



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

APR 02 2008

1200 New Jersey Ave., S.E.
Washington, DC 20590

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Christopher Beschler
Director, Department of Public Utilities
City of Richmond
730 East Broad Street
Richmond, VA 23219

Re: CPF No. 1-2004-0006

Dear Mr. Beschler:

Enclosed is the decision issued on the petition for reconsideration filed by the City of Richmond in the above-referenced case. For the reasons specified therein, the City's petition is denied. Payment of the \$30,000 civil penalty is due within 20 days of service. Your receipt of this decision constitutes service under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

William H. Giese
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

J.Dw/dd

Enclosure

cc: Mr. Byron Coy, Director, Eastern Region, OPS
Joshua L. Menter, Esq., Miller, Balis & O'Neil

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

In the Matter of	)	
	)	
City of Richmond, Virginia,	)	CPF No. 1-2004-0006
	)	
Petitioner	)	
	)	

DECISION ON PETITION FOR RECONSIDERATION

On January 12, 2006, pursuant to 49 C.F.R. § 190.213, the Associate Administrator for Pipeline Safety (Associate Administrator) issued a Final Order in this case finding that Petitioner had violated 49 C.F.R. §§ 191.5 and 192.751(a) of the pipeline safety regulations and assessing a civil penalty in the amount of \$30,000. In addition, the Final Order withdrew two charges (Items 3 and 4) and correspondingly reduced the total proposed penalty from \$80,000 to \$30,000. The Final Order was issued following a hearing on a Notice of Probable Violation (NOPV) arising out of a failure investigation of an excavation fire at the City of Richmond's (Petitioner or City) pipeline facilities located at 1709 North 21st Street, Richmond, Virginia.

On February 6, 2006,¹ Petitioner filed a petition for reconsideration of the Final Order pursuant to 49 C.F.R. § 190.215, seeking reconsideration of the one remaining finding of violation of 49 C.F.R. § 192.751(a) (Item 2) and its associated penalty. Petitioner argues that the \$25,000 penalty assessed for this violation should be withdrawn on the basis that the finding and penalty do not further compliance with pipeline safety standards and that Petitioner had taken all reasonable actions prior to the incident to ensure compliance with PHMSA regulations. Petitioner further argues that the finding and penalty are not well supported factually, legally, or on policy grounds.

A final decision on reconsideration may be issued without further proceedings. 49 C.F.R. § 190.215(e). Petitioner does not dispute the facts set forth in the Final Order, but seeks reconsideration of the finding of violation for Item 2 of the Final Order. That portion of the Final Order found that Petitioner violated 49 C.F.R. § 192.751(a), which states:

¹ 49 C.F.R. § 190.215 provides that petitions for reconsideration must be filed within 20 days after service of the final order upon the respondent and that "[p]etitions received after that time will not be considered." In its Petition, Petitioner stated it did not receive the Final Order until January 17, 2006, and therefore timely filed its petition.

§192.751 Prevention of accidental ignition.

Each operator shall take steps to minimize the danger of accidental ignition of gas in any structure or area where the presence of gas constitutes a hazard of fire or explosion, including the following:

(a) When a hazardous amount of gas is being vented into open air, each potential source of ignition must be removed from the area and a fire extinguisher must be provided.

The Final Order found the City had violated § 192.751(a) by failing to take steps to minimize the danger of accidental ignition of gas in an area where the presence of gas constituted a hazard of fire or explosion. Specifically, it found that Petitioner “failed to remove a construction light (a potential source of ignition) from close proximity to the abandonment area where natural gas was being vented into open air.” A light cord had been draped across the trench without placing a wire guard over the glass lens of the light. During the abandonment process, the light fell into the trench and the glass lens shattered, thereby igniting a flash fire that injured two workers. Final Order at 3.

Petitioner argues that PHMSA should not find the City in violation “for an act by employees of an independent contractor which those [sic] employees clearly knew or should have known was negligent and unsafe and that [the City] could not prevent despite all reasonable efforts.” Petition at 2. In short, the City argues that it should not be held liable for the unsafe actions of its independent contractor, Henkels and McCoy, in connection with a service abandonment procedure. *Id.* at 1.

In its initial response to the NOPV (Response), Petitioner contended that “the duties for taking appropriate action at the site were properly delegated to Henkels.” Response at 2. In its Petition, the City argues that the Final Order improperly found that the City had delegated all responsibility for maintaining regulatory compliance to Henkels. On the contrary, the City contends that it only delegated such responsibility to Henkels “*at the site of the incident*,” and that it was necessary to do so because the City’s own employees were required to perform other safety duties elsewhere at the same time. *Id.* at 3 (emphasis original). According to Petitioner, it would be “arbitrary and inequitable” to find the City in violation of PHMSA regulations when there was nothing it could reasonably have done to prevent the contractor’s unsafe acts. *Id.* at 5.

The Federal pipeline safety laws, however, make PHMSA’s minimum safety standards applicable to “owners and operators” of pipeline facilities. *See* 49 U.S.C. § 60102(a)(2)(A). The regulation at issue requires that “each operator shall take steps” to minimize the risk of accidental ignition. 49 C.F.R. § 192.751. An “operator” is defined as a person who engages in the transportation of gas. 49 C.F.R. §§ 191.3, 192.3. Therefore, in order to prevail, the City must demonstrate that Henkels and McCoy was an operator of the pipeline at the time of the failure.

Petitioner has not sufficiently demonstrated through new evidence that Henkels and McCoy was an operator of this pipeline at the time of the incident. The City's "Attachment A" to its Response contained a copy of the City's non-exclusive contract with Henkels and McCoy. Under that contract, Henkels and McCoy's work was limited to the "investigation, location and repair of leakage to gas and water services and mains and the relocation of gas meters on the City of Richmond gas and water system." Special provisions of Henkels DPU Contract, at 1. Moreover, it states that "[t]he City will provide gas and water survey results and generate service orders with which the Contractor will be required to locate and repair water leakage." *Id.* at 2.

As stated in the Final Order, the Federal pipeline safety laws (49 U.S.C. § 60101, *et seq.*) require the owners and operators of a natural gas pipeline system to comply with the pipeline safety standards applicable to their system. Because Henkels and McCoy's contractual obligations were limited to the repair of gas and water leaks, it did not "operate" the pipeline. Moreover, the City did not present evidence demonstrating that Henkels and McCoy contractually assumed the daily operations of the pipelines. *Cf. In the Matter of Potomac Electric Power Company and Support Terminal Services*, Final Order at 18, CPF No. 1-2000-6003 (June 2, 2004) (daily operations of the pipeline were ST Services' responsibility pursuant to an operating agreement); Decision on Petition for Reconsideration (Feb. 9, 2005). Therefore, the City has not produced sufficient evidence to demonstrate that Henkels and McCoy was an operator of the pipeline at the time of the incident. Accordingly, I find Henkels and McCoy was not an operator of the pipeline at the time of the incident and that the City violated 49 C.F.R. § 192.751(a) when its contractor failed to remove a potential source of ignition from the area where a hazardous amount of gas was being vented from the City's pipeline system.

Alternatively, Petitioner argues that the \$25,000 penalty assessed in the Final Order should be withdrawn; specifically, Petitioner contends that PHMSA based the penalty on the application of one criterion, namely, the gravity of the violation. Petition at 6. Petitioner further argues that PHMSA neglected to consider all the criteria set forth in 49 C.F.R. § 190.225 in determining the amount of a civil penalty, including "any good faith . . . in attempting to achieve compliance" and "such other matters as justice may require." *Id.* The City contends that the record in the case demonstrates that it undertook "numerous good faith efforts to achieve compliance with [PHMSA's] safety regulations and § 192.751(a) in particular." *Id.*

Contrary to Petitioner's argument, the penalty amount in the Final Order was not solely based on the gravity of the violation. The Final Order specifically stated that all of the criteria set forth in 49 C.F.R. § 190.225 were taken into consideration. Final Order at 5. The Assessment of Penalty for Item 2 merely noted that the gravity of the violation was "significant" and that the City had not presented information warranting a reduction in the proposed violation. *Id.* Petitioner has not presented any new facts or legal basis to justify a reduction or withdrawal of the penalty.

Relief Denied

I have considered Petitioner's request for reconsideration. I find that Petitioner has not presented any new evidence or arguments warranting withdrawal of a finding of violation, reduction in the civil penalty, or amendment to the terms of the Compliance Order. Accordingly, the petition for reconsideration is denied. The terms of the Final Order remain in effect, including assessment of the civil penalty in the amount of \$30,000.

Payment of the civil penalty must be made within 20 day of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications system (Fedwire), to the account of the U.S. Treasury. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-120), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125; (405) 954-4719.

Accordingly, Petitioner is directed to comply with the terms of the Compliance Order contained in the Final Order within 60 days of service of this decision on reconsideration. The Director, Eastern Region, PHMSA may grant an extension of time for noncompliance with any of the terms of the Compliance order upon a written request by the Petitioner demonstrating good cause for an extension.

This decision on reconsideration is the final administrative action in this proceeding.

William H. Gault
for

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

APR 02 2008

Date Issued