

April 21, 2023

VIA ELECTRONIC MAIL TO: gregory.mcilwain@energytransfer.com

Mr. Gregory McIlwain
Executive Vice President, Operations
Energy Transfer, LP
1300 Main Street
Houston, Texas 77002

Re: CPF No. 4-2022-047-NOPV

Dear Mr. McIlwain:

Enclosed is the Decision on the Petition for Reconsideration filed by Enable Mississippi River Transmission, LLC in the above-referenced case. For the reasons explained therein, the Decision grants your Petition and withdraws Item 1 of the Final Order. This Decision constitutes the final administrative action in this proceeding. Service of this Decision is made pursuant to 49 C.F.R. § 190.5.

Thank you for your cooperation in this matter.

Sincerely,

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Enclosure

cc: Mr. Bryan Lethcoe, Director, Southwest Region, Office of Pipeline Safety, PHMSA
Ms. Susie Sjulín, Director, Regulatory Compliance, Energy Transfer, LP,
susie.sjulin@energytransfer.com
Mr. Jimmy Cross, Senior Manager, Regulatory Compliance, Energy Transfer, LP,
jimmy.cross@energytransfer.com
Ms. Roina Baker, Counsel for Respondent, Murchison Law Firm, PLLC,
roina.baker@pipelinelegal.com

CONFIRMATION OF RECEIPT REQUESTED

² See Response.

Petitioner filed a Petition for Reconsideration (Petition) dated December 8, 2022.³ Pursuant to 49 C.F.R. § 190.243, an operator may petition for reconsideration of a final order issued under § 190.213. PHMSA may consider additional facts or arguments if the petitioner submits a valid reason explaining why such information was not presented prior to issuance of the final order.⁴ PHMSA may grant or deny, in whole or in part, a petition for reconsideration without further proceedings, but may request additional information or comment if deemed appropriate.

In its Petition, EMRT presents multiple grounds for reconsideration. First, Petitioner argues that the Final Order mischaracterizes the Response as uncontested when it had in fact contested the finding of violation for Item 1. Second, Petitioner contends PHMSA did not meet its burden of proof that EMRT had violated 49 CFR § 192.619 and argues, therefore, the item should have been withdrawn. Lastly, Petitioner argues that the evidence satisfying the proposed compliance order attached to the Response required the violation to be withdrawn, and failure to do so resulted in arbitrary and capricious agency action. For the reasons described below, this Decision grants the Petition and withdraws the finding of violation in the Final Order.

II. Discussion

i. Response to Notice

Petitioner contends that the Final Order mischaracterizes the Response, asserting that the submission of the documents establishing Line A-180's MAOP constituted an objection to the allegation of violation in the Notice. Petitioner asserts that an operator is not required to recite precise words in a Response to contest a finding of violation, rather, Petitioner argues the response only needs to demonstrate disagreement with the Notice.⁵ Petitioner argues that, in this instance, EMRT contested the Notice by its submission of documentation showing compliance with § 192.619, and the Final Order should have treated the Response as such.

Pursuant to 49 CFR § 190.208(b), an operator may respond to a notice of proposed violation that contains a compliance order in one of four ways: (1) the operator may agree with the finding of violation and the compliance order, (2) the operator and PHMSA can execute a consent order, (3) the operator can contest one or more of the alleged probable violations and/or some or all of the compliance terms, but not request a hearing, or (4) the operator may request a hearing.⁶ While I agree § 190.208(b) does not require operators to use specific words in response to a notice of probable violation to effectively contest the notice, there does need to be a clear demonstration of the operator's intent. Petitioner argues that the act of providing documentation indicating compliance with the pipeline safety regulations is, in and of itself, an objection to a notice of proposed violation. I disagree. Operators may, and often do, submit Responses that do

³ The Associate Administrator granted Petitioner's request for an extension of time to file a Petition for Reconsideration on November 21, 2022.

⁴ See 49 CFR § 190.243(a-d).

⁵ See Petition, at 6

⁶ See 49 CFR § 190.208(b).

not contest a finding of violation and that include documentation to demonstrate the operator has satisfied all or part of a proposed compliance order.⁷ In such instances, the Final Order may find violations against an operator for failing to meet the requirements of the regulations, and also find the proposed compliance order has been satisfied based on the actions the operator has taken since the notice was issued.⁸ Thus, a submission of documents showing an operator's compliance after the issuance of a notice of proposed violation is not an automatic indicator that an operator is contesting a finding of violation.

In this case, the wording used in Petitioner's Response was reasonably construed by PHMSA as Petitioner electing not to contest the Notice. Petitioner stated, "at the time of the field inspection performed for Line A-180, EMRT was not able to produce the complete MAOP validation for this pipeline," admitting EMRT did not have records available to show compliance with the regulations at the time of the inspection.⁹ Petitioner also specifically stated, "with the actions taken and supporting documentation provided [with the Response], EMRT believes it has *fulfilled the requirements of this Compliance Order* (emphasis added)."¹⁰ PHMSA reasonably construed this statement by EMRT to mean that it took action to complete of the Proposed Compliance Order following issuance of the Notice, rather than a statement that EMRT contested the Notice or Proposed Compliance Order.

In the interest of fairness, however, PHMSA recognizes that it is possible Petitioner used imprecise language while intending to contest the Notice. To afford the Petitioner the benefit of the doubt, PHMSA will exercise its discretion in this case and reconsider Petitioner's Response and the alleged violation.

ii. Finding of Violation

The Notice alleged Petitioner failed to establish the MAOP for the A-180 pipeline in accordance with § 192.619(a) based on EMRT's failure to provide records demonstrating how the MAOP was calculated during PHMSA's inspection.¹¹ Specifically, the Notice alleged that while EMRT could provide some documentation regarding the MAOP for certain segments of the pipeline, it "could not produce pressure test records, logs, or the highest actual operating pressure for the five-year period preceding July 1, 1970, to establish its MAOP in accordance with

⁷ See *In the Matter of Columbia Gas Transmission, LLC, a subsidiary of Columbia Pipeline Group*, Final Order 1-2015-1008, 2016 WL 1104434 (February 6, 2016); See also *In the Matter of ONEOK Partners, LP*, Final Order 4-2008-1003, 2009 WL 7820526 (December 2, 2009); *In the Matter of Pacific Operators Offshore*, Final Order 5-2006-5036, 2009 WL 7812785 (November 5, 2009); *In the Matter of Hunt Crude Oil Supply Company*, Final Order 2-2003-5007, 2004 WL 6241268 (August 24, 2004); *In the Matter of Atmos Energy, Formerly Known as Greely Gas Company*, Final Order 35113, 2003 WL 2529874 (December 11, 2003); *In the Matter of Northern Natural Gas Co.*, Final Order 36111, 2003 WL 25429876 (October 30, 2003); *In the Matter of ChevronTexaco Pipeline Company*, Final Order 5-2002-0006, 2003 WL 25429840 (October 6, 2003).

⁸ *Id.*

⁹ Response, at 4.

¹⁰ *Id.*

¹¹ Notice, at 3.

§ 192.619(a).^{12,13} In the Response, Petitioner attached a complete MAOP review of the pipeline, dated August 24, 2022, as well as a pressure log listing the highest actual operating pressure for the line from 1965 to 1970 that was not provided during the inspection.¹⁴ In light of this additional information, I reconsider the finding of violation in the Final Order *de novo*.

Section 192.619(a) states, in part, “no person may operate a segment of steel or plastic pipeline at a pressure that exceeds a [MAOP] determined under paragraph (c), (d) or (e) of this section.”¹⁵ Per § 192.619(c)(1), an operator may operate a segment of pipeline at its highest actual operating pressure to which the segment subjected to during the 5 years preceding 1970.¹⁶ By providing the pressure log from 1965 to 1970 that included the actual highest operating pressure the A-180 pipeline was subjected to during that time, EMRT has demonstrated that it is in compliance § 192.619(c)(1), thus fulfilling the requirements of § 192.619(a).

It is important to note that an operator, “is responsible for compliance with the pipeline safety regulations, which includes sound record keeping. Without this history, an operator will have difficulty determining areas where there are problems that need to be addressed.”¹⁷ While Petitioner could not produce the requisite records at the time of inspection, the information provided with the Response demonstrates that Petitioner was in possession of the required historical documentation and was in compliance with the pipeline safety regulations at that time. Accordingly, I grant EMRT’s Petition and withdraw Item 1.

iii. Standard of Review, Burden of Proof, and Miscellaneous Claims

Petitioner also argues that PHMSA did not meet its burden of proof that EMRT violated § 192.619(a), engaged in arbitrary and capricious action by not withdrawing Item 1, and denied EMRT its due process right to be heard. As this Decision reconsiders Petitioner’s Response and withdraws the finding of violation in the Final Order, it is not necessary to address Petitioner’s remaining arguments.

III. Conclusion

For the reasons stated above, the Petition for Reconsideration is granted, and Item 1 in the Final Order is withdrawn. Item 2 remains a warning item.

¹² *Id.*

¹³ EMRT has been operating the A-180 pipeline since 1964.

¹⁴ *See* Response.

¹⁵ 49 CFR § 192.619(a).

¹⁶ 49 CFR § 192.619(c)(1).

¹⁷ *In the Matter of Ozark Gas Transmission*, Final Order 2-2002-1004, 2003 WL 26473449 at *2 (April 29, 2003).

This Decision on Reconsideration is the final administrative action in this proceeding.

April 21, 2023

Alan K. Mayberry
Associate Administrator
for Pipeline Safety

Date Issued