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By e-mail

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Lawrence White
Presiding Official, Office of Chief Counsel
Pipeline and Hazardous Materials Safety Division
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: Niagara Mohawk Power Corporation Liquefied Natural Gas Facility in Providence, RI. **CPF 1-2018-3005**

Dear Mr. White:

Thank you for the opportunity to be heard on the above-captioned Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order ("NOPV") at the informal hearing held in this proceeding on December 12, 2018 (the "Hearing"), and for the chance to file this post-hearing brief.

Background

On June 12, 2018, the Pipeline and Hazardous Materials Safety Administration ("PHMSA" or the "Department"), Office of Pipeline Safety, of the U.S. Department of Transportation issued the NOPV to Niagara Mohawk Power Corporation ("Niagara" or the "Company") regarding its LNG facility in Providence, Rhode Island (the "LNG Facility"). The NOPV alleged a violation of Part 193 of Title 49 of the Code of Federal Regulations ("CFR") that was observed during the PHMSA inspection of the LNG Facility between August 29 and August 31, 2017. On July 10, 2018, in accordance with 49 CFR § 190.208(b)(4), the Company responded to the NOPV and requested an informal hearing to review the allegations and proposed civil penalty pursuant to 49 CFR § 190.211. On December 12, 2018, the Hearing took place at the Department of Transportation offices in Trenton, New Jersey. Oral testimony on behalf of the Company was provided by Thomas Smith, Director US LNG Operations, Kathleen Sullivan, Director, Rhode Island LNG, Kimberly Cardosi, Rhode Island Lead Engineer, Corinne Byrnes, Program Manager, Gas Process Safety, Lizette Lofton, LNG Operations Compliance and Training Manager, and the undersigned. Testifying for PHMSA were Ajoke Agboola and Forrest Pitman (via telephone) of PHMSA's Office of Chief Counsel, Robert Burrough, Director Eastern Region, Michael Springer, Operations Supervisor, Barry Small, Operations Supervisor and Marta Riendeau, Operations Supervisor, who had replaced Robert Smallcomb, the person who performed the on-site inspection, on his retirement.

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Discussion

The Alleged Violation, Proposed Civil Penalty, and Proposed Compliance Order

In the NOPV and the testimony at the Hearing by Ms. Riendeau, PHMSA alleged a violation of 49 CFR § 193.2635(d) ("Section 193.2635(d)"), entitled "Monitoring corrosion control," which states that "[e]ach component that is protected from atmospheric corrosion must be inspected at intervals not exceeding 3 years."

The NOPV alleged that "Niagara failed to conduct effective AC [atmospheric corrosion] inspections for the insulated glycol system and three insulated vaporizers at its Providence LNG Plant during the timeframe of 2014 to 2017."[1] The NOPV indicated that the inspection team had reviewed the plant's AC Inspection procedure 17.PR-M5 Rev. 9 (the "Procedure") and its records of inspections for atmospheric corrosion during that timeframe. The NOPV described the insulated glycol system as consisting of 1,650 feet of 8-inch pipe covered by thermal insulation, and alleged that "[i]nspecting these carbon steel components required specialized preparation or expanded effort to access and evaluate them for evidence of AC."[2] The NOPV went on to state that "Niagara's Procedure failed to provide a pathway for the inspection of carbon steel components under thermal insulation" and to "inspect other components with visual barriers, such as, pipe supports and areas under disbanded coating."[3] The NOPV stated that "[t]he 2017 records indicated that Niagara did not perform the AC inspections under most of the 8-inch glycol system piping and the three vaporizers due to the insulation barriers," and that "[t]he 2014-2016 Niagara AC inspection records showed inspection results for components under insulation, but there were no records to attest that the insulation had been removed to access and evaluate the carbon steel components."[4] The NOPV concluded that since the thermal insulation had not been removed and "Niagara's actions and its procedures present no alternate method to perform the AC inspections," Niagara had committed a probable violation of Section 193.2635(d) "by failing to conduct effective AC inspections of above-ground components under insulation at its Providence LNG Plant from 2014 to 2017."[5]

The NOPV then recommended the Company be preliminarily assessed a civil penalty of $46,700.[6] The NOPV also included a proposed Compliance Order ("Proposed Compliance Order") that would require the Company to "revise its procedure for atmospheric corrosion

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1 NOPV at 1.

2 *Id.* at 2.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

protection inspection to address insulated components, pipe at supports and pipe under disbonded coating," provide the revised procedure to PHMSA for review, apply the revised procedure (following its acceptance by PHMSA) "to conduct effective atmospheric corrosion inspections for all insulated components at Niagara's Providence LNG Plant," and provide records indicating the completion of the atmospheric corrosion inspections upon request.[7]

The Company's Response

The Company began the informal hearing by summarizing its position. As discussed in more detail below, the Company respectfully argued that the NOPV conclusion that the Company committed a probable violation of Section 193.2635(d) was based on a flawed interpretation of the regulation and incomplete factual information concerning the extent of the Company's AC inspections. In addition, the Company argued that its due process rights had been violated in that it had not received fair notice of the Department's interpretation of its regulation, and that, in the event that the hearing officer disagreed with the Company on all of the above, the civil penalty should be eliminated or reduced because the Company had a good faith belief that it was acting in compliance with all PHMSA AC regulations.

1. **Section 193.2635(d) does not require the operator of an LNG facility to inspect under thermal insulation.**

Section 193.2635(d) is contained in Part 193 of Title 49 of the CFR. Section 193.2635 states in relevant part:

> § 193.2635 Monitoring corrosion control.
>
> Corrosion protection provided as required by this subpart [G of Part 193 of Title 49 of the CFR] must be periodically monitored to give early recognition of ineffective corrosion protection, including the following, as applicable:
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> . . . .
>
> (d) Each component that is protected from atmospheric corrosion must be inspected at intervals not exceeding 3 years.

Thus, in order to "give early recognition of ineffective corrosion protection," Section 193.2635(d) requires the operator of an LNG facility to inspect "[e]ach component that is protected from atmospheric corrosion . . . at intervals not exceeding 3 years." However, Section 193.2635(d) does not state how such inspections are to be performed and specifically

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[7] *Id.*at 4. The Proposed Compliance Order also requested (not mandated) that the Company maintain documentation of the safety improvement costs associated with fulfilling the Proposed Compliance Order and submit the total to PHMSA. *Id.*

does not state that inspections must be made under thermal insulation. In fact, the section does not mention inspections under thermal insulation at all.

In contrast, the regulations on monitoring atmospheric corrosion control, contained in Part 192 of Title 49, which apply to gas pipelines, and contained in Part 195 of Title 49, which apply to hazardous liquids pipelines, expressly require inspections under thermal insulation. The gas pipeline regulations state:

> § 192.481 Atmospheric corrosion control: Monitoring.
>
> (a) Each operator must inspect each pipeline or portion of pipeline that is exposed to the atmosphere for evidence of atmospheric corrosion, as follows:
>
> . . . .
>
> (b) During inspections the operator must give particular attention to pipe at soil-to-air interfaces, *under thermal insulation*, under disbonded coatings, at pipe supports, in splash zones, at deck penetrations, and in spans over water.[8]

Using language very similar to that in the gas pipeline regulations quoted above, the hazardous liquids pipeline regulations state:

> § 195.583 What must I do to monitor atmospheric corrosion control?
>
> (a) You must inspect each pipeline or portion of pipeline that is exposed to the atmosphere for evidence of atmospheric corrosion, as follows:
>
> . . . .
>
> (b) During inspections you must give particular attention to pipe at soil-to-air interfaces, *under thermal insulation*, under disbonded coatings, at pipe supports, in splash zones, at deck penetrations, and in spans over water.[9]

As the U.S. Court of Appeals has explained, "[w]here an agency includes language in one section of [a] regulation and omits it in another, it is reasonable to presume that the agency acted intentionally in forgoing the language."[10] Applying this rule here, the differences in the wording

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[8] 49 CFR § 192.481(a)-(b) (emphasis added). The Company refers herein to these regulations as the "gas pipeline regulations".

[9] 49 CFR § 195.583(a)-(b) (emphasis added). The Company refers herein to these regulations as the "hazardous liquids pipeline regulations".

[10] *U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 983 (9th Cir. 2008) ("*Shark Fins*").

of the three sections of regulation quoted above evince intent on PHMSA's part to require inspections under thermal insulation pursuant to the gas pipeline regulations and the hazardous liquids pipeline regulations, but not pursuant to Section 193.2635(d). Neither the Part 192 gas pipeline regulations nor the Part 195 hazardous liquids pipeline regulations have been cited as part of the Company's alleged violation. While an agency's interpretation of its own regulation is generally entitled to deference within reasonable bounds,[11] it is not reasonable for PHMSA to import requirements from the gas pipeline and hazardous liquids pipeline regulations into Section 193.2635(d) applicable to LNG facilities, given that PHMSA has declined to write those requirements into Section 193.2635(d). Further, in past orders, PHMSA has applied its regulations to the letter.[12] It is inconsistent with that past practice for PHMSA to find that Section 193.2635(d) requires the Company to inspect under thermal insulation even though the section is silent on how such inspections are to be conducted.

The Department's attempt to argue that the sensible rule of regulatory interpretation articulated in *Shark Fins* does not apply here because the regulations for gas pipelines, hazardous liquids pipelines and LNG facilities are "entirely different" is entirely unsatisfying. Parts 192, 193 and 195 are, of course, all part of the same title of regulations by the same agency and cover exactly the same issue (AC control) in closely related facilities. Had the Department intended to require LNG facilities to perform AC inspections under insulation, it would not have had to look more than a few pages in the CFR to find language that made that clear. Nor was the Department's explanation that the language in Parts 192 and 195 post-dated the language in Part 193 helpful to their cause. In fact, this explanation undercuts the Department's argument that the language in Part 193 "clearly and unambiguously" requires inspection under insulation. Had the Department intended to require inspections under insulation and had the Part 193 language been as clear and unambiguous as the Department argued, surely there would have been no need for the same Department to make explicit mention of the obligation to inspect under insulation in the subsequent regulations. In short, try as they might, the Department cannot escape the fact that the language governing AC control measures for gas and hazardous liquids pipelines and LNG facilities is totally different, and yet its Enforcement branch is attempting to hold all of these facilities to exactly the same standard. This cannot be right.

Nor has PHMSA issued any guidance that requires the implementation of Section 193.2635(d) to include inspection under thermal insulation. It is fundamental that "[d]ue process requires that parties receive fair notice before being deprived of property. . .. In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal

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11 *Gen. Elec. Co. v. U.S. Envtl. Prot. Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

12 *See, e.g., In the Matter of Sunoco Pipeline, L.P.*, CPF No. 4-2007-5040, Final Order, 2010 WL 5761108 (D.O.T.), at *4 n.4 (Dec. 16, 2010); *In the Matter of El Paso Pipeline Corp. and ANR Pipeline Co.*, CPF No. 4-2007-1007, Final Order, 2011 WL 1919516 (D.O.T.), at *3 (Mar. 10, 2011).

liability."[13] The NOPV proposed to assess a civil penalty to the Company for failing to inspect under thermal insulation, but Section 193.2635(d) does not contain any requirement to perform inspections in that way, nor has PHMSA issued any formal interpretations regarding that section, *e.g.*, an interpretation that Section 193.2635(d) requires inspections under thermal insulation.[14]

Once again, the Department's failure to provide guidance on Section 193.2635(d) stands in stark contrast to the Department's conduct under Parts 192 and 195. As was clearly demonstrated at the Hearing by the exhibit at Tab 2 in the Company's binder of documents, for gas pipelines and hazardous liquid pipelines, the Department has helpfully issued guidance that provides: "Operators need not completely remove all thermal insulation to satisfy the monitoring requirements for atmospheric corrosion."[15] Again, while no similar instruction exists under the Department's Corrosion Enforcement Guidance for Part 193, at the Hearing Mr. Burrough echoed the Parts 192 and 195 Enforcement Guidance when he testified that not all insulation has to be removed to satisfy the Part 193 regulations and a sampling protocol would suffice. In short, not only has the Department chosen not to provide guidance to the Company in its Enforcement literature, this is another instance where it seeks to apply the precise standard from Parts 192 and 195 to the Company under Part 193.

PHMSA's response at the Hearing to the Company's "fair notice" argument rested on the 2012 *Transco* order that, the Department argued, provided fair notice that operators of LNG facilities such as the Company must inspect under thermal insulation.[16] The Department's reliance on *Transco* in this context is problematic for several reasons. First, Transco (for reasons unexplained) did not contest the allegation made in the NOPV, and PHMSA found that the violation had occurred without further discussion or exploration of the issues presented in the present case.[17] Second, using a single enforcement order to provide "notice" to Niagara Mohawk and other LNG operators in this context is inadequate where, as here, there is at least one PHMSA enforcement order that appears to contradict *Transco* on the required scope of AC inspections at an LNG facility. At the Hearing the Company cited the 1997 order in *Philips Petroleum Company*.[18] In *Philips Petroleum*, the order states that the operator failed to protect the propane transfer piping at its LNG facility in Kenai Alaska and widespread corrosion was observed. The PHMSA order found a violation of Section 193.2635(d) and stated:

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13 *Id.* at 1328-29 (citation omitted).

14 *See* https://www.phmsa.dot.gov/regulations/title49/part/193.

15 *See* https://www.phmsa.dot.gov/regulations/title49/part/192.

16 *In the Matter of Transcontinental Gas Pipe Line Co., LLC*, CPF No. 1-2012-3002, Final Order, 2012 WL 6892766 (D.O.T.) (Oct. 26, 2012) ("*Transco*").

17 *Id.*

18 *Philips Petroleum Company*, CPF No. 57301-W, 1997 WL 34614767(D.O.T.) (Jan. 24, 1997) ("*Philips Petroleum*").

> "The operator does not monitor atmospheric corrosion on the refrigerant transfer piping. Once corrosion protection is provided on the transfer lines, it must be monitored and recorded at the required intervals to give early warning of ineffective corrosion protection."[19]

The "it" that requires inspection in the quotation above clearly refers to the singular "corrosion protection" and not to the plural "transfer lines," so a fair reading of this order is that the company's obligation under Section 193.2653(d) was to monitor the external corrosion protection (i.e. the wrapped and jacketed pipe) at intervals not exceeding three years. Finally, *Transco* cannot be directly applied to the Company because, in contrast with Transco and as further explained in Section 2 below, the Company *did* remove insulation from the carbon steel piping at the LNG Facility in the course of performing its inspection protocol, and again unlike Transco, the Company made and retained extensive records of the AC inspections that were undertaken while the insulation was removed. Therefore, *Transco* cannot reasonably be considered to provide fair notice to the Company that PHMSA might find a failure to comply with Section 193.2635(d).

Finally, PHMSA's pre-hearing materials cited *Hopkinton*, in which PHMSA assessed the LNG plant operator with a civil penalty for failure to conduct AC inspections under thermal insulation.[20] Interestingly, *Hopkinton* is inapposite for the Department's fair notice defense but instructive on the question of how Section 193.2653(d) is to be interpreted. First, PHMSA moved against the operator not under Section 193.2653(d), as it did in the present case, instead it alleged a violation of 49 CFR § 193.2605 (entitled "Maintenance procedures") due to the operator's failure to properly follow its own manual of written procedures. These written procedures used language taken from Parts 192 and 195 and explicitly required it to inspect under thermal insulation for purposes of corrosion control. Clearly then, *Hopkinton* did not apply Section 193.2653(d), and it therefore cannot be relied upon to provide fair notice to the Company of its alleged obligations under that regulation. But the importance of *Hopkinton* lies in the Department's decision to cite the operator for failing to follow its own procedures, rather than citing it directly for a violation of 193.2653(d). Why would PHMSA make such a decision? The answer, we respectfully suggest, is that Section 193.2653(d) lacked the language requiring any such inspections, whereas Hopkinton's own internal procedures were taken directly from Parts 192 and 195 and so contained the explicit requirement to inspect under insulation. In contrast to the facts in *Hopkinton*, the Company's written procedures do not require inspection under thermal insulation and PHMSA does not allege that the Company failed to follow its written procedures. Indeed, PHMSA has never questioned the Company's written procedures when PHMSA has inspected the LNG Facility in the past.

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19 *Id.* at *1.

20 *In the Matter of Hopkinton LNG Corp.*, Decision on Petition for Reconsideration, CPS No. 1-2012-3001, 2014 WL 7507539 (D.O.T.) (Nov. 24, 2014) ("*Hopkinton*").

Although the NOPV did not cite the Part 192 gas pipeline regulations or the Part 195 hazardous liquids pipeline regulations, the NOPV implicitly and erroneously sought to import requirements of those regulations into the Proposed Compliance Order. The first remedial requirement listed in the Proposed Compliance Order (which was the foundation of the other listed remedial requirements) was that the Company had to "revise its procedure for atmospheric corrosion protection inspection to address insulated components, pipe at supports and pipe under disbonded coating."[21] The quoted language parallels the requirements in the gas pipeline and hazardous liquids pipeline regulations to "give particular attention" during inspections "under thermal insulation, under disbonded coatings, [and] at pipe supports."[22] The Proposed Compliance Order contends that the purpose of those required remedial actions is to "ensure . . . compliance . . . with the pipeline safety regulations."[23] However, those actions are only necessary to comply with the express requirements of the Part 192 gas pipeline regulations and the Part 195 hazardous liquids pipeline regulations, not Section 193.2635(d). In essence, PHMSA's Proposed Compliance Order seeks to require the Company to write into its internal procedures language that is taken directly from a section of the regulations that unarguably does not apply to it. Once again, this simply cannot be right.

2. Even if Section 193.2635(d) were to require the operator of an LNG facility to inspect under thermal insulation, the Company satisfied any such requirement.

As discussed above, The Company respectfully suggests that the Hearing Officer should find that Section 193.2635(d) does not require the Company to inspect under thermal insulation every three years in order to give early recognition of ineffective corrosion protection, and even if it did, the Department did not provide the Company with fair notice of this requirement. But even if the Hearing Officer interprets the section as the Department suggests and rejects the due process argument, the testimony and documentary evidence presented at the Hearing clearly show that the Company has met that requirement.

a. AC inspections of uncovered piping, pipe supports, and vaporizers were performed, and records were maintained.

During the period 2014-2017 for which PHMSA alleges a violation of Section 193.2635(d), most of the carbon steel pipe that forms the glycol system was covered with asbestos insulation and jacketed in aluminum, which together served as both a thermal insulator and protection against atmospheric corrosion, as required by Section 193.2627(b).

As Ms. Cardosi testified at the Hearing, because the asbestos insulation had been installed decades ago, the LNG Facility had an ongoing maintenance program of replacing the asbestos

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21 NOPV at 4.

22 49 CFR §§ 192.481(b), 195.583(b).

23 NOPV at 4.

insulation with polycarbonate insulation whenever the asbestos insulation was found to be in a deleterious condition. Pursuant to the Providence plant's maintenance program, Ms. Cardosi explained that the Company monitored the condition of the glycol system and vaporizers not only during the annual AC inspection pursuant to internal procedure 17.PR-M5 Rev. 9, but during the daily "Operational Tours" which were recorded in the plant log book.[24] As a result the Company successively replaced much of the asbestos insulation at the LNG Facility during the period, and while the underlying piping and vessels were exposed, they were examined visually for AC, and if any concerns were raised, the operator followed up with nondestructive testing.

Much of the time at the Hearing was taken up with Ms. Cardosi walking the attendees through the photographs, documents and engineering reports that revealed precisely what AC control measures were taken by the Company on a year-by-year basis during the period in question. While the Company provided documentary evidence for each year from 2014 to 2017, the documents for 2017 (Tab 11) provided a good example of these materials. Ms. Cardosi walked through these documents at the Hearing and explained that the 2017 documents began with work permits and entries to the Company's log book showing that much of the insulation on the glycol system was removed. Ms. Cardosi estimated that approximately 1,900 linear feet of the glycol 8-inch piping was stripped in 2017. There followed a series of 8 photographs of various portions of the exposed glycol pipe and pipe supports that clearly show the extent of corrosion. Ms. Cardosi explained that these photographs demonstrate that the pipes were visually inspected for AC while stripped of insulation. There followed further work permits and log book entries that showed that a company called Mistras from Auburn Massachusetts performed nondestructive testing on the exposed glycol pipe in early December 2017. More specifically, Ms. Cardosi explained the Mistras engineering reports in the package indicated that it performed a total of 340 separate ultrasonic readings at various points on the pipe to test the thickness of the pipe wall and all were found to be in-range. Ms. Cardosi then added that the liquid glycol in the system was also tested multiple times each year during the period in question for evidence of pipe corrosion. Documentary evidence of this testing was provided to all parties shortly after the hearing. Importantly, the Company found no significant corrosion or weakness on the pipe and other structures during these AC inspections from 2014 to 2017.

After Ms. Cardosi's presentation, there followed some discussion of the timing of the 2017 AC inspection. Ms. Sullivan and Ms. Cardosi testified that while the 2017 work was performed shortly after the 2017 PHMSA inspection, it had been planned long before Mr. Smallcomb raised the issue of the Company's AC procedures. This testimony is confirmed in Mr. Smallcomb's Pipeline Safety Violation Report, in which he noted that the asbestos insulation was scheduled for removal.[25] There was also some discussion of whether the 2017 AC inspection work fell within or outside the three-year period dictated by Section 193.2635(d). Ms. Agboola for the Department stopped short of suggesting that it should not be considered,

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[24] Internal procedure 99.PR-O2 Rev. 11, provided at Tab 4 of the company's pre-Hearing materials.

[25] Pipeline Safety Violation Report, CPF# 1-2018-3005 at p. 12 (*The Violation Report*).

but requested further information on the insulation replacement work that was performed in 2014, 2015 and 2016. While it is the Company's position that the 2017 work clearly fell within the period 2014-2017 put at issue by the Department in its NOPV -- and that should end the matter -- the Company complied with Ms. Agboola's request shortly after the Hearing. This data showed that in 2014 the Company removed insulation from 100 square feet of the vaporizer burners and inspected for AC. In 2015 the Company removed insulation from 36 linear feet of the glycol piping and 60 square feet from the glycol burner and inspected the underlying areas for corrosion. In 2016 the Company removed approximately 360 square feet of insulation from the vaporizers and inspected the vessels for corrosion. The Company had previously provided supporting documentation, photographs and, where appropriate, non-destructive testing reports, to support the fact that AC inspections were conducted whenever the insulation was removed during this period. Taken together, even if one were to question whether the 2017 work should be included for purposes of satisfying Section 193.2653(d), the Company would be entitled to add together all the insulation stripping and AC inspection work it had performed in the three-year period 2014, 2015 and 2016 to "reset" the regulatory three-year period. Using this analysis, the 2017 work would be applied to the three-year period 2017, 2018 and 2019. In short, having put the entire period 2014, 2015, 2016 and 2017 at issue in its NOPV, the Department should not now be allowed to "disqualify" as "out-of-time" any AC inspection work performed by the Company during that period, and even if it attempts to belatedly make that argument, it must fail due to the combined AC inspection sampling work performed by the Company in the period 1/1/2014 to 12/31/16 and again in 2017.

In sum, the actual inspections performed by the Company as described above satisfied the language and purpose of Section 193.2635(d) even if the section is interpreted to require the Company to inspect under the thermal insulation.

b. The Company employed a valid alternative method for AC inspections.

In addition to failing to take into account the actual inspections performed on the bare pipes and other structures, the NOPV erroneously concluded that the Company's "actions and its procedures present no alternate method to perform the AC inspections."[26] The NOPV failed to recognize that the Company's inspection protocol *did* include an "alternate method" to perform the inspections: the Company inspected the pipes and other structures on a section-by-section basis as the asbestos insulation was repaired and replaced over the period in question.

Both PHMSA's orders and interpretations of its regulations permit the use of an alternate method to inspect for atmospheric corrosion. In *Hopkinton*, PHMSA issued a compliance order permitting the operator to use an alternate method (in that case, a sampling process) to inspect for atmospheric corrosion on carbon steel pipe at its LNG facility:

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[26] NOPV at 2.

> [T]he Compliance Order portion of the Amended Order is sound and appropriate, even though it allows a sampling of thermally insulated piping. The intent of this provision in the Compliance Order is to allow Hopkinton the flexibility of determining and documenting which metallic components could be adversely affected by atmospheric corrosion and to address such risks under 49 C.F.R. § 193.2625(a) [entitled "Corrosion protection"], but to require that all components the company decides *do* need protection from atmospheric corrosion must be inspected at intervals not exceeding three years, as required under 49 C.F.R. § 193.2635(d).[27]

PHMSA has also found that, in the case of "a performance-based regulation [set forth in 49 CFR § 195.422, entitled 'Pipeline repairs'], which requires a specified minimum level of safety for pipeline repairs without prescribing a specific process or method for each type of repair," an operator "may comply with [the] regulation by using one or more evaluation methods" that satisfy the requirements of the regulation.[28] The same reasoning should permit the Company to use its inspection protocol to satisfy Section 193.2635(d), which is a performance-based regulation that does not prescribe a specific process or method to inspect for atmospheric corrosion.

There is nothing in Section 193.2635(d), or in the Part 192 gas pipeline regulations or the Part 195 hazardous liquids pipeline regulations,[29] that would preclude the Company from using the form of alternate inspection method that was used. To the contrary, as previously noted, PHMSA interprets the gas pipeline and hazardous liquids pipeline regulations to allow the operator to inspect under thermal insulation without fully removing the insulation. For each of those regulations, PHMSA's corrosion enforcement guidance specifically notes that "[o]perators need not completely remove all thermal insulation to satisfy the monitoring requirements for atmospheric corrosion."[30] Logically, the same must be true for Section 193.2635(d), if it is

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27 *Hopkinton* at *5 (emphasis in original).

28 *In the Matter of Butte Pipeline Co.*, CPF No. 5-2007-5008, Final Order, 2009 WL 3190794 (D.O.T.), at **3, 4 (Aug. 17, 2009).

29 49 CFR §§ 192.481, 195.583.

30 *Part 192 Corrosion Enforcement Guidance* at 128 (Dec. 7, 2015), available at https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Corrosion_Enforcement_Guidance_Part192_12_7_2015.pdf; *Part 195 Corrosion Enforcement Guidance* at 94 (June 22, 2016), available at https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/Corrosion_Enforcement_Guidance_Part195_6_22_2016.pdf. The corrosion enforcement guidance quoted above goes on to state that "[i]f an operator does not remove all insulation from thermally insulated pipe, the operator should identify avenues allowing moisture intrusion into the pipe/insulation system, pipe orientation or junctions between insulated and non-insulated pipe and components." As the Ms. Cardosi explained at the Hearing, the Company identified such avenues allowing moisture intrusion, such as broken or flaking insulation, as part of its inspection protocol. There is no PHMSA corrosion enforcement guidance on Part 193 of Title 49, the portion of the CFR that contains Section 193.2635(d). *See* https://www.phmsa.dot.gov/pipeline/enforcement/enforcement-program-0.

interpreted similarly to the gas pipeline and hazardous liquids pipeline regulations (as the Department claims), to permit inspection under thermal insulation when practical.

Besides incorrectly asserting that the Company presented no alternate method to perform the atmospheric corrosion inspections, the NOPV erred in other respects as well. It stated that the Company did not remove insulation during the inspections.[31] That statement ignores the fact that the Company's inspection protocol included removal of the old asbestos insulation and subsequent inspections for atmospheric corrosion as the old damaged insulation was replaced. The NOPV also mistakenly stated that the Company kept insufficient records regarding its inspections.[32] In fact, as demonstrated at the Hearing and as referenced above, the Company kept sufficient records, photographs and engineering analyses of the inspections it performed. For all these reasons, the NOPV was in error.

3. Any penalty assessed to the Company should be reduced or cancelled.

For the reasons explained above, the Company respectfully suggests that the Hearing Officer should find that the Company has satisfied Section 193.2635(d). If, however, the Hearing Officer finds that the Company violated Section 193.2635(d), PHMSA should exercise its discretion to issue a warning letter to the Company in lieu of assessing a civil penalty. PHMSA has considerable latitude in determining the appropriate response for a probable violation of the regulations promulgated under Title 49 of the CFR, including the authority to issue a warning letter in lieu of a penalty.[33] PHMSA's regulations provide six factors to be considered in determining an enforcement response.[34] Based on weighing these six factors, issuing a warning letter would be appropriate.

The first factor listed in the regulations is the nature, circumstances, and gravity of the violation, including adverse impact on the environment.[35] As explained above, the Company employed a multifaceted inspection protocol to monitor for atmospheric corrosion at the LNG Facility from 2014 to 2017. The Company's inspections found no significant corrosion or weakness on the pipe and other structures, and no adverse impact on the environment.

The second factor listed in the regulations is the degree of the respondent's culpability.[36] Again, the Company undertook an inspection protocol that it, acting in good faith, thought would satisfy Section 193.2635(d). The Company continued to follow the inspection protocol

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31 NOPV at 2.

32 *Id.*

33 *See* 49 CFR § 190.205.

34 49 CFR § 190.225.

35 49 CFR § 190.225(a)(1).

36 49 CFR § 190.225(a)(2).

for years with no reason to believe that PHMSA would find it problematic, given that PHMSA inspectors had previously reviewed the same procedures in detail and had never raised any substantive concerns about it during their prior inspections. Therefore, the Company had no reason to believe the inspection protocol might violate Section 193.2635(d).

The third factor is the respondent's history of prior offenses.[37] In the recent history of the LNG Facility there has been only one proceeding in which PHMSA has alleged the Company had violated its regulations,[38] and even in that case (involving 49 CFR § 193.2605, entitled "Maintenance procedures") PHMSA withdrew its entire proposed civil penalty.[39] The last proceeding in which PHMSA assessed a penalty for a violation of its regulations at the LNG Facility was initiated over a decade ago, in 2007.[40] Thus, the Company does not have any significant history of prior offenses.

The fourth factor is any good-faith attempt by the respondent in attempting to achieve compliance.[41] As explained above, the Company undertook its inspection protocol to comply with the purposes of Section 193.2635(d) and did -- and continues to -- believe that it did so. No credit for this factor was given to the Company by Mr. Smallcomb in the Pipeline Safety Violation Report on the grounds that "[t]he Operator was aware of the prescriptive requirement to inspect the components vulnerable to atmospheric corrosion."[42] This statement was strongly contradicted by all members of the Company team at the Hearing, including Ms. Sullivan, Ms. Cardosi and Ms. Lofton, who were identified by Mr. Smallcomb as being present at the interview, and all the Company witnesses stated unequivocally at the Hearing that they believed the Company's AC monitoring program to be compliant. No one at the Hearing questioned the sincerity of this testimony, nor could they.

The discrepancy between Mr. Smallcomb's account and the Company's testimony at the Hearing may be explained by what we respectfully suggest was a simple misunderstanding. We saw at the Hearing during the debate between Mr. Lodemore and Ms. Agboola that the meaning of the term "component" may be understood to refer to different things by different people. Ms. Agboola used the term "component" to refer to the pipe underlying the insulation and jacket, while Mr. Lodemore focused on the Department's definition of the phrase to conclude that "component" referred to the pipe, insulation and jacket in combination.[43] Thus,

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37 49 CFR § 190.225(a)(3).

38 *See* https://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_13480.html.

39 *In the Matter of Niagara Mohawk Power Corp.*, CPF No. 1-2015-3003, Final Order, 2016 WL 8309641 (D.O.T.) (Nov. 15, 2016).

40 *See* https://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_31706.html.

41 49 CFR § 190.225(a)(4).

42 *The Violation Report* at 11.

43 The definition of "Component" at 49 CFR 193.2627 provides: "Component means any part, or system of parts functioning as a unit, including, but not limited to, piping, processing equipment, containers, control devices,

when Mr. Smallcomb asked whether the Company was aware of the "prescriptive requirement to inspect the components" the Company's answer would have been "yes" although Mr. Smallcomb and the Company personnel understood the term "component" differently.

Further, the Company's written atmospheric corrosion inspection procedures have been in place for years without question during prior inspections. Taken together we believe that the foregoing demonstrates that the Company made a vigorous, reasonable and good-faith attempt to comply with the section.

The fifth factor is the effect on the respondent's ability to continue in business.[44] The sixth factor is that PHMSA may consider (i) the economic benefit gained from violation, if readily ascertainable, without any reduction because of subsequent damages, and (ii) such other matters as justice may require.[45] The only one of these factors that is relevant to this proceeding is the last. As discussed above, the Company has not received fair notice of the requirements of Section 193.2635(d), as now interpreted by PHMSA. Given the lack of specificity in Section 193.2635(d) regarding the required means of inspection and the good-faith actions the Company took to comply with the purposes of that section, PHMSA should issue the Company a warning letter.

Even if the Hearing Officer instead finds that a civil penalty should be assessed against the Company, the penalty amount should be reduced below the $46,700 preliminarily assessed in the NOPV. PHMSA considers the six factors described above in determining any penalty amount.[46] For the same reasons discussed above, the Hearing Officer should find that the six factors weigh in favor of a reduced penalty for the Company. In addition, regarding the sixth factor, PHMSA should consider that it has imposed a penalty for a violation of Section 193.2635(d) only in *Transco*, in the amount of $48,400.[47] However, *Transco* is factually distinguishable from the Company's case because Transco did nothing to inspect under insulation, while the Company provided documentary and photographic evidence to prove that it conducted extensive AC inspections on the bare pipe.

PHMSA precedent supports a reduction in any penalty assessed to the Company. For example, in *Hopkinton*, PHMSA explained that it had initially assessed the operator a civil penalty of $32,100 for failing to follow its own manual of written procedures. However, PHMSA later

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impounding systems, lighting, security devices, fire control equipment, and communications equipment, whose integrity or reliability is necessary to maintain safety in controlling, processing or containing a hazardous fluid." The Company pointed out that the glycol pipe, its insulation and steel jacket form just such a "system of parts functioning as a unit" and so meets the definition of "Component."

44 49 CFR § 190.225(a)(5).

45 49 CFR § 190.225(b)(1)-(2).

46 49 CFR § 190.225(a)-(b).

47 *Transco* at *3.

found that the evidence supported the penalty amount of $32,100 but that the operator "had a credible belief that its approach to monitoring and inspecting piping under insulation for atmospheric corrosion was faithful to its duty to meet its obligation to comply with its own procedures and . . . Section 193.2635(d)."[48] Therefore, PHMSA reduced the penalty amount to $19,688 "to recognize the company's good-faith efforts."[49] Here, the Company has followed its own manual of written procedures but as in *Hopkinton*, any penalty assessed to the Company should be reduced to recognize its good-faith efforts to inspect for atmospheric corrosion, as well as the weight of the other factors discussed above.

Conclusion

For all the above-stated reasons, the Company submits that the evidence in this case supports a finding that the Company did not violate Section 193.2635(d). If, however, the Hearing Officer finds that the Company violated Section 193.2635(d), then PHMSA should issue a warning letter to the Company, or in the alternative should reduce the civil penalty amount preliminarily proposed in the NOPV.

Thank you for your attention and consideration of this matter.

Sincerely,

David C. Lodemore
Senior Counsel
National Grid

cc: Ross Turrini, National Grid
Thomas Smith, National Grid
Y. Ajoke Agboola, PHMSA
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48 *Hopkinton* at *4.

49 *Id.*