GULF SOUTH PIPELINE

By Email Only

February 4, 2022

Mr. Gregory A. Ochs
Director, Central Region
Office of Pipeline Safety
Pipeline and Hazardous Materials Safety Administration
901 Locust Street, Suite 462
Kansas City, MO 64106

Re: Gulf South Pipeline Company, LLC, CPF No. 3-2021-073-NOPV
Written Response to Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order and Request for Documents

Dear Mr. Ochs,

Pursuant to 49 C.F.R. § 190.208, Gulf South Pipeline Company, LLC (Gulf South) respectfully submits its Written Response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued on December 22, 2021. On January 11, 2022, PHMSA approved by email an extension of time to respond to the Notice. The extension set a new deadline of February 5, 2022. Therefore, this response is timely.

As explained in the Written Response, Gulf South contests the proposed civil penalty in Item 1; contests the alleged violation and proposed compliance order in Item 2; and contests the alleged violation, proposed compliance order and proposed civil penalty in Item 3. Gulf South does not contest Item 4 which is a warning item.

Gulf South requests that it continue to be provided with all documents or communications from OPS pertaining to the case or the case file, which includes "all agency records pertinent to the matters of fact and law asserted,"[1] including Region Director's "written evaluation of response material submitted by the respondent and recommendation for final action, if one is prepared." 49 C.F.R. § 190.209(b)(7). Under § 190.209(a), the Region Director's written evaluation and recommendation is part of the case file and is to be made available to the Respondent.

Gulf South also requests that it be provided an opportunity to submit a response to the Region Director's written evaluation and recommendation.

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[1] 49 U.S.C. § 60117(b)(1)(C).

Thank you for your attention on this matter. Should you have any questions, please feel free to contact me at tony.rizk@bwpipelines.com or Ms. Tina Baker at tina.baker@bwpipelines.com

Respectfully submitted,

Tony G. Rizk, P.E.
Vice President, Technical Services

Attachment
CC: Joseph Hainline, Esq., Sr. Attorney Advisor, Office of Chief Counsel, PHMSA (via email Joseph.Hainline@DOT.gov

U.S. DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF PIPELINE SAFETY

In the Matter of	)	
Gulf South Pipeline Company, LLC,	)	**CPF No. 3-2021-073-NOPV**
Respondent.	)	

Response of Gulf South Pipeline Company, LLC
To Notice of Probable Violation, Proposed Civil Penalty,
and Proposed Compliance Order

Gulf South Pipeline Company, LLC (Gulf South)[1] submits its Response to the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order (Notice) issued on December 22, 2021, following an inspection performed by the Office of Pipeline Safety (OPS) in early 2020. On January 11, 2022, the Pipeline and Hazardous Materials Safety Administration (PHMSA) approved by email an extension of time to respond to the Notice. The extension set a new deadline of February 5, 2022 to submit a response. This response is timely.

I. Executive Summary

Gulf South is committed to public safety and operating its pipeline facilities in accordance with the PHMSA's regulations. Gulf South takes PHMSA's allegations of violation seriously however, certain allegations in the Notice lack factual and legal foundations.

Item 1 § 192.201 Required capacity of pressure relieving and limiting stations. Gulf South does not contest the allegation or proposed compliance order which requires continued implementation of the program that Gulf South developed and implemented in 2020 for confirming the capacities at pressure relief stations across its system. Gulf South does contest the proposed civil penalty as unwarranted and requests that it be withdrawn.

Item 2 § 192.605(b)(8) Procedural manual for operations, maintenance and emergencies. Gulf South contests this allegation and requests that it be withdrawn because the information relied on by OPS does not demonstrate the existence of a violation. The proposed compliance order also must be withdrawn because the Notice does not allege either that Gulf South does not have a procedure or that the procedure is inadequate. The Notice expressly acknowledges the existence of Gulf South's procedure. OPS has not met its burden of proof with respect to this item.

[1] Gulf South is a wholly-owned operating subsidiary of Boardwalk Pipelines, LP (Boardwalk)..

Item 3 § 192.706 Transmission lines: Leakage surveys. Gulf South contests the allegation in Item 3 as factually and legally unsupported and requests that the allegation, proposed compliance order and proposed civil penalty be withdrawn. The Notice contains no evidence supporting the conclusory statement that the identified leak detection equipment does not effectively detect leaks on buried gas transmission pipelines.

Item 4 § 192.947 What records must an operator keep? Gulf South does not contest Item 4 which is a warning item.

II. Response of Gulf South

A. PHMSA Bears the Burden of Proving the Allegations in the Notice.

PHMSA has the burden of proving that Gulf South has violated the pipeline safety regulations.[2] PHMSA has the "'burden of production,' *i.e.*, . . . the obligation to come forward with the evidence at different points in the proceeding," and the "'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced."[3] PHMSA "bears the burden of proof as to all elements of the proposed violation."[4] To meet its burden of production, PHMSA must present sufficient evidence to sustain an allegation of violation. Where PHMSA does not produce such evidence, the allegation of violation must be withdrawn.[5]

To meet its burden of persuasion, PHMSA "must prove, by a preponderance of the evidence, that the facts necessary to sustain a probable violation actually occurred."[6] This burden is carried "only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense."[7] A respondent will prevail under this standard not by conclusively proving compliance, but where its rebuttal evidence is more persuasive than the

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[2] *See* 49 C.F.R. § 190.213(a)(1) (2021). *In re Tennessee Gas Pipeline Co.*, Final Order, CPF No. 1-2018-1001, 2019 WL 7943664, **4, 5 (Nov. 14, 2019) (withdrawing alleged violation of § 192.706 because OPS did not meet its burden of proving a violation of the leak detection regulation); *In re ExxonMobil Pipeline Co.*, Final Order, CPF No. 4-2017-5027, 2019 WL 3734516, **4, 5 (Apr. 3, 2019) (withdrawing allegation because PHMSA's evidence did not establish a violation); *In re Air Prods. & Chems., Inc.*, Final Order, CPF No. 4-2013-1001, 2015 WL 6758819, *3 (Aug. 10, 2015) (withdrawing alleged violation because PHMSA did not produce "any evidence to support its position" and thereby did not meet its burden of proof); *In re So. Star Cent. Gas Pipeline, Inc.*, Final Order, CPF No. 3-2008-1005, 2011 WL 7006614, *4 (Oct. 21, 2011) (finding the evidence insufficient to sustain the allegation).

[3] *Schaeffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994)); *see also In re Butte Pipeline Co.*, Final Order, CPF No. 5-2007-5008, 2009 WL 3190794, *1 (Aug. 17, 2009) ("PHMSA carries the burden of proving the allegations set forth in the Notice, meaning that a violation may be found only if the evidence supporting the allegation outweighs the evidence and reasoning presented by Respondent in its defense.") (internal citation omitted).

[4] *In re ANR Pipeline Co.*, Final Order, CPF No. 3-2011-1011, 2012 WL 7177134, *3 (Dec. 31, 2012); *see also In re CITGO Pipeline Co.,* Decision on Reconsideration, CPF No. 4-2007-5010, 2011 WL 7517716, *5 (Dec. 29, 2011).

[5] *See, e.g.*, *Tennessee Gas*, 2019 WL 7943664 at *5 (withdrawing alleged violation for failure to prove Respondent engaged in conduct constituting a violation); *ExxonMobil.*, 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation); *In re Plains Pipeline, L.P.,* Final Order, CPF No. 4-2009-5009, 2011 WL 1919520, *5 (Mar. 15, 2011) (ordering withdrawal of allegation when limited evidence in the record was not conclusive).

[6] *In re Alyeska Pipeline Serv. Co.*, Decision on Petition for Reconsideration, CPF No. 5-2005-5023, 2009 WL 5538655, *3 (Dec. 16, 2009) (citing *In re Butte Pipeline*, 2009 WL 3190794 at *1, n.3; *Schaeffer*, 546 U.S. at 56-58).

[7] *In re Butte Pipeline*, 2009 WL 3190794 at *1 (internal citation omitted).

evidence provided by PHMSA.[8] If "the evidence is closely balanced," PHMSA has not met its burden of persuasion and the allegation of violation must be withdrawn.[9]

B. The Proposed Civil Penalty for Item 1 is Unwarranted and Should Be Withdrawn.

The Notice alleges a violation of § 192.201(a)(2)(i), stating that Gulf South "failed to set its pressure limiting devices to operate at a pressure that would not exceed MAOP [maximum allowable operating pressure] plus ten percent in the connecting pipe between the regulator and the relief valve at [Gulf South's] Gary meter station."[10] The Notice states that, when the inspector requested a review of relief device set points at meter stations and relief capacity calculations, Gulf South "provided calculations showing that the Gary meter station overpressure set point was not in compliance with" § 192.201.[11] The Notice proposes a $32,100 civil penalty and a compliance order that would require Gulf South to "continue with the program already submitted to the Central Region on June 8, 2020," and submit quarterly updates until Gulf South successfully completes the program.[12]

Gulf South does not contest the allegation or the proposed compliance order in Item 1, but submits this Response to provide factual context that is not reflected in the Notice. Gulf South requests that the proposed civil penalty be withdrawn because it is unwarranted.

Section 192.201(a) of PHMSA's regulations requires that pressure relieving or limiting stations that are installed to protect a pipeline must have enough capacity to prevent overpressurization. For a pipeline with an MAOP of 60 p.s.i. or higher, the pressure relief station must be set to ensure that the pressure may not exceed the MAOP plus 10 percent, or the pressure that produces a hoop stress of 75 percent of SMYS, whichever is lower.[13]

At its pressure limiting stations, Gulf South has long had a practice of setting relief valve set points so that the relief valve will release if the pressure reaches MAOP plus 5 percent. This 5

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[8] *See In re ANR Pipeline*, 2012 WL 7177134 at *3. In *ANR Pipeline*, PHMSA found that ANR's "plausible" explanation regarding the discovery of a reportable condition on its pipeline was sufficient to warrant withdrawal of the allegation of violation because the "Violation Report contain[ed] no evidence which would rebut ANR's argument." *Id. See also In re City of Richmond, VA*, Final Order, CPF No. 1-2004-0006, 2006 WL 3825337, *4 (Jan. 12, 2006) (stating that the Respondent does not have the burden of proving compliance, rather OPS has the burden of proving the violation).

[9] *In re Alyeska Pipeline*, 2009 WL 5538655 at *3 (quoting *Schaeffer*, 546 U.S. at 56). *Cf. In re Buckeye Partners, LP*, Final Order, CPF No. 1-2009-5002, 2012 WL 3144486, *7 (May 30, 2012) (where neither party "present[s] sufficient proof to prove its position," the violation must be withdrawn because PHMSA bears the burden).

[10] Notice at 2. Section 192.201(a) requires that "Each pressure relief station or pressure limiting station or group of those stations installed to protect a pipeline must have enough capacity, and must be set up to operate, to insure the following: . . . . (2) In pipelines other than a low pressure distribution system: (i) If the maximum allowable operating pressure is 60 p.s.i. (414 kPa) gage or more, the pressure may not exceed the maximum allowable operating pressure plus 10 percent, or the pressure that produces a hoop stress of 75 percent of SMYS, whichever is lower." 49 C.F.R. § 192.201(a)(2)(i).

[11] Notice at 2. The document that Gulf South provided to the Inspector is attached as Exhibit A of the Violation Report. Pipeline Safety Violation Report, CPF # 3-2021-073-NOPV (Dec. 22, 2021) (Violation Report).

[12] Notice at 4, 6.

[13] 49 C.F.R. §192.201(a)(2)(i).

percent setting is more conservative than the MAOP plus 10 percent permitted in the regulation and creates a higher margin of safety. This setting also is consistent with industry practice.

During the 2020 inspection, the OPS inspector observed that Gulf South had no calculations verifying that relief valve set points at pressure limiting stations were set at no more than MAOP plus 10 percent. The pipe segments affected at pressure limiting stations are generally small diameter (most commonly ranging between 1 inch and 4 inches in outside diameter) and short. The average site includes approximately 35 feet of piping between regulator and relief valve.

At the inspector's request, Gulf South reviewed the accuracy of the relief valve set point calculations at nine randomly selected pressure limiting stations. As explained in the report included as Exhibit A of the Violation Report, Gulf South determined that the relief valve set point at the Gary TBS Upstream Station was more than 110% of the MAOP of the pipe connecting the regulator and the relief valve and needed to be corrected.[14] Although exceeding MAOP by more than 10 percent, this incorrect setting presented no risk to any pipeline located outside the station.

Recognizing that other stations may require further evaluation, Gulf South developed a three-year program to confirm the accuracy of the relief valve set points at approximately 1200 other pressure limiting stations. As noted in the proposed compliance order for Item 1, Gulf South submitted the program to PHMSA on June 8, 2020.[15] OPS approved the program and Gulf South has been implementing it for over a year and submitting quarterly reports to the Central Region Director. Under the program, Gulf South verifies the MAOP of the piping between regulator and relief valves and evaluates pressure buildup as it relates to relief valve set points. Gulf South makes facility adjustments if needed and then updates its records.

Gulf South acknowledges that the incorrect set point at the pressure relief valve at the Gary Station did not comply with § 192.201(a)(2)(i) and does not object to the proposed compliance order directing Gulf South to continue implementing its three-year program to review the set points at other stations and to submit quarterly updates. Gulf South does contest the proposed civil penalty as unwarranted.

Under PHMSA's Pipeline Safety Enforcement Procedures, the purposes of proposing a civil penalty are to "reinforce the message of the Notice of Probable Violation, draw attention to the problem area, emphasize the need for lasting attention, and deter the respondent and other operators from committing future violations."[16] A civil penalty is unnecessary to advance any of these objectives here. Gulf South has long demonstrated a commitment to safety at pressure limiting stations through its policy of setting relief valve set point pressures at MAOP plus five percent, a setting that is more conservative than allowed under the regulation and which creates a greater margin of safety. After discovering the issue at the Gary station, Gulf South took the initiative to develop and submit a program for reviewing and confirming the accuracy of the relief valve set points at all pressure limiting stations and addressing those that may be set incorrectly.

[14] Violation Report, Exhibit A, 1,2.
[15] Notice at 2; Violation Report, Exhibit A.
[16] Pipeline Safety Enforcement Procedures, Section 3.1.1.4 at 5 (Sept. 15, 2020) https://www.phmsa.dot.gov/pipeline/enforcement/section-3-selection-administrative-enforcement-actions.

Gulf South accepted full responsibility and promptly began implementing a comprehensive solution. The safety risk at pressure relieving stations is not significant and no risk is posed to facilities located outside the station. PHMSA bears the burden of demonstrating that the proposed civil penalty is appropriate.[17] The proposed civil penalty is unwarranted and Gulf South requests that it be withdrawn.

C. The Notice Does Not Prove a Violation of § 192.605(b)(8).

Section 192.605(b)(8) requires an operator to have and follow a procedural manual for maintenance and normal operations, including procedures for "[p]eriodically reviewing the work done by operator personnel to determine the effectiveness and adequacy of the procedures used in normal operation and maintenance and modifying the procedures when deficiencies are found."[18] Item 2 of the Notice asserts that "Gulf South failed to determine the effectiveness and adequacy of its procedures based on a review of work performed during normal operations by its personnel."[19] The Notice states that, during the inspection, OPS "requested to review documentation relating to review of work performed for various procedures as required by Texas Gas procedure *O&M 1010 'General Procedures.'*"[20] The Notice states that the material provided by Gulf South, Form 1000-20: *Compliance Manual Effectiveness Review*, from the annual review for 2017, 2018, and 2019, "failed to document any assessment of work performed as part of the operations and maintenance procedures."[21] The Notice asserts that Gulf South was "unable to present adequate information showing that it had periodically reviewed its procedures for effectiveness based [on] consideration of the work performed by its personnel, and is in violation of the regulation."[22]

Without identifying any inadequacy in *O&M Section 1010, General Procedures* (*O&M Section 1010*), the Notice also proposes a compliance order that would require Gulf South to "provide a detailed written procedure to address the periodic review of work done to determine the effectiveness of its normal operations and maintenance procedures," and to submit the written program to the Director and provide semi-annual reports on the results of the revised program until reviews of all procedures have been completed.[23]

This item must be withdrawn because the alleged conduct does not constitute a violation of the regulation and because OPS does not submit any information to support the allegation that Gulf South "failed to determine the effectiveness and adequacy of its procedures" by reviewing the work performed by operator personnel during normal operations.[24]

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[17] *See, e.g., Slusser v. Commodity Futures Trading Comm'n*, 210 F.3d 783, 787-88 (7th Cir. 2000); *see also Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196, 201 (7th Cir. 1989); *Premex, Inc. v. Commodity Futures Trading Comm'n*, 785 F.2d 1403, 1408-09 (9th Cir. 1986); *Bosma v. U.S. Dep't. of Agriculture*, 754 F.2d 804, 810 (9th Cir. 1985).

[18] 49 C.F.R. § 192.605(b)(8).

[19] Notice at 2.

[20] *Id*. Texas Gas Transmission, LLC (Texas Gas) is a wholly-owned subsidiary of Boardwalk. The Texas Gas O&M Manual also applies to Gulf South.

[21] Notice at 2.

[22] *Id.*, Violation Report at 12-13.

[23] Notice at 6.

[24] *Id.* at 2.

O&M Section 1010, which is referenced in the Notice but not included in the Violation Report, addresses the review of operating and maintenance procedures. As demonstrated in the language cited below, *O&M Section 1010* first addresses reviews that are performed on an annual basis (not to exceed 15 months) as required under § 192.605(a) and then addresses the continual evaluation of the effectiveness and adequacy of operations and maintenance procedures based on work performed by operator personnel pursuant to § 192.605(b)(8):

> This O&M shall be reviewed at least once per calendar year, but at intervals not exceeding 15 months, by Operations and **Compliance Services. Compliance Services** shall use Form 1000-20: *Compliance Manual Effectiveness Review* to document the review . . . . This review shall include examination of work associated with these procedures used in normal operation and maintenance. **Manager, Compliance Services (or designee)** shall issue revisions as necessary to ensure that the manual is effective. <u>Procedures shall be evaluated any time there is a question of effectiveness and revisions issued in a timely manner as needed. Reference manuals/documents shall be continually evaluated by employees performing operations/maintenance activities on Boardwalk facilities.</u> Any **Employee** who believes there is a need to revise the current language in the manual should notify a Compliance Services representative using the Compliance Services mailbox. Proposed changes shall be reviewed by **Compliance Services** and may be referred to an appropriate O&M Review Task Group. **Compliance Services** shall make the necessary revisions. Details for review and management of change for O&M are described in Section 1020: *O&M Management of Change.*"[25]

O&M Section 1020, O&M Management of Change (*O&M Section 1020*) contains further procedures describing how revisions to operations and maintenance procedures are to be conducted and specifically provides that "[a]dditional reviews may be required on a periodic basis to ensure policies and procedures are effective and adequate."[26] In this respect, *Section 1020* states that the review by the Manager, Compliance Services shall "[v]erify that current policy/procedures are consistent with practices currently being performed by employees. (This review shall include examination of work associated with these procedures used in normal operation and maintenance.)"[27]

O&M Section 1020 also expressly instructs that "[i]f new policies, procedures, forms, or revisions to existing policies, procedures, or forms are required, **Boardwalk employees** shall complete Form 1000-10: *Document Change Request Form*."[28] Employees who recommend changes to a procedure are instructed to redline the existing procedure to indicate the suggested revisions by submitting this form to the Compliance Services mailbox. *Section 1020* then describes the Management of Change process that is followed to evaluate and formally approve the suggested change.[29]

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[25] *Section 1010, General Procedures* at 1 (Underlining added; bold and italics in original) (Attachment A).
[26] *Section 1020, O&M Management of Change* at 1 (Attachment A).
[27] *Id.*
[28] *Id.* at 2.
[29] *Id.* at 2-3.

The Notice relies on Form 1000-20, entitled *Compliance Manual Effectiveness Review*, to support the allegation that Gulf South did not "document any assessment of work performed as part of the operations and maintenance procedures."[30] As acknowledged in the Notice and as is clear in *O&M Section 1010*, however, the purpose of Form 1000-20 is to document compliance with the requirement in § 192.605(a) to review procedures annually, not to exceed 15 months.[31] This Form is not used to document compliance with § 192.605(a)(8). Rather, *O&M Section 1010* and *O&M Section 1020* provide that the form used to document changes to procedures based on a review of work done by operator personnel to determine the effectiveness and adequacy of the procedures is Form 1000-10.[32] OPS's reference to Form 1000-20 is misplaced. PHMSA has failed to meet its burden of demonstrating that Gulf South violated § 192.605(b)(8) because the Notice does not set forth "the facts necessary to sustain a probable violation actually occurred."[33] The allegation in Item 2 must be withdrawn.

The proposed compliance order also must be withdrawn because the Notice does not allege that Gulf South lacks a procedure for the required adequacy and effectiveness review of its procedures. The Notice's reference to *O&M Section 1010* is an explicit acknowledgement that the procedure exists.[34] The Notice also contains no allegation that either *O&M Section 1010* or *O&M Section 1020* is inadequate. OPS bears the burden of proving that a proposed remedy is appropriate.[35] OPS is proposing a remedy without identifying a violation and has not met its burden of proving that Gulf South should be required to "provide a detailed written procedure to address the periodic review of work done to determine the effectiveness of its normal operations and maintenance procedures."[36] The proposed compliance order must be withdrawn.

D. The Notice Does Not Demonstrate a Failure to Conduct Leakage Surveys.

The Notice alleges that Gulf South "failed to conduct leakage surveys on Class 3 transmission lines that transported gas without an odor or odorant using leak detector equipment."[37] The Notice states the Gulf South personnel performed leakage surveys using "improper leak detectors" and identifies three particular devices that were "not designed for detecting leaks from underground pipe." The Notice states, therefore, that the leakage surveys

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30 Notice at 2 & Violation Report, Exhibit B.

31 Notice at 2 (stating that the *Compliance Manual Effectiveness Review* documents Gulf South's annual reviews for the years 2017, 2018, 2019); Section 1010 – General Procedures at 1 (stating that "[t]his O&M shall be reviewed at least once per calendar year, but at intervals not exceeding 15 months, by Operations and **Compliance Services. Compliance Services** shall use Form 1000-20: *Compliance Manual Effectiveness Review* to document the review.") (bold and italics in original) (Attachment A).

32 Attachment B contains representative samples of Form 1000-10s completed by employees recommending changes to Part 192 Operations and Maintenance procedures.

33 *See, e.g.*, *Alyeska Pipeline*, 2009 WL 5538655 at *3 (quoting *Schaeffer*, 546 U.S. at 56-58); *Tennessee Gas*, 2019 WL 7943664 at *5 (withdrawing alleged violation because OPS did not meet its burden of proving a violation of the leak detection regulation); *ExxonMobil*, 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation); *So. Star Cent. Gas Pipeline*, 2011 WL 7006614 at *4 (finding the evidence insufficient to sustain the allegation).

34 Notice at 2.

35 *See e.g.*, *Slusser*, 210 F.3d at 787-88; *see also Gimbel*, 872 F.2d at 201; *Premex*, 785 F.2d at 1408-09; *Bosma*, 754 F.2d at 810.

36 Notice at 6.

37 *Id.* at 3.

Gulf South performed were inadequate and that this constitutes a violation of § 192.706(a).[38] The Notice does not identify any leakage surveys that were not performed. Neither the Notice nor the Violation Report contains any information or technical analysis demonstrating that the leak detectors used by Gulf South are "not designed for detecting leaks from underground pipe"[39] or otherwise "improper" or ineffective. This allegation, the proposed compliance order, and the proposed civil penalty must be withdrawn because PHMSA has not met its burden of proving that Gulf South violated § 192.706(a).[40]

Section 192.706 is a performance-based regulation[41] that requires the use of "leak detector equipment" but does not specify any criteria for that equipment. PHMSA decisions and guidance provide no indication that any particular leak detectors are approved or disapproved for leakage surveys as long as the chosen leak detection method is effective.[42] PHMSA has consistently held that the performance-based nature of this regulation leaves the choice of equipment up to the discretion and engineering judgment of the operator.[43]

The Notice claims that a review of manufacturer design specifications for the detectors used by Gulf South indicates that these devices were designed for detection of leaks in above-ground pipe'" not from underground pipe.[44] The Violation Report asserts that these leak detectors are designed to detect leaks in gas appliances and associated piping or above ground pipe components such as at meter stations.[45] The Notice and Violation Report, however, provide no technical analysis or data supporting these statements. For example, the Violation Report does not contain the manufacturer design specifications, a "review of manufacturer design specifications," or the findings of such a review.[46] Neither the regulation or any PHMSA decision or guidance specifies leak detection equipment or manufacturer to be used and the Notice contains no evidence that Gulf South's selection was improper or ineffective.

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38 *Id.*

39 *Id.*

40 *Tennessee Gas Pipeline*, 2019 WL 7943664 at **4, 5 (withdrawing alleged violation of § 192.706 where OPS did not meet its burden of proving that Respondent's chosen leak detection method was ineffective and a violation of § 192.706).

41 Odorization of Gas in Transmission Lines, Final Rule, 40 Fed. Reg. 20,279, 20,283 (May 9, 1975).

42 *See, e.g., Tennessee Gas Pipeline*, 2019 WL 7943664 at **4, 5 (withdrawing alleged violation of § 192.706 where OPS did not meet its burden of proving that Respondent's chosen leak detection method was ineffective and a violation of § 192.706); Letter of Richard D. Huriaux, P.E., Manager, Regulations, OPS, to Mr. Richard Motsinger, Pragmatics, Interpretation PI-01-0104 (Apr. 3, 2001) (stating OPS was "puzzled" why some believed that leak surveys needed to be conducted with a particular kind of equipment and that "[t]he DOT pipeline safety regulations at 49 C.F.R. § 192.706 and § 192.723 only require that leakage be conducted 'using leak detector equipment' . . . Our leak detection regulations are performance-based . . . The regulations do not mandate the use of any specific type of detection equipment.")

43 Interpretation PI-01-0104 (stating OPS was "puzzled" why some believed that leak surveys needed to be conducted with a particular kind of equipment). Letter of James C. Thomas, Southwest Regional Director, OPS, to Ms. Jayne Fletcher, Airwave Environmental Technologies, Interpretation PI-95-054 (Dec. 5, 1995) (refusing to opine on a particular kind of technology for gas pipeline surveillance, stating "[i]t is our policy not to issue general acceptance for new technologies but rather leave it to each individual operator to review the available technologies and determine if they are adequate.").

44 Notice at 3.

45 Violation Report at 15.

46 *See id.*

The Notice's distinction between leak detectors for aboveground pipe and belowground pipe has no basis in the regulation, regulatory guidance, PHMSA case law or industry literature.[47] It is the nature of any leak on a buried pipeline that the gas will make its way through the ground cover over a pipeline where the gas can be detected by any number of methods including sight (because of dead vegetation or surface bubbling), sound, or a leak detection device. Detection by these methods, which are widely used in the pipeline industry and often used in conjunction with one another when personnel walk the right of way, occurs when the leak reaches the atmosphere, regardless of whether the pipe is aboveground or below. Gulf South's pipeline is buried below ground and the equipment is held at ground level to detect if methane is reaching the surface. Leak detection equipment is not used to detect methane below the ground.

The material provided in the Violation Report does not support the alleged violation. Contrary to the Violation Report's assertion that Exhibit C contains "the record of [Gulf South's] equipment used in each location," this exhibit merely identifies dates, locations, personnel, and whether a leak survey was performed with or without an instrument.[48] Exhibit C neither identifies the leak detection equipment used nor demonstrates that such equipment is ineffective. Exhibit C is better characterized as establishing that Gulf South completed leakage surveys as required.[49]

By failing to provide any analysis supporting the allegation that the leak detectors Gulf South used were improper or ineffective, OPS has not satisfied its burden of demonstrating a violation of § 192.706 and this item must be withdrawn.[50] The proposed compliance order, which would require that Gulf South perform "adequate" leakage surveys at all sites identified in the Notice and report the results to the Director,[51] also must be withdrawn.

The proposed civil penalty for this item must be withdrawn. OPS bears the burden of demonstrating the appropriateness of a civil penalty for a pipeline safety violation.[52] OPS has not met that burden. OPS has provided no evidence or analysis supporting the assertion that Gulf South's leak detectors were improper or ineffective. OPS also provided no evidence of specific locations where the alleged improper devices were used. That lack of evidence is plain in the Violation Report which states that "[s]pecific locations of equipment used for individual

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[47] A review of industry literature as well as PHMSA guidance, regulatory history, and public meeting materials revealed no previously articulated distinction between leak detection devices for aboveground and belowground piping.

[48] Violation Report at 16 & Exhibit C.

[49] The Violation Report identifies an interview with a Gulf South employee as evidence. According to the Violation Report, this employee acknowledged that the equipment was inappropriate for leakage surveys. This acknowledgement from a Gulf South employee is an opinion, provided without context, and does not support the allegation either legally or factually.

[50] *Tennessee Gas Pipeline*, 2019 WL 7943664 at **4, 5 (withdrawing alleged violation of § 192.706 where OPS did not meet its burden of proving that Respondent's chosen leak detection method was ineffective and a violation of § 192.706); *ExxonMobil,* 2019 WL 3734516 at **4, 5 (ordering withdrawal of allegations where OPS failed to prove that Respondent engaged in conduct that would constitute a violation); *Air Prods. & Chems.*, 2015 WL 6758819 at *3 (withdrawing alleged violation because PHMSA did not produce "any evidence to support its position" and thereby did not meet its burden of proof); *So. Star Cent. Gas Pipeline*, 2011 WL 7006614 at *4 (withdrawing allegation because the evidence was insufficient to sustain the allegation).

[51] Notice at 6.

[52] *See e.g., Slusser*, 210 F.3d at 787-88; *see also Gimbel*, 872 F.2d at 201; *Premex,* 785 F.2d at 1408-09; *Bosma*, 754 F.2d at 810.

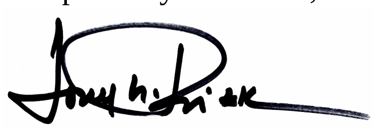
patrols/surveys of Class 3 segments was not provided by Gulf South, therefore, a minimum of 2 violations per year is entered for each operating area."[53] Despite the inability to identify specific locations where alleged "improper" leak detection equipment was used, OPS presumes that Gulf South committed a total of 32 violations: "[4] areas X [4] years X [2] per year = 32 violations"[54].

Speculation regarding the alleged number of violations in calculating a proposed $99,700 penalty does not satisfy OPS's burden of proving that the proposed civil penalty is appropriate. The proposed civil penalty must be withdrawn.

III. CONCLUSION

Based on the foregoing, Gulf South requests that (1) the proposed civil penalty for Item 1 be withdrawn; (2) the allegation and proposed compliance order in Item 2 be withdrawn; and (3) the allegation, proposed compliance order and proposed civil penalty for Item 3 be withdrawn.

Respectfully submitted,



Tony G. Rizk, P.E.
Vice President, Technical Services

[53] Violation Report at 19.
[54] *Id*.