

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

|  |   |                              |
|--|---|------------------------------|
| In the Matter of                       | ) |                              |
|  | ) |                              |
| Tennessee Gas Pipeline Company, L.L.C. | ) | CPF No. 4-2016-1004          |
|  | ) | Notice of Probable Violation |
| Respondent.                            | ) |                              |
|  | ) |                              |

**RESPONDENT'S  
PRE-HEARING WRITTEN SUBMITTAL**

## **I. Introduction**

The Associate Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA or the Agency), Office of Pipeline Safety (OPS), issued a Notice of Probable Violation (NOPV) dated June 13, 2016, which included a Proposed Civil Penalty and Proposed Compliance Order, to the Tennessee Gas Pipeline Company, LLC (TGP or the Company). The NOPV alleges nine (9) violations of the federal pipeline safety regulations, proposes a civil penalty of one hundred and twenty thousand and five hundred dollars (\$120,500) for Items 1 and 7, and proposes a compliance order outlining four (4) mandatory actions.

The NOPV was issued in response to PHMSA inspections that occurred between February 26, 2015 and August 20, 2015 of TGP's records and facilities in Texas and Louisiana. On July 14, 2016, TGP timely requested a hearing on Item 9 of the NOPV, the proposed civil penalty, and portions of the associated compliance order. TGP's request for hearing raises three issues: whether TGP violated 49 C.F.R. § 192.937(b) as alleged in Item 9 of the NOPV, whether TGP's civil penalty should be reduced or withdrawn, and whether PHMSA's proposed compliance order Item 4 (associated with NOPV Item 9) should be withdrawn and the timeframe for proposed compliance order Item 3 be extended.

TGP shares PHMSA's commitment to pipeline safety and takes any allegation of violation seriously. For the reasons set forth below, TGP respectfully requests that Item 9 be withdrawn; the proposed civil penalty be withdrawn or reduced; and the proposed compliance order Item 4 be withdrawn and the timeframe for proposed compliance order Item 3 be modified. The Company does not contest Items 1-8 of the NOPV.

## **II. TGP Conducted Periodic Evaluations in Compliance with 192.937(b)**

NOPV Item 9 is based on a misapplication of the law as well as a misunderstanding of the facts. The regulation at issue, 49 C.F.R. § 192.937(b), is straightforward. It requires operators to conduct a periodic evaluation "as frequently as needed to assure the integrity of each covered segment." TGP complied with this requirement through periodic annual reviews of its high consequence area (HCA) segments that considered, among other things, preventive and mitigative measures, to assure the integrity of each covered segment.

### **A. Applicable Law**

PHMSA's NOPV Item 9 alleges that TGP violated 49 C.F.R. § 192.937(b) by failing to reevaluate the need for remote controlled valves (RCVs) and automatic shut off valves (ASVs) in light of changes to HCAs that occurred after 2007. That regulation requires an operator to conduct a "periodic evaluation as frequently as needed to assure the integrity of each covered segment" and use the results to identify the threats specific to the covered segment and the risk represented by those threats. 49 C.F.R. § 192.937(b). An operator must periodically consider various factors including the results of prior integrity assessments, data integration and risk assessment information, and decisions about remediation and additional preventive and mitigative measures. *Id.*

Nowhere does 49 C.F.R. § 192.937(b) require an operator to reevaluate its separate one-time determination regarding RCVs and ASVs pursuant to 49 C.F.R. § 192.935(c), much less set forth a timeframe for doing so. In fact, 49 C.F.R. § 192.937(b) does not even mention RCVs and ASVs. Under 49 C.F.R. § 192.935(c), a separate regulation notably not alleged in the NOPV, operators must conduct a one-time risk analysis considering certain risk factors to determine whether an ASV or RCV would be an efficient means of adding protection to the HCA in the event of a gas release and, where it would, the operator must install the ASV or RCV. 49 C.F.R. § 192.935(c) (requiring operators to consider certain risk factors, including “swiftness of leak detection and pipe shutdown capabilities, the type of gas being transported” among others).

A different subsection of this regulation, 49 C.F.R. § 192.935(a), relates generally to additional measures that an operator must take on an HCA segment, referred to as preventive and mitigative (P&M) measures. Section 49 C.F.R. § 192.935(a) requires that an operator perform a risk analysis using the approaches in industry standard ASME/ANSI B31.8S to consider additional measures in HCAs beyond those already required by Part 192. These measures include, among other things, installing ASVs or RCVs where warranted and supported by the ASME/ANSI B31.8S risk analysis. The results of an operator’s separate one-time determination under 49 C.F.R. § 192.935(c) (considering specific factors beyond those outlined in ASME) informs this analysis. Where ASVs and RCVs are not warranted, however, they are not required and there is no requirement to update the determination performed under 49 C.F.R. § 192.935(c). These regulations are summarized in Exhibit 1, Summary of PHMSA ASV/RCV Risk Analysis and Continual Evaluation Regulations.

PHMSA’s NOPV in this instance conflates two separate and independent regulatory requirements to allege a violation of under NOPV Item 9, without support in the regulations, guidance, or prior enforcement. The interpretation set forth in the NOPV is different than anything PHMSA has articulated previously and different from the way most of the industry has interpreted the regulations. There is no regulatory guidance or enforcement that applies the continual evaluation requirements at 49 C.F.R. § 192.937(b) to an operator’s one-time determination regarding whether ASV and RCV are appropriate at 49 C.F.R. § 192.935(c). *See e.g., Exhibit 2, PHMSA Notice of Proposed Rulemaking, 68 Fed. Reg. 4278 (Jan. 28, 2003)(excerpts); PHMSA Final Rule, 68 Fed. Reg. 69778 (Dec. 15, 2003)(excerpts).*

Further, neither of these regulations require an operator to reevaluate its determination regarding ASV and RCVs or set forth a timeframe for doing so and there is no relevant guidance or enforcement that clarifies the issue. PHMSA discussion of the ASV and RCV analysis under 49 C.F.R. § 192.935(c) merely (1) “acknowledges generic work, some sponsored by RSPA/OPS that concluded that installation of such valves is usually not cost-beneficial,” (2) explains that PHMSA “does not expect that operators will perform detailed technical analyses that duplicate work done in the generic studies,” and (3) that operators are to “use the generic work as a starting point and then evaluate whether the generic conclusions are applicable to their high consequence area pipeline segments.” *Exhibit 2, at 68 Fed. Reg. 69798 (Dec. 15, 2003).*

It is well established that a regulation must provide a regulated entity with fair notice of the obligations it imposes. If a regulation does not provide “fair warning of the conduct it prohibits or requires,” an agency may not impose liability for violating the regulation. *Gates & Fox Co.,*

*Inc. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency may not enforce regulations according to “what an agency intended but did not adequately express. . . . [The agency] as enforcer. . . has the responsibility to state with ascertainable certainty what is meant by the standards [it] has promulgated.” *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir.1976) (citations omitted). Further, the Administrative Procedure Act (APA) and the courts prohibit PHMSA from articulating a new interpretation of an existing rule without complying with notice and comment rulemaking requirements. *See e.g., Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) (finding that where an interpretation brings with it a change in the substance of a rule, the change requires notice and comment).

## **B. TGP’s Identification and Review of P&M Measures**

The Company complied with 49 C.F.R. § 192.937(b). Pursuant to its Integrity Management Program (IMP) procedures in place at the time, TGP identified P&M measures and implemented them on the TGP system. *Exhibit 3, Kinder Morgan Integrity Management Program, Chapter 11, Preventive & Mitigative Measures*. These measures are reviewed annually by TGP every year. TGP procedures require review in response to certain events including, among other things, “new information providing substantial changes to identified threats or relative risk-ranking.” *Id. at Section 11.1*. The reviews occur annually and consider, on a segment by segment basis, the identified threats and the P&M measures implemented, including whether ASVs and RCVs have been installed, and incorporate new information such as changes to HCAs, etc. *Id. at Section 11.1.1* (to determine whether adequate P&M measures are already implemented in the covered segment to meet the identified threats). During the audit, the 2014 P&M annual review, completed at the end of 2014, was discussed and reviewed with the PHMSA inspector. *Exhibit 4, Abbreviated TGP Annual P&M Review (2014)*.

As to 49 C.F.R. § 192.935(c), which was not alleged in the NOPV, TGP procedures in place at the time required that the Company conduct a one-time risk analysis using the factors set forth in that section to determine whether an ASV or RCV would be an efficient means of protecting an HCA in the event of a release. *Exhibit 3 at Section 11.7*. Pursuant to 192.935(c), TGP determined in 2007 that the application of ASVs and RCVs would not significantly reduce the impact of a pipeline rupture or provide an efficient means of additional safety. *Exhibit 5, Automatic Shut-Off and Remote Controlled Valves Study and Conclusions (2007)*. No changes have occurred to the TGP system that impacted the conclusion of that study.

Despite its conclusions regarding ASVs and RCVs under 49 C.F.R. § 192.935(c) and even though it is not required by PHMSA regulations, TGP voluntarily implements guidance from the Interstate Natural Gas Association (INGAA) regarding the installation of ASVs and RCVs. As such, TGP reviews its system for valves that may protect an HCA on pipelines greater than 12 inches in diameter and where response time to the HCA exceeds 1 hour, among other factors. Consistent with the INGAA guidance, TGP has voluntarily undertaken a project to install auto-close devices across its system, investing an estimated \$1,700,000 to \$2,000,000 annually and installing 20 to 25 auto-close devices each year.

During the time of the audit, this practice was not set forth in TGP’s IMP manual. Although TGP believes that it complied with the applicable IMP regulations—which do not incorporate

the INGAA guidance or require that the 49 C.F.R. § 192.935(c) ASV and RCV study be updated—the Company made a voluntary internal decision to revise its IMP manual in March to (1) follow the INGAA guidance and (2) improve its P&M measure procedures, including requiring that the ASV and RCV study required by 49 C.F.R. § 192.935(c) be updated every 7 years. Accordingly, TGP’s ASV and RCV study required by 49 C.F.R. § 192.935(c) was recently updated and the conclusion remains the same: application of ASVs and RCVs would not significantly reduce the impact of a rupture or provide an efficient means of additional safety. *Exhibit 6, Automatic Shut-Off and Remote Controlled Valves Study and Conclusions (2016)*.

In light of the above, TGP complied with continual evaluation requirements in accordance with applicable law such that it reviews and, where appropriate, updates P&M measures every year in compliance with 49 C.F.R. § 192.937(b). In addition to the exhibits in this submission, the Company will offer testimony at the Hearing in support of these facts. To the extent that PHMSA is articulating a new interpretation of 49 C.F.R. § 192.937(b) to require periodic updating of an operator’s ASV and RCV determination under 49 C.F.R. § 192.935(c) in this enforcement proceeding, it violates the APA and fundamental considerations of fair notice and due process. For these reasons, TGP respectfully requests that Item 9 of the NOPV be withdrawn in its entirety.

### **III. The Proposed Civil Penalty Should be Withdrawn or Reduced**

The NOPV proposes civil penalties associated with Items 1 and 7 of the NOPV in the amount of \$120,500 (\$37,000 and \$83,500 respectively). These penalties are excessive and are not supported by the penalty consideration factors required by the Pipeline Safety Act and PHMSA regulations at 49 C.F.R. § 190.225. TGP requested and was provided with a copy of PHMSA’s pipeline safety violation report (PSVR) for this matter, and although it does not specifically provide numeric penalty calculations, the PSVR provides some insight to Agency’s mitigating factor analysis for each alleged violation (*i.e.*, nature, circumstances, gravity, culpability, and good faith). In addition, PHMSA most recently provided a “Proposed Civil Penalty Worksheet” on November 15, 2016, which outlines numerical penalty calculations for NOPV Items 1 and 8, without detailed explanation or analysis and despite the fact that the NOPV proposes penalties for Items 1 and 7 (not 8). TGP contests the penalty calculation and analysis for Items 1 and 7 and requests that PHMSA make a witness available at the Hearing to discuss the Agency’s analysis.

In addition, the APA requires that respondents to an enforcement pleading be informed of “the matters of fact and law asserted,” which should include a clear statement of the theory on which the agency will proceed with its case, such that respondent understands the issues and is afforded full opportunity to present its defense at a hearing. *5 U.S.C. 554(b); Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). The APA and due process considerations further require that PHMSA comply with the Pipeline Safety Act’s penalty provisions in a consistent manner. PHMSA has failed to meet this standard with respect to the civil penalties alleged in this case and to date has only provided TGP with limited information.

For those reasons, TGP respectfully requests that the proposed civil penalty be withdrawn or reduced.

**IV. The Proposed Compliance Order Should be Modified**

The NOPV proposes a compliance order that includes one item (Item 4) associated with Item 9 of the NOPV. As set forth above, the Company complied with its obligations to continually evaluate the HCA pipeline segments in the TGP system. For that reason, TGP respectfully requests that PHMSA withdraw proposed compliance order Item 4. In the alternative, TGP has satisfied compliance order Item 4 (requiring that the Company “perform [a] study based on [its] current HCA list”) as outlined in Exhibit 6 and explained above.

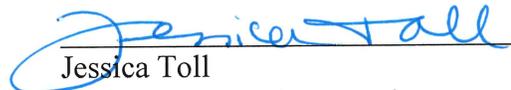
Additionally, at the hearing, TGP would like to discuss the schedule for completing the work on the Brazos River Span noted in Item 3 of the proposed compliance order (in relation to Item 4 of the NOPV). Depending on when PHMSA issues the final order, TGP may require an extension of time to complete this item.

**V. Conclusion and Requested Relief**

For all of the reasons identified above in this Pre-Hearing Written Submittal, and other matters as justice may require, TGP respectfully requests that PHMSA withdraw Item 9 of the NOPV because the Company complied with the continual evaluation regulations, withdraw or reduce the penalty associated with Items 1 and 7 of the NOPV, withdraw proposed compliance order Item 4 and modify the timeframe for proposed compliance order Item 3.

Respectfully submitted,

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## Exhibit Index

1. *Exhibit 1, Summary of PHMSA ASV/RCV Risk Analysis and Continual Evaluation Regulations.*
2. *Exhibit 2, PHMSA Notice of Proposed Rulemaking, 68 Fed. Reg. 4278, 4290-92, 4307 (Jan. 28, 2003)(excerpts); PHMSA Final Rule, 68 Fed. Reg. 69778, 69798-99, 69808-09 (Dec. 15, 2003)(excerpts).*
3. *Exhibit 3, Kinder Morgan Integrity Management Program, Chapter 11, Preventive & Mitigative Measures (2013).*
4. *Exhibit 4, Abbreviated TGP Annual Preventive & Mitigative Review (2014)(unabbreviated version will be made available at the Hearing).*
5. *Exhibit 5, Automatic Shutoff Valve and Remote Controlled Valves Study and Conclusions (2007).*
6. *Exhibit 6, Automatic Shutoff Valve and Remote Controlled Valves Study and Conclusions (2016).*