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November 11, 2024

Via Email (ryan.mcclure@dot.gov)

Pipeline and Hazardous Materials Safety Administration

Attn: Ryan McClure

Attorney Advisor, Pipeline Safety Division (PHC-20)

1200 New Jersey Avenue SE

Washington, DC 20590

Re: CPF 3-2024-049-NOPV Supplemental Response

Dear Mr. McClure:

Following the informal settlement conference (“Conference”) with the Pipeline and Hazardous Materials Safety Administration (“PHMSA” or the “Agency”) on September 12, 2024, Ferrellgas, LP (“Ferrellgas” or the “Company”) submits this supplemental response to the Notice of Potential Violation (“NOPV”) referenced above. Ferrellgas also wishes to continue informal discussions to see if we can come to a mutual resolution regarding the issues laid out below.

NOPV Item 2

PHMSA alleges that “Ferrellgas failed to have a leakage control program determined by the nature of the operations, per the requirements of § 192.723(b)” because a leak survey “was only an above ground survey utilizing a hydrogen flame ionization (“FI”) gas detector.” Ferrellgas continues to contest alleged violation NOPV Item 2 and the associated Proposed Compliance Order action item A in their entirety.

The requirement in § 192.723(b) is performance-based and only requires that the operator determine the type and scope of the leakage control program based on the nature of the operations, which Ferrellgas did. PHMSA cannot turn a performance-based standard into a more stringent and specific requirement within a non-binding document with no precedence.

Ferrellgas understands that PHMSA views the Gas Piping Technology Committee GPTC Z380.1, *Guide for Gas Transmission, Distribution, and Gathering Piping Systems* (“GPTC Guide”) as the controlling document for how gas system leak surveys should be conducted. However, the GPTC Guide is not binding. It is not incorporated by reference into the regulations and is not even guidance issued by the Agency.

Holding Ferrellgas to this standard is precluded by the Administrative Procedure Act, which requires regulations provide “fair notice” of the obligations imposed and be issued subject to notice and comment rulemaking. *See ExxonMobil Pipeline Co. v. U.S. Dep’t of Transp.*, 867 F.3d 564 (5th Cir. 2017). PHMSA itself has agreed with this position in overturning other NOPV items which attempted to hold operators to prescriptive leak survey requirements that are not within the regulations. In *In re: Tennessee Gas Pipeline Co.*, PHMSA Final Order CPF No. 1-2018-1001 (Nov. 14, 2019), the PHMSA Associate Administrator for Pipeline Safety sided with Tennessee Gas stating, “TGP is correct that the GPTC Guide does not create an enforceable requirement” and ultimately overturned the leak detection related NOPV item.

Even if the GPTC Guide were controlling, it allows for methods other than those argued for by PHMSA. Specifically, although the GPTC Guide indicates specific leak surveys and test methods in Appendix G-192-11A which addresses “gas leakage control guidelines for petroleum gas systems,” it also indicates “other surveys and test methods may be employed if they are deemed appropriate and are conducted in accordance with procedures that have been tested and proven to be at least equal to the methods listed in this section.” Ferrellgas believes FI, coupled with pinpointing and grading with Combustible Gas Indicator (“CGI”), has been tested and proven to be as effective as the other methods listed in the GPTC Guide.

The Company selected to use FI gas detection for large systems because it believes it is the best technology for quickly identifying leaks over large areas. Based on Ferrellgas’ experience and several examples in its contractor’s (Jarco Utilities) letter previously submitted, the technology is reliable and it has been proven to identify propane leaks that would not have been identified using the CGI methodology alone. Due to its sensitivity in detecting hydrocarbons, down to 1 part per million (ppm), the FI methodology is widely used and accepted across the propane industry to identify trace amounts of gas across large areas. Since FI technology also detects other lighter volatile compounds within the propane (e.g., methane and ethane) that may surface more quickly, arguments regarding the specific gravity of propane invalidating FI as a method for leak detection are unfounded. As the Company previously explained, once a leak is detected, CGI is then used to pinpoint and grade the leaks. Based on all of these considerations Ferrellgas developed its leakage control program to allow for FI testing based on the nature of the operations as required by § 192.723(b).

Additionally, Ferrellgas relied upon the April 2017 PHMSA Guidance for Small LPG Operators (“Guidance”) that PHMSA cites in the NOPV, which explicitly allows for the use of FI in conjunction with CGI to identify and pinpoint leaks. It states, “although a Flame Ionization (FI) unit may be used to assist in the survey, a Combustible Gas Indicator (CGI) shall be used for pinpointing leaks and classifying them.” It follows that the FI would be used first to identify leaks followed up by the CGI, which is exactly what Ferrellgas does. If there are no leaks identified by FI, then it stands to reason that CGI would not be performed to pinpoint or classify the non-existent leaks.

PHMSA appears to believe that this Guidance was developed and aimed at natural gas pipeline operators, not propane operators. However, the Guidance itself contradicts that notion as it states

“it is a product of close cooperation with the... National Propane Gas Association (NPGA)” and advisor group members included individuals associated with NPGA, Ferrellgas, and other propane industry representatives. Further, the Guidance directly references propane 70 times. Ferrellgas relied upon the Guidance as issued by PHMSA to develop its leakage control program, which it believes comports with industry standards.

Because Ferrellgas has a leakage control program determined by the nature of the operations in accordance with 49 C.F.R. § 192.723(b), Ferrellgas requests that PHMSA dismiss alleged violation NOPV Item 2 and the associated Proposed Compliance Order action item A.

NOPV Item 3

PHMSA alleges that “Ferrellgas failed to retain prior qualification records for a period of five years, per the requirements of § 192.807(b).” As discussed below, Ferrellgas made every effort to comply in good faith with this requirement, but due to an administrative error, a single year’s record for a single employee was lost, which amounts to a reasonable justification for the non-compliance. Ferrellgas requests that PHMSA apply its good faith effort as mitigation to reduce the penalty as detailed below.

Ferrellgas maintains qualification records for its employees in good faith compliance with the PHMSA requirement. In this case, the employee at issue was trained annually including in 2019 and their training records are available for 2020, 2021, 2022, and 2023. In support, Ferrellgas is providing the employee’s training records from 2020 through 2023 and a declaration signed by the employee stating that he was trained in 2019, as Attachment A. The missing record is an unfortunate, but understandable administrative oversight and does not detract from Ferrellgas’ overall good faith efforts to maintain compliance.

When PHMSA considers “good faith” for reduction of penalties, it only takes into consideration the operator’s actions prior to the discovery of the violation by PHMSA. Its *Civil Penalty Summary*, published January 19, 2024 indicates to establish “good faith,” the operator must have had a reasonable justification for its non-compliance. “For example, the operator’s interpretation of the requirement was reasonable, or the operator failed to achieve compliance for reasons such as unforeseeable events/conditions that were partly or wholly outside its control.” In this case, Ferrellgas retains its training records in good faith compliance with the requirement according to a written retention policy requiring they be kept for 5 years and was able to produce other training records upon request. In the instance cited in the NOPV by PHMSA, human error led to the record being misplaced, thus Ferrellgas had a reasonable justification for its non-compliance since it was due to a mistake (i.e., an event outside its control).

Ferrellgas has reviewed PHMSA’s proposed civil penalty worksheet associated with this NOPV and believes the following values are appropriate for PHMSA’s worksheet categories:

Factor	Assessment Consideration	Point Value
Nature	Records (examples: missing, inaccurate or incomplete records)	1
Circumstances	PHMSA or a State Partner discovered the violation	5
Gravity	Pipeline safety was minimally affected	1
Culpability	Operator failed to comply with the applicable requirement	2
History of Prior Offences	No prior violations	0
Good Faith	The operator had a reasonable justification for its non-compliance	-10
Total		-1

Based on these values totaling negative 1, Ferrellgas requests PHMSA reduce the penalty amount to \$0.

NOPV Item 4

PHMSA alleges that “Ferrellgas did not conduct periodic re-evaluations as required by § 192.1007(f).” Ferrellgas does not contest alleged violation NOPV Item 4; however, requests amendment of the associated Proposed Compliance Order action item B to allow for 90 days from receipt of a Final Order to correct the allegation, as discussed during the Conference.

Please feel free to contact me at (412) 288-3007 or mhaines@reedsmith.com if you would like to discuss further.

Sincerely,

/s/ Megan S. Haines

Megan S. Haines

MSH:sg

Enclosure – Attachment A

cc: Daniella Donaldson (PHMSA) via email to d.donaldson.ctr@dot.gov