December 30, 2009

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

DEC 31 2009

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

Dear Mr. Wiese:

Enclosed please find the Petition for Reconsideration, Clarification, and Stay of the Final Order in the above referenced case, issued on Dec. 4, 2009 and received by ANR Pipeline Company (ANR) on Dec. 14, 2009. In accordance with 49 C.F.R. § 190.215(a), ANR is enclosing one original and three copies of the Petition.

In accordance with 49 C.F.R. § 190.215(f), if a substantial delay in responding to this Petition is expected, ANR respectfully requests notice of that fact and the date by which it is expected that action will be taken, as practicable.

By correspondence dated Dec. 23, 2009, ANR requested an extension of time to file this Petition. No response has yet been received, and ANR deemed it prudent to timely file this Petition. In the event that an extension is subsequently granted, ANR requests the right to supplement or amend its Petition, in accordance with the granted extension.

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

Sincerely,

Eugene R. Morabito

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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,	)	

PETITION FOR RECONSIDERATION, CLARIFICATION, AND STAY

Respondent ANR Pipeline Company (ANR or Respondent) respectfully requests that the Associate Administrator reconsider the Final Order (Order) of the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued on Dec. 4, 2009 in the above entitled proceeding. The Order, inter alia, creates a new methodology for calculating the length of pipelines in a lateral system under 49 C.F.R. § 192.625(b)(3). Applying this new methodology, the Order finds Respondent in violation of § 192.625(b) for having failed to odorize seven specified Wisconsin laterals and requires Respondent to take corrective actions to be in compliance with this new rule. Respondent submits that the Administrator has created and applied a new substantive rule contrary to the notice and comment procedures required under the Administrative Procedures Act (APA), 5 U.S.C. § 553. Respondent contends further that the Order's methodology does not rationally flow from the language of § 192.625(b)(3) and constitutes arbitrary or unreasonable agency action. Respondent therefore requests that the Administrator withdraw the Notice of Probable Violation (NOPV), dated Feb. 8, 2007; or, in the alternative, that the Administrator clarify and/or modify this methodology as more fully explained in this Petition. In the event that the NOPV is not withdrawn, Respondent would request that the specific finding of a prior offense be withdrawn and that Respondent be accorded an extension of time to implement corrective action items nos. 1 through 4 of the Compliance Order. Accordingly, Respondent hereby submits this Petition for Reconsideration pursuant to 49 C.F.R. § 190.215 and requests a stay of all Compliance Order items pending a decision on the issues raised in this Petition.

I. The Order's New Methodology Constitutes a Legislative Rule Subject to the Notice and Comment Requirements of the APA and/or Violates Due Process.

The Order commits legal and factual error by adopting a new definition of a lateral line for the purposes of applying § 192.625(b)(3). The methodology introduced by the Order constitutes a significant departure from the decades long practice of PHMSA auditors to defer to various industry and agency definitions of "lateral line," including ANR's application of the American Gas Association (AGA) definition of a lateral line, when application of any of these definitions would indisputably qualify the subject Wisconsin laterals to the § 192.625(b)(3) exemption from the requirement for odorization.

The Order states that "[t]he issue presented in this matter is whether the ANR pipelines cited in the Notice are lateral lines and whether they meet an exception from odorization." (Order at 2). In resolving this proceeding, the Order does not merely provide an interpretation of an ambiguous or unclear regulation; rather, the Order substantively alters an established regulatory and universally accepted practice by adopting a novel "segment" interpretation of a lateral line, finding:

> [F]or purposes of § 192.625(b)(3),... a lateral line terminating at a distribution center originates at the first upstream connection with another transmission line. An operator shall calculate the length of a lateral line from its terminus at a distribution facility to the line's first upstream connection with another transmission pipeline, whether that connection is with another lateral transmission line or with a transmission line that is not a lateral. (Order at 7).

By its Order in this proceeding, PHMSA is changing "lateral line" in § 192.625(b)(3) to "short lateral line," which is inconsistent with the actions of OPS when the rule was promulgated. It then creates the new length methodology as the criteria for "short," when the concept of "short" is not in the regulations. If PHMSA wants to change its established practices and procedures in a manner that adversely affects ANR (even assuming that the new methodology promulgated under the Order is reasonable), PHMSA must give ANR notice and an opportunity to comment on the proposed change.

"A party may not lawfully be adversely affected by a rule promulgated in violation of the requirements of the APA." *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 626 (5th Cir. 2001), citing 5 U.S.C. § 552(a)(1). ANR cannot lawfully be affected by this methodology until PHMSA promulgates a new regulation consistent with the requirements of the APA.[1] The new methodology is invalid under the APA and Respondent asks that the NOPV be withdrawn, since

[1] Generally, a proceeding to prescribe regulations for safe transportation "must be conducted under section 553 of title 5, including an opportunity for informal oral presentation." 49 U.S.C. § 5103(b)(2). Moreover, 49 U.S.C. § 60102(b)(2) requires that certain factors be considered before a pipeline safety standard is prescribed, including relevant gas pipeline safety and environmental information; the appropriateness of the standard for the particular type of pipeline transportation or facility; the estimated costs and benefits expected to result from implementation or compliance with the standard; the reasonableness of the standard; comments and information received from the public, and comments of the Technical Pipeline Safety Standards Committee.

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 APA .

The Order improperly rejected Respondent's argument that the adoption of a new "segment" approach to the definition of a lateral pipeline should be made by rulemaking, stating, in part, "[i]f anything, the lack of public statements on this issue demonstrates that PHMSA has never issued a formal decision about how an operator must calculate the length of pipelines in a lateral system for purposes of § 192.625(b)(3)." (Order at 8). The Order further states that "PHMSA is not required to undertake a rulemaking in order to formulate a new interpretation of § 192.625(b)(3)" and that "[a]gencies have discretion to set forth regulatory interpretations by rulemaking or by adjudication." (Order at 9).

However, a new rule requiring notice and comment under the APA need not be a change from a written policy statement or regulation. In *Shell Offshore*, the Department of Interior changed its established unwritten practice of accepting FERC approved tariffs for the purposes of determining whether lessees under federal oil and gas leases were entitled to deduct transportation costs from royalty payments under 30 C.F.R. § 206.105(b)(5), which granted lessees an exception from showing the actual costs of transport if the lessee had "a tariff for the transportation system approved by the [FERC]." 238 F.3d at 624-625, quoting § 206.105(b)(5). Although Interior had treated all filed tariffs as "approved by FERC" for the purposes of this regulatory exception from 1988 to 1993, the Department changed its practice in 1994 to require lessees like Shell to petition and receive from FERC a determination that FERC had jurisdiction over the pipelines in question in order to apply the exception. *Shell Offshore* at 629. In a final order, Interior denied Shell's request to deduct as transportation costs Shell's FERC accepted tariff rate and Shell filed suit. The Fifth Circuit ruled that Interior's new practice was invalid under the APA.

Similar to PHMSA's position as reflected in the Order, Interior had argued that the "case merely involve[d] an 'adjudication' exempt from the rulemaking requirements of the APA, and, in the alternative, that the new rule [was] merely 'interpretive.' " *Shell Offshore* at 627. The court rejected Interior's arguments, noting that the adjudication resulted from a change in policy "rather than the facts of the particular adjudication causing Interior to modify or re-interpret its rule." *Shell Offshore*, at 628. The court also rejected Interior's claim that their new policy was merely an interpretive rule exempt from the notice and comment requirements of the APA, finding that this new policy was a change from a consistent practice substantially affecting the regulated industry. *Shell Offshore* at 630.

In the instant proceeding, it is irrelevant that PHMSA has never issued a formal decision as to how a pipeline operator must calculate the length of pipelines in a lateral system for the purposes of applying § 192.625(b)(3). As previously pointed out by Respondent, no length limitation was required when the rule was promulgated and none can be logically inferred from the text of the existing regulations. "An agency that, as a practical matter, has enacted a new substantive rule cannot evade the notice and comment requirements of the APA by avoiding written statements or other "official" interpretations of a given regulation." *Shell Offshore*,

supra at 630.[2] Alteration of existing practices may give rise to a violation of the APA and the Order ignores relevant statements in the record demonstrating that the present "interpretation" runs contrary to PHMSA's past practices.

As noted by Respondent, "Compliance Audits by PHMSA since 1990 included discussion of ANR's interpretation of the AGA definition of "lateral" that was used for determining compliance requirements of Rule 192.625(b)(3)." (ANR Nov. 29, 2007 Hearing Handout at 20). However, at no time until the instant NOPV did PHMSA challenge ANR's interpretation. This conduct is more than merely "an absence of prior enforcement cases." (Order at 8.) PHMSA auditors' decades long acceptance of ANR's interpretation is evidenced by compliance audit reviews that implicitly acknowledged Respondent's qualification for the § 192.625(b)(3) exception without finding a violation. PHMSA now seeks to apply a new definition of § 192.625(b)(3) as the basis for a prior offense finding against Respondent.

In fact, the Order itself finds no "significant inconsistency" between the AGA definition employed by ANR and a definition of a lateral line offered by PHMSA itself via its stakeholder website. (Order at 5). Further, the Order indicates that various industry and government definitions of "lateral line" are consistent with each other. *Id.* The seven subject ANR pipelines satisfy the requirements of each of these definitions to be a "lateral line." *Id.* In sum, contrary to the Order's claim that "there is no evidence in the record to suggest there is a settled administrative policy upset by the present interpretation" (Order at 8), PHMSA's conduct since at least 1990 demonstrates a longstanding agency practice to accept the various industry and government definitions of a lateral line, including the AGA definition employed by ANR.

The Order accurately notes that the Office of Pipeline Safety (OPS) expected that most lateral lines that would utilize the § 192.625(b)(3) exemption would be short. (Order at 6). But as previously noted by ANR and discussed in the Order, a hypothetical pipeline of 150 miles in length was referenced by OPS in the preamble to the rule promulgating the exemption. (Order at 7, n. 13). The Order suggests that because the comment was by a minority member of the Technical Pipeline Safety Standards Committee (TPSSC), which was advising OPS, the comment has less significance. This is incorrect. The minority viewpoint was that lateral lines should be limited in length and the 150 mile pipeline was the example it put forward. However, the majority of the TPSSC did <u>not</u> recommend to OPS that "lateral lines" should be specifically limited in length to eliminate the hypothetical possibility of a 150 mile lateral pipeline. Instead it kept the present language intact indicating that OPS and TPSSC did not want to have a length limitation.

In sum, Respondent contends 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 APA, as well as comply with any applicable requirements established under the Pipeline Safety Act, 49 U.S.C. §§ 60101 *et seq.*

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[2] Even in an appropriate case, an agency's discretion to proceed by an adjudicatory proceeding as opposed to rulemaking is not unlimited. *See, Natural Gas Pipeline Co. of America v. FERC*, 590 F.2d 664 (7th Cir. 1979), where FERC was precluded from retroactively modifying previous orders in an adjudicatory proceeding.

II. The New Interpretation Constitutes Arbitrary and Capricious Agency Action.

The new "lateral line" interpretation put forward under the Order constitutes arbitrary and capricious agency action which must be revised and/or clarified. "While an agency interpretation of a regulation is entitled to due deference, the interpretation must rationally flow from the language of the regulation, and any departure from past interpretations of the same regulation must be adequately explained and justified." Acadian Gas Pipeline System v. Federal Energy Regulatory Commission, 878 F.2d 865, 868 (5th Cir. 1989). "Where an agency fails to distinguish past practice, its actions may indicate that lack of reasoned articulation and responsibility that vitiates the deference the reviewing court would otherwise show." *Id.*; *see also, Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978). "Where an agency has acted arbitrarily or capriciously, a reviewing court is bound to set aside the agency action." *Acadian, supra* at 868.

As noted above, "[t]he issue presented in this matter is whether the ANR pipelines cited in the Notice are lateral lines and whether they meet an exception from odorization." (Order at 2). However, the Order proceeds to state that "[t]he central question that must be decided, however, is how an operator must calculate the length of a lateral line that terminates at a distribution center for purposes of applying the exception from odorization in § 192.625(b)(3)." (Order at 5). In this way, the Order introduces a new criterion of length into the analysis of whether a lateral line qualifies for the § 192.625(b)(3) exception, a criterion which is not a controlling characteristic of a lateral under any available regulatory or industry definitions and that was omitted from the regulation when promulgated.

It is significant that length or segmentation is not a concept that is addressed in the regulatory definition of a transmission line (see 49 CFR § 192.3) and, under § 192.625(b)(3), it is undisputed that a lateral line is a transmission line. Moreover, the AGA definition relied upon and deferred to by PHMSA auditors since the 1990s does not incorporate such a limiting concept of length. Notwithstanding, the Order relies on this concept by providing that only laterals which extend from the line's first upstream connection with another transmission line and end at a distribution center qualify for the § 192.625(b)(3) exception. The new interpretation is flawed and illogical in application by arbitrarily creating a distinction that would allow certain lateral systems to qualify for the § 192.625(b)(3) exception while denying this exemption to essentially similar systems.

An illustration of this distinction is apparent upon a cursory review of the hypothetical lateral system presented in the Order by way of illustrating the application of the new rule. (Order at 8). Using this example, a lateral constructed from H to D would qualify for the exception while the same lateral constructed from H to D with an interconnection at G would not be exempt. While the systems could be essentially the same from a safety standpoint, the application of the new rule creates an arbitrary distinction that renders the current definition flawed and unacceptable under basic principles of administrative law.

Further, if H to D were constructed first, and is entitled to the lateral line exemption, does the segment G to D lose its exempt status when G to C is constructed? If G to C is then exempt,

does F to C lose its exempt status because F to A is constructed? As one possible example, PHMSA could have defined a *Lateral* as:

- a pipeline that branches from a transmission or distribution pipeline and ends at another transmission or distribution pipeline, a distribution center, an end user, or a storage well; or

- a pipeline that originates at a production or storage well, a gas receipt point, or a gathering, transmission or distribution pipeline and ends at the tie-in to another transmission or distribution pipeline.

Applying this definition to the inconsistencies demonstrated in the preceding paragraph, G to D would retain its exempt status when G to C is constructed. Likewise, F to C would not lose its exempt status when F to A is constructed. However, this is just one of numerous plausible definitions that PHMSA could implement and ANR continues to believe that a rulemaking process to define "lateral" would be beneficial to PHMSA and the pipeline industry. The criterion of length as presently formulated and incorporated into the interpretation promulgated under the Order is unreasonable, arbitrary, and capricious and needs to be revised and/or clarified, or withdrawn.

Moreover, the arbitrary length limitation, created by PHMSA in its Order, cannot be rationally implied under any known reasonable interpretation or understanding of "lateral line." The Order rejects outright the possibility that lateral lines entitled to the exemption may overlap, and describes this as "double-counting." (Order at 6). However, there is no background in the preamble to the rule that indicates that overlapping should not be allowed. While the text of the promulgated rule did not explicitly address this, the rule did create an exemption for lateral lines predominantly in Class 1 or Class 2 locations and duplicate lateral lines are not excluded under any industry or government definition of a "lateral line;" such lines are therefore a subset of "lateral lines."

Though literally inconsistent with the text of § 192.625(b)(3), if it is assumed, solely for the sake of argument, that overlapping should not occur, this would not control the status of the subject 7 pipeline laterals. As discussed at the November 29, 2007 hearing, instead of measuring each lateral from its endpoint at a distribution center to the Sandwich Station, the measurement could occur from the distribution center endpoint to the pipeline that connects the Sandwich Station to the interconnection between the ANR facilities and the facilities of Great Lakes Gas Transmission Limited Partnership at Fortune Lake, Michigan. Since this line is the source of the majority of gas delivered in Wisconsin by ANR, it is a "main" transmission line from which various laterals emanate. This was not addressed in the Order. This would reduce or eliminate the length of the overlap.

ANR agrees that an agency interpretation of a regulation is generally entitled to judicial deference, but the interpretation must rationally flow from the language of the regulation. *See, Acadian, supra* at 868. Moreover, even "[j]udicial deference is tempered when an agency ruling is inconsistent with a prior pronouncement or prior actions." *Acadian, supra* at 870.

Here, the Order arbitrarily limits the applicability of the lateral line exemption by excluding any "lateral line" that does not meet the new test for measuring length, although the simple and unambiguous language in the text of the regulation does not exclude any types of lateral lines – whether such lines are of any particular length, of a certain diameter, or overlapping lines. Moreover, the Order fails to acknowledge or account for an audit history evidencing PHMSA's implicit acceptance of ANR's application of the AGA definition of a lateral line for the purposes of complying with the regulatory exemption from odorization. (ANR Nov. 29, 2007 Hearing Handout at 20).

Although PHMSA auditors since at least 1990 had found no violation of § 192.625(b), the Order now creates a new limitation on the meaning of "lateral line" that cannot be logically inferred from the text of the regulation. In other words, it is creating a limitation on "lateral line" that is outside the set of reasonable interpretations of "lateral line." Therefore, the new PHMSA limitation needs to be revised and/or clarified, or withdrawn.

III. A Stay from the Order Should be Granted.

Due to the issues raised in this Petition concerning the appropriate resolution of this proceeding and consistent with the applicable legal requirements which ANR does not believe have been satisfied (as discussed in Parts I and II herein), ANR believes that the Compliance Order aspects of the Order should be stayed, pending final resolution of this proceeding. Until PHMSA further clarifies which lateral lines are excluded from the § 192.625(b)(3) exemption from odorization, and whether a lateral line can lose its exempt status based upon subsequent construction of additional lateral lines, ANR will have great difficulty in developing procedures to identify those portions of its pipeline system that would be subject to the new criteria established in the Order. Further it is imprudent for ANR to be required to incur costs to design and construct odorization facilities when there is a possibility that the Order will be modified, either by rescinding some or all of the compliance requirements and/or clarifying what constitutes a "lateral line." Therefore, ANR respectfully requests that the Compliance Order requirements be stayed until PHMSA acts on this Petition.

IV. Additional Time to Implement the Compliance Order Should be Provided.

In the event PHMSA does not grant the stay requested in Part III herein, ANR requests that PHMSA extend the deadlines to complete some of the corrective action requirements. In the event that PHMSA does grant the stay, ANR also requests that PHMSA similarly extend these deadlines to the extent it retains the various Compliance Order requirements contained in the Order when it acts on this Petition.

Specifically, ANR requests that the 30 days in Compliance Order paragraphs 1 and 4 be extended to 60 days, that the 60 days in paragraph 2 be extended to 120 days, and that the one year requirement in paragraph 3 be extended to 2 years.

Reasons for our request for an extension include the need to coordinate completion of various tasks with other tasks, and additional time needed to consult with other affiliates of TransCanada, so we can obtain consistent and better internal specifications than would otherwise occur.

Also, the timeline for completing the corrective action in paragraph 3 should be 2 years instead of 1. ANR observes that it will need to obtain rights to construct and install above ground odorization facilities at numerous locations on its pipeline system, and acquiring such land rights may be a timely process. ANR may have to exercise eminent domain rights to acquire the legal rights, which process may take several months. Other factors that will cause delay in meeting the current deadline include material acquisitions, including long lead times, contractor availability, obtaining local permits, determining and minimizing environmental impacts (including possible impact on air emissions), and addressing customer concerns on optimizing facility utilization and avoiding unproductive facility duplication. A two year deadline is more realistic than a shorter time period.

V. Finding of Violation.

The Order indicates that "[t]his finding of violation will be considered a prior offense in any subsequent action taken against Respondent." (Order at 9). ANR notes that the Order determines that ANR is in violation of a PHMSA interpretation that did not exist prior to the issuance of the Order. ANR did not intentionally violate the PHMSA odorization requirement. Nor did it negligently violate the regulation, since PHMSA agrees that ANR's seven lines satisfied all known definitions of a lateral line under its regulations prior to the creation of a new requirement articulated in the Order (and being contested by this Petition).[3] Therefore, ANR requests that the finding of a violation, if this is the ultimate outcome of this proceeding, not be considered a prior offense.

[3] A respondent's culpability and history of prior offenses, as well as the nature, circumstances and gravity of the violation are among the factors to be considered in determining the amount of a civil penalty under 49 C.F.R. § 190.225.

Conclusion and Relief Requested

Based on the foregoing, Respondent therefore requests that the Administrator withdraw the NOPV; or alternatively, that the Administrator clarify and/or modify the new methodology created by the Order. Pending decision on this Petition, Respondent further requests a stay of all Compliance Order items. In the event that a stay is not granted, Respondent requests an extension of time to implement corrective action items nos. 1 through 4 of the Compliance Order. In the event that the NOPV is not withdrawn, Respondent would request that the specific finding of a prior offense be withdrawn for the reasons stated herein.

Respectfully submitted,

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