January 28, 2010

Via overnight mail

Jeffrey D. Wiese
Associate Administrator for Pipeline Safety
Pipeline and Hazardous Materials Administration
1200 New Jersey Ave., S.E.
Room Number E22-321
Washington, D.C. 20590

JAN 29 2010

Re: CPF No. 3-2007-1006;
Amendment to Petition for Reconsideration, Clarification, and Stay

Dear Mr. Wiese:

On January 22, 2010, ANR Pipeline Company (ANR) received your letter of January 15, 2010, which granted ANR's request for a stay of the above referenced proceeding and accorded ANR the option to submit an amendment to its Petition within 10 days of receipt of your letter. ANR greatly appreciates your consideration in this matter and the opportunity to supplement its original Petition.

In accordance with the above, hereby respectfully submits the enclosed Amendment to Petition for Reconsideration, Clarification, and Stay, with attached Affidavit. In keeping with the requirements of 49 C.F.R. § 190.215(a), ANR is enclosing one original and three copies of the Amendment and attachment.

Again, if you have any questions, please feel free to contact the undersigned.

Sincerely,

Eugene R. Morabito

Eugene R. Morabito
Attorney for ANR Pipeline Company
tel: (248) 205-7597 ~ fax: (248) 205-7637
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cc: Ivan A. Huntoon
Director, Central Region, OPS

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

In the Matter of	)	
ANR Pipeline Company,	)	**CPF No. 3-2007-1006**
Respondent,	)	

AMENDMENT TO PETITION FOR RECONSIDERATION, CLARIFICATION, AND STAY

Respondent ANR Pipeline Company (ANR or Respondent) respectfully submits this Amendment to its Petition for Reconsideration, Clarification, and Stay (Petition) of the Final Order (Order) of the Pipeline and Hazardous Materials Safety Administration (PHMSA), issued on Dec. 4, 2009 in the above entitled proceeding. In its pending Petition, ANR argues that the Order's new methodology for calculating the length of a lateral pipeline constitutes a new substantive rule changing established PHMSA practice and, as such, must be submitted for notice and comment under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, as well as comply with any applicable requirements established under the Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.* (Petition at 4). ANR also contends that the new "lateral line" interpretation put forward under the Order constitutes arbitrary and capricious agency action which must be revised and/or clarified. (Petition at 5). This Amendment resolves concerns about the factual record and provides additional legal bases in support of Respondent's Petition.

I. Supplemental Affidavit.

In the Petition and at the Nov. 29, 2007 Kansas City, Missouri hearing, ANR noted that, "Compliance Audits by PHMSA since 1990 included discussion of ANR's interpretation of the A[merican] G[as] A[ssociation] definition of "lateral" that was used for determining compliance requirements of Rule 192.625(b)(3)." (ANR Nov. 29, 2007 Hearing Handout at 20; Petition at 4).

Despite this unrefuted statement provided by ANR at the Nov. 29, 2007 hearing, the Order indicates that "...there is no evidence in the record to suggest there is a settled administrative policy upset by the present interpretation." (Order at 8). The Order also states that "there is

no evidentiary support" for the ANR position that PHMSA has previously tacitly accepted an AGA-type interpretation of "lateral line." *Id.* ANR believes that this is a mischaracterization of the facts as discussed at the Nov. 29, 2007 hearing. No evidence refuting the ANR Hearing Handout statement was put forward at the hearing and, as noted in the Petition, "at no time until the instant NOPV did PHMSA challenge ANR's interpretation." (Petition at 4). In order to further clarify this matter, ANR has checked with personnel who participated in prior PHMSA audits, and offers the following additional information to assist PHMSA in understanding the factual background in this proceeding.

To supplement the evidentiary record herein, ANR submits the attached Affidavit from David H. Coker, who, as a Senior Field Compliance Engineer, was responsible for providing technical support to ANR's Field Operations for Department of Transportation Compliance Matters. The attached Affidavit pertains to responses given to PHMSA representatives during a June/July 2002 compliance audit of ANR's Wisconsin facilities and provides additional evidence of PHMSA longstanding practice of accepting the AGA definition employed by ANR.

As noted in the Affidavit, in the years previous to and including 2002, PHMSA representatives specifically audited ANR for compliance with the odorization requirements of 49 C.F.R. § 192.625(b) and officially declined to challenge ANR's interpretation of lateral line when determining compliance with section 192.625(b)(3). PHMSA consistently utilized this regulatory practice of deferring to ANR's definition for decades. PHMSA's new methodology constitutes a significant departure from this long established past practice which must be submitted for notice and comment consistent with the APA and the Pipeline Safety Act. *See, Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) ("If a new agency policy represents a significant departure from long established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment.").

II. PHMSA's Reliance on Adjudication in the Present Case Constitutes an Abuse of Discretion.

PHMSA specifically relies on *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) as authority for the agency's discretion to set forth its new definition of a lateral line by means of this adjudicatory proceeding. "However, like all grants of discretion, 'there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion...' " *First Bancorporation v. Board of Governors of the Federal Reserve System*, 728 F.2d 434, 437 (10th Cir. 1984), quoting *Bell Aerospace, supra*, 416 U.S. at 294; *See, Shell Offshore Inc., supra; and Union Flights, Inc. v. Administrator, FAA*, 957 F.2d 685, 688 (9th Cir. 1992) (noting that "policymaking by adjudication could be an abuse of discretion if an agency's sudden change of direction leads to undue hardship for those who had relied on past policy," but finding no abuse of discretion absent any detrimental reliance on past policy or attempted agency circumvention of the APA). Under the present circumstances, PHMSA abused its discretion by announcing and applying a new, generally applicable definition of a lateral line in the course of an ad hoc adjudicatory proceeding, rather than by following rulemaking procedures.

In *Bell Aerospace,* the factual and legal circumstances justified the agency's use of adjudicatory proceedings to develop case by case standards. Such circumstances concerned the determination of whether certain buyer employees were properly classified as managerial and therefore excluded from the protections of the National Labor Relations Act. The National Labor Relations Board's choice to adjudicate, rather than proceed to rulemaking, was not an abuse of discretion in the context of that determination:

> Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. Indeed, there is ample indication that adjudication is especially appropriate in the instant context. As the Court of Appeals noted, "[t]here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." 475 F.2d 496. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company. The Board's judgment that adjudication best serves this purpose is entitled to great weight. *Bell Aerospace*, *supra*, 416 U.S. at 294.

Thus, in *Bell Aerospace*, the choice to adjudicate was appropriate where "[i]t was doubtful whether any generalized standard could be framed which would have more than marginal utility." In that case, the Board was justified in "developing its standards in a case by case manner with attention to the specific character of the buyers' authority and duties in each case." Significantly, while the agency in *Bell Aerospace* needed to determine specific facts to resolve whether certain employee activities were primarily managerial or not, there are no facts to be determined in this enforcement action, which has created a new, limiting interpretation of a lateral line, not unique to ANR, but which will henceforth, if not rescinded, be applicable to the entire pipeline industry.

In contrast to *Bell Aerospace*, the Tenth Circuit held that the Board of Governors of the Federal Reserve System "abused its discretion by improperly attempting to propose legislative policy by an adjudicative order." *First Bancorporation*, *supra* at 438. In changing policy via an administrative order, the Board determined that bank holding companies could offer certain accounts (negotiable order of withdrawal or NOW accounts) if such accounts were subject to Board regulations regarding interest limitations and reserve requirements. The petitioner bank challenged the Board's decision, arguing that the order constituted "a rule of general applicability subject to the rulemaking provisions of [5 U.S.C.] § 553 of the Administrative Procedure Act, and [was] not, as the Board claim[ed], merely an adjudication of the activity's merits." *Id.* at 437.

Rejecting the Board's contention that the order was merely an interpretive rule, the court noted that "a significant policy change was announced and thus a substantive rule subject to the rulemaking provisions of [5 U.S.C.] § 553 was proposed." *Id.* at 438. In formulating its policy, the Board did not rely on specific adjudicative facts as to the petitioner bank, instead making broad policy conclusions as to important public policy objectives. *Id.* As noted by the court, "[t]he Board's order [was] an attempt to construct policy by adjudication." *Id.*

In *Patel v Immigration and Naturalization Service*, 638 F.2d 1199, 1205 (9th Cir. 1981), the court contrasted the limited circumstances in *Bell Aerospace*, which justified agency preference for adjudication over rulemaking, to the imposition of a general standard that did "not call for a case- by-case adjudication" and could "be stated and applied as a general rule even though the result [could] vary from case to case," ultimately holding that the agency improperly circumvented rulemaking procedure. Further, the *Patel* court noted that the agency abused its discretion by applying a standard when the impacted party had no notice of its existence, until the agency issued its order. *Patel, supra* at 1202. Similarly, ANR did not have notice of the new PHMSA concept limiting the length of a lateral until PHMSA announced its new position in the Order.

Additionally, in the instant case, PHMSA has improperly circumvented proper rulemaking procedures by changing its past practice and issuing a rule of general applicability through the vehicle of this ad hoc administrative proceeding. The standard announced under the Order constitutes a general definition applicable prospectively to all lateral systems under 49 C.F.R. 192.625(b)(3); it does not contemplate a case by case evolution of standards with attention to the specific character of any given pipeline system. Like the Board in *First Bancorporation*, PHMSA did not rely on any particular adjudicative facts in formulating this definition. Instead, it issued a general statement of administrative policy, although the result in any individual application of the definition may vary. These circumstances distinguish PHMSA's action from the contemplated case by case evolution of standards which would justify a discretionary choice to act by adjudication. The status of the ANR enforcement action is clearly more on point with *First Bancorporation* and *Patel* than with *Bell Aerospace*.

III. Respondent's Good Faith Reliance on PHMSA's Historical Audit Practices.

Finally, an additional factor distinguishes the present matter from the administrative proceedings at issue in *Bell Aerospace*. In *Bell Aerospace*, there were no issues concerning individual actions taken in good faith reliance on agency pronouncements; as stated by the Court, "this [was] not a case in which some new liability [was] sought to be imposed on individuals for past actions which were taken in good faith reliance on [agency] pronouncements." 416 U.S. at 295.

As noted in Respondent's Petition, supplemented by the Affidavit attached to this Amendment, PHMSA departed from its decades' long policy of accepting Respondent's use of an AGA based definition of a lateral line in order to institute this adjudicatory proceeding. It was this policy change that occurred in the ANR adjudicative process, rather than any particular adjudicative

facts being determined and considered as part of a case by case evolution of a regulatory standard. *See, Shell Offshore Inc, supra* at 628 (where the court noted that "Interior's new policy was the basis for the adjudication rather than the facts of the particular adjudication causing Interior to modify or re-interpret its rule.").

Thus, by means of this adjudicatory proceeding, PHMSA has effected a sudden change of direction from its past policy, resulting in the imposition of a prior offense finding against ANR. *See, Union Flights, Inc.*, supra; and *Cities of Anaheim v. Federal Energy Regulatory Commission*, 723 F.2d 656, 659 (9th Cir. 1984) ("[A]gencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy...[and] may not use adjudication to circumvent the Administrative Procedures Act's rulemaking procedures.").

Even assuming that *Bell Aerospace* controlled, PHMSA should be precluded from proceeding against Respondent based on PHMSA's historical audit practices and Respondent's good faith reliance on these practices.

Conclusion and Relief Requested

The new rule of general applicability issued in PHMSA's Order constitutes an improper attempt to use an adjudicatory procedure as a vehicle to effect a general policy change. Respondent asks that the Associate Administrator grant the Petition for Reconsideration, Clarification, and Stay, as supplemented herein, and grant all such other relief as may be just and proper.

Respectfully submitted,

By: Eugene R. Morabito
Eugene R. Morabito
Attorney for ANR Pipeline Company

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

In the Matter of	)	
ANR Pipeline Company,	)	**CPF No. 3-2007-1006**
Respondent,	)	

AFFIDAVIT OF DAVID H. COKER IN SUPPORT OF RESPONDENT ANR PIPELINE COMPANY'S PETITION FOR RECONSIDERATION, CLARIFICATION, AND STAY

State of Illinois)
) §
County of Will)

David H. Coker, being duly sworn, deposes and says that:

1. I am over the age of 18 and not under any disability which would preclude making this affidavit, and that this affidavit is made of my personal knowledge. I am employed by TransCanada USA Services Inc. on behalf of ANR Pipeline Company (ANR) as a Pipe Integrity Engineer, and work out of ANR's Tinley Park office, located at 18428 South West Creek Drive, Tinley Park, Illinois, 60477.

2. In 2002, as a Senior Field Compliance Engineer and member of El Paso Corporation's Department of Transportation (DOT) Compliance Department (former owner of ANR), I provided technical support to ANR's Field Operations for DOT compliance matters for ANR

facilities; and, in this capacity, I had discussions with Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS), representatives Bill Lowry and Benson Dushane during a 2002 PHMSA Compliance Audit of ANR facilities. It was my understanding that Benson Dushane was the lead PHMSA representative on this audit, which occurred on or about June/July of 2002, and that Bill Lowry's role was to assist Mr. Dushane by completing the audit of ANR's Wisconsin facilities. It was my understanding that Benson Dushane had, for a number of years, audited the majority of ANR facilities and had gained considerable knowledge of ANR facilities and practices.

3. My July 2002 audit discussions with Bill Lowry addressed the compliance requirements of 49 CFR 192.625(b) with respect to ANR's Wisconsin system and the fact that ANR did not odorize its pipeline facilities in Wisconsin.

4. Specifically, during these July 2002 audit discussions, I provided Mr. Lowry with a list of ANR's Wisconsin pipelines showing the percentage length in Class 3 locations. Based on my understanding of company records, I further advised Mr. Lowry that it was my understanding that neither Mr. Dushane, nor others in DOT in their previous audits of ANR facilities, had ever issued written opposition to ANR's interpretation that all of ANR's Wisconsin facilities were branches from the Mainline and that mileage was not based on individual branches. According to my understanding, this ANR interpretation was based on the American Gas Association definition of "lateral" and it was ANR's longstanding practice to use this definition for determining compliance with section 192.625(b)(3).

5. Following the conclusion of the 2002 audit, Mr. Dushane and the Central Region provided ANR with the summary report which included a few minor frequency-related infractions (Notice of Probable Violations) tied to maintenance inspections for the complete audit of ANR's Southwest Mainline System and the Wisconsin system. This summary report did not include any findings against ANR regarding the failure to odorize under 49 CFR 192.625(b).

6. From my knowledge and experience concerning PHMSA audit practices, I believe that previous to and including 2002, OPS Central Region, did not officially challenge ANR's interpretation of "lateral" and thus indicated it was an acceptable interpretation as evidenced by the lack of the issuance of a Notice of Probable Violation or Corrective Action Order as a result of prior audits.

Further deponent saith not.

David H. Coker
Pipe Integrity Engineer
ANR Pipeline Company

Subscribed and sworn to before me
This 25th day of January, 2010

Joan Marie Muzzey

Notary Public, Will County, Illinois
My Commission Expires: 3-9-10