 195.583(b).

At the hearing, PHMSA also cited two unrelated inspections of different operators involving pipe supports, and stated that those inspections supported its interpretation that operators must inspect under pipe supports. Contrary to PHMSA's assertion, neither of those inspections is on point or dispositive. In the first matter, *In The Matter of Kinder Morgan Energy Partners, L.P.*, CPF No. 3-2007-5020, the operator was cited for violating Section 195.583(b) for not properly classifying and correcting corrosion discovered at the pipe support during an atmospheric

corrosion inspection, resulting in a release of butane. There is nothing in the Final Order addressing whether an atmospheric corrosion inspection must include the area at the pipe support versus under the pipe support. The operator only appealed the amount of the civil penalty, not the violation.

The second matter was not an NOPV. Rather, it was an incident failure investigation of another operator, *Magellan Pipeline*, involving a jet fuel release from a pinhole leak under a pipe support that occurred on November 25, 2012. PHMSA emphasized the unique design of the pipe support, including that it was partially welded, and reached the following conclusion:

Pipe supports from a bridge structure typically involve a hanger and roller assembly, allowing for some flexibility between the bridge structure and the pipeline. In this case, however, the pipeline was rigidly affixed to the bridge. The pipe support was of a unique U-shaped design in which the curved area was fillet-welded to the pipe and the straight portions of the U-shape were welded to a plate that was bolted to the bridge. The design created crevices and did not shield the carrier pipe from the elements or road salt applied to the bridge. In addition to the poor design of the pipe hanger, its location on the bridge did not allow convenient atmospheric corrosion inspections. (*Magellan Pipeline Company*, Failure Investigation Report at p. 7.)

There was no notation in the report regarding whether the scope of the atmospheric corrosion inspections should be “at” or “under” the pipe supports. Indeed, PHMSA did not find that there was a violation of Section 195.583(b), and PHMSA did not issue an NOPV to the operator. Thus, PHMSA’s reliance on this incident to support its assertion that Express violated Section 195.583(b) is misplaced.

Furthermore, both incidents are factually distinct. In both cases, the corrosion occurred under a wear pad or patch which had been partially tack-welded to the pipe. None of the three spans identified in PHMSA’s findings involving Express are similar to the two unrelated releases cited by PHMSA involving the other two operators. As reflected in the atmospheric corrosion inspection reports, Express had verified an isolation device was in place at the time of the atmospheric corrosion inspections to eliminate metal-to-metal contact at support locations. Therefore, the two examples presented by PHMSA support that Express’s inspections were consistent with the standard.

In conclusion, PHMSA does not deny that Express gave particular attention to the pipe at the pipe supports at the three cited spans. Indeed, the atmospheric corrosion reports for all three spans make it clear that Express inspected the pipe supports and the pipe at the pipe supports. PHMSA contends, however, that Express violated Section 195.583(b) for not inspecting under the pipe supports. In making this argument, PHMSA ignores the plain language of the standard, which clearly and unequivocally states that the operator must inspect the pipe at the pipe support, not under the pipe support. PHMSA’s guidance is consistent with Section 195.583(b), and does not provide that inspections must be under the pipe supports. While the two cited API consensus standards are not incorporated by reference in Part 195, they support Express’s position that an operator is not required to inspect under the pipe supports, and further support Express’s position that there may be risk associated with moving the pipe to inspect under the supports. Finally, the

two releases involving other operators that PHMSA cited to support its position are not dispositive. If anything, they support Express's position that there is not a requirement under Section 195.583(b) to inspect under pipe supports. The *Magellan Pipeline* incident investigation also supports Express's position that there was no violation for failing to inspect under a pipe support, because PHMSA did not cite the operator.

c. PHMSA's Enforcement Interpretation of Section 195.583(b) Is Arbitrary, Capricious, and an Abuse of Discretion

PHMSA's interpretation of Section 195.583(b) that operators must inspect under pipe supports, in contravention of the plain language of the regulation that instructs operators to inspect the pipe at pipe supports, is arbitrary, capricious and an abuse of discretion. If this matter were to be appealed to a reviewing court under the Administrative Procedure Act ("APA"), the court would assess whether PHMSA provided fair notice to the regulated community of its interpretation of its own regulation. 5 U.S.C. 554(b); *ExxonMobil Pipeline Co. v. U.S. DOT*, 867 F.3d 564 (5th Cir. 2017).

Here, PHMSA did not issue any guidance or interpretations directed to the regulated community that operators are required to inspect under pipe supports pursuant to Section 195.583(b). To the contrary, PHMSA's enforcement guidance repeats the plain language of the regulation that operators must inspect the pipe at the pipe supports.

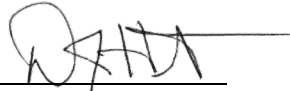
In conclusion, Section 195.583(b) is clear and unambiguous. PHMSA's interpretation of its own regulation in this enforcement proceeding is contrary to the plain language of the standard. PHMSA did not introduce any evidence prior to the hearing or at the hearing to support its interpretation, and failed to meet its burden of proof, burden of production, and burden of persuasion. The API standards that PHMSA referenced do not support PHMSA's claim. API 570 and API 574 are not incorporated by reference, and neither consensus standard mandates moving the pipe to inspect under the pipe support. To the contrary, these standards highlight the risks involved in moving a pressurized pipe. Likewise, the two incidents involving other operators that PHMSA referenced at the hearing do not support PHMSA's claim. In the *Kinder Morgan* matter, the operator only appealed the penalty, not the violation. In the *Magellan Pipeline* matter, PHMSA noted that the operator failed to identify a pinhole leak under a partially welded pipe support, which resulted in a release, but PHMSA did not cite the operator. Given PHMSA's failure to provide notice to the regulated community regarding its unique interpretation of the word "at" to mean "under," PHMSA's interpretation would not withstand scrutiny on review.

VII. Request for Relief

For the reasons set forth in this Post-Hearing Brief and on the record, Express respectfully requests that PHMSA withdraw Item 1, 2, and 8 of the NOPV or that the Hearing Officer recommend dismissal of these Items.

Respectfully Submitted,

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