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January 20, 2023

**By Electronic Mail**

Robert Burrough  
Director, Eastern Region, Office of Pipeline Safety  
Pipeline and Hazardous Materials Safety Administration  
840 Bear Tavern Road, Suite 300  
West Trenton, NJ 08628

**Re: Kiantone Pipeline Corporation  
Notice of Probable Violation and Proposed Civil Penalty  
CPF 1-2022-076-NOPV  
Request for Settlement Conference and Hearing**

Dear Mr. Burrough:

Kiantone Pipeline Corporation (“Kiantone”) acknowledges receipt of the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) Notice of Probable Violation (“NOPV”) and Proposed Civil Penalty which was dated December 8, 2022. Kiantone was granted an extension until January 23, 2023 to respond, making this response timely.

The NOPV alleges two (2) separate violations of the regulations under 49 C.F.R., and includes a proposed total civil penalty of \$44,800. For reasons explained below, Kiantone contests Item 1 but does not contest Item 2, though Kiantone contests the amount of the proposed civil penalty as to both Items.

With this letter and pursuant to the Pipeline Safety Act, 49 U.S.C. § 60117(b)(1)(B), Kiantone respectfully requests the opportunity to convene an informal settlement meeting with PHMSA to discuss the issues of fact and law raised by the NOPV, as well as the proposed civil penalty of \$44,800.

In the event that the parties are unable to resolve the issues, and in order to preserve Kiantone’s rights, Kiantone is timely filing the attached request for a hearing and statement of issues for all items in the NOPV, including the associated proposed civil penalty pursuant to 49 C.F.R. §§ 190.208 and 190.211. Kiantone respectfully requests that PHMSA refrain from scheduling a hearing in order to provide the parties with sufficient time to attempt to resolve these issues.

Thank you for your consideration of this request for an informal settlement meeting and request for hearing. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "George C. Hopkins". The signature is written in a cursive style with a large, stylized "G" and "H".

Vinson & Elkins, LLP  
George C. Hopkins  
2200 Pennsylvania Ave. NW  
Washington DC 20037  
Counsel for Kiantone Pipeline Corporation

**Before the  
U.S. Department of Transportation  
Pipeline and Hazardous Materials Safety Administration  
Office of Pipeline Safety  
Washington, D.C.**

|                               |   |                              |
|-------------------------------|---|------------------------------|
|                               | ) |                              |
| In the Matter of              | ) |                              |
|                               | ) |                              |
| Kiantone Pipeline Corporation | ) | CPF No. 1-2022-076-NOPV      |
|                               | ) | Notice of Probable Violation |
| Respondent.                   | ) |                              |
|                               | ) |                              |

**Request for Hearing and Response to NOPV**

I. Introduction and Request for Hearing

Kiantone Pipeline Corporation (“Kiantone”) hereby responds to the Notice of Probable Violation (“NOPV”) and Proposed Civil Penalty issued by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) relative to the Pipeline Safety Regulations, Title 49, Code of Federal Regulations (“C.F.R.”). Kiantone hereby requests a hearing pursuant to 49 C.F.R. § 190.208.

II. Response to NOPV

**Response to NOPV No. 1**

Kiantone disputes alleged violation number 1 because it rests on incorrect factual premises. The NOPV alleges that Kiantone failed to obtain employees’ written consent or request the drug and alcohol (“D&A”) testing records of the employees it intended to use to perform safety-sensitive duties for the first time (i.e. covered employees) in calendar years 2020 and 2021. The NOPV then assumes that, because 52 and 58 employees were drug tested in 2020 and 2021 respectively, those employees must have been covered employees who had been previously employed by DOT-regulated employers, and therefore Kiantone committed a violation by failing to request their D&A records.

On the contrary, Kiantone believes that none or virtually none of those new hires was coming from a covered position at another DOT employer or had covered employment history prior. In other words, there were no D&A records to request because, according to their applications, those employees had not been employed by DOT employers within the two years prior to hire. See 49 C.F.R. § 40.25(b). Kiantone is willing to share those employment applications with PHMSA to demonstrate this point.

For the reasons more fully set forth above, Kiantone requests that PHMSA either withdraw Violation number 1, or issue a warning letter and not seek a penalty. Alternatively, the proposed civil penalty should be reduced because it is excessive and does not adequately take into account the circumstances, including Kiantone's good faith efforts to comply with the regulations.

### **Response to NOPV No. 2**

Kiantone does not contest alleged violation number 2. Kiantone does contest, however, the amount of the proposed civil penalty for Item 2.

### **Statement of Issues**

1. Can PHMSA uphold a violation under 49 C.F.R. § 40.25(a) for an Operator's failure to request the information required in § 40.25(b) where the employees in question were not previously covered employees for whom drug and alcohol records from previous DOT-regulated employers would be available?
2. If an employee seeking to begin performing safety-sensitive duties for an Operator for the first time has not worked, according to that employee's job application, for a DOT-regulated employer during any period during the two years before the date of the employee's application or transfer, what, if any, are an Operator's obligations with respect to 49 C.F.R. § 40.25(b)?
3. Are the proposed civil penalties excessive, arbitrary or capricious?
4. Is PHMSA's enforcement scheme constitutional where it allows PHMSA to impose penalties without affording the Operator a right to a jury trial?
5. Does PHMSA's enforcement scheme violate an Operator's Seventh Amendment right to a jury trial where it allows the Secretary of Transportation to decide whether or not to bring an enforcement action and seek civil penalties within the agency or in federal court before a jury?
6. Is PHMSA's enforcement scheme unconstitutional because the statutes provide the Secretary of Transportation unfettered discretion—no intelligible principle—to decide whether to bring enforcement actions against Operators within the agency or in district court?

Kiantone intends to be represented by counsel at the hearing.

Sincerely,

A handwritten signature in blue ink that reads "George C. Hopkins". The signature is written in a cursive style with a large, stylized 'G' and 'H'.

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