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By Email and Overnight Delivery

March 9, 2020

Ms. Kristin Baldwin, Esq.
Presiding Official
United States Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue SE
East Building
Washington, DC 20590

**Re: Respondent's Post-Hearing Brief
Distrigas of Massachusetts, LLC
CPF No. 1-2019-3001M**

Dear Ms. Baldwin,

Pursuant to 49 C.F.R. § 190.211(g) (2019) and instruction provided at the January 21, 2020 hearing, Distrigas of Massachusetts, LLC submits its Post-Hearing Brief in this proceeding.

Please let us know if you have any questions. Thank you for your attention on this matter.

Respectfully submitted,

Susan A. Olenchuk

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

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In the Matter of	)	
	)	
Distrigas of Massachusetts, LLC	)	CPF No. 1-2019-3001M
	)	
Respondent.	)	
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**POST-HEARING BRIEF
OF DISTRIGAS OF MASSACHUSETTS, LLC**

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**UNITED STATES DEPARTMENT OF TRANSPORTATION
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In the Matter of

Distrigas of Massachusetts, LLC

Respondent.

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CPF No. 1-2019-3001M

**Post-Hearing Brief
of Distrigas of Massachusetts, LLC**

I. INTRODUCTION

Pursuant to 49 C.F.R. § 190.211(g) (2019) and the instruction of the Presiding Official at the January 21, 2020 hearing, Distrigas of Massachusetts, LLC (Distrigas) respectfully submits its Post-Hearing Brief regarding the Notice of Amendment (NOA) issued by the Office of Pipeline Safety (OPS) on September 17, 2019.¹ The NOA alleges that Distrigas's Truck Loading Procedure, EMT-05, does not provide adequate recordkeeping guidance with respect to testing the transfer hoses used to transfer liquefied natural gas (LNG) to tanker trucks at the Everett LNG Terminal (Terminal).

This Post-Hearing Brief incorporates by reference the Pre-Hearing Brief submitted by Distrigas on January 10, 2020² and responds to issues raised during the January 21, 2020 hearing and the Pre-Hearing Submission provided by the Region.³ Distrigas respectfully requests that the Pipeline and Hazardous Materials Safety Administration (PHMSA) Associate Administrator withdraw the NOA because it is factually and legally unsupported. In addition, the Closure Letter issued by the Region on November 18, 2019 should be rescinded and withdrawn because it is improper as a matter of law and factually unsupported.

II. ARGUMENT

The NOA alleges that Distrigas's Truck Loading Procedure is inadequate because, according to OPS, the procedure does not provide adequate recordkeeping guidance with respect to testing the transfer hoses used to transfer of LNG when loading trucks with LNG. Distrigas demonstrated in its Pre-Hearing Brief that OPS has not met its burden of proving that the Truck

¹ PHMSA, Office of Pipeline Safety, Notice of Amendment, CPF No. 1-2019-3001M (Sept. 17, 2019).

² Pre-Hearing Brief of Distrigas of Massachusetts, LLC, CPF No. 1-2019-3001M (Jan. 10, 2020) (Distrigas Pre-Hearing Br.).

³ Email of Ms. Ajoke Agboola, Attorney Advisor, Office of Chief Counsel, PHMSA, to Ms. Kristin Baldwin, Presiding Official, PHMSA (Jan. 10, 2020) (OPS Pre-Hearing Submission).

Loading Procedure is inadequate.⁴ The Truck Loading Procedure contains all of the information alleged by the NOA to be missing and none of the information alleged to be missing from the Bills of Lading is related to either Part 193 or to safety of the Terminal. The Pre-Hearing Brief also demonstrated that Distrigas's procedures contained all necessary record retention provisions prior to both the inspection and issuance of the NOA. The Truck Loading Procedure is not inadequate to ensure safety of the LNG Terminal.

At the January 21, 2020 hearing, the lack of support for the NOA's allegation was even more clear. First, OPS conceded that Distrigas's Record Retention Procedure (RC-003), updated June 6, 2016, existed at the time of the inspection and addressed the examples of alleged record-keeping inadequacies described in the NOA.⁵ Therefore, the NOA's allegation that Distrigas's procedures failed to provide details on record retention requirements is unsupported. Other assertions advanced by the Region to justify the NOA also are unsupported as OPS misconstrues the purpose of the Truck Loading Procedure and the regulations applicable to the completion of the Distrigas Bills of Lading. The Truck Loading Procedure does not govern the Bill of Lading. Rather, it is governed by PHMSA's regulations governing the transportation of hazardous materials.

At no time in this proceeding has OPS identified any instance of a failure to visually inspect the transfer hoses or to document that visual inspections were performed. Each Bill of Lading record shows that the transfer hoses were inspected each time a truck was loaded. Distrigas respectfully requests that PHMSA find that OPS has failed to satisfy its burden of demonstrating that Distrigas's Truck Loading Procedure is inadequate and withdraw the NOA.

Distrigas also reiterates its request that PHMSA rescind and withdraw the Closure Letter issued by the Region on November 18, 2019. Issuance of the Closure Letter was improper as a matter of law because Distrigas had filed a request for hearing challenging the merits of the NOA and that request was still pending. Distrigas's right to a hearing to challenge the merits of the NOA is provided by the Pipeline Safety Act⁶ and PHMSA's regulations.⁷ In addition, PHMSA's Pipeline Safety Enforcement Procedures require that PHMSA convene a hearing if a Respondent requests one.⁸ Despite Distrigas's pending request for a hearing, however, the Closure Letter implicitly assumed that the inadequacies alleged in the NOA regarding Distrigas's Truck

⁴ Three versions of Distrigas's Truck Loading Procedure are relevant in this proceeding. The first is the March 13, 2018 version which was in effect until June 6, 2019 when it was revised and updated. The NOA incorrectly refers to this version as the "3/3/18 Procedure." The second version, dated June 6, 2019, was in effect during the June 2019 inspection and was reviewed by the PHMSA Inspector. The third version was updated on June 25, 2019 for the purpose of clarifying for the Inspector that the "operator" is the "Shipper" and the truck driver is the "Carrier" on the Bill of Lading. These procedures were included with the Non-Public version of Distrigas's Pre-Hearing Brief as Attachments 2, 3, and 4. A redline showing how the June 25, 2019 version of the Truck Loading Procedure modified the June 6, 2019 version is included as Attachment 5 of Distrigas's Pre-Hearing Brief.

⁵ In the Matter of Distrigas of Massachusetts, L.L.C., Deposition of PHMSA Hearing, CPF No. 1-2019-3001M, at 30 (Jan. 21, 2020) ("Hearing Transcript," included as Attachment 1 hereto).

⁶ 49 U.S.C. § 60108(a)(2) (2018).

⁷ 49 C.F.R. § 190.206(a).

⁸ PHMSA, Pipeline Safety Enforcement Procedures, Section 4, Administrative Enforcement Processes, at 57-58, 75 (Dec. 12, 2018) (The portion of Section 4 describing processes related to Notices of Amendment is included as Attachment 2 of Distrigas's Post-Hearing Brief) (Pipeline Safety Enforcement Procedures)

Loading Procedure were true and stated, without explanation, that Distrigas had “corrected” them. At the hearing, the basis for one of these assertions was demonstrated to be entirely unsupported as OPS admitted that Distrigas’s Record Retention Procedure existed at the time of the inspection and addressed the NOA’s examples of alleged Record Retention inadequacies. Whether the Inspector reviewed the procedure at the time of the inspection is irrelevant. The Region’s reliance on the June 25, 2019 revised Truck Loading Procedure to justify closing the NOA is similarly untenable because the revised procedure was provided before issuance of an NOA. Submitting this procedure, regardless of its purpose, does not void a Respondent’s right to respond to an NOA when it is issued and request a hearing to challenge its merits, especially when the NOA raised issues not identified after the inspection. The Closure Letter was improper and should be rescinded and withdrawn.

Even though the Presiding Official convened a hearing, Distrigas remains harmed by the Closure Letter because its implicit assumption that an inadequacy existed and the finding that Distrigas “corrected” it give the false impression that Distrigas’s Truck Loading Procedure was inadequate to ensure safety at the Terminal. This impression is false because, as demonstrated in this Post-Hearing Brief, the alleged inadequacy and the basis for the Closure Letter’s finding that Distrigas “corrected” the alleged inadequacy are contradicted by the facts. The Closure Letter creates unjustified public blemish on Distrigas’s compliance record. In addition, this proceeding would be considered prior enforcement action in a potential future proceeding.

Even if PHMSA upholds the NOA, the Closure Letter should be rescinded and withdrawn in order to properly recognize that a Region cannot unilaterally close a case while a request for hearing has been filed and is pending and before the merits of alleged inadequacies are adjudicated. Rather, if the NOA is sustained, the proper action under PHMSA’s regulations is for the Associate Administrator to issue an Order Directing an Amendment.⁹ A closure letter would be an appropriate action only after Distrigas submits a revised procedure and PHMSA finds it to be adequate.

A. OPS Concedes That Distrigas’s Procedures Contained the Necessary Record Retention Provisions

The NOA states that the Procedure “failed to provide details” regarding, among other things, “Record retention requirements.”¹⁰ The NOA does not mention Distrigas’s Record Retention Procedure RC-003, updated June 6, 2016, because the Region claims that Distrigas did not provide the procedure during the inspection and that the Inspector did not review it until Distrigas provided it on November 13, 2019 when the Region requested it.¹¹ Upon reviewing

⁹ 49 C.F.R. § 190.206(b) (“After considering all material presented in writing or at the hearing, if applicable, the Associate Administrator determines whether the plans or procedures are inadequate as alleged. The Associate Administrator issues an order directing amendment of the plans or procedures if they are inadequate, or withdraws the notice if they are not.”); *see also* Pipeline Safety Enforcement Procedures, Section 4, at 78-79 (*see* Attachment 2 hereto).

¹⁰ NOA at 2.

¹¹ Hearing Transcript at 28, 30; OPS Pre-Hearing Submission, Attached email of Ms. Ajoke Agboola to Ms. Kristin Baldwin and Ms. Susan Bergles, Assistant General Counsel, Exelon (Dec. 9, 2019) (OPS Pre-Hearing Submission Attachment). The Inspector stated in his affidavit that, during the inspection, he did not review Distrigas’s Record Retention procedures related to transfer hoses and that he reviewed them for the first time on November 13, 2019,

the procedure, OPS claimed that it resolved the Region's record-keeping concerns and was part of the basis for issuing the Closure Letter.¹²

In its Pre-Hearing Brief, Distrigas challenged the alleged inadequacy, arguing that the Inspector reviewed the Record Retention Procedure during the inspection and that it contained all the necessary record retention provisions prior to the inspection and prior to issuance of the NOA.¹³

At the hearing, OPS admitted that Distrigas's Record Retention Procedure existed at the time of the inspection and conceded that the procedure addressed the examples of record-keeping inadequacies alleged in the NOA.¹⁴ The Region's concession is clear from the following statements during the hearing:

MS. AGBOOLA: The first time that PHMSA reviewed the record-retention procedures was on November 13th, after having an informal meeting with Distrigas. After reviewing the record-retention procedures, the Eastern Region willingly, you know, recognized, okay, these – some of the alleged inadequacies. Some of the examples that were provided were, in fact, addressed by the record-retention procedure, but at no time were the record-retention procedures reviewed during the inspection, and that is why it is the first thing listed in the NOA.¹⁵

* * * * *

MS. AGBOOLA: We had an informal meeting, and during that meeting, Distrigas explained that they keep all of their record-retention requirements in a separate procedure, and so, we asked to see that procedure, and they provided it to us, and after reviewing that procedure, you know, we realized that, okay, one of the examples of what the procedures failed to provide had been addressed. They do have a procedure that details the record retention requirements and the details of the frequency for completing the Bill of Lading records. That is all in the record-retention procedures.

MS. BALDWIN: But it was not a new procedure? The Region is not alleging that this procedure was created for the purposes of satisfying this NOA? This is a procedure that they failed to give you at the time of the inspection until the November 13th –

MS. AGBOOLA: Yes.

when Distrigas provided them. Affidavit of Mr. Matthew Valerio, General Engineer, Eastern Region, PHMSA, at ¶¶ 20-21 (Feb 10, 2020) (Valerio Affidavit).

¹² Hearing Transcript at 28, 30-31.

¹³ Distrigas Pre-Hearing Br. at Attachment 6. The procedure had been reviewed and approved without any changes by Distrigas on September 9, 2018.

¹⁴ Hearing Transcript at 30. OPS also acknowledged that the Record Retention Procedure was not created for the purpose of satisfying the NOA. *Id.*

¹⁵ *Id.* at 28.

MS.BALDWIN: So, on the basis of that document, the Region made a decision to close the NOA?

MS. AGBOOLA: Yes.¹⁶

These statements confirm that, contrary to the allegation in the NOA, Distrigas had a procedure that provided “details” regarding “Record retention requirements.”¹⁷ OPS’s admission demonstrates that the NOA’s allegation that Distrigas’s procedures failed to address record retention requirements has no factual support.

The Region claims that Distrigas did not provide the Record Retention Procedure during the inspection and that the Inspector did not review it until November 13, 2019 when Distrigas provided it at the Region’s request.¹⁸ The preponderance of the evidence, however, suggests otherwise. As described in Distrigas’s Pre-Hearing Brief and in the Affidavit of Ms. Bryn Karaus, who attended the first day of the inspection on behalf of Distrigas,¹⁹ the Inspector asked “whether Terminal procedures included a process for requiring the maintenance of records for every inspection and test required by Part 193.”²⁰ Terminal representatives explained that Record Retention Procedure No. RC-003, most recently updated on June 6, 2016, describes record retention periods for each inspection and test performed under Part 193. Ms. Karaus explains in her affidavit that her notes of the inspection show that, like other procedures reviewed by the Inspector that day, the Record Retention Procedure was displayed on a visual monitor so that the Inspector could review the language and the procedure’s content.²¹

Distrigas personnel have no recollection of the Inspector requesting that the Record Retention Procedure be submitted to OPS and OPS has not stated that it made such a request. The Inspector admits that, during the verbal exit briefing, he did not discuss any concerns about record retention.²² Indeed, none of the post-inspection correspondence, including the emails of the Inspector, the post-inspection Verbal Exit Briefing Report and Requested Items, and the Post-Inspection Written Preliminary Findings, mentions record retention issues.²³ The complete absence of any mention by OPS of record retention concerns in the post-inspection correspondence suggests that OPS did not raise it. Therefore, Distrigas had no reason to provide the Record Retention Procedure. When OPS requested the Record Retention Procedure on November 13, 2019, Distrigas provided it on the same day.²⁴

¹⁶ Hearing Transcript at 30-31.

¹⁷ NOA at 2.

¹⁸ OPS Pre-Hearing Submission Attachment at 1; Hearing Transcript at 28, 30; Valerio Affidavit at ¶¶ 20-21.

¹⁹ Affidavit of Ms. Bryn Karaus, Of Counsel, Van Ness Feldman, LLP, at ¶ 5 (Feb. 10, 2020) (Karaus Affidavit) (Attachment 3 hereto).

²⁰ Distrigas Pre-Hearing Br. at 14; Karaus Affidavit at ¶ 5.

²¹ Karaus Affidavit at ¶ 5.

²² Valerio Affidavit at ¶ 17 (“In addition to the above concerns regarding the Bills of Lading, I was concerned that EMT-05 did not have a record retention provision. *This concern was not specifically discussed during the verbal exit briefing* but was included in the NOA.”) (emphasis added).

²³ Distrigas Pre-Hearing Br. at Attachments 9, 11, 13, & 14.

²⁴ *Id.* at Attachment 15.

The date on which the Inspector reviewed OPS's Record Retention Procedure does not have any impact on the fact that, at that time of the inspection, Distrigas had a procedure that details record retention requirements. At the hearing, OPS conceded that the procedure addressed examples of inadequacies alleged in the NOA and that the procedure was not created in response to the NOA. Therefore, at the time the NOA was issued, Distrigas's procedures relating to record retention were not inadequate for failing to address recordkeeping details. The allegation in the NOA has been disproved by more than a preponderance of the evidence and OPS failed to meet its burden.²⁵

B. The Truck Loading Procedure Is Not Inadequate

The NOA alleges that the Truck Loading Procedure "failed to include sufficient guidance on how to record the information on the Bill of Lading Record"²⁶ because the procedure failed to provide the following details:

- Identification of what form/document, name/number that LNG truck loading transfers and transfer hose visual inspections are to be documented on
- A definition of "Operator", "Shipper, Per" and "Carrier, Per" from the Bill of Lading record fields
- Who completes/signs off on the Bill of Lading records²⁷

At the Hearing, OPS reiterated these allegations. OPS claimed that the Truck Loading Procedure governs the Bill of Lading and that the procedure should be drafted so that "anyone" can use it, even those "unfamiliar with this process" of loading a truck with LNG and completing the Bill of Lading.²⁸ OPS also stated that "the point of the procedures is to help any personnel regardless of how familiar they are with your forms fill out the document, and that the regulation is focused on the details."²⁹ OPS also appeared to suggest that the procedure may be ambiguous because it does not specify which version of the Bill of Lading is to be used.

These allegations cannot be sustained as a matter of either law or fact.

1. Only One Version of the Bill of Lading Exists

The NOA claimed that the Truck Loading Procedure was inadequate because it failed to provide the details regarding the "[i]dentification of what form/document, name/number that

²⁵ *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 4-2017-5027, 2019 WL3734516, at **4-5 (D.O.T. Apr. 3, 2019) (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in the conduct that would constitute a violation); *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.").

²⁶ NOA at 2.

²⁷ *Id.* at 2.

²⁸ Hearing Transcript at 50-51.

²⁹ *Id.* at 53.

LNG truck loading transfers and transfer hose visual inspections are to be documented on.”³⁰ Distrigas’s Pre-Hearing Brief explained that Section 3.1.1.1 of all versions of the Truck Loading Procedures clearly specifies that the Bill of Lading is the document used to record that the transfer hoses are visually inspected when a truck is loaded.³¹

At the hearing, the Region seemed to suggest that the Truck Loading Procedure did not clearly identify which version of the Bill of Lading should be used to record the completion of the visual inspection:

MR. SPRINGER: . . . it is very common to see . . . a revision date, a version number on a procedure, that kind of thing, and for that to be specifically referenced in the procedure . . . these documents, the records that are used, they often go through revisions, and we think it’s important that they are to be kind of, you know, an agreement between the procedure and the current version of whatever record form is being used so that . . . there is no confusion to the person who is trying to follow that procedure on which version of the form I am supposed to be using and that there is consistency in the way that things are being documented.³²

To the extent that the Region is suggesting that the Truck Loading Procedure is inadequate because it fails to specify which “version” of the Bill of Lading should be used to record completion of the visual inspection of the transfer hoses, Distrigas clarifies that only one version of the Bill of Lading exists. There is no confusion and no inconsistency in how the visual inspections of the transfer hoses are documented, and the Region has not identified any. The allegation that the Truck Loading Procedure did not clearly identify which version of the Bill of Lading should be used to record the completion of the visual inspection lacks any record support and must be rejected.³³

2. The Truck Loading Procedure Does Not Govern the Completion of the Bills of Lading and Is Clearly Written for the Trained Personnel Who Use Them

The NOA asserts that the Truck Loading Procedure was inadequate because it failed to provide details regarding “[a] definition of “Operator”, “Shipper, Per” and “Carrier, Per” from the Bill of Lading record fields” and “[w]ho completes/signs off on the Bill of Lading records.”³⁴ This concern appears to have its genesis in the Inspector’s confusion during the inspection when he viewed the computer-printed duplicates of the original handwritten Bills of Lading. As Distrigas explained in its Pre-Hearing Brief, these computer-printed duplicates, generated days

³⁰ NOA at 2.

³¹ Distrigas Pre-Hearing Br. at 15.

³² Hearing Transcript at 39.

³³ *In re ExxonMobil*, 2019 WL3734516 at **4-5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in the conduct that would constitute a violation); *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).

³⁴ NOA at 2.

after the trucks were loaded at the request of Constellation (the seller of the LNG), did not bear the signature of the Carrier, *i.e.*, the truck driver. The original handwritten version of each Bill of Lading, however, was signed by the truck driver (*i.e.*, Carrier) and Distrigas (*i.e.*, the Operator/Shipper).³⁵

At the hearing, OPS asserted that, before Distrigas submitted the revised Truck Loading Procedure on June 25, 2019, it referred to the “Operator’s” signature on the Bill of Lading to document the visual inspection of the transfer hoses, but that the Bill of Lading uses the terms “Shipper” and “Carrier.” Alleging that the two documents are inconsistent,³⁶ OPS asserted that because the Truck Loading Procedure dictates the completion of the Bill of Lading³⁷ the alleged lack of clarity regarding who signs the Bill of Lading raises a safety concern.³⁸

Acknowledging a lack of familiarity with shipping documents, OPS also asserted that Truck Loading Procedure should be written so that “anyone” can understand it and to enable “any personnel” to complete the Bill of Lading.³⁹ Without pointing to any examples where signatures were either missing or incorrect, OPS stated further that “[i]f it [the Truck Loading Procedure] had said, ‘The Shipper’s signature on the Bill of Lading indicates that the hoses had been visually inspected,’ then someone who is unfamiliar with this process can read the procedures and look at the Bill of Lading, and say, oh, this makes sense.”⁴⁰

OPS’s statements that the Truck Loading Procedure governs the completion of the Bill of Lading and that the procedure should be written so that “anyone” and those “unfamiliar with the process” can understand them, or that “any personnel” can use them to complete the Bill of Lading, are incorrect and inconsistent with applicable regulations. The Distrigas Bill of Lading is not governed by the Truck Loading Procedure. Rather, like the transportation of LNG by truck, the Bill of Lading is governed by PHMSA’s regulations applicable to the transportation of hazardous materials. The Truck Loading Procedure also is written with the appropriate level of clarity for the trained Terminal personnel who use it. “Anyone” and those “unfamiliar with this process” do not need to know how to load a truck with LNG, as untrained individuals are

³⁵ Distrigas Pre-Hearing Br. at 5, 16. As Distrigas explained in its Pre-Hearing Brief, each original handwritten bill of lading contains the truck driver’s signature. *Id.* at 5, 16 & Attachment 1. These handwritten bills of lading and the computer-printed duplicates were provided to the Inspector immediately following the inspection. In July 2019, Distrigas and the Inspector convened a conference call to review their content. *Id.* at 6-7 and Attachments 1 (containing Bills of Lading and Truck Loading Slips) and Attachments 8, 10, & 12.

³⁶ Hearing Transcript at 42-43; Valerio Affidavit at ¶¶ 11-15.

³⁷ Hearing Transcript at 40 (“MS. AGBOOLA: They said that there were some statements made that the truck-loading procedures . . . don’t dictate how you fill out the Bill of Lading. We disagree. The truck-loading procedures walk through . . . who is supposed to sign the Bill of Lading, and what that – the signature is supposed to represent.”); Valerio Affidavit at ¶ 10 (“I also reviewed Respondent’s Truck Loading Procedure EMT-05 (EMT-05), which governs the Bills of Lading.”).

³⁸ Hearing Transcript at 40-41 (“MS. AGBOOLA: . . . the Bill of Lading is a document that Distrigas has chosen to use to demonstrate that they are in compliance with [§ 193.2321(b)]. It’s important that it’s filled out correctly, and that the signatures are there in order to demonstrate safety, and to insure that their personnel are safe, and that the hoses that they are using are safe.”).

³⁹ Hearing Transcript at 50-51, 53.

⁴⁰ *Id.* at 51.

prohibited from performing these tasks at the Terminal and are prohibited from transporting LNG by truck under PHMSA's regulations.

a. The Truck Loading Procedure Is Governed by PHMSA's Hazardous Materials Transportation Regulations

Distrigas's Pre-Hearing Brief fully explained the purpose of a bill of lading and the terms "Shipper" and "Carrier" when goods are shipped in commerce.⁴¹ The Distrigas Bill of Lading records the details of the shipment of LNG by truck. Distrigas, the Operator, is the Shipper, and the truck driver is the Carrier. Shipping information on the Bill of Lading is provided by both Constellation (the seller of the LNG at the Terminal) and the driver of the truck used to ship the LNG to its destination.⁴²

Distrigas also explained that the purpose of the Truck Loading Procedure is to describe the steps required to ensure that the physical transfer of LNG from the Terminal tanks into the tanker trucks is performed safely in compliance with Part 193.⁴³ Although certain information generated by the truck loading process is recorded on the Bill of Lading, the Truck Loading Procedure does not govern the completion of the Bill of Lading.⁴⁴

OPS's claim that the Truck Loading Procedure governs the completion of the Bill of Lading is incorrect because the Bill of Lading is governed by PHMSA's regulations covering the transportation of hazardous materials. The Truck Loading Procedure addresses requirements of Part 193, not requirements relating to the shipment of hazardous materials.

PHMSA is one of the federal agencies that regulates the safe and secure transportation of hazardous materials.⁴⁵ Under PHMSA's hazardous materials regulations, LNG is a "cryogenic liquid" classified as a Class 2 Hazardous Material.⁴⁶ LNG is listed on PHMSA's Hazardous Materials Table under Methane and its Identification Number is UN1972.⁴⁷

The transportation of LNG by tanker truck is governed by PHMSA's hazardous materials regulations.⁴⁸ These regulations also apply to persons who cause hazardous materials to be transported in commerce and who perform, or are responsible for performing, a pre-transportation function.⁴⁹ "Pre-transportation functions" include "[p]reparing a shipping paper."⁵⁰ A bill of lading is a shipping paper.⁵¹ The completion of shipping papers is governed

⁴¹ Distrigas Pre-Hearing Br. at 2-3.

⁴² *Id.*

⁴³ *Id.* at 3-4, 15.

⁴⁴ *Id.* at 15.

⁴⁵ 49 C.F.R. § 171.1. The Department of Transportation is the primary federal department that regulates the transportation of hazardous materials. 49 U.S.C. §§ 5101-5128 (2018). The Secretary of Transportation has delegated that authority to PHMSA. 49 C.F.R. § 1.53 (2019).

⁴⁶ 49 C.F.R. § 173.115(g).

⁴⁷ *Id.* § 172.101 (Methane, refrigerated liquid (cryogenic liquid) or Natural gas, refrigerated liquid (cryogenic liquid), with high methane content).

⁴⁸ *Id.* § 171.1

⁴⁹ *Id.* § 171.1(b).

⁵⁰ *Id.* § 171.1(b)(7).

by the requirements of subpart C of Part 172.⁵² These regulations specify the information that is to be included on a shipping paper and how it is to appear. PHMSA's hazardous materials regulations prohibit a person from accepting hazardous material for transportation or transporting a hazardous material by highway without receiving a shipping paper prepared in accordance with Part 172.⁵³

OPS's assertion that the Truck Loading Procedure governs the completion of the Bill of Lading is incorrect. The Truck Loading Procedure governs the transfer of the LNG to a truck consistent with Part 193. The completion of the Distrigas Bill of Lading is governed by PHMSA's hazardous materials regulations. For example, as required under section 172.202(a)(2), the Distrigas Bill of Lading reflects the Proper Shipping Name of the LNG transported via truck from the Terminal as "Natural Gas, Refrigerated Liquid, Cryogenic Liquid with High Methane Content."⁵⁴ Some of the information relevant to loading a truck, such as tare weight, scale number and confirmation that transfer hoses were visually inspected, and signatures of the truck driver and Distrigas operator, also happens to be recorded on the Bill of Lading.⁵⁵ This does not mean, however, that the Truck Loading Procedure governs the completion of the Bill of Lading.

The Bill of Lading is a shipping paper that is subject to PHMSA's hazardous materials regulations governing the completion of shipping papers that are required before the LNG is transported in commerce by truck. The purpose of Truck Loading Procedure is to ensure the safe transfer of LNG from the Terminal tank to the trucks as required under section 193.2513. The Procedure does not, and is not intended to, address requirements pertaining to the preparation of shipping papers under PHMSA's hazardous materials regulations.

OPS's unsupported assertions to the contrary are inconsistent with the applicable regulations.

b. The Truck Loading Procedure Is Used by Trained Personnel and Is Appropriately Clear

OPS's claim that the Truck Loading Procedure should be written so that "anyone" or "someone who is unfamiliar with this process" can understand them or that "any personnel" can use them to complete a Bill of Lading is misplaced. This procedure, like all other procedures at the Terminal, is intended to be used by Terminal personnel who have been trained regarding the requirements of Part 193 and to perform specific tasks in compliance with Part 193. The only personnel who are permitted to load trucks with LNG are those who have been trained to perform that task. These personnel understand the identities of the Shipper and the Carrier on the Bill of Lading and which entity is required to sign which box on the Bill of Lading.

⁵¹ *Id.* § 171.8 ("Shipping paper means a shipping order, bill of lading, manifest or other shipping document serving a similar purpose and prepared in accordance with subpart C of Part 172 of this chapter.")

⁵² *Id.* Part 172, Subpart C.

⁵³ *Id.* § 177.817(a).

⁵⁴ Distrigas Pre-Hearing Br. at Attachment 1.

⁵⁵ *Id.* at 3, 15.

Subpart H of Part 193 describes extensive personnel qualifications and training requirements for personnel who work at an LNG Terminal.⁵⁶ The following are several examples that are relevant to this proceeding:

- Section 193.2705 requires that “[s]upervisors and other personnel utilized for construction, installation, inspection, or testing” demonstrate “their capability to perform satisfactorily the assigned function by appropriate training in the methods and equipment to be used or related experience and accomplishments.”
- Section 193.2707(a) requires that Distrigas use for operation or maintenance of components “only those personnel who have demonstrated their capability to perform their assigned functions.”
- Section 193.2707(b) prohibits any person who does not meet the requirements of Section 193.2707(a) from operating or maintaining a component unless accompanied by someone who does meet the requirements.
- Section 193.2713(a) requires that Distrigas implement a written plan of initial training to among other things instruct “all operating and appropriate supervisory personnel -- (i) to understand detailed instructions on the facility operations, including controls, functions, and operating procedures; and (ii) to understand the LNG transfer procedures provided under Section 193.2513.”
- Section 193.2713(b) requires that Distrigas have a written plan of continuing instruction that is provided at no more than 2-year intervals to ensure personnel stay current on the knowledge and skills from the initial training program.
- Section 193.2717 requires that all operations and maintenance personnel and supervisors be trained on fire protection.

In addition to Part 193’s requirements for training Terminal personnel, PHMSA’s hazardous materials regulations prohibit a carrier from transporting a hazardous material by motor vehicle unless each employee involved in the transportation is trained.⁵⁷ In addition, as noted above, a carrier is prohibited from accepting hazardous material for transportation or transporting a hazardous material by highway without receiving a shipping paper prepared in accordance with Part 172.⁵⁸

OPS’s claim regarding the intended audience for Distrigas’s Truck Loading Procedure lacks support and is without merit. Only trained personnel are permitted to load trucks with LNG or perform any task described in the Truck Loading Procedure. These personnel, as well as the trained truck driver who will be shipping the LNG in commerce, understand the identities of the Operator, Shipper, and Carrier.

⁵⁶ 49 C.F.R. Part 193, Subpart H.

⁵⁷ *Id.* Part 172, Subpart H and § 177.800(c) and § 177.816.

⁵⁸ *Id.* § 177.817(a).

OPS has not identified any official Bill of Lading record missing a signature, including a signature verifying the visual inspection of the transfer hoses. OPS completely overlooks the fact that every Bill of Lading executed at the time trucks were loaded at the Terminal contained all required signatures, including signatures of Distrigas personnel who were attesting to the fact that the transfer hoses had been visually inspected.⁵⁹

OPS has not met its burden of proving that the Truck Loading Procedure was inadequate and the NOA must be withdrawn.⁶⁰

C. The Region Did Not Have Authority to Close the NOA Proceeding While Distrigas's Request for Hearing Was Pending

On November 18, 2019, the Region Director issued a letter purporting to close this NOA Proceeding even though Distrigas had filed a request for a hearing challenging the basis of the NOA.⁶¹ The Region Director attempted to justify the Closure Letter by asserting that the revised Truck Loading Procedure provided by Distrigas on June 25, 2019 and the Record Retention Procedure, provided on November 13, 2019, "corrected" inadequacies alleged in the NOA.⁶²

In its Pre-Hearing Brief, Distrigas demonstrated that closing the NOA proceeding while Distrigas's request for hearing was pending violated the Pipeline Safety Act and PHMSA's regulations, both of which provide a Respondent the right to respond to an NOA and request a hearing to challenge the merits of an NOA.⁶³ Distrigas also argued that the Closure Letter's statement that Distrigas had "corrected" the alleged inadequacies implicitly assumes that the NOA's allegations are true, even though they were subject to a challenge.⁶⁴ The Region's assumption is confirmed by OPS's Pre-Hearing Submission which states that "[t]he Region reaffirms its position that closing an NOA is the appropriate course of action once all apparent inadequacies appear to have been addressed."⁶⁵

OPS also claims in its Pre-Hearing Submission that "[f]or cases where there are no outstanding adversarial issues (allegations of inadequacies) it is common practice for Regional Directors to close NOAs,"⁶⁶ and that the "Regional Director has an inherent discretion to stop

⁵⁹ Distrigas Pre-Hearing Br. at Attachment 1.

⁶⁰ *In re ExxonMobil*, 2019 WL3734516 at **4-5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in the conduct that would constitute a violation); *In re Air Prods.*, 2015 WL 6758819 at *3 (withdrawing alleged violation because PHMSA did not produce "any evidence to support its position" and thereby did not meet its burden of proof).

⁶¹ Distrigas Pre-Hearing Br. at Attachment 16.

⁶² *Id.*

⁶³ *Id.* at 17-18 (citing 49 U.S.C. § 60108(a)(2) and 49 C.F.R. § 190.206(a)).

⁶⁴ *Id.* at 18 and Attachment 16 ("My staff reviewed the amended procedures submitted on June 25, 2019 and the Record Retention procedures submitted on November 13, 2019, and it appears that the inadequacies outlined in this Notice of Amendment have been corrected.") (emphasis added).

⁶⁵ OPS Pre-Hearing Submission Attachment at 2.

⁶⁶ *Id.* at 1.

pursuing any enforcement case originally brought and thereby close it.”⁶⁷ In support, OPS identified three proceedings where the Region Director had closed NOAs.⁶⁸

During the Hearing, OPS placed significant emphasis on the fact that Distrigas had submitted the June 25, 2019 revised Truck Loading Procedure after the inspection, asserting that Distrigas submitted the revised procedure for the purpose of addressing “an inadequacy” identified by the Inspector.⁶⁹ In addition, OPS emphasized Distrigas’s submission of the Record Retention Procedure on November 13, 2019.⁷⁰

OPS’s reliance on these submissions, however, do not support issuance of the Closure Letter as a matter of either fact or law. First, the Region’s claim in the Closure Letter that the Record Retention procedure (updated June 6, 2016) submitted on November 13, 2019 “corrected” the alleged “inadequacies”⁷¹ is undermined by OPS’s admission at the hearing that the procedure existed at the time of the inspection and addressed the alleged inadequacies in the NOA.⁷² Because the inadequacies never existed, they could not be subsequently “corrected” by providing the Inspector with a copy of the same procedure that was available and reviewed during the inspection. The Closure Letter’s assertion cannot be sustained.⁷³

Second, reliance on Distrigas’s submission of the June 25, 2019 procedure after the inspection, but before issuance of the NOA, cannot be used to justify closing the proceeding. The Pipeline Safety Act and PHMSA’s regulations provide any Respondent with the opportunity to respond to an NOA, challenge its merits, and exercise the right to request a hearing.⁷⁴ Submitting a revised procedure after the inspection and before issuance of the NOA does not void this right, especially when the NOA raised record retention issues not identified during the post-inspection verbal briefing⁷⁵ or in the post-inspection correspondence.⁷⁶

In this proceeding, Distrigas requested a hearing to challenge the merits of the NOA. Distrigas did not file amended procedures after the NOA was issued or withdraw the request for a hearing. Therefore, contrary to OPS’s Pre-Hearing Submission, adversity existed in this proceeding at the time the Closure Letter was issued. In fact, adversity continues to exist. The Pipeline Safety Act and PHMSA’s regulations provided Distrigas the right to challenge the

⁶⁷ *Id.* at 2.

⁶⁸ OPS Pre-Hearing Submission at 1.

⁶⁹ Hearing Transcript at 34-37, 39-40.

⁷⁰ *Id.* at 26-28, 30.

⁷¹ Distrigas Pre-Hearing Br. at Attachment 16.

⁷² *See supra*, Section II.A.

⁷³ *In re ExxonMobil*, 2019 WL3734516 at **4-5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in the conduct that would constitute a violation); *In re Air Prods.* 2015 WL 6758819 at *3 (withdrawing alleged violation because PHMSA did not produce “any evidence to support its position” and thereby did not meet its burden of proof).

⁷⁴ 49 U.S.C. § 60108(a)(2) and 49 C.F.R. § 190.206(a).

⁷⁵ Valerio Affidavit at ¶ 17 (“In addition to the above concerns regarding the Bills of Lading, I was concerned that EMT-05 did not have a record retention provision. *This concern was not specifically discussed during the verbal exit briefing* but was included in the NOA.”) (emphasis added).

⁷⁶ *See supra*, Section II.A at 5.

merits of the NOA in a hearing. This right also is reflected in Section 4 of PHMSA's Pipeline Safety Enforcement Procedures which explicitly state that "[i]f an operator requests a hearing, one must be held, unless the case is withdrawn for other reasons."⁷⁷ Contrary to the suggestion in OPS's Pre-Hearing Submission, the Region cannot ignore Distrigas's request for a hearing and simply declare that this case presents "no outstanding adversarial issues," and foreclose Distrigas's ability to exercise that right.

The cases cited in OPS's Pre-Hearing Submission do not support OPS's position. None of them involve circumstances where a Respondent filed a request for hearing. In two of the proceedings cited by OPS, PHMSA found that because the Respondent had not requested a hearing, the right was waived.⁷⁸ In the third proceeding cited by OPS, the Respondent did not contest the allegations and did not request a hearing.⁷⁹ By contrast, Distrigas *has* filed a request for a hearing. Issuing the Closure Letter while the request was pending was effectively the same thing as unilaterally waiving Distrigas's right to a hearing and denying Distrigas the process afforded by section 190.206(b) of PHMSA's regulations.

Even though the Presiding Official convened a hearing regarding the NOA in this case, the Region's Closure Letter adversely affects Distrigas because the Closure Letter implicitly assumed that Distrigas's Truck Loading Procedure is inadequate and then found that Distrigas had "corrected" the alleged inadequacies. The Closure Letter therefore gives the false impression that Distrigas's Truck Loading Procedure was inadequate to ensure safety at the Terminal and reflects a blemish on Distrigas's compliance record in a public docket. The finding also is considered a prior enforcement action in a potential future proceeding. Rescinding and withdrawing the Closure Letter properly recognizes that, when a Respondent files a request for hearing, a Region, which is the entity advancing the allegation, cannot short circuit the enforcement process by making premature findings regarding the merits of the pending allegations. Rather, the matter must be properly adjudicated before a Presiding Official with the Associate Administrator making a determination under section 190.206(b).⁸⁰

The Closure Letter should be rescinded and withdrawn regardless of the outcome of the merits of this proceeding, including if the Associate Administrator sustains the NOA. In that circumstance, section 190.106(b) provides that proper action is for the Associate Administrator to issue an Order Directing an Amendment. A closure letter would be an appropriate action only after all issues in the proceeding are resolved.

⁷⁷ Pipeline Safety Enforcement Procedures, Section 4, at 75.

⁷⁸ *In re Enterprise Products Operating LLC*, Order Directing Amendment, CPF No. 1-2017-5021M (Oct. 15, 2018); *In re Magellan Terminals Holdings, L.P.*, Order Directing Amendment, CPF No. 1-2016-6001M (Apr. 18, 2017).

⁷⁹ Letter of Gregg Johnson, Dir. of Pipeline Compliance, Targa Resources Corp., to Allan C. Beshore, Dir. Central Region, OPS, CPF No. 3-2019-6005M at 5-6 (Oct. 25, 2019).

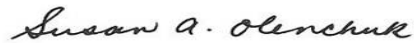
⁸⁰ 49 C.F.R. § 190.206(b) ("After considering all material presented in writing or at the hearing, if applicable, the Associate Administrator determines whether the plans or procedures are inadequate as alleged. The Associate Administrator issues an order directing amendment of the plans or procedures if they are inadequate, or withdraws the notice if they are not."); *see also* Pipeline Safety Enforcement Procedures, Section 4, at 78-79.

Therefore, Distrigas requests that the Associate Administrator rescind and withdraw the Closure Letter and make clear that a Region is required to follow the process set forth in the regulations when a Respondent files a request for a hearing regarding the merits of an NOA.

III. CONCLUSION

Based on the foregoing, Distrigas requests that PHMSA withdraw the NOA as unsupported by either law or fact and rescind and withdraw the Closure Letter.

Respectfully submitted,



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