JUL 07 2009

Mr. John W. Somerhalder, II
President
AGL Resources, Inc.
Ten Peachtree Place, NE
Atlanta, GA 30309

Re: CPF No. 2-2006-3003

Dear Mr. Somerhalder:

Enclosed is the Final Order issued in the above-referenced case. It makes findings of violation and assesses a civil penalty of $303,000. The penalty payment terms are set forth in the Final Order. This enforcement action closes automatically upon payment. Your receipt of the Final Order constitutes service of that document under 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Enclosure

cc: David E. Slovensky, Esq.,
AGL Resources Inc., Ten Peachtree Place NE, Atlanta, Georgia 30309
Paul Biancardi, Esq., 5818 Beaver Falls Drive, Kingwood, Texas 77345
Linda Daugherty, Director, Southern Region, PHMSA
Richard Lonn, Director, Regulatory Compliance, Chattanooga Gas Company

CERTIFIED MAIL – RETURN RECEIPT REQUESTED [7005-1160 0001 0046 9716]

U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY
WASHINGTON, D.C. 20590

In the Matter of	)	
AGL Resources, Inc.,	)	**CPF No. 2-2006-3003**
Respondent.	)	

FINAL ORDER

Pursuant to 49 U.S.C. § 60117, a representative of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), conducted a post-incident investigation of a natural gas fire at a liquefied natural gas facility (LNG Plant) owned by AGL Resources, Inc. (AGL or Respondent), and operated by its subsidiary, Chattanooga Gas Company, in Chattanooga, Tennessee. AGL Resources, Inc., is a diversified energy services company that distributes natural gas in Florida, Georgia, Maryland, New Jersey, Tennessee, and Virginia.

The incident occurred on May 13, 2005, when a fire at the LNG Plant severely burned one of Chattanooga's employees, Mr. Terry Poss, and resulted in his hospitalization (Incident). At the time of the Incident, Mr. Poss was attempting to unclog an F-101 filter that was used to clean the natural gas of certain impurities. When the built-up pressure dislodged the blockage in the filter, gas rushed out in Mr. Poss' direction, ignited, and caused him to sustain second- and third-degree burns.[1] Respondent promptly initiated an emergency shutdown of the LNG Plant.[2]

As a result of the post-incident investigation, the Director, Southern Region, OPS (Director), issued to Respondent, by letter dated April 20, 2006, a Notice of Probable Violation and Proposed Civil Penalty (Notice). In accordance with 49 C.F.R. § 190.207, the Notice proposed finding that Respondent had violated 49 C.F.R. §§ 193.2503, 193.2503(f)(4), 193.2603(a), 193.2603(b), 199.105(b), and 199.225(a)(1) and assessing a civil penalty of $303,000 for the alleged violations.

After an authorized extension of time, AGL responded to the Notice by letter dated July 20, 2006 (Response). AGL did not dispute the allegations of violation but contested the amount of the proposed civil penalty and offered a compromise amount of $173,000. OPS declined the offer

[1] *Investigation Report, Natural Gas Fire, May 13, 2005, Chattanooga LNG Plant, Chattanooga Gas Company*, U.S. Department of Transportation, Pipeline & Hazardous Materials Safety Administration (December 30, 2005), at 5.

[2] *Id.*

and the matter was scheduled for hearing, which was subsequently held on May 11, 2007, in Atlanta, Georgia. An attorney from the Office of Chief Counsel, PHMSA, served as presiding official pursuant to 49 C.F.R. § 190.211(c). After the hearing, Respondent provided a Post-Hearing Closing Argument (Closing), which was further supplemented by letter dated July 18, 2008.[3]

FINDINGS OF VIOLATION

AGL did not contest the allegations in the Notice that it violated 49 C.F.R. Parts 193 and 199, as follows:

Item 1: The Notice alleged that Respondent violated 49 C.F.R. § 193.2503, which states:

> **§ 193.2503 Operating procedures.**
> Each operator shall follow one or more manuals of written procedures to provide safety in normal operation and in responding to an abnormal operation that would affect safety….

The Notice alleged that on the date of the Incident, Respondent violated § 193.2503 by failing to follow its own written procedures to provide safety in both normal and abnormal operating situations. At the time of the Incident, AGL's written procedures required that all employees wear personal protective equipment (PPE), including flame-retardant coveralls and hood, whenever "a hazardous or potentially hazardous atmospheric condition exist[ed] on a job site…."[4] Mr. Poss, however, was not wearing flame-retardant clothing when he attempted to clear the clogged filter and, as a result, suffered serious injury.[5] The Notice alleged that AGL failed to ensure that Poss followed these company procedures.

In its Response, AGL did not contest this allegation. Accordingly, upon consideration of all of the evidence, I find that AGL violated 49 C.F.R. § 193.2503 by failing to follow its own written procedures to provide safety in normal operation and in responding to an abnormal operation that would affect safety.

Item 2: The Notice alleged that Respondent violated 49 C.F.R. § 193.2503(f)(4), which states:

> **§ 193.2503 Operating procedures.**
> Each operator shall follow one or more manuals of written procedures to provide safety in normal operation and in responding to an abnormal operation that would affect safety. The procedures must include provisions for:

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[3] AGL confirmed in its Closing that it did not wish to contest the allegation of violation in the Notice. See Closing, 1.

[4] Chattanooga Gas Company Safety Manual, Paragraph 5.3 (1993).

[5] *Investigation Report, supra,* at 2.

> (a) ….
> (f) In the case of liquefaction, maintaining temperatures, pressures, pressure differentials and flow rates, as applicable, within their design limits for:
> (1) ….
> (4) Purification and regeneration equipment;….

The Notice alleged that Respondent violated § 193.2503 by failing to follow its own manual of written liquefaction procedures for maintaining pressure differentials and flow rates for purification and regeneration equipment, within their design limits. Specifically, the Notice alleged that AGL failed to follow the instructions in the manufacturer's manual for maintaining pressure differentials across the F-101 filter within its design limits.[6] The manufacturer (Perry Equipment Corporation) warned in its operating instructions that the pressure drop across the filter should never exceed 35 psi or else the filter elements might collapse.

AGL admitted in its Response that the company was aware of this restriction and expected its employees to adhere to it.[7] However, its employees failed to comply with this restriction and allowed the pressure drop across the filter to reach 54 psi before they shut down the liquefaction process. As a consequence, the filter collapsed, causing molecular sieve and dust particles to ignite. In its Response, AGL did not contest this allegation. Accordingly, upon consideration of all the evidence, I find that Respondent violated 49 C.F.R. §193.2503(f)(4) by failing to follow its own written procedures for maintaining pressure differentials for the F-101 filter within the design limits set by the manufacturer.

Item 3: The Notice alleged that Respondent violated 49 C.F.R. § 193.2603, which states:

> **§ 193.2603 General.**
> (a) Each component in service, including its support system, must be maintained in a condition that is compatible with its operational or safety purpose by repair, replacement, or other means.
> (b) An operator may not place, return, or continue in service any component which is not maintained in accordance with this subpart.

The Notice alleged that AGL violated § 193.2603 by failing to maintain various components of the LNG Plant equipment in a condition that was compatible with their operational or safety purpose by repair, replacement, or other means. Specifically, it alleged that AGL failed to properly maintain the three dehydrator towers. The Notice further noted that Respondent had continued to keep the dehydrators in service despite known problems dating back to 2003.

During the LNG liquefaction pre-treatment process, water, carbon dioxide, and other compounds

[6] The pressure differential for the filter is calculated by subtracting the outlet pressure from the inlet pressure. The inlet pressure is a reading taken from a gauge installed upstream from the dehydrator. The outlet pressure is a reading taken from a gauge installed at the outlet of the cold box.

[7] Closing, at 7.

are removed by using a dehydrator and molecular sieve towers.[8] As revealed by the AGL internal investigation, the caulking that sealed the gap between the mesh and the inside wall of all three towers failed, allowing sieve under pressure to be forced out of the dehydrator and causing the F-101 filter to clog.[9] As explained in the Investigation Report, the F-101 filter had routinely clogged prior to the Incident, becoming blocked by molecular sieve and dust that originated in the dehydrator.[10] Although AGL cleaned and replaced the filter numerous times, it did not repair or replace the dehydrator, the source of the problem. As recently as six days prior to the Incident, the filter clogged and required cleaning. Respondent chose to install an additional strainer to catch the sieve rather than to properly repair the dehydrator but both strainers failed prior to the Incident.

Proper maintenance and repair of these various components could have prevented the May 13, 2005 fire. AGL did not contest this allegation. Accordingly, upon consideration of all of the evidence, I find that Respondent violated 49 C.F.R. § 193.2603 by failing to maintain the dehydrator and other related components in a condition that was compatible with their operational or safety purpose by repair, replacement, or other means.

Item 4: The Notice alleged that Respondent violated 49 C.F.R. § 199.105(b), which states:

> **§ 199.105 Drug tests required.**
>
> Each operator shall conduct the following drug tests for the presence of a prohibited drug:
>
> (a) …
>
> (b) *Post-accident testing*. As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use….

The Notice alleged that Respondent violated § 199.105(b) by failing, within 32 hours after an accident, to drug test an employee whose performance either contributed to the accident or could not be completely discounted as a contributing factor. Specifically, the Notice alleged that Respondent failed to drug test within 32 hours the employee who was involved and injured in the Incident. AGL failed either to provide a reasonable explanation for its failure to test or to

[8] *Investigation Report, supra,* at 7.

[9] *Id.* at 9.

[10] *Id.*

demonstrate that the employee's performance could be completely discounted as a contributing factor to the accident. AGL did not contest this allegation. Accordingly, upon consideration of all of the evidence, I find that Respondent violated 49 C.F.R. § 199.105(b) by failing to drug test, within 32 hours, the employee involved and injured in the Incident.

Item 5: The Notice alleged that Respondent violated 49 C.F.R. § 199.225 (a)(1), which states:

> **§ 199.225 Alcohol tests required.**
>
> Each operator shall conduct the following types of alcohol tests for the presence of alcohol:
>
> (a) *Post-accident.* (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

The Notice alleged that Respondent violated § 199.225(a)(1) by failing to test, as soon as practicable following an accident, each surviving covered employee for alcohol if that employee's performance of a covered function either contributed or could not be completely discounted as a contributing factor to the accident. Specifically, the Notice alleged that AGL failed to test, as soon as practicable, the employee involved and injured in the Incident. Respondent failed either to provide a reasonable explanation for its failure to test or to demonstrate that the employee's performance could not be completely discounted as a contributing factor to the accident. In its Response, AGL did not contest this allegation. Accordingly, upon consideration of all of the evidence, I find that Respondent violated 49 C.F.R. § 199.225(a)(1) by failing to test for alcohol use, as soon as practicable, the employee involved and injured in the Incident.

These findings of violation will be considered prior offenses in any subsequent enforcement action taken against Respondent.

ASSESSMENT OF PENALTY

Under 49 U.S.C. § 60122, Respondent is subject to an administrative civil penalty not to exceed $100,000 per violation for each day of the violation, up to a maximum of $1,000,000 for any related series of violations.

49 U.S.C. § 60122 and 49 C.F.R. § 190.225 require that, in determining the amount of a civil penalty, I consider the following criteria: the nature, circumstances, and gravity of the violation, including adverse impact on the environment; the degree of Respondent's culpability; the history of Respondent's prior offenses; the Respondent's ability to pay the penalty and any effect that

the penalty may have on its ability to continue doing business; and the good faith of Respondent in attempting to comply with the pipeline safety regulations. In addition, I may consider the economic benefit gained from the violation without any reduction because of subsequent damages, and such other matters as justice may require. The Notice proposed a total civil penalty of $303,000 for violations of 49 C.F.R. §§ 193.2503, 193.2503(f)(4), 193.2603, 199.105(b), and 199.225(a)(1).

AGL did not contest any of the findings of violation but presented five distinct arguments why the total penalty should be reduced. The first involved the gravity and circumstances of each violation and is therefore discussed separately under each Item below. The other four, which can be discussed collectively, are as follows: (1) that the Incident and injuries were the direct result of employee misconduct rather than the culpability of the company; (2) that AGL had made a substantial good-faith investment after the Incident in certain company-wide safety enhancements; (3) that the company had no history of prior offenses; and (4) that 10 other Final Orders issued by OPS in the past provided for mitigation of a proposed penalty based upon the operator's conduct subsequent to issuance of the Notice.

I find these last four arguments unpersuasive. First, it is well settled that pipeline operators are ultimately responsible for the acts and omissions of their employees, contractors, and agents in complying with federal pipeline safety regulations. Furthermore, such a policy conforms to the traditional doctrine of *respondeat superior* under which AGL is legally responsible for the actions of its employees and agents acting within the scope of their employment. Even if AGL had appropriate safety procedures in place at the time of the Incident, the company still failed to take effective action to ensure that the procedures were actually followed by individuals performing work at the LNG Plant.

In fact, it is troubling that Respondent attempts to shift responsibility and culpability for its own regulatory violations to two front-line employees.[11] An organization with an effective safety culture is one that imposes multiple safety "barriers" to reduce the risks and consequences of accidents. Under Respondent's argument, no pipeline operator that had adopted adequate safety procedures but then failed to monitor or supervise its personnel in carrying them out would ever be held liable for its own regulatory violations. Under the circumstances of this case, it is clear that AGL failed on multiple levels to take the measures necessary to prevent the Incident and to ensure that its employees actually followed company procedures.

Second, AGL argued that its actions after the Incident reflected a sincere, good-faith effort to improve safety conditions at the company and that such efforts should serve to mitigate the proposed penalty. The company stated that it had made "substantial investments in time and money which had yielded demonstrable improvements in the safety of the Company's overall operations."[12] These improvements, it argued, were not limited to ones directly related to the

[11] For example, AGL states in its Closing: "The Company did not condone or ratify the misconduct of Poss or [Plant Superintendent] Young in failing to follow applicable policies and manufacturer's instructions, and the Company notes that neither individual is presently employed by the Company." Closing at 1.

[12] Closing, at 2.

Incident but encompassed a broad range of measures designed to foster "a renewed safety focus across all operations." This included a commitment, made prior to issuance of the Notice, to invest more than $1.77 million on actions that went "above and beyond the requirements of 49 CFR Part 193."[13]

While such measures may reflect a sincere and effective effort to improve safety, they do not constitute a basis for mitigating a penalty imposed for multiple, significant safety violations that occurred prior to a serious accident. PHMSA has indeed recognized a "good faith" defense for actions voluntarily taken by an operator *before* a violation to achieve regulatory compliance; it has not generally recognized this defense for corrective actions taken in *response* to an accident or enforcement proceeding. In this case, I find that the actions taken by AGL after the Incident were largely ones that any reasonable and prudent operator would have taken to protect its facilities and operating personnel and do not constitute a basis for reducing a penalty.

Third, AGL argued that it had not previously been cited by PHMSA for the specific violations listed in the Notice. While this may be correct, an operator's history of prior violations is one of several considerations listed in 49 C.F.R. § 190.225 and by which a proposed civil penalty is initially calculated. In this case, AGL's prior enforcement history was considered by PHMSA in calculating the proposed penalty; otherwise, the proposed penalties might have been substantially higher.

Finally, Respondent's counsel referred to 10 other OPS Final Orders in which a civil penalty was reduced. As discussed at the hearing and as referenced above, all of the penalty assessment considerations enumerated in 49 U.S.C. § 60122 are evaluated in calculating a proposed penalty. In fairness, this necessarily entails an independent assessment of the totality of the facts and circumstances of each case. This case involved an accident that resulted in one employee being seriously injured and that could have easily resulted in a major catastrophe. Therefore, it is difficult to draw meaningful parallels between this case and the ones cited by Respondent.

In addition to these general arguments, AGL raised the following specific arguments for mitigation of the penalties proposed for Items 1-5:

Item 1. The Notice proposed a civil penalty of $41,000 for Respondent's violation of 49 C.F.R. § 193.2503, for failing to follow its own written procedures requiring the use of PPE. In its post-hearing submissions, Respondent acknowledged the seriousness of the employee's injuries but asserted that they were the result of his own "poor choices," not those of the company.[14] AGL argued that Mr. Poss elected to violate standard AGL procedures by failing to wear the PPE and chose to stand in the flow of gas when cleaning the filter, thus increasing the risk and extent of his injuries. The company also argued that the penalty should reflect the fact that the company had provided Poss with proper training on the company's safety procedures and the usage of PPE prior to the Incident.

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[13] *Id.*

[14] *Id.* at 4.

I disagree. First, the gravity of this violation cannot be overstated. Not only was Mr. Poss severely injured and hospitalized with second- and third-degree burns, but the consequences of the Incident could easily have been far worse. AGL is fortunate that only one employee was injured and that the fire was quickly contained. Regardless of any mistakes that the employees may have made, the fact remains that Mr. Poss would not have suffered significant injuries if AGL had taken adequate measures to ensure that its personnel properly followed the company's procedures on PPEs. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $41,000 for Item 1.

Item 2. The Notice proposed a civil penalty of $91,000 for Respondent's violation of 49 C.F.R. § 193.2503(f)(4), for failing to follow the manufacturer's written instructions for maintaining pressure differentials and flow rates for purification and regeneration equipment within their design limits. As stated above, Respondent admitted that it allowed the pressure drop across the filter to exceed the manufacturer's stated allowance. AGL argued nevertheless that a reduced penalty was appropriate because: (1) AGL was not required by the pipeline safety regulations to maintain equipment to measure the pressure differential across the filter; (2) the violation was a result of employee misconduct; and (3) the fire was quickly controlled and did not present a risk to the public.

I find these arguments unconvincing. First, it is true that Respondent was not required to maintain specific equipment to measure the pressure differential across the filter, but it was required to adopt and follow procedures for "maintaining temperatures, pressures, pressure differentials and flow rates, as applicable, within [the purification and regeneration equipment's] design limits."[15] Although AGL acknowledged that it was aware of the manufacturer's design limits for the filter and attempted to observe the pressure drop by periodically observing the flow, it had a clear responsibility to maintain the proper pressure levels by whatever means necessary. The company failed to do this. Respondent stated that it has since installed a measuring device to detect the pressure drop. However, as explained above, this post-accident action is not persuasive of an operator's good faith in attempting to comply with the pipeline safety regulations prior to an incident.

As noted above, the alleged misconduct of AGL employees does not absolve the company of its own obligation to properly maintain its equipment so that it does not pose a safety risk. Likewise, the fact that the fire was contained and did not result in greater injury does not reduce the culpability of the operator. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $91,000 for Item 2.

Item 3. The Notice proposed a civil penalty amount of $131,000 for Respondent's violation of 49 C.F.R. § 193.2603, for failing to maintain the three dehydrator towers. As stated above, I found that the fire and the resulting injuries to Mr. Poss would not have occurred if the liquefaction equipment had been properly maintained. In addition to the general arguments discussed earlier, AGL argued that a reduced penalty was appropriate for this Item because the company had made a good-faith effort, prior to the Incident, to correct the problem with the F-101 filter by installing an additional strainer and replacing the filter.

[15] 49 C.F.R. § 193.2503.

Even though such measures may have been taken prior to the Incident, I still do not believe they rise to the level of a valid "good faith" defense. Under § 193.2603, operators have an affirmative obligation to maintain their equipment "in a condition that is compatible with its operational or safety purpose by repair, replacement, or other means." AGL had experienced repeated problems with molecular sieve at the LNG plant dating back to 2003 and occurring as recently as six days prior to the Incident. The company clearly knew or should have known that its previous repair efforts had been unsuccessful, that the dehydrator was not operating properly, and that more extensive repairs were necessary in order to comply with the regulation.

Since Respondent failed to repair the dehydrator towers or to fix the underlying cause of the filter problems, despite having had ample opportunities to do so for several years, I find that the proposed penalty of $131,000 is warranted. Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $131,000 for Notice Item 3.

Items 4 and 5. The Notice proposed a civil penalty of $40,000 for violation of 49 C.F.R. § 199.105(b) and 49 C.F.R. § 199.225(a)(1), for Respondent's failure to drug and alcohol test the involved employee after the Incident.

Respondent did not provide an explanation for its failure to conduct the drug and alcohol tests, but noted that the employee's supervisor, who was an hour-and-a-half away from the LNG Plant at the time of the Incident, was more focused on managing the incident response and assisting with the hospitalization of the injured employee than with conducting the alcohol and drug tests. While this may be understandable, such is the case for most accidents involving injuries. In addition, § 199.105(b) allows for drug testing to occur within a 32-hour window and § 199.225 (a)(1) requires that alcohol testing occur "as soon as practicable" following an accident.[16] AGL had ample opportunity to meet both requirements. Furthermore, the injured employee was taken to a hospital, where the tests could have readily been performed.

Accordingly, having reviewed the record and considered the assessment criteria, I assess Respondent a civil penalty of $20,000 for Item 4 and $20,000 for Item 5.

In summary, having reviewed the record and considered the assessment criteria for all the Items discussed above, I assess Respondent a total civil penalty of **$303,000**.

Payment of the civil penalty must be made within 20 days of service. Federal regulations (49 C.F.R. § 89.21(b)(3)) require this payment be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions are contained in the enclosure. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, OK 73125; (405) 954-8893.

[16] §§ 199.105(b) and 199.225(a)(1).

Failure to pay the $303,000 civil penalty will result in accrual of interest at the current annual rate in accordance with 31 U.S.C. § 3717, 31 C.F.R. § 901.9 and 49 C.F.R. § 89.23. Pursuant to those same authorities, a late penalty charge of six percent (6%) per annum will be charged if payment is not made within 110 days of service. Furthermore, failure to pay the civil penalty may result in referral of the matter to the Attorney General for appropriate action in a United States District Court.

Under 49 C.F.R. § 190.215, Respondent has a right to submit a Petition for Reconsideration of this Final Order. The petition must be received within 20 days of Respondent's receipt of this Final Order and must contain a brief statement of the issue(s). The filing of the petition automatically stays the payment of any civil penalty assessed. However if Respondent submits payment for the civil penalty, the Final Order becomes the final administrative decision and the right to petition for reconsideration is waived. The terms and conditions of this Final Order shall be effective upon receipt.

_____ _____

Jeffrey D. Wiese
Associate Administrator
for Pipeline Safety

Date Issued