

CITY OF CHARLOTTESVILLE

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Department of Public Works
Charlottesville Public Utilities

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January 14, 2013

VIA E-MAIL

Byron Coy, PE
Director, Eastern Region
Pipeline and Hazardous Materials Safety Administration
820 Bear Tavern Road, Suite 103
West Trenton, NJ 08628
Byron.Coy@dot.gov

Reference: CPF 1-2012-0007

Dear Mr. Coy:

The Department of Public Works, Charlottesville Public Utilities ("Charlottesville") hereby submits its response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order that Charlottesville received on December 14, 2012. As you will observe, the response was prepared by Joshua L. Menter, Esq. of Miller, Balis & O-Neil, P.C., who is counsel for Charlottesville in this matter.

Sincerely,

Lauren Hildebrand, P.E.
Director of Utilities

Attachments

**UNITED STATES OF AMERICA
BEFORE THE
PIPELINE HAZARDOUS MATERIALS AND SAFETY ADMINISTRATION**

In the Matter of	)	
	)	CPF 1-2012-0007
The Department of Public Works,	)	
Charlottesville Public Utilities	)	

**RESPONSE OF THE DEPARTMENT OF PUBLIC WORKS,
CHARLOTTESVILLE PUBLIC UTILITIES TO
NOTICE OF PROBABLE VIOLATION, PROPOSED
CIVIL PENALTY AND PROPOSED COMPLIANCE ORDER**

Pursuant to §190.209 of the Pipeline Safety Regulations (“Regulations”), the Department of Public Works, Charlottesville Public Utilities (“Charlottesville”) hereby provides a written response to the Notice of Probable Violation, Proposed Civil Penalty and Proposed Compliance Order (“NOPV”) in the above-captioned proceeding. The NOPV was sent by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) on December 13, 2012 and was received by Charlottesville on December 14, 2012.

PREFACE

The NOPV proposes various violations of the Regulations, an assessment of related penalties totaling \$88,500 as well as a compliance plan. Charlottesville here respectfully challenges a number of the proposed violations and demonstrates that virtually all of the items set forth in the compliance plan have been satisfied by Charlottesville since April, 2011—over 19 months ago.

Charlottesville also challenges the very high level of penalties proposed, which Charlottesville respectfully submits, has not been justified and cannot be justified under the Regulations, particularly in light of the attitude of full compliance that Charlottesville has historically and continually demonstrated.

The standards for the assessment of penalty levels are set forth in §190.225 of the Regulations, which require that the PHMSA must consider, among other things, not only (a) the violation itself, namely “(1) The nature, circumstances, and gravity of the violation, including adverse impact on the environment, (2) The degree of the respondent’s culpability,” but also (b) the compliance attitude of Charlottesville, namely “(3) The respondent’s history of prior offenses; . . . (5) Any good faith by the respondent in attempting to achieve compliance.”

Charlottesville submits that application of these criteria compels the conclusion that the imposition of penalties is not appropriate. Moreover, even assuming arguendo that imposition of

some penalties may be appropriate, the individual proposed penalties and the total penalty level of \$88,500 are clearly unreasonable.

In that regard, the past conduct of Charlottesville is particularly instructive. Since the Virginia State Corporation Commission (“VA SCC”) has assumed the responsibility of inspecting for possible violations of the Regulations in 2005, Charlottesville has from time to time received notifications of possible non-compliance, and has immediately in each and every instance complied with the requests of VA SCC. Moreover, Charlottesville has been proactive by continually asking questions of the VA SCC regarding the intent of safety regulations to attempt to ensure compliance. This consistent attitude of compliance is confirmed by the fact that since 2005 until the NOPV issued in this docket, there has not been one NOPV sent to Charlottesville with respect to any regulation. This consistent attitude also underscores the “good faith by the respondent [Charlottesville] in attempting to achieve compliance.”

That good faith is also manifest with respect to the proposed violations set forth in the NOPV. As will be shown below, in virtually all instances, Charlottesville has promptly complied with the specific requests of the VA SCC for what that agency viewed were required compliance actions, regardless of whether Charlottesville believed that such actions were warranted. Notably, the NOPV in this proceeding assumes precisely the opposite—that Charlottesville has taken no compliance actions—as the NOPV sets forth a compliance program that Charlottesville essentially completed over 19 months ago.

The fact of such immediate compliance was, hence, apparently unknown to PHMSA or at the least not considered when it issued its NOPV. Charlottesville assumes that once the facts are known, PHMSA will, consistent with the requirements of §190.225, reconsider the penalties and eliminate the proposed penalties or, at the very least, substantially reduce them. In that regard, Charlottesville provides as Attachment 1 to the instant response the April 25, 2011 Charlottesville response (“April 25, 2011 Response”) to the April 15, 2011 VA SCC NOI (“April 15, 2011 NOI”). The April 15, 2011 Response describes the immediate compliance actions, and will be referenced periodically below.

ANALYSIS OF SPECIFIC PROPOSED VIOLATIONS, PENALTIES AND PROPOSED COMPLIANCE ACTIONS

Charlottesville here responds to each of the individual proposed violations and associated proposed penalties and compliance action. In doing so, Charlottesville incorporates the information set forth in the Preface which, as demonstrated, is critically important in determining the extent of any penalties.

Item 1: §192.739: Proposed Penalty of \$10,300

The regulation requires inspection of certain devices and stations at least (1) once during a fifteen-month period and (2) once during a calendar year. The NOPV indicates that, with

respect to three regulator stations, the VA SCC staff determined that Charlottesville complied with the first requirement, but has not complied with the second requirement. As to the second requirement, the VA SCC staff report provides that Charlottesville missed the second requirement by 8 days with respect to two stations and 5 days with respect to the third station.

There is no rationale provided by the NOPV that seeks to justify the significant level of the proposed penalty.

Charlottesville acknowledges that its action with respect to the three stations was not in strict compliance with DOT regulations. However, Charlottesville respectfully notes that it is equally clear that the violations with respect to the three stations are de minimis and, thus, that there is no demonstrated reason for any penalty, much less the proposed penalty.

Per §190.225:

- (1) given the de minimis nature of the violation, it is clear that it does not fall within the category of a serious or grave violation,
- (2) while the culpability of Charlottesville is clear, it is with respect to a technical violation, and there is no intent to violate the substance of the regulation that inspections occur with regularity; rather just the opposite is clear—that Charlottesville clearly intended to comply with the substance of the regulation;
- (3) there is no history of prior violations of this regulation or history within any recent period of time of any NOPV for any violation; and
- (4) as noted above, the attitude of compliance of Charlottesville historically and with respect to the proposed violations of the NOPV is real, sustained and unquestionable.

In sum, there is no reason or need for a penalty, much less the proposed penalty of \$10,300, associated with what is a technical, de minimis violation.

Item 2: §192.161(c): Proposed Penalty of \$16,200 and Proposed Compliance Order, ¶1.

The NOPV states the Charlottesville contravened the regulation as it failed to install a non-combustible support of an exposed pipeline. Charlottesville does not contest the proposed finding of violation.¹

¹ The NOPV references a report by the VA SCC that the involved segment of exposed pipe also was not fastened to the building. The fact that it was not fastened to the building is not a violation of any requirement of §192.161(c), as the section discusses the appropriate requirements for a support *or* an anchor. In any event, the fact that the support was not anchored did not pose any kind of safety hazard.

The NOPV's Proposed Compliance Offer sets forth in its ¶1 that Charlottesville must now replace "the existing" wood block supports with non-combustible supports and then provide documentation of that action.

The proposed compliance requirement is obviously ill-founded. As evidenced by Attachment 1, the wood block supports are no longer "existing;" indeed, Charlottesville immediately replaced the wooden supports with non-combustible metal supports and promptly provided written notification to the VA SCC of this compliance action.² In that regard, on February 1, 2012, the VA SCC inspected the metal supports and has not since advised Charlottesville on this matter.

Accordingly, Charlottesville believes that it has already taken fully compliant actions, not only because it is apparent that these actions are sufficient, but also because it has received no notice from the VA SCC since its inspection over 10 months ago that its actions were not sufficient. Accordingly, ¶1 of the proposed compliance order is obviously ill-founded and unnecessary.

As noted, the NOPV also proposes a penalty of \$16,200. There is no rationale provided by the NOPV that seeks to justify the significant level of the proposed penalty. Charlottesville respectfully submits that the penalty should be eliminated or, if not, reduced substantially. While Charlottesville takes no violation lightly, it is clear that this one, per the standards of §190.225, does not deserve a significant penalty, given "[t]he nature, circumstances, and gravity of the violation, including adverse impact on the environment." The requirement set forth in §191.161(c) is intended to prevent the risk that a faulty support could allow a pipe segment to fall which would result in the rupture of a pipeline or a pipeline leak. There was no practical risk of that occurring in this instance. The pipe segment in question traverses a flat roof that has a tar and gravel surface and no segment of the pipe is close the edge of the roof. The wood blocks that were replaced put the pipe segment only 3.5 inches above the roof. Even in the unlikely event that the wood supports failed, the fall of the pipe segment would only be 3.5 inches onto the roof. The risk that such a fall would result in a rupture or gas leakage was remote, at most.

In that regard, the violation is similar to the incidents that the VA SCC has reported to Charlottesville in the past, when it was determined that no NOPV was appropriate particularly given the prompt compliance of Charlottesville. By the standards historically employed by the VA SCC, Charlottesville respectfully submits that its actions do not give rise to any penalty.

Moreover, the NOPV is clearly incorrect in its assumption that Charlottesville has not taken prompt actions to comply with the requested actions of the VA SCC and still needs to take such actions over 19 months after being notified in April, 2011 that its actions may be a violation of the Regulations. This error alone requires substantial reduction if not elimination of the proposed penalty.

² Attachment 1, page 2, numbered paragraph 6.

The sum of the foregoing is that the proposed penalty is unreasonable because (a) the safety risk related to the proposed violation was remote and (b) the NOPV incorrectly assumes that Charlottesville did not take prompt compliance actions once notified by the VA SCC of the situation.

Finally, quite apart from any legalistic application of §192.161(c), it should be stressed again that the attitude of compliance by Charlottesville historically and with respect to the proposed violations of the NOPV has been, and continues to be, real, sustained and unquestionable. These important factors compel reconsideration of the proposed penalty.

Item 3: §192.317(b): Compliance Order, ¶2.

The regulation states in relevant part that “each above ground transmission line or main...must be protected from accidental damage by vehicular traffic or other similar causes, either by being placed *at a safe distance from the traffic* or by installing barricades.” Emphasis added.

The NOPV asserts that Charlottesville contravened this provision with respect to an above ground district regulator station at the intersection of Market Street and Old Preston Avenue. The NOPV references the VA SCC assertion that the regulator station was 12 feet from the edge of the road at a curve without barricades.

Charlottesville challenges the finding of a violation, particularly given the relevant circumstances. Since the installation of the regulator station, Charlottesville has consistently believed that the station has been “placed at a safe distance from traffic . . .” particularly given the specific circumstances of the location, namely, that the station (a) is located 12 feet from the road concrete curb line, (b) has the 6-inch high curb, (c) is in an area with a 25 mph speed limit, and (c) is located *inside* the curve of the road—i.e., if a car missed the curve (for example, as a result of exceeding the speed limit), it would travel *away from* the regulator station.

Importantly, historically, there has been no suggestion by the VA SCC that the station was not at a safe distance. The station was specifically inspected in November 2007 by the VA SCC, and there was no mention of any concern that the regulator station was not at a safe distance.

Moreover, Charlottesville has attempted to be proactive and has sought to ensure that it was in compliance with this regulation. Specifically, the Chief Gas Engineer of Charlottesville, Mr. Phil Garber, has repeatedly requested on an informal basis for over three years the VA SCC to provide any guide or useful interpretation of the specific phrase “at a safe distance from the traffic” that is employed in §192.317. In doing so, Mr. Garber has provided to the VA SCC his interpretation of the phrase—that a safe distance should be a function of the speed limit, the road edge construction (i.e., concrete curb versus edge of pavement), and other considerations.

Despite these efforts, the VA SCC has provided no response to Charlottesville's inquiries over this three-year period.

Against this backdrop, the imposition of any finding that Charlottesville is in violation of §192.317(b) would be clearly inappropriate. It is inarguable that Charlottesville has in good faith affirmatively attempted on repeated occasions to be in compliance and has sought the assistance of the VA SCC. Rather than provide advice over this three-year period, the VA SCC has chosen now to recommend a violation based on its interpretation of a phrase based on unrevealed criteria and despite the facts (a) that it has not, upon repeated request by Charlottesville, provided any criteria to give meaning to the phrase and (b) that it found no violation previously. The record of Charlottesville should not be tarnished by the inappropriate finding of a violation it has made every reasonable attempt to avoid.

The NOPV's Proposed Compliance Offer sets forth in its ¶2 that Charlottesville must now relocate the regulator to a safe distance or provide barricades to protect the regulator and then provide documentation of its actions.

The proposed compliance requirement is obviously ill-founded. As evidenced by Attachment 1, despite its good faith and reasonable interpretation that the regulator was located at a safe distance, Charlottesville immediately put in place appropriate barricades at the involved location and notified the VA SCC of this action.³ On February 1, 2012, the VA SCC inspected this site and has not since advised on this matter.

In sum, Charlottesville believes that it has already taken fully compliant actions, not only because it is apparent that these actions are sufficient (assuming *arguendo* a violation), but also because it has received no notice from the VA SCC since its inspection over 10 months ago that its actions were not sufficient. Accordingly, ¶2 of the proposed compliance order is obviously ill-founded and unnecessary.

Item 4: §192.353: Proposed Penalty of \$13,700 and Proposed Compliance Order, ¶3.

The NOPV states that Charlottesville failed to install an inside meter in a ventilated place with adequate separation from a source of ignition or heat. In support, NOPV references the VA SCC observation of a meter in an unventilated place, near a wood storage area, and less than 3 feet from electrical equipment.

Charlottesville notes as a technical matter, the NOPV assertion is incorrect. Charlottesville installed the meter *prior* to installing the electrical equipment which is referenced in the NOPV. In that regard, the proposed violation can be regarded as technical as well. Based on conversations with the VA SCC, it is clear that the proposed violation was based on the fact

³ Attachment 1, page 2, numbered paragraph 3.

that the meter was located less than 3 feet from the electrical equipment.⁴ While Charlottesville acknowledges this fact, it also notes that the meter location was located *slightly* less than 3 feet—i.e., 2.5 feet—from the electrical equipment.

However, Charlottesville does not wish to stress these technical matters, but rather the fact that its actions demonstrate an attitude of compliance. As set forth in Attachment 1, upon learning on April 15, 2011 of the VA SCC concerns regarding the location of the meter, Charlottesville stated on April 25, 2011 that it had scheduled the meter to be relocated.⁵ In fact, Charlottesville relocated the meter the next day, April 26, 2011.

The NOPV's Proposed Compliance Offer sets forth in its ¶3 that Charlottesville must relocate now the meter and provide written documentation. Here, too, the NOPV is obviously ill-founded. As noted, Charlottesville relocated the meter promptly. Also, on February 1, 2012, the VA SCC inspected this site and has not since advised on this matter.

Accordingly, Charlottesville believes that it has already taken fully compliant actions, not only because it is apparent that these actions are sufficient (assuming *arguendo* a violation), but also because it has received no notice from the VA SCC since its inspection over 10 months ago that its actions were not sufficient. Accordingly, ¶3 of the proposed compliance order is obviously ill-founded and unnecessary.

Finally, as noted, the NOPV proposes a penalty of \$13,700. There is no rationale provided by the NOPV that seeks to justify the significant level of the proposed penalty. Per §190.225, Charlottesville is culpable, at most, of a technical violation, and there is no intent to violate its substance. Moreover, the level of the penalty is apparently based on the erroneous assumption that Charlottesville has not yet sought to remedy the VA SCC concerns in this matter. These factors as well as Charlottesville's consistent attitude of compliance compel the conclusion, Charlottesville respectfully submits, that the proposed penalty must be eliminated or at least substantially reduced.

Item 5: §192.357: Proposed Compliance Order, ¶4.

The NOPV states that Charlottesville failed to install a meter so as to minimize anticipated stress upon the connecting pipeline. Charlottesville does not contest the proposed violation.

⁴ There were two other factors referenced by the NOPV attributable to the VA SCC. These factors were not mentioned in informal communications between Charlottesville and the VA SCC and, again, Charlottesville does not believe that either is a basis for the proposed violation. However assuming *arguendo* that the proposed violations are based on such factors, they would not be well-founded. The first factor is that the meter was in an unventilated place. There is no support for or details underlying the conclusion, and Charlottesville would challenge the conclusion in any event, particularly given that the meter was located in a large room, estimated to be 20' x 30'. The second factor is that the meter was near a wood storage area. There is no support for or details underlying a conclusion that the wood is a source of ignition or heat in the sense that it would interact with leaked gas to trigger an immediate combustion, and Charlottesville would challenge such a conclusion.

⁵ Attachment 1, page 2, numbered paragraph 4.

The NOPV's Proposed Compliance Offer sets forth in its ¶4 that Charlottesville must now provide additional meter supports to limit the possible horizontal movement of the connecting pipe and the meter. Here, too, the NOPV is obviously ill-founded. As evidenced in Attachment 1, upon learning on April 15, 2011 of the VA SCC concerns, Charlottesville stated on April 25, 2011 that it would provide the supports requested by the VA SCC.⁶ In fact, Charlottesville installed the requested support the next day, April 26, 2011. Also, on February 1, 2012, the VA SCC inspected this site and has not since advised on this matter.

In sum, Charlottesville believes that it has already taken fully compliant actions, not only because it is apparent that these actions are sufficient, but also because it has received no notice from the VA SCC since its inspection over 10 months ago that its actions were not sufficient. Accordingly, ¶4 of the proposed compliance order is obviously ill-founded and unnecessary.

Item 6: §192.479: Proposed Penalty of \$32,100 and Proposed Compliance Order, ¶5.

The NOPV states that Charlottesville failed to clean and coat a segment of two pipelines that were exposed to the atmosphere. Charlottesville does not contest the proposed violation.

The NOPV's Proposed Compliance Offer sets forth in its ¶5 that Charlottesville must now clean and coat the two exposed pipeline segments. Here, too, the NOPV is obviously ill-founded. Upon learning on March 9, 2011 of the VA SCC concerns, Charlottesville cleaned and coated one pipeline segment on March 14, 2011 and the other on March 16, 2011. Charlottesville provided notice to the VA SCC Attachment 1 that these actions had already been performed.⁷ In that regard, on February 1, 2012, the VA SCC inspected this site and has not since advised on this matter.

In sum, Charlottesville believes that it has already taken fully compliant actions, not only because it is apparent that these actions are sufficient, but also because it has received no notice from the VA SCC since its inspection over 10 months ago that its actions were not sufficient. Accordingly, ¶5 of the proposed compliance order is obviously ill-founded and unnecessary.

Finally, as noted, the NOPV proposes a penalty of \$32,100. There is no rationale provided by the NOPV that seeks to justify the significant level of the proposed penalty, and it is apparently based on the erroneous assumption that Charlottesville has not sought to remedy the VA SCC concerns in this matter. The facts are quite the contrary; Charlottesville's attitude and actions of prompt compliance not only with respect to the proposed violation but also as shown in its historical practice compel, Charlottesville respectfully submits, the conclusion that the proposed penalty must be eliminated or at least substantially reduced.

⁶ Attachment 1, page 2, numbered paragraph 5.

⁷ Attachment 1, page 2, numbered paragraph 2.

Item 7: §192.707(c): Proposed Penalty of \$16,200 and Proposed Compliance Order, ¶6.

The regulation provides that “Line markers must be placed along each section of a *main and transmission line* that is located aboveground in an area accessible to the public.” Emphasis added. The NOPV states that in two locations—one at North Wing Barracks Road (“Barracks Road”) and one at Allied Street—Charlottesville failed to place line markers on an exposed main.

Charlottesville contests the proposed violation at both locations. Charlottesville did not install a line marker at that location at the Allied Street location. However, the pipe segment at Allied Street is clearly neither a transmission line nor a main line; it is part of a service line. Accordingly, Charlottesville has no obligation under §192.707(c) to install line markers along that segment.

The Allied Street segment fits squarely within the definition of a service line set forth in §192.3, i.e., “a distribution line that transports gas from a common source of supply to . . . small commercial customers served through a meter header or manifold.”

Notable in this regard is the exchange of e-mails between the VA SCC and Charlottesville, which is provided as Attachment 2. On March 22, 2012, the VA SCC sent an e-mail to Charlottesville which stated that the pipe segment at Barracks Road could not be considered to be part of a service line, because it was *upstream* of a service regulator that reduced the pressure to the pressure at which the gas is delivered to the customer:

“Each of the meters has a regulator that controls the pressure from a higher pressure to the pressure provided to the customer. Since the regulator at each meter [located at Barrack Road] meets the definition of a service regulator, the pipeline in question cannot be a service manifold as the pressure in the pipeline is not that provided to the customer. Therefore, the service lines begin at the tap off the main through the service regulator to the individual customer.”

In contrast, the pipeline segment at Allied Street is *downstream* of the service regulator and, thus, the segment distributes gas *at the same pressure at which the gas is delivered to the customer*. Thus, under the VA SCC’s own interpretation, the pipe is to be considered as a service manifold, i.e., part of a service line.⁸ The VA SCC interpretation confirms Charlottesville position, which in itself is reasonable and compelling—that the Allied Street pipeline segment must be considered to be a manifold or header and, in any event, part of a service line because it is located downstream of a service regulator that reduces the pressure of that segment down to the pressure of gas delivered to a small number of small commercial

⁸ The above analysis was set forth in the March 26, 2012 Charlottesville e-mail sent at 3:26 p.m. to the VA SCC, which is included as part of Attachment 2. Notably, the VA SCC chose not to address, much less challenge, this analysis.

customers. Accordingly, the requirement of §192.707(c) for line markers at the Allied Street location is clearly inapplicable.

Charlottesville also contests the proposed at the Barracks Road location. Charlottesville has historically maintained a line marker at that location. Importantly, Charlottesville has done so, notwithstanding its position that no markers were required under §192.707(c) at that location, inasmuch as the pipeline segment was a service line. The marker at the Barracks Road location was a sign that provided an explicit warning of a gas line and was in complete compliance with the Regulations. Charlottesville acknowledges that the sign was missing as of the date of the VA SCC inspection, as it apparently was stolen before the inspection. However, promptly after being notified by the VA SCC that there were no markers at that location, Charlottesville installed another sign, and moreover, bolted that sign onto a metal post to seek to ensure that it was not stolen again. These actions affirmatively demonstrate that Charlottesville not only installed, but has maintained a line marker in a manner fully consistent with its obligations.

The NOPV's Proposed Compliance Offer sets forth in its ¶6 that Charlottesville must install and maintain line markers with respect to the pipe segments at the Barracks Street and Allied Street locations. As evidenced by Attachment 1, upon learning of the VA SCC position, notwithstanding its belief that the position of the VA SCC was erroneous, Charlottesville immediately installed a line marker at the Allied Street location. Charlottesville also promptly replaced the stolen marker at the Barracks Road location. Charlottesville then promptly provided written notification to the VA SCC of these actions.⁹ In that regard, on February 1, 2012, the VA SCC inspected the line markers and has not since advised Charlottesville on this matter.

Accordingly, Charlottesville believes that it has already taken fully compliant actions, not only because it is apparent that these actions are sufficient, but also because it has received no notice from the VA SCC since its inspection over 10 months ago that its actions were not sufficient. Accordingly, ¶6 of the proposed compliance order is obviously ill-founded and unnecessary.

As noted, the NOPV also proposes a penalty of \$16,200. There is no rationale provided by the NOPV that seeks to justify the significant level of the proposed penalty. As demonstrated, it is clear that Charlottesville has not violated §192.707(c). In any event, assuming arguendo there was a violation, the NOPV is incorrect in its assumption that Charlottesville has not taken prompt compliance actions and still needs to take such actions over 19 months after being notified in April, 2011 that its actions may give rise to a violation of DOT regulations. This error alone requires further substantial reduction if not elimination of the proposed penalty assuming, contrary to fact, that Charlottesville has violated §192.707(c).

Finally, as shown in Attachment 1, Charlottesville had a good faith belief that the requirements of §192.707(c) were not applicable to either the Barrack Street or Allied Street

⁹ Attachment 1, page 1, numbered paragraph 1.

pipeline segments.¹⁰ Indeed, as shown in that attachment, in an effort to avoid any future problems, Charlottesville set forth its interpretation of the definitions in the regulation of a service line and specifically sought the opinion of the VA SCC.¹¹ The additional exchange of viewpoints showed, as noted, that the requirements of §192.707(c) did not apply to the Allied Street pipe segment. These Charlottesville actions underscore, again, the attitude of compliance that has been repeatedly demonstrated, which compels reconsideration of the proposed penalty assuming, contrary to the facts, that a violation has occurred.

Item 8: §192.805: Proposed Compliance Order, ¶7.

The NOPV asserts that Charlottesville failed to have and follow a written qualification program that identified a covered task “for the calibration and maintenance of field telemeters related to their [sic] telemetry system.” Notably, the allegation by the NOPV that Charlottesville failed to identify as a covered task the “maintenance of telemeters” was not included in the April 15, 2011 NOI issued by the VA SCC and, presumably, should not now be included as part of the NOPV.

The NOPV is clearly incorrect in its assumption that the calibration of telemetering equipment is a covered task. Under §192.801 (b), a covered task is limited to “an activity, identified by the operator, that: . . . (3) is performed as a requirement of this part . . .” The action of calibrating telemetering equipment is *nowhere* defined in Part 192 as a requirement. Based on Charlottesville’s review of the regulations, there is a provision, §192.741, that requires an operator in certain circumstances to install telemetering requirement. However, there is nothing in that section that implies, much less asserts, the requirement that the operator must calibrate such equipment.

The historic facts fully corroborate the conclusion that calibration of telemetering is not a covered task. The part of the Regulations concerning operator qualifications, subpart NN, was promulgated in 1999. Immediately thereafter, all Virginia operators—together with a representative of the VA SCC—held a series of meetings to review the subpart to determine what should be included as covered tasks and thus set forth in each operator’s written qualification program. Several such tasks were identified, and defined with specificity. None of these tasks included calibration of telemetering equipment.

As a result of these meetings, each Virginia operator, including Charlottesville, compiled a written qualification program, which was in 2001. Since that time—i.e., *for over 10 years of regulatory oversight and investigations*—neither the PHMSA nor the VA SCC has ever indicated that Charlottesville’s written qualification program was not in compliance with

¹⁰ As discussed previously, Charlottesville had historically maintained a line marker at the Barracks Road station, notwithstanding its position that it was not required to do so under §192.707(c).

¹¹ Attachment 1, page 1, numbered paragraph 1.

§192.805 (or any PHMSA regulation or requirement) on the theory that the program did not identify as a covered task the calibration of telemetering equipment.

As noted, the NOPV claim that Charlottesville is required to include maintenance of telemetering equipment is not properly included within the NOPV. Nonetheless, Charlottesville stresses that such a claim is ill-founded for the same reasons discussed above—(1) maintenance of telemetering is not a requirement of Part 192, and (2) (a) Charlottesville’s written qualification program, which implemented the consensus of the meetings participated in by all Virginia operators and a representative of the VA SCC, does not define maintenance as a covered task, (b) nor has the PHMSA or VA SCC in over 10 years or regulatory oversight since the implementation of that program ever suggested it should be.

In light of the foregoing, Charlottesville respectfully submits that the claim in the NOPV that Charlottesville violated §192.805 of the Regulations is clearly unreasonable and wrong. Accordingly, the PHMSA should withdraw this finding of violation.

It is equally important that PHMSA withdraw the ill-founded requirement that Charlottesville revise its operator qualification program to include as a covered task the calibration and maintenance of telemetering equipment. As demonstrated, there is no requirement of the Regulations to perform either activity which, under §192.801(b), is a pre-condition to be considered a required task to be included in an operator’s written qualification program.

CONCLUSION

For the reasons demonstrated above, Charlottesville respectfully submits that the PHMSA should withdraw (a) its proposed violations with respect to items 3, 7 and 8.

Charlottesville also requests that the PHMSA withdraw the entire proposed Compliance Order. Charlottesville has complied with each of ¶¶1-7 of the proposed order. ¶8 of the proposed order is neither required nor appropriate for the reasons discussed above.

Charlottesville respectfully submits that the proposed penalties should be entirely eliminated or, alternatively, if they are not, substantially reduced. Charlottesville will not reiterate the facts that justify its request. However, Charlottesville does want to underscore its consistent efforts, described above, to comply with the requirements of the Regulations. Should the PHMSA have any questions regarding any statement set forth in this response, please contact the undersigned counsel, as Charlottesville welcomes any questions or other interaction with the PHMSA to confirm the seriousness and constancy of its attitude of compliance.

Finally, Charlottesville stresses that in all previous instances in which the VA SCC has indicated to Charlottesville possible non-compliance with the Regulations, the matters have been resolved by Charlottesville’s prompt compliance without the escalation of the issuance of an

NOPV. Charlottesville respectfully submits that the same action would have been appropriate for the matters raised in the NOPV, given the circumstances—i.e., not only the fact that the claimed violations are of the same nature as violations that were fully addressed by informal action previously, but also that (1) the claimed violations were determined by the VA SCC in January and March of 2011, some 21 months ago, (2) the compliance actions requested by the VA SCC were promptly and fully undertaken by Charlottesville at that time, and (3) the VA SCC inspected such actions over 10 months ago and did not provide any suggestion that such actions did not fully address the VA SCC concerns or did not fully address any other safety risk.

Respectfully submitted,

THE DEPARTMENT OF PUBLIC WORKS,
CHARLOTTEVILLE PUBLIC UTILITIES

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