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**VIA E-MAIL**

August 31, 2018

Kristin Baldwin, Esq., Presiding Official  
U.S. Department of Transportation  
Pipeline and Hazardous Materials Safety Administration  
Office of Chief Counsel  
East Building  
1200 New Jersey Ave, SE  
Washington, DC 20590

**RE: Cheniere Corpus Christi Pipeline's Pre-Hearing Submission,  
CPF No. 4-2018-1002**

Dear Ms. Baldwin:

Pursuant to the Notice of Hearing issued on July 10, 2018, and 49 C.F.R. § 190.209(b)(5), please find attached Cheniere Corpus Christi Pipeline's (CCP) pre-hearing submission for inclusion in the case file in the above-reference matter.

CCP's Pre-Hearing Submission is comprised of the following documents:

1. Revised Statement of Issues
2. Pre-Hearing Brief, with attachments

The following people will attend the September 12, 2018 hearing in Houston, Texas, on behalf of CCP:

1. Michael Weller, Senior Counsel, Cheniere Energy, Inc.
2. Susan Olenchuk, Van Ness Feldman, L.L.P., Counsel for CCP
3. Bryn Karaus, Van Ness Feldman, L.L.P., Counsel for CCP

The following people will be attending and available as potential witnesses for CCP:

1. William A. Bruce, Senior Principal Engineer, DNV GL USA, Inc.
2. Daniel Hamburger, Senior Manager, Pipeline Operations, CCP
3. Brian Luis, Senior Project Manager, Pipelines & Midstream, CCP

CCP has arranged for a transcript of the hearing to be prepared at its own expense, and will provide copies of the transcript to the Presiding Official and PHMSA.

CCP looks forward to the discussion with OPS at the hearing, and to a resolution of this matter. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

/s/ Susan A. Olenchuk

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Counsel for Cheniere Corpus Christi  
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Cc: Mary McDaniel, Director, Southwest Region, OPS, PHMSA (by E-Mail)  
Lauren Clegg, Esq., Counsel, Southwest Region, OPS (by E-Mail)  
Michael Weller, Esq., Senior Counsel, Cheniere Energy, Inc. (by E-Mail)  
Bryn Karaus, Esq., Van Ness Feldman, LLP

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

<b>In the matter of</b>	)	
	)	
<b>Cheniere Corpus Christi Pipeline,</b>	)	<b>CPF 4-2018-1002</b>
	)	
<b>Respondent.</b>	)	
	)	

**Revised Statement of Issues  
of Cheniere Corpus Christi Pipeline**

Set forth below is the Revised Statement of Issues that Cheniere Corpus Christi (CCP) intends to raise at the September 12, 2018 hearing in this case. CCP reserves the right to supplement these issues based upon any additional arguments that are raised at the hearing.

**Item 1. § 192.225 Welding Procedures.**

Whether CCP violated section 192.225 by failing to qualify welding procedures in accordance with section 5 of API Std. 1104, 20th Ed., incorporated by reference in section 192.7.

1. Whether the Office of Pipeline Safety (OPS) misinterprets API Std. 1104 as specifying wall thickness ranges for the qualification welding procedures.
2. Whether OPS misinterprets API Std. 1104 as requiring that the wall thickness groupings listed in section 6.2.2 apply to the qualification of welding procedures.
3. Whether OPS failed to allege facts necessary to establish a violation of section 192.225.
4. Whether OPS has failed to satisfy its burden of proving that CCP failed to qualify welding procedures SMAW-A18A-FLT, SMAW-A28A-FLT, SMAW-A38A-FLT, and SMAW-A48A-FLT based on the record in this case and the provisions of API Std. 1104.

**Item 2. § 192.227 Qualification of Welders and Welding Operators.**

Whether CCP violated section 192.227 by failing to qualify welders to a previously qualified welding procedure in accordance with section 6 of API Std. 1104, 20th Ed., incorporated by reference in § 192.7.

1. Whether OPS failed to allege facts necessary to establish a violation of section 192.227.

2. Whether the alleged violation is inconsistent with statements contained in the Notice and the Violation Report.
3. Whether the alleged violation is inconsistent with the welder multiple qualification provisions of API Std. 1104.
4. Whether OPS has satisfied its burden of proving that CCP failed to qualify welders based on the record in this case and the provisions of API Std. 1104.

**Item 3. § 192.303 Compliance With Specifications or Standards.**

Whether CCP violated section 192.303 by failing to construct a pipeline facility in accordance with written specifications by using unqualified welding procedures and unqualified welders.

1. Whether Item 3 relies on the same evidence asserted to support Item 1 and Item 2 and cannot be considered a different offense.
2. Whether OPS has failed to satisfy its burden of proving that CCP failed to qualify its welding procedures and welders in accordance with the provisions of API Std. 1104 and CCP's written specifications which rely on API Std. 1104.

**Proposed Civil Penalties**

Whether the proposed civil penalties totaling \$185,600 must be withdrawn or reduced.

1. Whether the proposed civil penalties are unsupported by the record of evidence in this case.
2. Whether the proposed civil penalties were determined consistent with applicable laws and regulations.

At the hearing in this case, CCP intends to present evidence and engage with OPS in discussion on these issues. CCP reserves the right to respond to any assertions and arguments introduced by OPS during the proceedings in this case, and to supplement the record accordingly.

Respectfully submitted,

*/s/ Susan A. Olenchuk*

Susan A. Olenchuk  
Van Ness Feldman LLP  
Counsel for Cheniere Corpus Christi Pipeline

August 31, 2018

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

	)	
<b>In the Matter of</b>	)	
	)	
<b>Cheniere Corpus Christi Pipeline</b>	)	<b>CPF No. 4-2018-1002</b>
	)	
<b>Respondent.</b>	)	
	)	

**Prehearing Brief  
of Cheniere Corpus Christi Pipeline**

Pursuant to 49 C.F.R. § 190.211(d) (2017), Cheniere Corpus Christi Pipeline (CCP) respectfully submits its Prehearing Brief regarding the Amended Notice of Probable Violation (Notice), Proposed Civil Penalty, and Proposed Compliance Order, issued by the Office of Pipeline Safety (OPS) on April 16, 2018. The Notice arose out of a construction inspection of CPP’s pipeline (Pipeline) that was performed in early 2017 and raises issues regarding whether CCP violated certain Part 192 regulations related to welding procedures when constructing the Pipeline. The Notice proposes that the Pipeline and Hazardous Materials Safety Administration (PHMSA) assess civil penalties totaling \$185,600.<sup>1</sup>

CCP is committed to public safety and the construction and operation of its pipeline facilities in accordance with PHMSA’s regulations. CCP takes PHMSA’s allegations of a violation seriously. In this case, however, the allegations in the Notice are factually unsupported and inconsistent with the regulations and relevant industry standards. CCP respectfully requests that PHMSA withdraw the Notice and the proposed civil penalties. CCP is not challenging the Proposed Compliance Order which CCP has already implemented.<sup>2</sup>

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<sup>1</sup> Notice at 5.

<sup>2</sup> CCP implemented the provisions of the Proposed Compliance Order by submitting requalified welding procedures, welder qualification information, and a plan for destructively testing a statistically significant number of welds at the Sinton Compressor Station. On March 16, 2018, the Southwest Region Director verbally approved those submissions and indicated that written approval of them would be provided. On April 12, 2018, CCP submitted a report documenting the destructive testing of the welds and demonstrating that all the test specimens were deemed acceptable.

## I. INTRODUCTION

### A. Procedural Background

The Pipeline is a 23-mile, 48-inch diameter natural gas pipeline extending from Sinton, Texas, to its termination at Cheniere's Corpus Christi Liquefaction Terminal (Terminal). The Pipeline delivers gas to the Terminal for liquefaction and export and will receive regasified imported liquefied natural gas. The Pipeline includes the Sinton Compressor Station and three meter stations. The Federal Energy Regulatory Commission authorized construction and operation of the Pipeline and the Terminal in 2014.<sup>3</sup> The Pipeline was placed into service on June 1, 2018.

In January and February 2017, OPS conducted construction inspections of the Pipeline and identified potential issues regarding the qualification of the welding procedures and welders. OPS expressed concern that fillet welding procedures, SMAW-A18A-FLT, SMAW-A28A-FLT, SMAW-A38A-FLT, and SMAW-A48A-FLT, were not qualified in accordance with American Petroleum Institute (API) Standard (Std.) 1104, *Welding of Pipelines and Related Facilities*.<sup>4</sup> OPS also expressed concern that, if the welding procedures were not properly qualified, welders using those procedures may not be properly qualified. The basis for OPS's concern was that the wall thickness range identified in CCP's fillet welding procedure specifications covered pipe wall thicknesses of below 0.188", 0.188" to .750", and above 750".<sup>5</sup> In OPS's view, each of these groups required a separate welding qualification test because wall thickness is an essential variable under API Std. 1104. OPS reiterated these concerns at a follow-up visit in April 2017.

Over a year after performing the initial inspection, OPS issued its initial Notice, Proposed Civil Penalty and Proposed Compliance Order on February 5, 2018. The Notice contained proposed civil penalties totaling \$207,800.<sup>6</sup> On February 26, 2018, pursuant to 49 C.F.R. § 190.209 and PHMSA's Policy Statement on Civil Penalties,<sup>7</sup> CCP requested a copy of the case file, including the Violation Report<sup>8</sup> and any evidence or correspondence relating to the facts giving rise to the alleged violations in the Notice. CCP also requested a copy of the more detailed proposed civil penalty calculation and any other materials (including guidance or policy documents or manuals) that describe how OPS applied the civil penalty assessment factors set,

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<sup>3</sup> *Corpus Christi Liquefaction, LLC and Cheniere Corpus Christi Pipeline, L.P.*, 149 FERC ¶ 61,283 (2014), *vacating order in part*, 154 FERC ¶ 61,163 (2016).

<sup>4</sup> Notice at 2; *see* API, *Welding of Pipelines and Related Facilities: Pipeline Segment*, API Std. 1104, 20th Ed. (Oct. 2005, including errata/addendum (July 2007) and errata 2 (Dec. 2008), reaffirmed (Apr. 2010)) (hereafter, API Std. 1104, 20th Ed.). Sections of API Std. 1104, 20th Ed. are incorporated by reference into Part 192 of PHMSA's regulations. 49 C.F.R. § 192.7(b)(9) (hereafter, API Std. 1104). Excerpts of API Std. 1104, 20th Ed. are attached hereto as Attachment 1.

<sup>5</sup> Notice at 2.

<sup>6</sup> The Notice, Proposed Civil Penalty and Proposed Compliance Order was originally issued on February 1, 2018 in CPF No. 4-2017-1009. On February 5, 2018, OPS withdrew that document and reissued it in CPF No. 4-2018-1002.

<sup>7</sup> Pipeline Safety: General Policy Statement; Civil Penalties, 81 Fed. Reg. 71,566 (Oct. 17, 2016) (Policy Statement on Civil Penalties).

<sup>8</sup> PHMSA, Pipeline Safety Violation Report, CPF# 4-2018-1002 (Feb. 9, 2017) (Violation Report).

forth in 49 U.S.C. § 60122(b) and 49 C.F.R. § 190.225, when determining the amount of the proposed civil penalty.

On March 7, 2018, a portion of the case file was transmitted to CCP's counsel via email.<sup>9</sup> The material provided by OPS included the Violation Report but did not include the more detailed proposed civil penalty calculation supporting the proposed \$207,800 civil penalty. Instead, in a separate email, OPS provided a one-page document recommending a proposed civil penalty of \$185,000 which was \$22,800 less than the \$207,800 civil penalty proposed in the Notice.<sup>10</sup> The document provided no explanation of, or reference to, the statutory factors that must be considered in calculating either of the two proposed civil penalty amounts. The document also lacked discussion of the facts considered in calculating the proposed penalty.

The Violation Report omits important material relevant to the Notice's allegations. For example, Exhibit A of the Violation Report purports to contain section 5 of API Std. 1104, 20th Ed., but omits pages 6-9 which contain several of section 5's provisions, including section 5.4.2.5 which addresses the essential variables applicable to the qualification of welding procedures. In addition, Exhibit E of the February 9, 2017 Violation Report purports to support Item 2 regarding the qualification of welders, but omits section 6.3 of API Std. 1104, 20th Ed., which is the provision governing how the CCP welders were qualified under the multiple qualification provisions. Exhibit E contains only section 6.1 of API Std. 1104, 20th Ed., which does not contain any specific welder qualification provisions.

On April 2, 2018, CCP submitted a timely Request for Hearing, Renewed Request for Documents, and Preliminary Statement of Issues (Request for Hearing) challenging the Notice and the proposed civil penalty. CCP reiterated its request for the more detailed proposed civil penalty calculation that is to be provided to Respondent under PHMSA's Policy Statement on Civil Penalties.

On April 16, 2018, OPS issued an amended Notice reducing the total proposed civil penalty to \$185,600, consistent with the amount reflected in the one-page document that had been previously provided to CCP. In all other respects, the amended Notice is identical to the Notice issued on February 5, 2018. On April 17, 2018, PHMSA counsel provided the proposed civil penalty calculations, a copy of the amended Notice and the Violation Report. On May 3, 2018, via email correspondence, the Presiding Official indicated that she would treat CCP's April 2, 2018 Request for Hearing as a Request for Hearing of the Amended Notice. The hearing in this case is scheduled to be convened on September 12, 2018.

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<sup>9</sup> Ms. Sheila White transmitted the Violation Report to Mr. Michael Weller of CCP and appears to have attempted to transmit the Violation Report to Ms. Susan Olenchuk and Ms. Bryn Karaus of Van Ness Feldman LLP (VNF). However, the email addresses of Ms. Olenchuk and Ms. Karaus were not typed correctly and they did not receive the Violation Report from OPS. Ms. Olenchuk has provided Ms. White the correct email addresses.

<sup>10</sup> Email from Ms. Sheila White, PHMSA to Ms. Susan Olenchuk, VNF (Mar. 7, 2018, 08:51 ET) (forwarding the "One Pager" that Ms. White received from Mr. Chad Hall, a PHMSA inspector, on February 5, 2018), attached hereto as Attachment 2.



## B. API Std. 1104, 20th Ed.

API Std. 1104 is an industry standard that provides methods for producing “high-quality welds through the use of qualified welders using approved welding procedures, materials, and equipment.”<sup>11</sup> API Std. 1104 addresses numerous topics related to welding procedures, including the qualification of welding procedures and the qualification of welders. The qualification of welding procedures is addressed in section 5 of API Std. 1104. The qualification of welders is addressed in section 6 of API Std. 1104.<sup>12</sup> These two independent sections of API Std. 1104, 20th Ed. are incorporated by reference into different sections of Part 192 of PHMSA’s regulations.<sup>13</sup>

The Notice alleges that CCP failed to qualify its welding procedures for fillet welds in accordance with section 5 of API Std. 1104, and that CCP failed to qualify welders in accordance with section 6 of API Std. 1104.

### 1. *Qualification of Welding Procedures Under API Std. 1104.*

Section 5 of API Std. 1104, entitled “Qualification of Welding Procedures for Welds Containing Filler-metal Additives,” addresses the qualification of welding procedures. Welds must be performed pursuant to a detailed written welding procedure specification that has been “qualified” to demonstrate that welds made pursuant to the procedure will have suitable mechanical properties and soundness.<sup>14</sup>

A welder must follow the specifications of a welding procedure, unless the company authorizes a change as provided for in section 5.4 of API Std. 1104. A company must record the details of each qualified welding procedure, including the complete results of the procedure qualification test, or procedure qualification report (PQR).<sup>15</sup> The quality of a weld must be determined using destructive testing.<sup>16</sup>

The information that must be included in a welding procedure specification is described in section 5.3.2 of API Std. 1104. With respect to pipeline diameters and wall thicknesses, section 5.3.2.3 states that “[t]he ranges of outside diameters and wall thicknesses over which the procedure is applicable shall be identified. Examples of suggested groupings are shown in 6.2.2, items d and e.”<sup>17</sup> Because the wall thickness grouping examples described in section 6.2.2 are merely suggested and are not mandatory, an operator is not required to use them and may instead

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<sup>11</sup> API Std. 1104, 20th Ed. at iii; *see also id.* at 1.

<sup>12</sup> Section 5 and section 6 of API Std. 1104, 20th Ed. are attached hereto as Attachment 1.

<sup>13</sup> 49 C.F.R. § 192.7(b)(9). The 21st Edition of API Std. 1104, first published in 2013, has not been incorporated into PHMSA’s regulations.

<sup>14</sup> API Std. 1104, 20th Ed. at 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 4. The wall thickness groupings contained in section 6.2.2 apply to welders who are qualified using the single qualification test. *Id.* at 10, 14.

identify its own wall thickness range or ranges.<sup>18</sup> API Std. 1104 contains no provision specifying any required wall thickness range that must be identified for purposes of section 5.3.2.3.<sup>19</sup>

A welding procedure specification contains “essential variables” that are described in Section 5.4 of API Std. 1104. If any essential variable is changed, the welding procedure must be re-established as a new procedure specification and requalified.<sup>20</sup> The wall thickness range that an operator identifies pursuant to section 5.3.2.3 is an essential variable. If that operator-identified wall thickness range is changed, the welding procedure must be requalified as a new specification.<sup>21</sup>

## 2. *Qualification of Welders Under API Std. 1104.*

Section 6 of API Std. 1104 addresses the qualification of welders. Section 6.1 states that the purpose of welder qualification tests is to “determine the ability of welders to make sound butt or fillet welds using previously qualified procedures.”<sup>22</sup> Section 6.1 states further that “a welder who satisfactorily completes the procedure qualification test is a qualified welder, provided the number of test specimens required by 6.5 have been removed, tested, and meet the acceptance criteria of 5.6, for each welder.”<sup>23</sup> A welder may be qualified under either a single qualification or multiple qualification procedures.

The procedure for a welder single qualification is described in section 6.2 of API Std. 1104. Section 6.2 states, in part, that “[c]hanges in the essential variables described in 6.2.2 require requalification of the welder.”<sup>24</sup> These essential variables include the wall thickness groups set forth in section 6.2.2, items d and e.<sup>25</sup> Therefore, if a welder is qualifying under the single qualification test, the wall thickness groupings specified in section 6.2.2 apply and any change from them require that the welder be requalified.

Multiple qualification is described in section 6.3 of API Std. 1104 and requires that a welder successfully complete two tests. The first test requires that a welder make a butt weld that meets the requirements specified in API Std. 1104. The second test requires that the welder

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<sup>18</sup> Affidavit of William A. Bruce ¶¶ 11-13 (Bruce Aff.), attached hereto as Attachment 3; The API-AGA Joint Committee on Oil and Gas Pipeline Field Welding Practices (Joint Committee) Interpretation at 31, <http://mycommittees.api.org/standards/techinterp/transpipe/Shared%20Documents/1104.pdf> (last visited Aug. 31, 2018) (Interpretation). The Joint Committee is comprised of representatives of API, the American Gas Association (AGA), the Pipe Line Contractors Association, the American Welding Society, and the American Society for Nondestructive Testing.

<sup>19</sup> Bruce Aff. ¶ 11.

<sup>20</sup> API Std. 1104, 20th Ed. at 4.

<sup>21</sup> *Id.* at 7 (stating that “[a] change from one wall thickness group to another constitutes an essential variable.”); Bruce Aff. ¶ 9.

<sup>22</sup> API Std. 1104, 20th Ed. at 10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 14.

“lay out, cut, fit, and weld a full-sized branch-on-pipe connection” pursuant to the standard’s requirements.<sup>26</sup> Both welds must be performed with a pipe diameter of at least 6.625” and with a nominal wall thickness of at least 0.250”.<sup>27</sup> Section 6.3.2 then states that:

A welder who has successfully completed the butt-weld qualification test described in 6.3.1 on pipe with an outside diameter greater than or equal to 12.750 in. (323.9 mm) and a full-size branch-connection weld on pipe with an outside diameter greater than or equal to 12.750 in. (323.9 mm) shall be qualified to weld in all positions; *on all wall thicknesses*, joint designs, and fittings; and on all pipe diameters.<sup>28</sup>

The wall thickness groups listed in section 6.2.2 do not apply to multiple qualification. A welder who qualifies under multiple qualification is qualified on all wall thickness ranges.

### C. Overview of Alleged Violations

The Notice contends that CPP failed to qualify its welding procedures and welders in accordance with section 5 and section 6 of API Std. 1104 in violation of sections 192.225, 192.227, and 192.303 of PHMSA’s regulations.<sup>29</sup>

Section 192.225 requires, in relevant part, that welding be performed by a qualified welder in accordance with welding procedures that are qualified under either API Std. 1104 or section IX of the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPVC).<sup>30</sup> Item 1 of the Notice (at 2) alleges that CCP did not properly qualify four fillet welding procedures in accordance with section 5 of API Std. 1104 because CCP provided a test record for only one of the three pipe wall thickness groupings that were identified in each procedure. According to the Notice, because wall thickness is an essential variable in a welding procedure specification, CCP was required to have a test record for all three wall thickness groups. Item 1 alleges that the failure to provide test records for two of the wall thickness groups meant that CCP failed to qualify each welding procedure.<sup>31</sup> Based on four procedures alleged to be unqualified for two wall thickness groupings, the Violation Report and Proposed Civil Penalty Worksheet<sup>32</sup> allege eight instances of a violation.<sup>33</sup> The Violation Report

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 14-15.

<sup>28</sup> *Id.* at 15 (emphasis added).

<sup>29</sup> Notice at 2-5.

<sup>30</sup> *See* 49 C.F.R. §§ 192.225(a), 192.7(c)(9).

<sup>31</sup> Notice at 2 (stating “there was only one test record for one wall thickness group”). Violation Report at 6 (citing Exhs. B & C) (stating that “[t]he wall thickness tested on the report only covers wall thickness group 3/16” to 3/4” (0.188” to .750”)).

<sup>32</sup> PHMSA – Office of Pipeline Safety – Proposed Civil Penalty Worksheet, Cheniere Corpus Christi Pipeline, (Mar. 22, 2018) (hereinafter, Proposed Civil Penalty Worksheet).

<sup>33</sup> Violation Report at 10; Proposed Civil Penalty Worksheet, Item 1 at 1.

also states that the alleged violation started on September 28, 2015, the date of the first weld coupon test report.<sup>34</sup> The Notice proposes a civil penalty of \$24,100 for Item 1.<sup>35</sup>

Item 2 contends that CCP failed to qualify welders in accordance with section 6 of API Std. 1104 because welders performed their “multi-qualification test” using fillet welding procedure specification SMAW-A28A-FLT, one of the allegedly unqualified procedures.<sup>36</sup> According to the Notice this constituted a violation of section 192.227.<sup>37</sup> The Violation Report and the Proposed Civil Penalty Worksheet identify a total of eleven violations based on the number of welders that CCP unsuccessfully “attempted” to qualify to weld in a compressor station.<sup>38</sup> The Notice proposes to assess a civil penalty of \$53,500 for Item 2.<sup>39</sup>

Reiterating the allegations that CPP failed to qualify welding procedures and welders in accordance with API Std. 1104, Item 3 asserts that CPP failed to construct a pipeline facility in accordance with written specifications as required under CPP’s welding manual.<sup>40</sup> The Notice states that CCP’s Welding Manual requires that welds be performed using qualified welding procedures and by welders qualified for the welding procedure used.<sup>41</sup> According to the Notice, CCP performed 51 welds at the Sinton Compressor Station using an unqualified welding procedure and welders not qualified on that procedure. Specifically, the Notice alleges that the 51 welds were performed on pipe with a wall thickness less than 0.188” using welding procedure SMAW-A28A-FLT, which lacked a destructive test for welds on pipe with that wall thickness.<sup>42</sup> As a result, Item 3 alleges that CCP failed to construct a pipeline facility in accordance with its written specifications in violation of section 192.303.<sup>43</sup> The Notice proposes to assess a civil penalty of \$108,000 for this item based on 51 welds performed at the compressor station.<sup>44</sup>

## II. SUMMARY OF ARGUMENT

The alleged violations should be withdrawn because OPS has not satisfied its burden of demonstrating that CCP violated sections 192.225, 192.227, and 192.303 of PHMSA’s regulations. Item 1 should be withdrawn because it misinterprets API Std. 1104 as specifying wall thickness ranges for welding procedure qualification purposes and mandating that the wall thickness groupings applicable to the qualification of welders also apply to the qualification of welding procedures. This interpretation is inconsistent with the plain language of the standard, other authorities, and PHMSA’s welding expert who agreed that suggested wall thickness

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<sup>34</sup> Violation Report at 9.

<sup>35</sup> Notice at 5; Proposed Civil Penalty Worksheet at 2.

<sup>36</sup> Notice at 3.

<sup>37</sup> *Id.*; Violation Report at 13 (citing Exh. C (Coupon Test Reports)).

<sup>38</sup> *See* Violation Report at 18; Proposed Civil Penalty Worksheet, Item 2 at 1.

<sup>39</sup> Notice at 5.

<sup>40</sup> *Id.* at 4-5; Violation Report at 21-22.

<sup>41</sup> Notice at 4; Violation Report at 22 (citing Exh. G (Cheniere Welding Manual: CWM-02 General: 2.1)).

<sup>42</sup> Notice at 4-5; Violation Report at 22.

<sup>43</sup> 49 C.F.R. § 192.303.

<sup>44</sup> Notice at 5; Proposed Civil Penalty Worksheet, Item 3 at 1-22.

groupings listed in section 6.2.2 of API Std. 1104 are not mandatory for purposes of qualifying welding procedures. Moreover, expert reports demonstrate that CCP's welding procedure specifications were suitable for the wall thickness groupings specified, including wall thicknesses less than 0.188". Alternatively, Item 1 must be withdrawn because it fails to identify any welds that were performed using the welding procedures alleged to be unqualified and, therefore, does not assert the facts necessary to establish a violation. OPS has not met its burden of proving that CCP failed to qualify its welding procedures in accordance with API Std. 1104 or that CCP violated section 192.225.

Item 2 should be dismissed because the Notice does not establish that any welder was unqualified or that any weld on the Pipeline was performed by an unqualified welder. The Notice, therefore, fails to assert facts necessary to establish a violation. Alternatively, OPS has failed to meet its burden of demonstrating that CCP's welders were not qualified using previously qualified procedures. The allegation is inconsistent with the Notice and Violation Report which state that CCP tested one wall thickness group covering pipe wall thicknesses of 0.188" – 0.750" for fillet welding procedure SMAW-A28A-FLT. These statements effectively acknowledge that this procedure was qualified for this wall thickness group and constituted a "previously qualified procedure." Under the multiple qualification provision, CCP's welders were therefore qualified to weld on all wall thicknesses. The Notice is unsupported by both the facts and API Std. 1104. OPS has not met its burden of demonstrating that CCP failed to qualify its welders in accordance with API Std. 1104 or that CCP violated section 192.227.

Item 3 must be dismissed because it relies on the same facts and evidence as Items 1 and 2 and is not a separate offense. CCP's Welding Manual, which requires that welding be performed with qualified procedures by qualified welders and cites API Std. 1104, does not constitute additional evidence. Alternatively, Item 3 must be withdrawn because PHMSA has failed to demonstrate that CCP did not qualify welding procedures and welders in accordance with section 5 and section 6 of API Std. 1104. OPS has not met its burden of demonstrating that CCP violated section 192.303.

Finally, if the allegations are not withdrawn, the proposed civil penalties should be withdrawn or significantly reduced because OPS has not demonstrated they are reasonable in light of the applicable assessment factors.

### **III. ARGUMENT**

#### **A. PHMSA Bears the Burden of Demonstrating That CCP Violated PHMSA's Regulations.**

In an enforcement proceeding, PHMSA has the burden of demonstrating that a violation of the pipeline safety regulations occurred.<sup>45</sup> PHMSA has the "burden of production," *i.e.*, . . .

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<sup>45</sup> See 49 C.F.R. § 190.213(a)(1). See also *In re Inland Corp.*, Final Order, CPF No. 1-2017-5003, 2018 WL 2229407, at \*3 (D.O.T. Mar. 7, 2018) (withdrawing alleged violation where testimony was contradictory and factual evidence provided by respondent did not support OPS's claim); *In re Air Prods. & Chems., 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*

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.”<sup>46</sup> PHMSA “bears the burden of proof as to all elements of the proposed violation.”<sup>47</sup> 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.<sup>48</sup>

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.”<sup>49</sup> This burden is carried “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”<sup>50</sup> 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.<sup>51</sup> If “the evidence is closely balanced,” PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.<sup>52</sup>

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*ExxonMobil 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 Cent. 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*, Final Order, CPF No. 4-2008-1017, 2011 WL 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).

<sup>46</sup> *Schaeffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *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.*, Final Order, 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.”).

<sup>47</sup> *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 Pipeline Co. (ANR) knew of probable existence of safety-related condition based on in-line inspection (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).

<sup>48</sup> 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 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).

<sup>49</sup> *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*, 2009 WL 3190794 at \*1, n.3; *Schaeffer*, 546 U.S. at 56-58).

<sup>50</sup> *In re Butte Pipeline*, 2009 WL 3190794 at \*1.

<sup>51</sup> See *In re ANR Pipeline*, 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.*

<sup>52</sup> *In re Alyeska Pipeline*, 2009 WL 5538655 at \*3 (quoting *Schaeffer*, 546 U.S. at 56). Cf. *In re Buckeye Partners, LP*, Final Order, CPF No. 1-2009-5002, 2012 WL 3144486, at \*7 (D.O.T. May 30, 2012) (where neither party

**B. Item 1 Is Based on a Flawed Interpretation of API Std. 1104 and Fails to Allege Facts Necessary to Support a Violation.**

Item 1 and the proposed civil penalty must be withdrawn because OPS has failed to demonstrate that CCP did not qualify the welding procedures in accordance with API Std. 1104. OPS's interpretation of API Std. 1104 is contrary to its plain language, the interpretation of authoritative experts, other industry standards, and the interpretation of PHMSA's own welding expert. In addition, the allegation fails to assert that CCP performed any welding, a prerequisite to establishing a violation of 49 C.F.R. § 192.225.

*1. Item 1 Must Be Withdrawn Because It Misinterprets API Std. 1104.*

Item 1 alleges that CCP failed to qualify the four welding procedures listed in the Notice in accordance with API Std. 1104 because CCP provided a qualification test for only one of the three wall thickness groups that are listed in each welding procedure specification.<sup>53</sup> The Notice alleges that qualification tests were required for all three thickness groups and that not having qualification tests for two of the wall thickness groups for each procedure meant that the procedures were not qualified in accordance with API Std. 1104, resulting in a violation of section 192.225.<sup>54</sup> This is a misunderstanding of API Std. 1104.

To support the alleged violation, the Notice first recites section 5.4.1 of API Std. 1104, 20th Ed. which requires that a welding procedure “be re-established as a new procedure specification and must be completely requalified when any of the essential variables listed in 5.4.2 are changed.”<sup>55</sup> The Notice describes section 5.4.2 of API Std. 1104 as establishing that “[w]all thickness group is an essential variable.”<sup>56</sup> The Notice then asserts without support that “[a]s a result, each wall thickness group *as specified* in API 1104 requires a separate qualification test.”<sup>57</sup> In describing the evidence, the Violation Report relies more specifically on section 5.4.2.5 of API Std. 1104 to support the assertion that wall thickness is an essential variable.<sup>58</sup> The Violation Report then adds that, “[a]dditionally, section 5.4.2.5 refers to Section 6.2.2, item e, API Std. 1104 20<sup>th</sup> edition suggested groupings for wall thickness,”<sup>59</sup> implying that the wall thickness groups of section 6.2.2 of API Std. 1104, which apply to the qualification of welders, are also mandatory for the qualification of welding procedures.

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

<sup>53</sup> Notice at 2; Violation Report at 6.

<sup>54</sup> Notice at 2; Violation Report at 6 (citing Exh. B (Cheniere Welding Procedures) and Ex. C)).

<sup>55</sup> Notice at 4.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (emphasis added.).

<sup>58</sup> Violation Report at 6 (citing Exh. A (Section 5, API Std. 1104, 20th Ed.)).

<sup>59</sup> *Id.* (citing Exh. A).

The Notice reflects a misinterpretation of API Std. 1104 in two respects. First, API Std. 1104 does not specify wall thickness ranges for the qualification of welding procedures. Second, the wall thickness groupings listed in section 6.2.2 of API Std. 1104 apply to the qualification of welders, and for purposes of qualifying welding procedures, are merely suggested.

API Std. 1104 does not specify any ranges of wall thickness groupings for purposes of qualifying a welding procedure.<sup>60</sup> Section 5.3 of API Std. 1104 lists the information that must be contained in a welding procedure specification.<sup>61</sup> Section 5.3.2.3, entitled “Diameters and Wall Thicknesses,” states “[t]he ranges of outside diameters and wall thicknesses over which the procedure is applicable *shall be identified*. Examples of *suggested* groupings are shown in 6.2.2, items d and e.”<sup>62</sup> The wall thickness groupings described in section 6.2.2, therefore, are suggestions and are not mandatory. Rather, the words “shall be identified,” mean that the range of wall thicknesses to which a procedure will apply are to be determined by the operator and identified in the welding procedure specification.<sup>63</sup>

Section 5.4 of API Std. 1104 describes the essential variables of a welding procedure that, if changed, require requalification of the procedure.<sup>64</sup> Section 5.4.2.5 identifies wall thickness groups as an essential variable.<sup>65</sup> The Violation Report asserts that section 5.4.2.5 refers to section 6.2.2, implying that the wall thickness groups described in that section are mandatory for the qualification of a welding procedure.<sup>66</sup> The Violation Report is incorrect. The complete text of section 5.4.2.5, which is omitted from Exhibit A of the Violation Report, states: “A change from one wall thickness group to another constitutes an essential variable.”<sup>67</sup> Section 5.4.2.5 contains no reference to section 6.2.2. The statement in the Violation Report that section 6.2.2 “specifies” wall thickness groups for purposes of qualifying a welding procedure is inaccurate.

The conclusion that API Std. 1104 does not specify groupings of wall thicknesses for qualifying a welding procedure and that section 6.2.2 is not mandatory for the qualification of welding procedures is confirmed by authoritative sources. The Joint Committee, which developed and continues to revise API Std. 1104, occasionally releases interpretive guidance on the standard. One of the Joint Committee’s interpretations states the following:

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<sup>60</sup> Bruce Aff. ¶ 11.

<sup>61</sup> API Std. 1104, 20th Ed. at 3-4.

<sup>62</sup> *Id.* at 4 (emphasis added).

<sup>63</sup> Bruce Aff. ¶ 8 (citing API Std. 1104 § 5.3.2.3).

<sup>64</sup> API Std. 1104, 20th Ed. at 4.

<sup>65</sup> *Id.* at 7.

<sup>66</sup> Violation Report at 6.

<sup>67</sup> API Std. 1104, 20th Ed. at 7; *see also* Bruce Aff. ¶ 9.



Question 2A: What is the defined thickness group – there isn't one referenced?

Response 2A: There are no defined wall thickness groups referenced for the procedure specification in 5.4.2.5, however, the ranges of diameters and wall thicknesses must be identified in the specification, as noted in 5.3.2.3.<sup>68</sup>

This guidance makes clear that, under section 5.3.2.3, wall thickness ranges must be specified when qualifying a welding procedure, but that section 5.4.2.5 does not dictate those wall thickness ranges. The Notice's statement that API Std. 1104 specifies wall thickness groupings for the qualification of welding procedures is incorrect.

The Violation Report's suggestion that wall thickness groups described in section 6.2.2 apply to the qualification of welding procedures is similarly erroneous. Guidance materials developed by the Pipeline Research Council International (PRCI), a not-for-profit organization that facilitates research on a range of topics regarding pipeline systems, makes clear that API Std. 1104 does not mandate the wall thickness groupings to be used when qualifying welding procedures.<sup>69</sup> The PRCI *Guidance Materials* explain that "[t]he suggested groupings shown in 6.2.2, items d and e are just that – *suggested groupings*. Other groupings can be used provided that there is technical justification for doing so based on sound engineering judgment. Guidance can be found in a variety of other codes and standards."<sup>70</sup>

The *Guidance Materials* explain further that misunderstanding the essential variable requirements is "[a] common source of error" under section 5 and section 6 of API Std. 1104."<sup>71</sup> The PRCI *Guidance Materials* state that "[t]he essential variables for welding procedure qualification are different than those for welder qualification. Special attention should be given to assure that the requirements in Section 5 are applied to welding procedure qualification and the requirements in Section 6 are applied to welder qualification."<sup>72</sup>

In addition, Mr. Ken Lee, PHMSA's Director of Engineering, who was a contributor to the PRCI *Guidance Materials*,<sup>73</sup> has stated that he agrees that the wall thickness groupings described in API Std. 1104 section 6.2.2 are not mandatory for the qualification of welding procedures.<sup>74</sup>

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<sup>68</sup> Joint Interpretation at 31.

<sup>69</sup> Guidelines for Interpretation and Application of API 1104, Prepared for the Pipeline Research Council International, Inc. at 4 (Apr. 2010) (*Guidelines*); see also *id.*, App'x at 6, Guidance Material for API Standard 1104–Welding of Pipelines and Related Facilities (*Guidance Materials*), excerpts attached hereto as Attachment 4. The purpose of these *Guidelines* was to "allow both users and regulators to better understand the intent regarding the interpretation of some requirements, the rationale behind the requirements, and the applicability of API 1104 to both conventional and modern high-strength pipelines." *Guidelines* at 6; see also PRCI *Guidance Materials* at i.

<sup>70</sup> PRCI *Guidance Materials* at 6.

<sup>71</sup> *Id.* at i.

<sup>72</sup> *Id.*; see also *id.* at 15-16.

<sup>73</sup> *Guidelines* at 6-7.

<sup>74</sup> Bruce Aff. ¶ 16.

The Notice and the Violation Report are inconsistent with the plain language of sections 5.4.2.5 and 5.3.2.3, the Joint Committee’s interpretation, the PRCI *Guidance Materials*, and the opinion of a PHMSA welding expert. API Std. 1104 does not specify the wall thickness groups for qualifying welding procedures. Rather, operators are required to identify the wall thicknesses to which a procedure will be applicable. The statement in section 5.4.2.5 that “[a] change from one wall thickness group to another constitutes an essential variable” means that a welding procedure must be requalified if the wall thickness range identified by the operator’s procedure specification is altered.<sup>75</sup> Section 5.4.2.5 does not refer to section 6.2.2 and section 5.3.2.3 makes clear that the wall thickness groupings listed in section 6.2.2 are merely suggested examples.<sup>76</sup> PHMSA has failed to meet its burden of showing that its interpretation of API Std. 1104 is correct and Item 1 must be withdrawn.<sup>77</sup>

OPS also has not demonstrated that CCP failed to qualify the welding procedures in accordance with API Std. 1104. Each of CCP’s welding procedure specification forms reflects the identification of a single “wall thickness range” that includes wall thicknesses under  $\frac{3}{16}$  in. (under 0.188”),  $\frac{3}{16}$ ” to  $\frac{3}{4}$ ” (0.188” to .750”), and over  $\frac{3}{4}$ ” (over .750”).<sup>78</sup> In other words, the wall thickness group to which each of CCP’s welding procedures applies includes each of those wall thicknesses. This is permitted by API Std. 1104.<sup>79</sup> CCP qualified the procedures on pipe with wall thicknesses of either 0.281” or 0.375”,<sup>80</sup> both of which fall within the range identified by the welding procedure specifications. Such thicknesses are not inordinately thick or thin relative to the thickness ranges of pipe used on the Pipeline.<sup>81</sup> In addition, the wall thickness range identified by CCP is consistent with ASME BVPC section IX which also is incorporated by reference into section 192.225 of PHMSA’s regulations and allows fillet welds to be made on any wall thickness regardless of the thickness used to qualify the procedure.<sup>82</sup>

CCP demonstrated the suitability of the original four welding procedures for each identified wall thickness group, including those less than 0.188”. In April 2017, to proactively address PHMSA’s concerns about welds performed on pipe with wall thicknesses less than 0.188”, CCP retained an expert to perform four additional procedure qualifications for this thinner wall thickness to supplement the qualifications of the four welding procedures listed in

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<sup>75</sup> API Std. 1104, 20th Ed. at 7.

<sup>76</sup> PRCI *Guidance Materials* at 6; Bruce Aff. ¶¶ 12-13.

<sup>77</sup> See *In re Golden Pass*, 2011 WL 1919517 at \*5 (finding that PHMSA did not meet its burden of proving that its interpretation of regulatory language was correct); *In re ExxonMobil Pipeline*, 2015 WL 780721 at \*12 (finding that PHMSA failed to meet burden of proving that certain measures were required under the regulations).

<sup>78</sup> Violation Report, Exh. B.

<sup>79</sup> Bruce Aff. ¶ 18.

<sup>80</sup> Violation Report, Exh. C.

<sup>81</sup> Bruce Aff. ¶ 20.

<sup>82</sup> *Id.* ¶ 23; see also Excerpts of 2010 ASME Boiler & Pressure Vessel Code, IX Qualification Standard for Welding and Brazing Procedures, Welders, Brazers, and Welding Brazing Operators, at 17, 146 (2010 Ed. July 1, 2010), attached hereto as Attachment 5. Attachment 5 contains excerpts from the 2010 edition of ASME BVPC section IX. The 2007 edition of ASME BVPC section IX are incorporated by reference into PHMSA’s regulations. The section IX provisions cited in this brief did not change in the between the 2007 and 2010 editions.

the Notice.<sup>83</sup> The additional procedure qualifications involved making branch welds in accordance with the parameters specified in the four welding procedures and testing them in accordance with API Std. 1104 Section 5.8.<sup>84</sup> The successful completion of the supplemental procedure qualifications proves the suitability of the original four welding procedures for performing fillet welds on wall thicknesses of less than 0.188” on the CCP pipeline, compressor station, and meter stations.<sup>85</sup>

The suitability of CCP’s welding procedure specifications is further demonstrated by the destructive tests CCP voluntarily performed in response to the proposed compliance order. CCP retained an independent third-party consultant to perform destructive tests on a statistically significant number of welds that had been made with the procedures identified in Item 1.<sup>86</sup> CCP submitted to PHMSA a welding test report dated April 4, 2018, which demonstrates that all of the welds at the Sinton Compressor Station selected for destructive testing were deemed acceptable.<sup>87</sup> Each of these welds was performed on pipe less than  $\frac{3}{16}$  in”. This testing demonstrates that the welds had the required strength and mechanical properties, and supports the conclusion that CCP’s identified wall thickness range was based on sound engineering judgment and that the procedures produced sound welds.

PHMSA can prevail in an enforcement proceeding “only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.”<sup>88</sup> PHMSA must demonstrate that its interpretation of the regulation is correct or that “certain measures” were required under regulations.<sup>89</sup> A respondent prevails not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the evidence provided by PHMSA.<sup>90</sup> If “the evidence is closely balanced,” PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.<sup>91</sup>

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<sup>83</sup> See Bruce Aff. ¶ 21.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* ¶ 22.

<sup>86</sup> CCP chose to perform this destructive testing in order to avoid the possibility of having to do destructive testing after putting the Sinton Compressor Station into service. The Director, Southwest Region, OPS, approved the destructive testing plan.

<sup>87</sup> Letter of Mr. Brad Etheridge, Senior Engineer, Welding Technology, DNV GL, to Mr. Daniel Hamburger, Manager, DOT Compliance and Technical Services, Cheniere Pipelines, at 2 (Apr. 4, 2018), attached hereto as Attachment 6.

<sup>88</sup> *In re Butte Pipeline*, 2009 WL 3190794 at \*1.

<sup>89</sup> See *In re Golden Pass*, 2011 WL 1919517 at \*\*1, 5 (finding that, where both provided credible interpretation, PHMSA did not satisfy its burden of proving that its interpretation of regulatory language was correct), *In re ExxonMobil Pipeline*, 2015 WL 780721 at \*12 (finding that PHMSA failed to meet burden of proving that certain measures were required under the regulations).

<sup>90</sup> See *In re ANR Pipeline*, 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.*

<sup>91</sup> *In re Alyeska Pipeline*, 2009 WL 5538655 at \*3 (quoting *Schaeffer*, 546 U.S. at 56). *Cf. In re Buckeye Partners*, 2012 WL 3144486 at \*7 (where neither party “present[s] sufficient proof to prove its position,” the violation must be withdrawn because PHMSA bears the burden).

The evidence in this proceeding is not closely balanced. PHMSA’s interpretation of API Std. 1104 is flawed and inconsistent with its plain text, other authoritative sources, and PHMSA’s own engineer. PHMSA’s interpretation also is inconsistent with ASME BPVC section IX, which also is incorporated into PHMSA’s regulations. PHMSA’s incorporation of API Std. 1104 and ASME section IX demonstrate PHMSA’s sound engineering judgment that these standards result in sound welds. Moreover, CCP has demonstrated that the welding procedure specifications are suitable for the wall thickness range specified. OPS has not satisfied its burden of proving that CCP failed to qualify the welding procedures in accordance with API Std. 1104 and has failed to prove a violation of 49 C.F.R. § 192.225. Item 1 and the proposed civil penalty must be withdrawn.<sup>92</sup>

2. *Item 1 Must Be Withdrawn Because the Notice Fails to Assert Facts Necessary to Establish a Violation.*

Under section 192.225, “[w]elding must be performed by a qualified welder . . . in accordance with” properly qualified welding procedures.<sup>93</sup> Item 1 asserts that CCP “failed to qualify welding procedures in accordance with API Std. 1104.”<sup>94</sup> The Notice fails, however, to assert that CCP performed any welds using the allegedly unqualified procedures and therefore, fails to assert facts necessary to establish the existence of a violation.

The plain language of section 192.225 applies to “welding” that is “performed.” If welding is not performed, there can be no violation. The existence of welding procedures that allegedly are not properly qualified is itself not a violation of section 192.225. The unqualified procedure must be used to perform a weld. A violation requires that PHMSA find that (1) welding was performed and that (2) such welding was performed using welding procedures that were not qualified. Neither the Notice nor the Violation Report pertaining to Item 1 asserts that CCP performed any weld using any of the welding procedures identified in the Notice. Therefore, a fact necessary to support the alleged violation is missing.

PHMSA “bears the burden of proof as to all elements of the proposed violation.”<sup>95</sup> To meet its burden of production, PHMSA must present evidence sufficient to establish an alleged violation. If PHMSA does not produce such evidence, the allegation must be withdrawn.<sup>96</sup>

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<sup>92</sup> See *In re Inland Corp.*, 2018 WL2229407 at \* 3.

<sup>93</sup> 49 C.F.R. § 192.225(a) (emphasis added).

<sup>94</sup> Notice at 2.

<sup>95</sup> *In re ANR Pipeline*, 2012 WL 7177134 at \*3 (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*, 2011 WL 7517716 at \*5 (finding lack of evidence demonstrating that breakout tank was not receiving adequate cathodic protection).

<sup>96</sup> See, e.g., *In re EQT Corp.*, 2010 WL 2228558 at \*\*6-7 (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*, 2011 WL 1919520 at \*\*4-5 (ordering withdrawal of allegation when limited evidence in the record was not conclusive); *In re Bridger Pipeline*, 2009 WL 2336991 at \*\*5-6 (finding evidence introduced by PHMSA insufficient to establish whether pressure transmitters were integral to overpressure control system).

Item 1 contains no assertion that CCP performed any welding at all, let alone welding using the allegedly unqualified welding procedures. Item 1, therefore, lacks the factual foundation necessary to sustain a violation of section 192.225. OPS has failed to meet its burden of proof and Item 1 and the associated proposed civil penalty must be withdrawn.

**C. Item 2 Fails to Allege Facts Necessary to Establish a Violation and Is Contrary to the Plain Language of Section 6 of API Std. 1104.**

*1. Item 2 Must Be Withdrawn Because the Notice Fails to Allege Facts Necessary to Establish a Violation.*

Item 2 alleges that CCP “failed to adequately qualify welders in accordance with Section 6 of API Std. 1104, 20th edition” in violation of section 192.227.<sup>97</sup> The Notice, however, does not identify any welders that allegedly were not qualified or demonstrate that such welders performed any welds. Item 2 must be withdrawn because it fails to assert facts necessary to establish a violation. The vague statement in the Violation Report that “[t]he Operator attempted to qualify 11 welders to weld in a compressor station”<sup>98</sup> is insufficient. Under section 190.207(b)(1) of PHMSA’s regulations, a Notice “shall include [a] (1) Statement of the provisions of the laws, regulations or orders which the respondent is alleged to have violated *and a statement of the evidence upon which the allegations are based.*”<sup>99</sup> The Notice does not satisfy the requirements of this regulation.

The Notice is the formal charging document and each allegation must assert all the facts necessary to sustain it. OPS should not be permitted to bury facts that are essential to the allegation in a Violation Report, especially when an operator does not receive the Violation Report without requesting it.

PHMSA “bears the burden of proof as to all elements of the proposed violation.”<sup>100</sup> To meet its burden, PHMSA is required to present evidence sufficient to sustain an alleged violation. If PHMSA does not produce such evidence, the allegation must be withdrawn.<sup>101</sup> Item 2 identifies no allegedly unqualified welders and contains no assertion that they performed any welds. The allegation, therefore, lacks the factual foundation necessary to sustain a violation of section 192.227. Item 2 and the associated proposed civil penalty must be withdrawn.

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<sup>97</sup> Notice at 3.

<sup>98</sup> Violation Report at 18.

<sup>99</sup> 49 C.F.R. § 190.207(b)(1) (emphasis added).

<sup>100</sup> *In re ANR Pipeline*, 2012 WL 7177134 at \*3; *see also In re CITGO Pipeline*, 2011 WL 7517716 at \*5.

<sup>101</sup> *See, e.g., In re EQT Corp.*, 2010 WL 2228558 at \*\*6-7 (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*, 2011 WL 1919520 at \*\*4-5 (ordering withdrawal of allegation when limited evidence in the record was not conclusive); *In re Bridger Pipeline*, 2009 WL 2336991 at \*\*5-6 (finding evidence introduced by PHMSA insufficient to establish whether pressure transmitters were integral to overpressure control system).

2. *Item 2 Must Be Withdrawn Because It Is Inconsistent With the Notice and Violation Report and Misinterprets Section 6 of API Std. 1104.*

The Notice alleges that CCP did not qualify its welders in accordance with section 6 of API Std. 1104 in violation of section 192.227. The basis for this allegation is that the procedure used to qualify welders who performed welds at the Sinton Compressor Station, SMAW-A28A-FLT, had not been properly qualified under section 5 of API Std. 1104.<sup>102</sup> The Notice alleges that the welders were qualified under the multi-qualification provisions using fillet welding procedure SMAW-A28A-FLT. Because this procedure allegedly was not properly qualified for the wall thickness on which the welds at the Sinton Compressor Station were performed, the Notice alleges that the welders using this procedure also were not qualified under section 6 of API Std. 1104.<sup>103</sup>

As demonstrated above in Section III.B.1, OPS has failed to prove that the welding procedures, including SMAW-A28A-FLT, were not qualified in accordance with API Std. 1104. Item 2, therefore, has no factual foundation. Even if Item 1 is not withdrawn, Item 2 cannot be sustained because it is inconsistent with the Notice and the Violation Report and overlooks the multiple qualification provisions of API Std. 1104 under which CCP's welders were qualified. OPS has not met its burden of proving a violation and Item 2 must be withdrawn.

Section 6.1 of API Std. 1104 provides that a welder qualification test must use "previously qualified procedures."<sup>104</sup> Section 6.1 states further that a welder qualified pursuant to the provisions of section 6 of API Std. 1104 is then deemed a qualified welder.<sup>105</sup> PHMSA has failed to demonstrate that CCP's welders were not qualified using previously qualified procedures.

The Notice and Violation Report acknowledge that CCP used the "multi-qualification test" to qualify welders.<sup>106</sup> Section 6.3 of API Std. 1104 describes the multiple qualification requirements: if a welder uses a previously qualified procedure to successfully complete a butt weld and a full-size branch connection weld on pipe with an outside diameter greater than or equal to 12.750 in., the welder is qualified to weld on all wall thicknesses.<sup>107</sup> The Notice disregards section 6.3 and omits it from the excerpts of API Std. 1104 contained in the Violation Report.

With respect to the butt weld test requirement of the multiple qualification, the Notice and Violation Report make no allegation and contain no evidence suggesting that the procedure used, SMAW-A24A-BW, was not previously qualified. Rather, the focus of the Notice appears

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<sup>102</sup> Notice at 3.

<sup>103</sup> *Id.*

<sup>104</sup> *See* API Std. 1104, 20th Ed. at 10.

<sup>105</sup> *Id.*

<sup>106</sup> Notice at 3; Violation Report at 13.

<sup>107</sup> API Std. 1104, 20th Ed. at 14-15.

to be the branch connection weld, which can be a fillet weld.<sup>108</sup> In this respect, Item 2 states that CCP's welders used SMAW-A28A-FLT in the multiple qualification, but contends that because this procedure was not previously qualified, CCP's welders were not qualified.<sup>109</sup>

This allegation is belied by the Notice and Violation Report which state that CCP provided a test report for one of the wall thicknesses listed in the welding procedure specification.<sup>110</sup> Specifically, the Violation Report states that CCP provided a test report for a weld performed on a pipe with a wall thickness of 0.375" which falls within the 0.188" – 0.750" range.<sup>111</sup> Fillet Welding Procedure SMAW-A28A-FLT, therefore, was qualified for at least that wall thickness group. In fact, Mr. Lee has stated that CCP's procedure was qualified for the wall thickness group for which CCP provided a test report.<sup>112</sup> Welding Procedure SMAW-A28A-FLT is a "previously qualified" procedure under section 6 of API Std. 1104. Under the multiple qualification provision of section 6.3 of API Std. 1104, welders using this welding procedure were qualified to weld on all wall thicknesses, including those less than 0.188".<sup>113</sup>

Item 2's allegation that CCP's welders were not qualified in accordance with section 6 of API Std. 1104 is undermined by statements contained in the Notice and Violation Report and is inconsistent with the multiple qualification provisions of section 6.3. OPS has failed to prove that either the facts or the regulation support the existence of a violation. Item 2 and the proposed civil penalty must be withdrawn.<sup>114</sup>

**D. Item 3 Must Be Withdrawn Because It Is Based on the Same Facts as Items 1 and 2 and Is Not a Different Offense; Alternatively, OPS Has Failed to Demonstrate That SMAW-A28A-FLT and CCP's Welders Were Not Qualified in Accordance With API Std. 1104.**

Section 192.303 requires that a transmission line "be constructed in accordance with comprehensive written specifications or standards that are consistent with this part."<sup>115</sup> As noted in the Notice, CCP's Welding Manual requires that all welding be performed using qualified welding procedures and by welders "who are qualified for welding procedure to be used."<sup>116</sup> Item 3 contends that CCP constructed 51 welds at the Sinton Compressor Station using an unqualified welding procedure and unqualified welders. The Notice therefore contends that CCP failed to construct a pipeline in accordance with its written standards, i.e., the Welding

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<sup>108</sup> *Id.* at 2 (*see* § 3.2.2)

<sup>109</sup> Notice at 3; Violation Report at 13.

<sup>110</sup> Notice at 3; Violation Report at 13, 14.

<sup>111</sup> Violation Report at 14 & Exh. C, which contains the Coupon Test Report for SMAW-A28A-FLT showing that the test was performed on pipe with a wall thickness of 0.375".

<sup>112</sup> Bruce Aff. ¶ 16.

<sup>113</sup> *See* API Std. 1104, 20th Ed. at 14-15.

<sup>114</sup> *See In re Inland Corp.*, 2018 WL2229407 at \* 3; *In re Air Prods. & Chems.*, 2015 WL 6758819, at \*3; *In re So. Star Cent. Gas Pipeline, Inc.*, 2011 WL 7006614, at \*4; *In re Golden Pass*, 2011 WL 1919517 at \*\*1, 5.

<sup>115</sup> 49 C.F.R. §192.303.

<sup>116</sup> Notice at 4; Violation Report at 21 (citing Exh. G).

Manual.<sup>117</sup> Item 3 must be withdrawn because it relies on the same facts alleged in Items 1 and 2 and cannot be considered a different offense.

Item 3 alleges that CCP failed to qualify welding procedure SMAW-A28A-FLT and that welders using this procedure in their “multi-qualification test” are not qualified. These are the same unfounded allegations made in Items 1 and 2. The Notice’s reference to CCP’s Welding Manual does not constitute new evidence supporting a new allegation because the Welding Manual requires that welds be performed using qualified procedures and by welders qualified for the welding procedures used,<sup>118</sup> and references API Std. 1104.<sup>119</sup> Referencing CCP’s Welding Manual, therefore, is the same as citing API Std. 1104. The Notice does not allege failure to comply with any other provision of the Welding Manual.

Item 3 alleges that the same acts constitute violations of two different regulations. “[T]he test to be applied is to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”<sup>120</sup> PHMSA must apply this test to determine whether multiple alleged violations “each require proof of an additional fact, or have their own ‘evidentiary basis.’”<sup>121</sup> Item 3 does not require proof of any additional fact or additional basis not already asserted in Item 1 and Item 2 and should be withdrawn.

In the alternative, Item 3 must be withdrawn because, as demonstrated above in Sections III.B.1 and III.C.2, OPS has failed to prove that CCP did not qualify either the welding procedure used or the welders who performed the 51 welds at the Sinton Compressor Station in accordance with API Std. 1104. In addition, CCP demonstrated that the welding procedure was appropriate for the identified wall thickness range, including the wall thicknesses of the 51 welds identified in Item 3. CCP also has demonstrated that the welders listed in Exhibit H of the Violation Report were qualified under the multiple qualification procedures and are qualified welders for any wall thickness.<sup>122</sup> Therefore, the welds performed at the Sinton Compressor Station were performed by qualified welders using qualified procedures.

The evidence presented in support of Item 3 is not closely balanced because CCP’s evidence outweighs OPS’s unsupported assertions.<sup>123</sup> Nor has PHMSA demonstrated that its interpretation of the regulation is correct or that “certain measures” were required under regulations.<sup>124</sup> Item 3 and the proposed civil penalty must be withdrawn.

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<sup>117</sup> Notice at 4-5; Violation Report at 22.

<sup>118</sup> Violation Report, Exh. G.

<sup>119</sup> *Id.*, Exh. D (Cheniere Welding Manual CWM-01 Introduction) and Exh. G.

<sup>120</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>121</sup> *In re ExxonMobil Pipeline*, 2015 WL 780721 at \*19 (citation omitted); *In re Colo. Interstate Gas*, Final Order, CPF No. 5-2008-1005, 2009 WL 5538649, at \*\*11-13 (D.O.T Nov. 23, 2009) (finding that two separate allegations were essentially the same because both alleged the same operator conduct and the exact same evidence).

<sup>122</sup> See Section III.C.2, *supra*.

<sup>123</sup> See *In re Butte Pipeline*, 2009 WL 3190794 at \*1.

<sup>124</sup> See *In re Golden Pass*, 2011 WL 1919517 at \*\*1, 5 (finding that, where both provided credible interpretation, PHMSA did not satisfy its burden of proving that its interpretation of regulatory language was correct), *In re*



**E. OPS Has Not Demonstrated That the Proposed Civil Penalties Are Reasonable or Consistent With the Applicable Assessment Factors.**

The Notice proposes total civil penalties of \$185,600.<sup>125</sup> In the event the allegations are not withdrawn, CCP requests that the proposed civil penalties be withdrawn because OPS has not supported them with a preponderance of the evidence under the penalty assessment criteria. Alternatively, the proposed penalty should be substantially reduced.

OPS is required by the Pipeline Safety Act to consider certain factors when determining a civil penalty for a pipeline safety violation.<sup>126</sup> Those factors include:

- (1) The violation's nature, circumstances, and gravity, including any adverse impact on the environment;
- (2) The degree of the violator's culpability;
- (3) The violator's history of prior offenses;
- (4) Any good faith by the violator in attempting to achieve compliance; and
- (5) The effect on the violator's ability to continue in business.<sup>127</sup>

OPS may also consider the economic benefit gained from the violation and such other matters as justice may require.

OPS bears the burden of proving that a proposed civil penalty is reasonable and consistent with the statutory assessment factors. A proposed civil penalty cannot be assessed if the record lacks sufficient evidence to support the applicable factors or to show that the amount sought is reasonable.<sup>128</sup>

Item 1 asserts that CCP failed to qualify welding procedures in accordance with API Std. 1104 and proposes a \$24,100 civil penalty.<sup>129</sup> OPS has not shown that the assessment considerations support this proposed penalty. First, the Violation Report overstates the number of violations, resulting in an inflated and unjustified proposed civil penalty. The Proposed Civil

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*ExxonMobil Pipeline*, 2015 WL 780721 at \*12 (finding that PHMSA failed to meet burden of proving that certain measures were required under the regulations).

<sup>125</sup> Notice at 5.

<sup>126</sup> 49 U.S.C. § 60122(b). These factors are codified in PHMSA's regulations at 49 C.F.R. § 190.225.

<sup>127</sup> 49 C.F.R. § 190.225(a).

<sup>128</sup> It should also be noted that while "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases," *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973), "[a]s a general matter, an agency cannot treat similarly situated entities differently unless it 'support[s] th[e] disparate treatment with a reasoned explanation and substantial evidence in the record.'" *Lilliputian Sys., Inc. v. PHMSA*, 741 F.3d 1309, 1313 (D.C. Cir. 2014) (quoting *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005)) (holding that prohibiting some products containing flammable gas, but not others, from checked baggage was arbitrary and capricious because the disparate treatment was not supported with reasoned explanation and substantial evidence).

<sup>129</sup> Notice at 5.

Penalty Worksheet identifies eight violations under Item 1.<sup>130</sup> This number appears to have been calculated based on the number of procedures (four) that allegedly were not qualified for two wall thicknesses. Item 1, however, makes no assertion that CCP used any of these procedures to perform any welds on the Pipeline.

Moreover, because Item 1 does not allege that CCP used any of the procedures, the date the Violation Report asserts the alleged violation began (September 28, 2015)<sup>131</sup> is unsupported. This date is based on the date the qualifying test was performed.<sup>132</sup> An allegedly unqualified procedure, however, is not a violation if not used to perform a weld. Because OPS did not establish whether or when the welding procedures were used to perform any welds, the September 28, 2015 start date is unsupported. OPS has failed to demonstrate that the proposed civil penalty for Item 1 is supported by the evidence or the assessment criteria.

In addition, the Violation Report asserts that “[t]he Operator could not provide a reasonable justification for its non-compliance. All ‘Butt Weld’ welding procedures have the same grouping in wall thickness and are tested and qualified to a specific grouping on the welding procedure.”<sup>133</sup> The Proposed Civil Penalty Worksheet also states that CCP “did not make a reasonable interpretation of the requirement or did not have a credible justification for its actions or lack of actions.”<sup>134</sup> Consequently, CCP did not receive a good faith credit to offset to the proposed penalties.

The statements in the Violation Report and Proposed Civil Penalty Worksheet are not supported by the facts. The April 2017 test demonstrated that the welding procedures were suitable for the welds that were performed.<sup>135</sup> The assertion that CCP failed to offer a reasonable justification for its interpretation of API Std. 1104 or its procedures is unsupported. CCP should receive credit for good faith compliance and the proposed civil penalties should be eliminated or reduced.

The proposed civil penalty with respect to Item 2 also is flawed because it is inconsistent with the alleged violation. Under the “Gravity” assessment factor, the Violation Report indicates that there were eleven instances of a violation.<sup>136</sup> This finding, however, is inconsistent with the alleged violation which does not identify any allegedly unqualified welders and contains no assertion that they performed any welds.<sup>137</sup>

The proposed civil penalty for Item 3 should be eliminated because it is duplicative and excessive. The evidence supporting Item 3 is the same as the evidence described in Items 1

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<sup>130</sup> Proposed Civil Penalty Worksheet at 1.

<sup>131</sup> Violation Report at 9.

<sup>132</sup> *Id.* & Exh. C.

<sup>133</sup> *Id.* at 12.

<sup>134</sup> Proposed Civil Penalty Worksheet at 1.

<sup>135</sup> Bruce Aff. ¶¶ 21-22.

<sup>136</sup> Violation Report at 18.

<sup>137</sup> See Section III.C.1, *supra*.

and 2. Because the conduct described in these violations overlap, the proposed \$108,000 civil penalty reflects an unfair aggregation of penalties.<sup>138</sup> The proposed civil penalty should be withdrawn based on the “other matters as justice may require” factor.

For these reasons, the Violation Report does not support the proposed civil penalties.

#### IV. CONCLUSION

Based on the foregoing, CCP requests that PHMSA withdraw the Notice and the Proposed Civil Penalties.

Respectfully submitted,

/s/ Susan A. Olenchuk

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<sup>138</sup> *In re Colo. Interstate Gas Co.*, Final Order, CPF No. 5-2016-6005, 2018 WL 3703707, at \*5 (D.O.T. June 1, 2018).