

RESPONDENT FERRELLGAS, LP's POST-HEARING BRIEF

A hearing in this matter was held before Presiding Official Dolores Francis on August 12, 2025. Respondent Ferrellgas, LP (“Ferrellgas”) submits this Post-Hearing Brief pursuant to the instructions provided by Ms. Francis’s email following the conclusion of the hearing on August 12, 2025.

I. Introduction

Between September 27–30, 2021 and November 1–5, 2021, the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) Southern Region (“Southern Region” or “Region”) inspected distribution systems located in Martin County, Florida that are owned and operated by Ferrellgas. A follow-up inspection of records via video conference occurred on April 28, 2022 (collectively, “Inspections”). The facilities inspected included the Arbors, Islesworth, Orchid Bay, Sailfish Point, Treasure Coast Mall, and The Villas. Following the Inspections, the Southern Region issued a Notice of Probable Violation (“NOPV”), Proposed Civil Penalty (“PCP”), and Proposed Compliance Order (“PCO”) to Ferrellgas on November 16, 2023.

Ferrellgas disputes NOPV Items 6 and 9 as well as PCO Item 4 (which provides proposed corrective action with respect to NOPV Item 6) and PCP associated with NOPV Items 6 and 9. With respect to NOPV Item 6, as well as PCO Item 4 and the associated PCP (which relate to delays in remediating tank cathodic protection deficiencies), Ferrellgas has established that (a) no further correction is warranted as the tanks have been replaced and (b) the proposed corrective action is outside of the Region’s authority to impose and bears no rational relationship to the alleged violation. Further, Ferrellgas has established that Sailfish Point is not jurisdictional as it is on private property and serves six customers.

With respect to NOPV Item 9, Ferrellgas has established that the cited regulation (§ 192.741) is not applicable to the Islesworth and Orchid Bay systems as neither system is or was

“supplied by more than one district pressure regulating station,” and even if the Region’s construction of the term “district pressure regulating station” were correct, there is now only one source supplying each system, addressing the Region’s concerns. Consequently, the asserted PCP is inappropriate.

II. Statement of Facts

A. The Parties

PHMSA is the federal agency within the Department of Transportation responsible for administering and enforcing federal pipeline safety laws, including those relating to the safety of gas and hazardous liquid pipelines under Title 49 of the United States Code. The Parties’ Agreed Upon Facts (“Agreed Facts”) ¶ 1.

Ferrellgas is a publicly traded limited partnership headquartered in Liberty, Missouri. *Id.* ¶ 2. It operates nationwide, including in all 50 states, the District of Columbia, and Puerto Rico, distributing propane, related equipment, and supplies, and operating LP-gas distribution systems. *Id.* Among its facilities are propane distribution systems located in Martin County, Florida, including the Arbors, Islesworth, Orchid Bay, Sailfish Point, Treasure Coast Mall, and The Villas. *Id.* ¶ 3. The relevant leadership for Ferrellgas includes Rufus Youngblood (corporate Director of Safety), Brian Bertke (current General Manager for the Southern Florida facilities), and Tom Fite (Operations Manager for the Southern Florida facilities). *Id.* ¶¶ 5, 7; *see also* Ex. 1, Hearing Tr. 8:24–9:9.

B. Procedural Background

The Southern Region conducted inspections of these Martin County systems between September 27–30, 2021, and November 1–5, 2021, followed by a records inspection by video conference on April 28, 2022. Agreed Facts ¶ 3. Donald Murphy conducted the inspections on

behalf of the Southern Region. *Id.* ¶ 4. At that time, John Fegett served as Ferrellgas's Regional Safety Manager for its Southern Florida facilities. *Id.* ¶ 6. Mr. Fegett, however, is no longer employed by Ferrellgas, having been terminated for performance failures, including around his handling of this case. *Id.*; *see also* Ex. 1, Hearing Tr. 111:7–21.

On November 16, 2023, the Southern Region issued a NOPV, PCP, and PCO to Ferrellgas. Agreed Facts ¶ 8. Ferrellgas contested the NOPV and PCO, requested an informal hearing under 49 C.F.R. § 190.211, and further requested informal meetings with PHMSA. *Id.* ¶ 9. Ferrellgas submitted a Response Letter on June 21, 2024, setting forth its position regarding the alleged violations and compliance items. *Id.* ¶ 10. Informal discussions followed on April 2, 2024, and July 18, 2024. *Id.* ¶ 11. After the July 18 conference, the Southern Region transmitted a Violation Report with referenced exhibits and a PCP Worksheet on August 28, 2024. *Id.* ¶ 12. On June 2, 2025, the Southern Region informed Ferrellgas of a revised civil penalty calculation policy that reduced the proposed penalty from \$63,900 to \$59,300. PHMSA transmitted additional records on July 18, 2025. *Id.* ¶ 13.

On August 12, 2025, the Presiding Official heard testimony given by witnesses from both the Southern Region and Ferrellgas. Ex. 1, Hearing Tr. The Southern Region's witnesses included Mr. James Urisko, Director of the Southern Region for PHMSA's Office of Pipeline Safety, and Mr. Donald Murphy, Inspector of the Southern Region for PHMSA's Office of Pipeline Safety. *Id.* at 3:2–7. Ferrellgas's witnesses were Mr. Rufus Youngblood, the corporate Director of Safety for Ferrellgas, and Mr. Tom Fite, the Operations Manager for Ferrellgas's Southern Florida facilities. *Id.* at 3:8–11.

C. Ferrellgas Systems

A typical Ferrellgas propane distribution system begins with a propane storage tank (or tanks) near the community it services. *Id.* at 107:9–12. From that tank, the propane flows through connecting pipes into main lines that extend throughout the service area. *Id.* at 107:13–25. Individual service lines then branch off from these main lines to deliver propane directly to each customer. *Id.*

Ferrellgas’s distribution systems are designed and operated with multiple, redundant layers of pressure control. The company’s systems typically operate the distribution mains at approximately 10 psi by running the tank pressure into two first-stage regulators used in a series. Ex. 1, Hearing Tr. 94:15–95:1, 108:19–24 (Mr. Youngblood confirming that “two regulators at the tank, a pressure relief valve and then a pressure [regulating] device at the customer inlet” is common “for most Ferrellgas’ systems.”). After those two regulators, there is a second stage of regulators “at each meter that break it down from 10 PSI to roughly 11 inches water column going into a house.” *Id.* at 95:4–9. There are also relief valves (pressure limiting devices) built into the second stage regulators. *Id.* at 95:10–17. In total, there are typically at least four layers of overpressure protection on the typical Ferrellgas system. *Id.* at 95:18–21.

D. Tanks and Cathodic Protection Testing at Sailfish Point and the Villas

The Sailfish Point system services less than ten customers. Ex. 1, Hearing Tr. 31:17–21 (Southern Region’s Mr. Murphy testifying that “we can all agree there are fewer than ten” customers for the Sailfish Point system). The Sailfish Point system is located within a private, gated community with 24-hour guarded access. *Id.* at 88:11–22. While there are various facilities within Sailfish Point, access is restricted to homeowners and their guests. *Id.* at 88:20–22, 100:8–101:1. A member of the public would be turned away at the gate. *Id.* at 99:22–101:1. The system’s

tanks and piping are located beneath private property. The roadways in Sailfish Point are owned and controlled by the homeowners' association. *Id.* at 89:4–10 (HOA controls access and owns the private roads). The replacement of tanks in 2024 required negotiations with the homeowners' association to obtain access. *Id.* at 90:5–16 (Mr. Fite explaining that Ferrellgas could not “just do the work on the tanks whenever it wanted to” because “the HOA kept dragging their feet until they finally gave us permission.”).

NOPV Item 6 and PCO Item 4 relate to remedying alleged issues with Ferrellgas's cathodic protection monitoring at the Sailfish Point and the Villas systems. The Southern Region proposed that Ferrellgas perform “a close interval survey” by “taking cathodic protection readings in a grid with spacing no more than three (3) apart over the entire area of the buried container.” PCO, ¶ 4.1. The proposed corrective action, however, is not derived from the applicable regulations regarding cathodic protection. *See* 49 C.F.R. §§ 192.11 (incorporating NFPA 58), 192.463, 192.465. The regulations do not prescribe the manner in which the monitoring is to be conducted, only that it should be done within a certain frequency and meet certain results. *See* 49 C.F.R. § 192.11 (incorporating NFPA 58); §§ 192.463, 192.465; app. D. As PHMSA has acknowledged, these regulations do not prescribe a particular method of taking readings. Ex. 1, Hearing Tr. 56:1–57:7 (Mr. Murphy explaining that while “close interval surveys” are mentioned in Part 192, the regulations do not mandate a specific methodology and the guidance related to the methodology all relates to piping systems not tanks); Ex. II, PHMSA Interpretation Response #PI-19-0009 (Oct. 15, 2019) (“The purpose of both Subpart I of Part 192 and Subpart H of Part 195 is to prescribe minimum requirements for protecting steel pipelines against corrosion. The rule does not prescribe a means of inspection.”). PCO Item 4, however, dictates a specific method and spacing: “a grid

with spacing no more than three (3) apart.” PCO, ¶ 4.1. This method appears nowhere in Part 192 or Appendix D. *See* 49 C.F.R. §§ 192.463, 192.465, app. D.

Nevertheless, Ferrellgas has replaced and tested the tanks for both systems, with each system passing the required cathodic protection thresholds under the regulations immediately after the replacement and during subsequent annual testing. Ex. 1, Hearing Tr. at 90:17–92:3 (Mr. Fite testifying that each system’s tanks were replaced, tested, and passed); Ex. 2, The Villas Cathodic Testing Results (March 2023, March 2024, November 2024); Ex. 3, Sailfish Point Cathodic Testing Results (September 2024, November 2024).

E. Islesworth and Orchid Bay

At the time of the NOPV, the Islesworth and Orchid Bay systems were supplied by two local propane tank sources. Ex. 1, Hearing Tr. 93:12–25. They are closed-loop systems that do not receive gas from transmission lines or city gate stations. *Id.* at 94:1–3. The systems are low-pressure propane distribution networks consisting of approximately 1,000 gallon tanks connected to customers by small-diameter underground piping. *Id.* at 91:10–11. The tanks operate at a maximum allowable working pressure of 250 psi, with first stage regulators reducing pressure to approximately 10 psi—comparable to the pressure of a basketball. *Id.* at 94:4–10. Additionally, the Islesworth and Orchid Bay systems contain multiple, redundant layers of overpressure protection: two regulators in series at the tank set to 10 psi, relief devices within those regulators, and a second-stage regulator with internal relief located at each customer’s access point. *See id.* at 126:6–127:2 (Mr. Youngblood explaining the “three or four levels of failure” needed for any over-pressuring to occur).

The Southern Region asserts that the Islesworth and Orchid Bay systems violate 49 C.F.R. § 192.741 because there is no telemetering and recording pressure gauges for the systems. *See id.*

at 11:15–22. The Southern Region alleges that those systems were “supplied by more than one district pressure regulating station,” which triggers the telemetering and recording pressure gauge requirement. *See id.* The Islesworth and Orchid Bay systems, however, are supplied by tank-outlet regulators and not “district pressure regulating stations.” *See id.* at 93:12–25. Additionally, no definition exists for “district pressure regulating station,” as PHMSA’s own guidance discusses overpressure protection equipment but does not mention “district pressure regulating stations.” *See id.* at 59:3–6; *see also* Ex. EE, Guidance Manual for Operators of LP Gas Systems at 60–61, 116–69. The propane industry does not use the term “district pressure regulating station.” *See* Ex. 1, Hearing Tr., 95:22–96:5 (Mr. Fite explaining that in his 21 years of experience, he has never heard that term), 123:21–23 (Mr. Youngblood explaining that in his 24 years of experience, including through his service on industry groups, he has never seen a district pressure regulating station used on a propane system).

Following the issuance of the NOPV, Ferrellgas removed one set of tanks from each system so that both the Islesworth and Orchid Bay systems are now supplied by a single source. *Id.* at 96:6–16.

F. Lack of Safety Benefits

None of the Southern Region’s proposed corrective actions would produce any meaningful safety benefit. The proposed methodology for a close interval survey would not improve safety because Ferrellgas’s policies and procedures are industry proven and identify problems with cathodic protection:

MS. HAINES:	Would using close interval surveying make the system safer?
MR. YOUNGBLOOD:	No, I do not think so.
MS. HAINES:	Why not?

MR. YOUNGBLOOD: Because of the systems that we have in place now. They're industry tested, proven. We know, under the policies and procedures that we have in place now, they will identify problems with cathodic protection. So I just—I don't believe that applying this type of survey to an underground container would make any difference.

Id. at 122:2–12. Additionally, the tanks located at Sailfish Point and the Villas have passed cathodic protection testing since being installed. Ex. 3, Sailfish Point Cathodic Testing Results (September 2024, November 2024); Ex. 2, The Villas Cathodic Testing Results (March 2023, March 2024, November 2024). Additionally, finding that the Sailfish Point system falls under PHMSA's jurisdiction would not increase safety because various other federal and state agencies regulate Ferrellgas's conduct. Ex. 1, Hearing Tr. 115:21–116:13 (Mr. Youngblood testifying “we have many different agencies that we have to comply with. So just because—just because a system is not regulated by PHMSA should not be implied that it's unsafe.”).

PHMSA's proposed additional monitoring for the Islesworth and Orchid Bay systems would not make these systems safer because they already feature multiple, redundant layers of overpressure protection. *Id.* at 134:11–17.

However, PHMSA's proposed corrective actions would create additional costs for Ferrellgas's customers in the purported name of safety. *See id.* at 133:24–134:10.

III. Applicable Standards and Burdens

The Southern Region's enforcement actions are subject to an arbitrary and capricious standard of review. 5 U.S.C. § 706. Agency actions will be set aside if they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* The term “agency action” includes “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). Agency actions

which run counter to the evidence before the agency are arbitrary and capricious. *Magellan Tech, Inc. v. U.S. Food & Drug Admin.*, 70 F.4th 622, 628 (2d Cir. 2023).

The Southern Region has the burden to demonstrate that the alleged violations have been proven. 5 U.S.C. § 556(d) (“the proponent of a rule or order has the burden of proof”); 49 C.F.R. § 190.213(a)(1); 49 U.S.C. § 60117(b)(1)(F) (“the Secretary shall—require that the agency have the burden of proof, presentation, and persuasion in any enforcement matter”). “The burden of persuasion is the burden of showing that the preponderance of the evidence supports a particular finding.” *Broadgate, Inc. v. Su*, 124 F.4th 985, 988 (6th Cir. 2024) (citing *Dir., Off. Of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994)). As a result, “if the evidence is evenly balanced, the party that bears the burden of persuasion must lose.” *Id.* (quoting *Greenwich Collieries*, 512 U.S. at 272). By contrast, the burden of presentation describes “a party’s obligation to come forward with evidence to support its claim.” *Id.* (quoting *Greenwich Collieries*, 512 U.S. at 274).

Accordingly, the Southern Region has the burden to present sufficient affirmative evidence in support of its claim by a preponderance of the evidence in order for a particular finding to be made against Ferrellgas.

IV. Argument

A. The Southern Region Has Not Met Its Burden

Despite having the burden in this matter, the Southern Region’s arguments are entirely responsive to Ferrellgas’s positions. The Region does not come forward with affirmative evidence of the elements it needs to establish its case and, therefore, does not even attempt to meet its burden. *See Broadgate, Inc.*, 124 F.4th at 988. Instead, it seeks to shift its burden to Ferrellgas, arguing that Ferrellgas’s positions are “not persuasive” or that Ferrellgas “does not dispute”

various Southern Region allegations. Southern Region Post-Hearing Brief and Recommendation dated September 29, 2025 (“Region Brief”) at 4, 11. In fact, the Southern Region structured its brief as responsive, first identifying Ferrellgas positions only to respond to them. Such arguments miss the mark as Ferrellgas is not required to disprove the Region’s case.

B. NOPV Item 6 & Corresponding PCO Item 4 (Cathodic Protection Issues)

1. PCO Item 4 is arbitrary and capricious as no further corrective action is warranted.

The Southern Region asserts that Ferrellgas did not promptly correct deficiencies as required by 49 C.F.R. § 192.465(d) after identifying low cathodic protection levels at the Villas and Sailfish Point.¹ However, Ferrellgas replaced the tanks at the Villas in April 2022—approximately 18 months before the Southern Region issued the NOPV and PCO. Ex. 1, Hearing Tr. 91:7–25; Ex. S, Service Order for the Villas Tank Replacement. Similarly, after receipt of the NOPV, Ferrellgas replaced the tanks at Sailfish Point, as promptly as access was granted, even though it does not concede the system is subject to PHMSA’s jurisdiction. Ex. 1, Hearing Tr. 89:21–90:16; Ex. P, Service Order for the Sailfish Point Tank Replacement. As part of the tank replacements and as required annually since, Ferrellgas completed Cathodic Protection testing. Ex. 1, Hearing Tr. 90:17–91:2, 91:17–91:21; Ex. 3, Sailfish Point Cathodic Testing Results (September 2024, November 2024); Ex. 2, The Villas Cathodic Testing Results (March 2023,

¹ Ferrellgas notes that 49 C.F.R. § 192.465 does not apply to buried containers but rather requires monitoring of pipelines under cathodic protection. The scope of 49 C.F.R. 192, Subpart I titled *Requirements for Corrosion Control*, where the requirement is found, “prescribes minimum requirements for the protection of metallic pipelines from external, internal, and atmospheric corrosion.” 49 C.F.R. § 192.451. However, Ferrellgas protects its buried containers with cathodic protection and conducts testing as required by NFPA 58, incorporated by reference in 49 C.F.R. §§ 192.7 and 192.11.

March 2024, November 2024). Consequently, Ferrellgas has fully resolved any alleged compliance issues identified by NOPV Item 6.

In response to these facts, the Region weakly argues that Ferrellgas has not provided evidence that it resolved NOPV Item 6 because “Ferrellgas has not provided documentation demonstrating there are no cathodic protection deficiencies needing remediation.” Region Brief at 15. However, that misstates the record in this matter. Mr. Fite testified to the tank replacement and the Cathodic Protection testing. Ex. 1, Hearing Tr. 89:21–90:4. Ferrellgas had previously submitted the records demonstrating the tank replacements. Ex. P, Service Order for Sailfish Point Tank Replacement; Ex. S, Service Order for the Villas Tank Replacement. Ferrellgas also provides the pertinent testing records with this brief.² Ex. 3, Sailfish Point Cathodic Testing Results (September 2024, November 2024); Ex. 2, The Villas Cathodic Testing Results (March 2023, March 2024, November 2024).

PCO Item 4, which identifies additional remedial action, is not warranted. There is no corrective action needed for Ferrellgas to come into compliance with cathodic protection requirements at the Villas or Sailfish Point.

2. The Southern Region’s proposed corrective action is divorced from the alleged violation and beyond its authority to impose.

PCO Item 4 orders Ferrellgas to perform additional cathodic protection monitoring using a particular method:

Perform close interval surveys over and around Ferrellgas’ jurisdictional buried containers and evaluate whether each container has adequate levels of cathodic protection. In this instance, **a close interval survey means taking cathodic protection readings in a grid with spacing no more than three (3) apart** over the entire area of the buried container. Make a record of the results for each

² The Region never requested cathodic protection testing results post tank replacement during the course of this dispute, nor is there a regulatory requirement to submit the records.

container. This may be done through use of a third party specializing in corrosion control and cathodic protection.

PCO, ¶ 4.1 (emphasis added). There are two major problems with this proposed corrective action.

First, PCO Item 4 is untethered to the alleged violation. The Southern Region alleged that Ferrellgas did not timely act on prior monitoring results—not that Ferrellgas failed to conduct cathodic protection monitoring or monitored it incorrectly. Ex. 1, Hearing Tr. 40:6–9 (Mr. Murphy testifying that the “underlying violation here is that Ferrellgas fail[ed] to take prompt action to correct cathodic protection deficiencies.”). Mandating *more* monitoring does not address an alleged failure to act on results already obtained. Because PCO Item 4 bears no rational relationship to the purported noncompliance, it is an abuse of discretion. *See AccelGov, LLC v. United States*, 166 Fed. Cl. 606, 611 (2023) (corrective action under the APA must be “rationally related” to the underlying problem). Even so, Ferrellgas has already tested the tanks for cathodic protection monitoring using an otherwise appropriate method and the tanks passed. Ex. 1, Hearing Tr. 90:18–92:2, 91:17–91:21 (Mr. Fite explaining that after the tanks were replaced, they were immediately tested, and the tanks passed), 119:7–24 (Mr. Youngblood explaining that neither PHMSA nor any other regulatory agency has disapproved of the protocols Ferrellgas uses regarding cathodic protection monitoring).

Second, the Southern Region lacks the authority to dictate a prescriptive monitoring methodology. The Pipeline Safety Act authorizes the Secretary to prescribe minimum safety standards for pipeline facilities, which the Secretary has delegated to PHMSA. 49 U.S.C. § 60102(a); 49 C.F.R. § 1.97(a). That authority is exercised through properly promulgated regulations and not ad hoc enforcement actions. *MCR Oil Tools, L.L.C. v. U.S. Dep’t of Transp.*, 110 F.4th 677, 687 (5th Cir. 2024) (agency may not exceed statutory limits; rejected PHMSA’s

position where it “refuse[d] to engage with the text”). Thus, if the Region seeks to impose specific monitoring methodology, it must point to the corresponding obligations in the regulations.

Here, the governing rules require cathodic protection and specify performance criteria (e.g., protection more negative than -0.85 volts) and monitoring frequency. *See* 49 C.F.R. § 192.11 (incorporating NFPA 58); §§ 192.463, 192.465; app. D. As PHMSA itself has acknowledged, these regulations do not prescribe a particular method of taking readings:

The purpose of both Subpart I of Part 192 and Subpart H of Part 195 is to prescribe minimum requirements for protecting steel pipelines against corrosion. The rule does not prescribe a means of inspection. Therefore, an operator must have procedures that define the technology to be utilized and must conduct its inspections utilizing technology or means it chooses if the testing method used accurately monitors the cathodic protection levels and provides information on the protection criteria that it is monitoring is at least equivalent to the Subpart I of Part 192 or Subpart H of Part 195 corrosion protection level requirements.

Ex. II, PHMSA Interpretation Response #PI-19-0009 (Oct. 15, 2019). PCO Item 4 does the opposite. It dictates a specific method and spacing: “a grid with spacing no more than three (3) apart.” PCO, ¶ 4.1. This method appears nowhere in Part 192 or Appendix D. *See* 49 C.F.R. §§ 192.463, 192.465, app. D. PHMSA has admitted that “none of these standards specifies a required spacing for this type of survey.” Ex. HH, Email from R. McClure to M. Balaster (May 21, 2025). During the hearing, the Region similarly could not base its proposed methodology on the applicable regulations. *See* Ex. 1, Hearing Tr. 56:12–23 (Mr. Murphy explaining that while Part 192 mentions the term close interval survey “in at least three locations,” it does not support a specific methodology and “[i]t’s just identified as close interval survey for locating cathodic protection issues.”).

Imposing an unpromulgated, prescriptive method through enforcement violates basic Administrative Procedure Act notice principles and due process. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012) (agency may not spring interpretations in

enforcement and demand deference); *ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 574, 580 (5th Cir. 2017) (“The regulations do not mandate a particular outcome, but rather prescribe a decision-making process that pipeline operators must undergo in good faith.”).

PHMSA’s own precedent underscores Ferrellgas’s point: it reversed NOPV items that attempted to hold operators to prescriptive survey requirements not found in the regulations. *In re Tennessee Gas Pipeline Co.*, PHMSA Final Order CPF No. 1-2018-1001 (Nov. 14, 2019). In fact, PHMSA has doubled down on the principle that enforcement actions must be rooted in the text of the regulations. Ex. I, Enforcement Memo (emphasis added) (emphasizing the importance of “not adopt[ing] or rely[ing] upon overly broad or unduly expansive interpretations of the governing statutes or regulations, and [enforcement] should ensure that the law is interpreted and applied **according to its text.**”)

In an attempt to salvage its position, the Southern Region asserts that its statutory corrective action authority allows it to require Ferrellgas to perform additional cathodic protection monitoring using a particular method. Region Brief at 12. However, this reading of the statute writes out a critical portion of its language. PHMSA has authority to “issue orders *directing compliance*” 49 U.S.C 60118(b) (emphasis supplied). As discussed at length above, there is no existing non-compliance as the tanks were replaced and cathodic protection surveying has been successfully completed. PCO Item 4 does not “direct[] compliance” and is therefore not authorized by the statute. Consequently, PCO Item 4 is beyond the Region’s authority to impose.

3. *PHMSA does not have jurisdiction over the Sailfish Point system.*

a. *Sailfish Point is not jurisdictional under the plain language of the applicable regulations.*

The Sailfish Point system is non-jurisdictional. The scope of PHMSA’s jurisdiction is outlined in Section 192.1 of Title 49 of the Code of Federal Regulations. *See* 49 C.F.R. § 192.1.

Subsection (a) explains the facilities that are jurisdictional, while subsection (b) outlines those that are non-jurisdictional. *See id.* PHMSA does not have jurisdiction over any pipeline system that transports petroleum gas or petroleum gas/air mixtures to “[f]ewer than 10 customers, if no portion of the system is located in a public place[.]” 49 C.F.R. § 192.1(b)(5)(i). The Sailfish Point system meets this definition.

First, the Sailfish Point system only services six total customers. *See, e.g.,* Ex. 1, Hearing Tr. 99:4–5 (Mr. Fite testifying that “The system only feeds those six homes right around where the tanks are.”); Ex. L, Aerial Photograph of Sailfish Point System. Here, there is no dispute that the Sailfish Point system services fewer than 10 customers. Ex. 1, Hearing Tr. 31:17–21 (Mr. Murphy testifying that “we can all agree there are fewer than ten” customers for the Sailfish Point system).

Second, the Sailfish Point system is not located in a public place. Consistent with the ordinary understanding of the term, PHMSA has consistently interpreted “public place” to mean “a place which is generally open to all persons in a community as opposed to specific persons.” 61 Fed. Reg. 28770, 28773 (June 6, 1996); *see also* Ex. EE, *Small LP Gas Operator Guide* (April 2017), effective March 18, 2025 (“A place that is generally open to all persons in a community as opposed to being restricted to specific persons.”) [*hereinafter* “*Operator Guide*”]. Indeed, Mr. Urisko echoed that whether a place is “open to all persons” is the main touchpoint of interpreting the term “public place.” *See* Ex. 1, Hearing Tr. 67:17–68:15.

Here, the Sailfish Point system only services six customers that are located within a gated community. Ex. 1, Hearing Tr. 31:17–21 (Mr. Murphy testifying that the system services fewer than ten customers), 99:4–5 (Mr. Fite testifying that the system services six customers); Ex. L, Aerial Photograph of Sailfish Point System. Access to the system is restricted through a gated entrance that is continuously monitored by security personnel, with access limited and controlled

at all times. Ex. 1, Hearing Tr. 88:11–22; Ex. M, Photograph of Manned Security Gate at Sailfish Point. In fact, access to the community is entirely dependent on clearance by residents, with the guard verifying whether a particular person is authorized to enter the community.

PRESIDING OFFICIAL
FRANCIS:

Okay. So if I went to the guard gate and I said, you know, I want to go use the golf—you know, the golf course, would they let me in?

MR. FITE:

Oh, definitely not.

PRESIDING OFFICIAL
FRANCIS:

Okay. So for me to go in, I would have to say I'm going to so-and-so's house at such and such address; is that correct?

MR. FITE:

Exactly. And if the resident is nice, they'll call the guard gate ahead of time to give you access. Otherwise, you'll sit there and they'll call the resident, you know, and say, you know, "Such and such is trying to get in here to play golf." Then they'll let you in.

Id. at 100:13–101:1. The system's tanks are located in the center of the cul-de-sac that the six customers make up. *Id.* at 99:4–5 (Mr. Fite testifying that "The system only feeds those six homes right around where the tanks are."). Additionally, the associated piping runs beneath a private roadway serving those customers. *Id.* at 89:4–10. Because the roadway is private, the system is non-jurisdictional. Any assertion to the contrary disregards the factual circumstances of the

Sailfish Point system, the plain language of the applicable regulations, and PHMSA’s consistent interpretation of the term “public place.”³

Further, the Southern Region’s concern with visible signage indicating the existence of a liquid propane gas system under the park is immaterial to whether the Sailfish Point system is jurisdictional. Region Brief at 7. PHMSA does not have jurisdiction over any pipeline system that transports petroleum gas or petroleum gas/air mixtures to “[f]ewer than 10 customers, if no portion of the system is located in a public place[.]” 49 C.F.R. § 192.1(b)(5)(i). Nowhere in that regulation, nor in the Southern Region’s brief, indicates how or why visible safety signage regarding a system’s existence impacts the jurisdictional analysis.

Accordingly, per the plain text of the regulation, Sailfish Point is a non-jurisdictional system.

b. *The Region’s interpretation of its regulations would lead to absurd results.*

The Southern Region’s argument that Sailfish Point is public runs contrary to the ordinary understanding of that word. In fact, the Region advocates that public and private can be the same thing, stating “[f]urthermore, PHMSA has made clear that a ‘public place’ may exist within a privately owned area.” Region Brief at 8. This is nonsensical. Public and private have opposite meanings. It simply cannot be the case that the term public and private mean the same thing as the Region suggests. Regulations are not construed to create such absurd results. *See, e.g., Norfolk Southern Ry. v. Surface Transp. Bd.*, 72 F.4th 297, 307 (D.C. Cir. 2023) (traditional principles of

³ Ferrellgas has not waived its objections to PHMSA’s claim of jurisdiction over the Sailfish Point system. The purported statements of a former employee regarding the jurisdictional status of Sailfish Point are not a legal determination nor are they binding upon Ferrellgas in this proceeding. Similarly, the re line of an e-mail is insufficiently specific to commit Ferrellgas to a legal position on that matter. *See, e.g., White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 339 (3d Cir. 2023) (“waiver occurs where a party has ‘intentional[ly] relinquish[ed] or abandon[ed] . . . a known right.’”); *Page v. JPMorgan Chase Bank, N.A.*, 605 F. App’x 272, 276 (5th Cir. 2015) (same).

interpretation apply to regulations and an agency interpretation that contravenes the text of the regulations will be rejected).

Moreover, the Southern Region cannot alter the plain language of its regulations through guidance or simply by asserting a different meaning of the regulation's terms. As the Region acknowledged, PHMSA has the power to define the terms within its regulations through the proper rulemaking process. Ex. 1, Hearing Tr. 67:8–16 (Mr. Urisko testifying that PHMSA promulgates its own regulations and could define the phrase “public place”). Congress delegated to PHMSA the authority to promulgate safety standards under the federal pipeline safety laws, and that authority carries with it the obligation to establish definitions and requirements through notice-and-comment rulemaking. 49 U.S.C. § 60102(a); 49 C.F.R. § 1.97(a). This process ensures that regulated entities receive fair notice of the obligations imposed upon them. *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019) (explaining that the rulemaking process “gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes”). Where PHMSA has chosen not to define certain terms or impose specific requirements through the regulatory process, it cannot circumvent those procedures by attempting to expand the scope of existing rules through enforcement actions.

c. PHMSA does not have universal jurisdiction.

Despite initially saying its position in this case would not create universal PHMSA jurisdiction, the Region nonetheless argues that it does in fact have “nationwide federal jurisdiction.” Region Brief at 8–9. This position underscores the regulatory overreach in this case as the Region's position flatly defies basic U.S. Constitutional principles. Any power not specifically granted to the federal government under the U.S. Constitution is reserved to the states under the 10th Amendment. *See, e.g., Shelby Cnty. v. Holder*, 570 U.S. 529, 542 (2013). Here,

PHMSA’s jurisdiction is limited to where federal jurisdiction can be established under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 564 (1995) (discussing the scope of the Commerce Clause and Congress’s authorities thereunder). Simply put, there is not federal jurisdiction everywhere, which means that PHMSA cannot possibly have jurisdiction everywhere it may wish to assert under the guise of public safety. *See id.* (rejecting arguments that would result in limitless power to regulate). The Natural Gas Pipeline Safety Act does not purport to and cannot overrule these basic constitutional precepts, contrary to PHMSA’s assertion. Region Brief at 9–10.

Moreover, PHMSA’s position is contrary to its own testimony during the hearing:

MS. HAINES: You’ll agree with me that PHMSA doesn’t have jurisdiction over every propane system, correct?

MR. URISKO: I’d ask for some—some supporting qualifying comment because specific to the commodity versus the system—is that your—is that your—

MS. HAINES: I guess my question is does PHMSA have jurisdiction over every propane distribution system?

MR. URISKO: Well, I’m leery of answering that mainly because of various implications from just general statement. I will say—not being an abject expert on it, I would say no.

MS. HAINES: PHMSA does not have jurisdiction?

MR. URISKO: Over every—the only composing statement, “every,” I would say no.

Ex. 1, Hearing Tr. 69:4–17.

In addition to these constitutional principles, the canons of construction require Congress to use “exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 590 U.S. 604, 621–22 (2020). In *Cowpasture*, the Supreme Court

rejected the view that the National Park Service’s administration of the Appalachian Trail transformed all lands it crossed into the National Park System, subjecting them to federal restrictions. *Id.* The Court explained that such an interpretation would displace state law and private property rights, effectively converting thousands of miles of land into federally regulated territory absent clear congressional direction. *Id.* Finding no such “exceedingly clear language,” the Court declined to adopt that reading. *Id.* at 622. Likewise, nothing in the statutes authorizing 49 C.F.R. Part 192 reflects congressional intent to alter the traditional balance of federal and state power in the manner PHMSA proposes. 49 U.S.C. § 5103 *et seq.*; 49 U.S.C. § 60101 *et seq.*

d. The Region’s interpretation is not entitled to deference.

The Southern Region’s interpretation of PHMSA’s jurisdictional regulation is entitled to no deference for two reasons. Initially, the regulation is not ambiguous, and the Region’s construction is not reasonable. *See United States v. Boler*, 115 F.4th 316, 322–23 (4th Cir. 2024) (deference can apply only to reasonable interpretations of ambiguous regulations); *United States v. Poore*, No. 22-3154, 2025 U.S. App. LEXIS 9941, at *5 (7th Cir. Apr. 23, 2025). The regulation on its face does not extend to private locations. It is commonly understood that a private, gated community is not a public location. The Region may attempt to construe the regulation as reaching these facilities, but its position does not render the regulation ambiguous. *See ExxonMobil Pipeline Co. v. DOT*, 867 F.3d 564, 574 (5th Cir. 2017); *Bouchikhi v. Holder*, 676 F.3d 173, 177 (5th Cir. 2012) (“When construing statutes and regulations, we begin with the assumption that the words were meant to express their ordinary meaning.”).

Second, agency deference may only be triggered by an interpretation relying upon the agency’s technical experience. *Kisor v. Wilkie*, 588 U.S. 558, 578–79 (2019) (“the agency’s interpretation must in some way implicate its **substantive expertise**. Administrative knowledge and experience largely ‘account [for] the presumption that Congress delegates interpretive

lawmaking power to the agency.’” (emphasis added)).⁴ That is not the issue here. The construction of the term “public” does not relate in any way to any substantive experience PHMSA may have.

Therefore, the Region’s position is not entitled to any deference.

C. NOPV Item 9 (pressure limiting and regulating station requirements)

Nowhere in this case has the Southern Region clearly identified the specific equipment that it is calling “district pressure regulating stations” and the Region’s Brief does not undertake to clarify its position. Instead, the Region asserts that anything that “controls the source of gas supply to a district in a distribution system” is a “district pressure regulating station.” Region Brief at 16. However, the Southern Region neither defines these terms—for example, what is a district?—nor applies them to the facts of this case. Instead, the Region baldly asserts that “devices” at the Islesworth and Orchid Bay systems “reduce gas from higher pressure to a lower pressure suitable for the downstream distribution system.” *Id.* at 17. The Region doesn’t specify which “devices” nor does it explain what it means by a “downstream distribution system.” It appears the Region’s position is simply that the term “district pressure regulation station” is whatever it says it is. Such a position is plainly untenable.

Ferrellgas believes that the Region is referring to its tank-outlet regulators as “district pressure regulating stations.” *See* Ex. 1, Hearing Tr. 93:12–25; *see* Ex. X, Image of First Stage Regulator Outlet on a Typical Ferrellgas Propane Tank; Ex. W, Image of Typical District Pressure Regulating Station. Both the Islesworth and Orchid Bay systems received gas from multiple on-

⁴ Ferrellgas notes that there is, at minimum, a question as to the continued viability of such deference following the *Loper Bright Enters. v. Raimondo* decision. 603 U.S. 369, 403 (2024) (“delegating ultimate interpretative authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise.”); *see also* *Midthun-Hensen v. Grp. Health Coop. of S. Cent. Wisc., Inc.* 110 F.4th 984, 988 (7th Cir. 2024) (noting the issue of *Loper Bright* might apply to agency deference on regulations).

site tanks equipped with outlet regulators, not from district pressure regulating stations. Ferrellgas disputes that its tank-outlet regulators are “district pressure regulating stations.”⁵

The Region’s interpretation of this requirement is arbitrary and capricious and does not comport with its own prior interpretations and statements. The term “district pressure regulating station” is not defined by the applicable statute or regulations. Ex. 1, Hearing Tr. 57:22–58:1 (Mr. Murphy testifying that the phrase “district pressure regulating station” is “not defined as an explicit term” by the regulations). PHMSA’s preamble uses the term “district regulator station” and explains these are “pressure-reducing facilities downstream of city gate stations that further reduce the pressure from the pipeline coming from the city gate.” 88 Fed. Reg. 61752, 61786 (Sept. 7, 2023). By PHMSA’s own description, a “district regulator station” receives gas from a high-pressure source (e.g., a transmission line) and delivers it to a distribution system. *Id.* at 61786. Tank-outlet regulators on closed, on-site propane systems like the Islesworth and Orchid Bay systems do not meet that description. Ex. 1, Hearing Tr. 94:1–3 (Mr. Fite explaining that the Islesworth and Orchid Bay systems are “closed loop”), 124:19–125:10 (Mr. Youngblood testifying that the tank-outlet regulators on the Islesworth and Orchid Bay systems cannot by their nature be characterized as district pressure regulating stations or district regulator stations).

⁵ Ferrellgas has not waived its objections to the Southern Region’s contention that the Islesworth and Orchid Bay systems failed to comply with § 192.741(a). Region Brief at 18. The purported statements of a former employee regarding how these systems were fed or whether they had functioning telemetering or recording pressure gauges are not a legal determination nor are they binding upon Ferrellgas in this proceeding. *See, e.g., White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 339 (3d Cir. 2023) (“waiver occurs where a party has ‘intentional[ly] relinquish[ed] or abandon[ed] . . . a known right.’”); *Page v. JPMorgan Chase Bank, N.A.*, 605 F. App’x 272, 276 (5th Cir. 2015) (same). Notably, Ferrellgas disputes that these systems are “district pressure regulating stations” under § 192.741(a), which the Southern Region has the burden of establishing. 5 U.S.C. § 556(d) (“the proponent of a rule or order has the burden of proof”); 49 C.F.R. § 190.213(a)(1); 49 U.S.C. § 60117(b)(1)(F) (“the Secretary shall—require that the agency have the burden of proof, presentation, and persuasion in any enforcement matter”).

Part 192 also treats “district regulator stations” as a subset of regulated equipment—not a label that sweeps in all regulators. *See* 49 C.F.R. § 192.199(g) (requirements “where installed at a district regulator station”). Logically then, not all pressure relief or limiting devices are installed at or part of district regulator stations, since the regulation makes the distinction. The Islesworth and Orchid Bay systems feature ordinary pressure-limiting regulators on the outlets of local tanks, not installations “at a district regulator station.”

The Islesworth and Orchid Bay systems are closed-loop networks independently supplied by on-site tanks, with no connection to a transmission line or city gate station. *See, e.g.*, Ex. 1, Hearing Tr. 123:24–124:9 (explaining that the Islesworth and Orchid Bay systems are “closed systems simply being fed from the propane tanks.”); Ex. U, Map of the Islesworth System during NOPV; Ex. V, Map of the Orchid Bay System during NOPV. They are not “transmission lines” under 49 C.F.R. § 192.3 and are not downstream of such lines. The Islesworth and Orchid Bay systems operate at low pressure (maximum of 10 psi), while tank pressures operate around 250 psi compared to transmission lines that often exceed 1,000 psi. Ex. 1, Hearing Tr. 94:1–10 (Mr. Fite testifying that the maximum pressure is 10 psi, with the “[t]anks’ max pressure, the relief valves are at 250 psi.”), 108:11–18 (same). The continuous-monitoring rationale for § 192.741(a) simply does not fit the closed, locally supplied systems at Islesworth and Orchid Bay.

Additionally, the Southern Region’s construction of “district pressure regulating station” does not comport with industry custom and usage of that term. Where a technical term is an industry term of art, interpretation follows industry usage. *Blue Cross & Blue Shield v. AstraZeneca Pharms. LP*, 582 F.3d 156, 168 (1st Cir. 2009); *see also La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 372 (1986) (explaining a term of art “should be interpreted by reference to the trade or industry to which [it] applies”); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201

(1974) (“[W]here Congress has used technical words or terms of art, it is proper to explain them by reference to the art or science to which they are appropriate.”). The propane industry does not consider its tank sources to be “district pressure regulating stations,” and generally do not use such a term to describe any of the equipment in their systems.⁶ Both Mr. Youngblood and Mr. Fite had never heard that term used in the propane industry in their combined 45 years of experience:

MR. YOUNGBLOOD: I—honestly, that term, district pressure regulating station is not used in the propane industry. It’s not recognized. The documents we referred to earlier, they never speak of a district pressure regulating station. It’s just not something that’s typical or it occurs on propane systems.

[. . .]

MS. HAINES: Would you characterize one of these regulators as a district pressure regulating station?

MR. YOUNGBLOOD: No. Again, not anything that the propane industry has ever described or heard of that I know of.

[. . .]

MS. HAINES: Looking at Exhibit X, would you refer to this regulator as a district pressure station or a district pressure regulating station?

MR. FITE: I never knew what that meant. I don’t know what that is.

MS. HAINES: Is that terminology that you’ve heard used in the propane industry?

MR. FITE: Not in Ferrellgas.

Ex. 1, Hearing Tr. 123:6–11, 124:19–23, 95:23–96:5.

⁶ The Region’s assertion Ferrellgas has not provided evidence of this is erroneous. Mr. Youngblood’s testimony is not only evidence, but authoritative evidence. Mr. Youngblood is a leading industry figure with familiarity of industry practices. Ex. 1, Hearing Tr. 103:1–106:23. It is unclear to Ferrellgas why Mr. Murphy’s testimony is relied upon by the Region as evidence, *see* Region Brief at 11–12, while also apparently asserting that hearing testimony is not evidence.

Further, PHMSA’s own guidance does not define the term “district pressure regulating station.” *See id.* at 59:3–6. While the PHMSA guidance does discuss overpressure protection equipment, it does not convert tank-outlet regulators like Ferrellgas’s into the “district pressure regulating stations” that PHMSA claims exist at the Islesworth and Orchid Bay systems. *See* Ex. EE, Guidance Manual for Operators of LP Gas Systems at 60–61, 166–69.

The Region’s position also fails to account for the fact that its theory of probable violation and proposed corrective action are not necessary. As Mr. Youngblood explained, the Islesworth and Orchid Bay systems already employ multiple, redundant layers of overpressure protection: two regulators in series at the tank set to 10 PSI, relief devices within those regulators, and a second-stage regulator with internal relief at each customer. *See* Ex. 1, Hearing Tr. 126:6–127:2 (Mr. Youngblood explaining the “three or four levels of failure in order for the hypothetical that Mr. Murphy described” for over-pressuring to occur). This renders any additional monitoring unnecessary and offers no incremental safety benefit. *Id.* at 134:11–17 (Mr. Youngblood explaining that the proposed additional monitoring would not make the system safer “[b]ecause of the safeguards that are already in place, overpressure protection we have in place and just a smaller footprint of the systems themselves.”).

Further, as discussed above, the Region’s position extends beyond the text of § 192.741(a). Agencies may not penalize regulated parties “based on interpretative exceptions announced for the first time during an enforcement proceeding.” *Christopher*, 567 U.S. at 158–59; *see also ExxonMobil*, 867 F.3d at 578 (failing to anticipate an unwritten interpretation is to deny the fair notice required by due process). Yet without a basis in the text of the regulations, PHMSA’s position attempts to do just that.

For these reasons, the Southern Region’s proposed interpretation of the regulation is unreasonable and therefore not entitled to deference. *Boler*, 115 F.4th at 322–23 (deference can apply only to reasonable interpretations of ambiguous regulations); *Poore*, 2025 U.S. App. LEXIS 9941, at *5.

Even if the Region’s view were correct (it is not), Ferrellgas has removed one source at each system, eliminating the “more than one” prerequisite. Ex. 1, Hearing Tr. 96:6–13; *see also* Ex. BB, Photograph of the Orchid Bay Tank Disconnect; Ex. Y, Photograph of the Islesworth Tank Disconnect. At a minimum, any penalty should be reduced under 49 C.F.R. § 190.225(a)(1), (3), and (4). The nature and gravity are low—the Southern Region’s report reflects pipeline safety was “minimally affected,” and that was not a repeat violation. *See* Ex. 1, Hearing Tr. 60:3–65:13 (Mr. Urisko’s testimony regarding PHMSA’s report).

Accordingly, Ferrellgas requests PHMSA dismiss NOPV Item 9 or, alternatively, reduce the penalty amount.

D. The Southern Region’s Case Represents Significant Regulatory Overreach

As demonstrated above, there is no corrective action necessary for Ferrellgas to come into compliance nor will PCO Item 4 result in any meaningful safety improvements at the pertinent systems. Nevertheless, the Region persists in this matter. Such enforcement is regulatory overreach. The Region has failed to establish that the applicable statutory and regulatory provisions authorize the corrective action it seeks, instead suggesting that it has far broader corrective action authority than it actually has (*see* Brief at 12), that it has unlimited jurisdiction (*see* Brief at 9–11) and that even the most nominal potential increase of safety rationalizes its position (*see* Brief at 9).

The Region’s position here is, at minimum, troubling. The regulated community is entitled to know what the rules are and how they will be enforced by being informed by the plain language of the applicable statutes and regulations. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 143–44 (declining to apply the *Auer* deference when the agency’s interpretation is “plainly erroneous or inconsistent with the regulation” because it creates an “unfair surprise” that the “Court has long warned” against); *Azar*, 587 U.S. at 582 (explaining that the rulemaking process “gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes”).

Moreover, the Southern Region’s positions in this case run contrary to current PHMSA policy. PHMSA is expressly seeking to reduce regulatory burden. Pipeline Safety: Mandatory Regulatory Reviews To Unleash American Energy and Improve Government Efficiency, 90 Fed. Reg. 23660 (June 4, 2025). “PHMSA has an obligation to ensure that the burdens imposed by its regulations on all potential stakeholders are necessary for the [Pipeline Safety Regulations] PSR to serve the public interest.” *Id.* The regulatory burden the Region seeks to impose on Ferrellgas cannot be justified through this lens.

E. This Enforcement Creates Due Process Concerns

In addition to the regulatory overreach, this case presents significant due process concerns. Due process requires a clear set of procedural guidelines. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests affected.” (citations omitted)). It also entails an adversarial proceeding with an opportunity to be heard. *Id.* (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time

and in a meaningful manner.”” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citations omitted)). PHMSA’s lack of clear prescribed process for enforcement is problematic in the context of these requirements. 49 C.F.R. § 190.211.

Making matters worse is the Region’s lack of regard for the customary process for a hearing. During the August hearing, Ferrellgas suspected that the Region’s witnesses were reading from a prepared script and/or outline. When each witness was asked whether they were in fact reading, each witness admitted that they were.

MS. HAINES: Mr. Murphy, it appeared to me that you could be reading when you were testifying. Do you have any outline or notes in front of you?

MR. MURPHY: I do.

[. . .]

MS. HAINES: And let me back up for a second, Mr. Urisko. During your testimony earlier, were you relying upon any notes or an outline?

MR. URISKO: No, just the exhibits. I did have notes specific to some exhibits, but no outline.

MS. HAINES: Okay. But you do have separate notes that you’re relying on?

MR. URISKO: Yes.

MS. HAINES: Who prepared those notes?

MR. URISKO: With support from internal reference, SMEs, so team effort, but predominantly myself.

Ex. 1, Hearing Tr. 52:23–53:1 (Mr. Murphy’s testimony), 69:18–70:3 (Mr. Urisko’s testimony). Ferrellgas raised these concerns with the Presiding Official during the hearing but continued on with the proceeding in the interest of time and did not waive its objections. *Id.* at 53:2–8.

The Region’s witnesses reading from pre-prepared notes during their testimony raises issues regarding fundamental fairness and Ferrellgas’s right to effectively cross each witness. The

APA states that parties are entitled “to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). The Federal Rules of Evidence implicitly acknowledge the unfairness of a witness reading from their prepared notes by stating that “an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony.” FED. R. EVID. 612(b).

Here, both Mr. Urisko and Mr. Murphy admitted to relying on prepared outlines and notes to testify at the August hearing. Ex. 1, Hearing Tr. 52:23–53:1 (Mr. Murphy’s testimony), 69:18–70:3 (Mr. Urisko’s testimony). This was not done so for a permissible purpose, such as refreshing the witnesses’ recollection while testifying under Rule 612. Rather, this was an undisclosed attempt to have preprepared testimony put on the record that may have possibly been written by counsel or persons other than Mr. Urisko and Mr. Murphy respectively. Such conduct also compromised Ferrellgas’s right to a full and fair opportunity to cross-examine and test the PHMSA witnesses’ credibility and memory in real time under § 556(d) of the APA.

V. Relief Requested

With respect to NOPV Item 6, NOPV should be rescinded and no penalty assessed. PCO Item 4 should be stricken.

With respect to NOPV Item 9, the NOPV should be rescinded and no penalty assessed. In the alternative, a lower penalty should be assessed.

October 31, 2025

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